

Trials and TRIBULATIONS

Ethically obtaining and authenticating images taken from social media

In the context of personal injury cases, social media can be a blessing for the defense and a curse to an unwitting plaintiff. Prior to the age of social media, a defendant seeking to undermine a plaintiff's claimed injuries would be forced to hire someone to follow the plaintiff to see, for example, if the plaintiff was waterskiing despite his or her alleged debilitating back injury sustained from a car accident. That task has become much easier when the plaintiff maintains social media accounts such as Instagram, Facebook, Twitter or LinkedIn. Attorneys must be cognizant of both how to ethically obtain this social media information as well as how to authenticate the information for evidentiary purposes.

From an ethical standpoint, an attorney must be careful about how information from social media sources is obtained. In New York, a party is permitted to seek access to and use publically available information contained on an opposing party's social media accounts, because the person with a publically accessible account has already forfeited his or her right to privacy. However, it is unethical for an attorney (or someone working at the request of an attorney, such as a paralegal) to "friend" or otherwise contact an opposing party using a fake account solely to gain incriminating information about that other party.

An attorney is permitted, however, to communicate with an unrepresented party or request permission to view the



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private portions of an unrepresented party's social media accounts if the attorney uses his or her full name and an accurate profile. Where a party is represented, however, the mandate that counsel for a party cannot directly contact the opposing party remains intact. In that instance, an attorney

must obtain consent from the represented party's counsel before attempting any contact with the represented party.

If useful evidence is obtained in an ethical manner, it still must be properly authenticated to use it as evidence at trial. New York law requires that a foundation be laid to authenticate tangible or physical evidence before it can be offered as evidence. With respect to a photograph (for example, one obtained from a social media account), this means establishing the authenticity of the photograph as a fair and accurate representation of the plaintiff and, further, establishing that the photograph has not been altered. While not always required, the party seeking to use the photograph should also be prepared to establish who took the photograph, when it was taken, where it was taken and/or under what circumstances it was taken. Authentication of a photograph obtained on social media was at issue in

the recent Appellate Division, Fourth Department case of *Cicco v. Duroleck, et al.* (CA 18-01136, April 26, 2019).

In *Cicco*, the plaintiff claimed he sustained injuries in an automobile accident. After trial of the case, the jury returned a verdict in the defendants' favor, which effectively dismissed the plaintiff's complaint. The plaintiff then appealed the jury's verdict to the Appellate Division, Fourth Department on several grounds, including whether Supreme Court Justice Frank Caruso, erred in admitting photographs of the plaintiff taken from his social media accounts to demonstrate the plaintiff's post-accident condition. A majority of the Appellate Division, Fourth Department affirmed Supreme Court's holding that the photographs were properly authenticated. The Court found that, while there was disagreement about the date of the photographs and the date of the accident, such discrepancies went to the weight of the evidence and did not affect the admissibility of the photographs.

However, the Hon. Edward D. Carni dissented on this issue, finding that the defendants failed to properly authenticate the photographs and that, therefore, Supreme Court erred in admitting them into evidence to demonstrate the plaintiff's post-accident condition. While Justice Carni agreed that the defendants established that the photographs of the plaintiff were *posted* after the occurrence of the accident, he found that the defendants failed to demonstrate that

the photographs were actually taken after the accident. For this reason, Justice Carni found that the proffered photographs were not properly authenticated and thus could not be used to establish the plaintiff's post-accident condition. While the majority of the Appellate Division, Fourth Department did not find authentication in the *Cicco* case to be an issue, Justice Carni's dissent should be

taken as a warning to those seeking to use photographs as evidence, particularly those taken from social media accounts. Attorneys should be careful to make every attempt to determine the "who, what, where and when" of social medial evidence to ensure admissibility.

In sum, social media has changed the way attorneys are gathering evidence, and it is ever-evolving. Attorneys have an

obligation to ensure that they are well-informed regarding how such information can be ethically obtained from the different social media platforms, as well as how it can be properly admitted as evidence.

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