APRIL 2015

The Tweet's the thing...

Helping clients who are too social on social media

Cooper

By Miles B. Cooper

The defense lawyer, cross-examining the plaintiff, began the windup.

Q: So, if I understand you correctly, your back injury prevents you from doing the things you used to enjoy.

A: Correct.

Q: Before the accident, you used to enjoy hiking. But last July, you went to a trailhead, made it a half mile up the trail, and were unable to go the additional five miles to the summit. You had to turn back."

A: Correct.

And the pitch:

Q: Marking defense exhibit 503, a photograph of three individuals at the top of a mountain. Mr. Smith, isn't this a picture of you that very same day at the summit of that mountain?

The plaintiff sat there, blinking. Pinpricks of sweat popped out along his lawyer's back. This was not going to end well.

Social disease

Where did the defense lawyer get the photo? From the interwebs and that joyous series of tubes that now bind us into an ever-more-connected world. Facebook's current user base is staggering – billions. Add in Twitter, Instagram, LinkedIn, Snapchat, Tumblr, Pinterest, Swarm, Strava – an endless list. You learn one and seven more IPO (but we're not on the brink of another tech crash, no sir.)

The old approach: Have clients disconnect from social media entirely during the case. Follow it with a stern letter.

That rarely worked. For some, it is akin to saying, "please stop breathing oxygen." The connectedness is pervasive. You try telling them not to. The client nods politely while simultweeting, telling the world about the lawyer who just does not get it (that's you, FYI.) So if you can't force clients to disengage, what do you do? Warn about what not to do, plus the consequences if the advice is ignored.

That warning involves a detailed conversation about the bad things that happen to a case when one is caught saying one thing – "I'm terribly injured" – and doing another "Find me in the club, bottle full of bub," and here's a picture!

We can protect against what we know

Clients must continue to live their lives. They leave the house and make efforts to get better. We need to know about the efforts *and* consider them when evaluating the case. Is your client back on her bicycle, posting rides on Strava (a social media app that tracks athletic efforts), and a top-ten rider for a particular roadway? Consider adjusting your noneconomic damages.

Edward Snowden has a posse

Anything a client does online may be found, no matter the social-media account privacy settings. Stress this both in the initial meeting and depo prep. "No, I've never done that," is a dangerous answer unless your client is absolutely certain it never ever happened (not even that one time.) Others may post photos of them. Anonymous efforts on message boards using alternative handles (Catlady46) can be tracked back with diligent search efforts and pattern recognition. Uncommon names – Keyser Soze for example – are easier to find. Of course, if you represent Mr. Soze, you probably have other concerns…

The defense researches your clients. The introductory example is based on a real situation. An associate lawyer spent 40 hours researching the client. It doesn't stop with a name. They look for friends, friends of friends, Twitter handle variants used on message boards. In our example, the client did not post the photo, nor did he know it was out there. Someone at the summit took it and mentioned the individual's handle in the post.

Not every case gets that level of scrutiny. Higher exposure cases and uncommon client names are greater risks.

But is it admissible?

The prime evidentiary directive for admissibility: is the evidence relevant and reliable? In our example, there was an evidentiary hurdle. If the client said he did not recognize the photo, it probably would not have been admissible. The defense would need to have the witness who took the photo on standby. (They did.) The authentication issue exists with any digital evidence – useful to consider both as a shield and when preparing your prosecution.

The Patriot Act does not apply

We are not the NSA. Remember there are ethical limits if you decide to employ similar research about the defendant. Friending a represented party to obtain access to a Facebook account is verboten. Nor can you use a friend or other cutout to do it for you. Watch out for the occasional overly-aggressive investigator who offers these services – their acts are your acts.

A quick settlement

Back to our plaintiff, twisting on the stand. "Yes, that's me," he quietly admitted. Shortly after, the court took the morning

recess. There were some discussions in the hall. What was a mid-seven-figure demand resolved in the low sixes. The client had a serious injury, yes, but now he had no credibility. A painful lesson: our clients don't always tell us everything. And what we don't know can hurt us.

Miles B. Cooper is a partner at Emison Hullverson LLP. *He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time.)*