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A publication of
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Omar O'Hara, via Google+

WEED CONTROL

Understanding Plaintiff's Approach to Social Media

By Matthew J. Smith, Esq.

The agenda for almost every insurance-related conference in America today will contain at least one course on the use of social media. At one recent conference in Denver, the social media class even outdrew a concurrent session on Colorado's new legalized marijuana law.

What is interesting, however, is that the courses we present and attend all relate to how we in the

insurance industry can use social media in the handling and investigation of insurance claims. What we have been overlooking for far too long are the weeds on the other side of the electronic "fence." The use of social media by plaintiffs' attorneys, chiropractors, and other medical providers and "runner and capper" services, may well be giving rise to many of the claims that are presented and which we are called upon to investigate.

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WEED CONTROL

In short, the question is this: Are we looking at social media from the perspective of how others are using this technology to reach potential claimants and insureds and analyzing how it is impacting claims and the resulting litigation?

The obvious answer is “no,” and we are doing so at our own peril. No one needs to be convinced of the impact of social media on our society. With more than 1.32 billion active Facebook users, nearly 271 million active Twitter accounts, and six billion texts a day sent on smartphones, we have truly entered the new world of electronic communications.

Social Media and Lawyer Advertising

When the U.S. Supreme Court first permitted lawyer advertising in *Bates v. State Bar of Arizona* in 1977, the justices hardly could have foreseen the electronic future that lay less than 50 years away. The world of lawyer advertising on the back of phonebooks, on billboards, and in mailboxes is becoming a thing of the past.

Lawyers, physicians, and unscrupulous companies that prey on people involved in motor vehicle accidents to secure claims for financial compensation all are moving aggressively to solicit potential clients via new electronic gateways.

The reason for doing so is clear: it works. Unlike mass marketing of old, the ability to use social media provides a much higher impact for a much lower cost. The new world of electronic communication is moving so quickly that even emails now are considered out of date and too slow. In an article on text message marketing, *The New York Times* notes, “At a time when inboxes fill with hundreds of never opened email messages from direct marketers, 97 percent of [text] marketing messages are opened and 83 percent are opened within one hour.” Those seeking to profit from personal injury claims, or even from large-scale catastrophic losses, are turning more to instantaneous forms of social media communication. Lawyer advertising no longer focuses on areas of expertise, years of experience, or even geographic location. Instead, they promote links to Web pages, Google+, Twitter, and Facebook pages all in the hope of opening a “portal” for



Future lawyers and doctors are being marketed to on campus by companies promoting themselves as offering the ability to create a digital marketing program to assist these soon-to-be-admitted practitioners.

contact when a person needs legal services. Advertising in this manner also allows for possible skirting of bar association limits on lawyer advertising, as these ads may be construed as simply providing information and not directly soliciting a person for legal services.

Even before graduating from law school or chiropractic college, future lawyers and doctors are being marketed to on campus by companies promoting themselves as offering the ability to create a digital marketing program to assist these soon-to-be-admitted practitioners. Many of these services downplay the need for years of experience or skill, focusing instead on finding quick financial success with a large practice driven by social media marketing.

Especially with large student loans to pay off, many young professionals flock to these services.

It is not simply young practitioners, however, who are using these new forms of social media communication. Just last year, the Federal Bar Association published an article titled, “44 Million Reasons Why You Should Use Social Media in Your Law Practice.” The article stated, “In 2012, 58 million consumers—nearly 20 percent of the United States population—sought attorneys. Of that monumental number, 76 percent, or more than 44 million people, searched using online resources, including search engines, websites, and social media sites like Facebook.”

QR Codes, Apps, and Beyond

In addition to the world of texts and tweets, vast new areas of social media marketing are opening further avenues for solicitation. In many major metropolitan areas, old-fashioned billboard advertising is beginning to carry the ubiquitous quick response (QR) code for those traveling along the highway to gain more information. Attorneys and medical solicitation services already are using QR codes in many forms of advertising.

What is a QR code? It is a multidimensional bar code that a smartphone or similar device can read and then link for further information. Multiple companies already exist that claim they provide services “exclusively” to law firms or medical providers on how to use QR codes effectively in advertising. Instead of simply ignoring these unintelligible digital boxes, those of us in the insurance and legal professions need to be looking carefully at these types of solicitations to determine potential sources of fraud and investigating more effectively how potential claimants are ending up at particular law firms and medical providers.

We also have entered the age of the app. Even a brief search of the Internet reveals multiple sites that offer auto-accident app creation for lawyers and medical providers, which people then can download to their smartphones to have instantaneous service in the event that they are involved in a car crash.

One of these services begins by citing the fact that there are 11 auto accidents per

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minute in the U.S., and three out of four victims involved will have their cellphones with them at the time of the accident. This service goes on to promote its app offerings, which include the ability to save photographs of the driver's license and insurance card information, the accident site, physical damage, and injuries at the scene. Additionally, the app provides an instant link to providers that offer body shop, legal, or medical services. The links go directly to those body shops, attorneys, and doctors who are willing to pay a fee for an assigned geographic area. These types of services will do nothing but multiply in the future.

Claims handlers and investigators in this new era need to be asking more affirmative questions regarding smartphones and tablet applications. They also need to find out when such apps were added to devices to see if prearranged motivation may have existed for financial gain or if the accident was, in fact, a staged occurrence.

New Challenges for Regulators

The electronic era has created new forms of potential insurance claims and insurance fraud. This requires those of us on the other side of the fence to be more diligent. Unfortunately, not only are we failing to keep up, but even state medical and bar associations are facing difficult hurdles in reining in the social media onslaught, even though they are trying very hard to do so.

In 2011, the American Bar Association clarified its model rule prohibiting real-time electronic contact to include lawyers soliciting individuals via Internet chat rooms. Many states have tried to limit doctors and lawyers making social media solicitations, but with very mixed results. In New York, the U.S. District Court for the Northern District struck down as unconstitutional a New York rule prohibiting pop-up advertising by lawyers on websites other than those owned by the attorney or law firm. While many of us in the insurance industry would disagree, the court held, "There is no evidence that the regulation, observation, or retention of pop-up advertisements is any more difficult than the regulation, observation, or retention of advertisements on television, radio, or websites."

A similar result was reached in Louisiana when the U.S. District Court for the Eastern District sided with a plaintiff's law firm holding that the rules of professional conduct adopted by the Louisiana Supreme Court were unconstitutional as related to online attorney advertising. The court reasoned that the state failed to show where online advertising techniques or methods were statistically supported by evidence to support the state's interest in restricting free speech and trying to narrowly regulate this new form of lawyer advertising.

Other states have made some progress. In 2013, the Ohio Supreme Court issued an opinion allowing lawyers to use text messaging to solicit prospective clients but in doing so mandated that lawyers must include state-required language regarding "understanding your rights," even if doing so meant it exceeded the number of characters permitted in the electronic message. The Ohio Supreme Court now requires that any lawyer using such electronic communication must adhere to three rules: (1) the message should not create a cost to the prospective client; (2) the lawyer must be mindful of the age of the recipient, given the number of minors who possess smartphones and electronic devices; and (3) any such electronic communication must be in strict compliance with all federal and state telemarketing laws.

In the battle against insurance fraud, insurance carriers and their legal counsel also must actively engage in stopping unscrupulous practices. One of the most notable recent victories was in Virginia, where a high-profile plaintiff's attorney was disciplined by the Virginia State Supreme Court and fined more than \$500,000 for instructing a plaintiff to delete information from a Facebook account of his client, who was a plaintiff in a wrongful-death case. The attorney involved was noted for engaging in extensive advertising and promotion throughout the state, including via social media sites.

Claims personnel and investigators also need to be attuned to the fact that social media now allows lawyers to market on a much broader geographic platform than ever before. Solicitations are no longer necessarily occurring on a local basis, but may well come from statewide or even national

marketing services. Many state bar associations are beginning to address the question of which state has jurisdiction over a lawyer who is using electronic communications to solicit clients when that lawyer may not be admitted in the state but is marketing residents of many or all states via social media.

While this is less prevalent in the field of medical providers, a trend of national services soliciting those wishing to make injury claims and then "linking" those individuals with locally licensed physicians is taking form. Fraud rings of this nature are occurring more frequently in both major and minor population centers across the U.S., and such fraud is often linked to medical providers, participants, and claims that are hundreds or thousands of miles apart but are linked via social media connections.

We Must Act Now

We are in a world of rapidly changing technology. As prevalent as QR codes, apps, and pop-up ads are today, they will become the outdated technology of tomorrow. Exacerbated by diminished budgets and staffing, we are already stretching our financial and personnel resources to simply learn how to use social media and electronic communications to better investigate claims from a defense perspective. Now we also must focus more attention on how unscrupulous attorneys, medical providers, runners, and cappers all are using social media to create and advance claims that 10 years ago may never have occurred.

While we have much to tend to in our own backyard, it is equally important to take time to peer over the electronic fence to see what is going on next door and be prepared. The grass may not be greener on the other side of the fence, but there is certainly the potential for some electronic "weeds" to cross over into our own yard, and we need to be prepared and act now before it is too late. **CM**

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