

LEGAL IMPLICATIONS OF USING SOCIAL MEDIA

Do You Know Who You're Sharing With?

David Alli

Amanda has arthritic pain in her knees and is claiming short-term disability from her employer. The insurance company denies her claim because pictures on Amanda's Facebook profile show her jumping on a trampoline. She then deletes many pictures from her profile.

All age groups from kindergarteners to senior citizens are using Facebook, Twitter, and LinkedIn to connect with others. In so doing, many people unknowingly give the world an all-access pass to their lives. Employers routinely check Facebook and LinkedIn during the hiring process and at various other times.

Since 2007 (*Kourtesis v. Joris*, [2007] O.J. No. 2677), Canadian courts have held that social media content is admissible as documentary evidence under the *Rules of Civil Procedure*. In *Kourtesis*, the plaintiff claimed that her injuries in a car accident greatly limited her activities, but the judge permitted Facebook photographs showing her enjoying a wide range of activities to be admitted as evidence. Since then, there is an obligation to produce such evidence if it is relevant in a proceeding. Knowing this, it may be tempting to modify or even delete specific content from social media websites, as in the fictitious example above. This is not without risk: the content in question qualifies as documents and the tampering or spoliation of documents can lead to severe penalties.

Not all social media content is automatically considered to be admissible as evidence. There is debate about whether social media content displayed under privacy settings is admissible. In 2007 (*Murphy v. Perger* [2007] O.J. No. 5511), the Ontario Superior Court of Justice decided that since the plaintiff, who was claiming damages for injuries suffered in a car accident, had used photographs published on Facebook in support of her claim, the photographs published only to her 366 "friends" could be admitted into evidence. A judicial consensus has since emerged that "private" documents (i.e. social media content) will be ordered for production only if it can be reasonably inferred from "public" content that



"private" content may well be relevant to the case at hand. In the example above, since Amanda is claiming short-term disability from her employer for arthritic pain in her knees and her public display pictures shows her jumping on a trampoline, the employer could reasonably infer that the private portion of her profile may contain such relevant documents as other pictures showing her being physically active. Courts have further held that there is no reasonable privacy interest where access is granted to a large number of "friends" online.

The use of social media is expanding into every facet of our lives and its presence in litigation cannot be ignored. As we continue to grow our online social media presence, we must keep in mind the changing legal landscape where one's private online presence can become a matter of public record. Production of social media evidence depends on the circumstances of each case: courts will continue to weigh the privacy interests of the individual against the desire for an open and transparent litigation process. Lawrences' Litigation Group can assist if you have questions about the use of online content in legal proceedings.



David Alli is a member of Lawrences' Litigation Group, where he is developing a broad area of practice in civil litigation, with particular emphasis on contractual disputes, construction liens, enforcing orders and judgments, collections matters, and employment-related issues. He can be reached at 452-6872 or dalli@lawrences.com.

In this issue:

Do You Know Who You're Sharing With?	1
Fatal Flaws in Disclosure Documents	2
Buying a Home from a Builder	3
Life at Lawrences [®]	4