

Blogging, Friending, and Tweets:

A Broad Overview of the Developing Role of Social Media for Medical Malpractice Cases and Other Litigation

By Kathleen Flynn Peterson and Melissa Wendland



Social media created a paradigm shift in how members of our society interact and communicate with one another. For example, the 2012 Summer Olympics' opening ceremony saw 9.66 million mentions on Twitter in a single day, which accounted for more tweets than for the whole duration of the 2008 Winter Olympics. As Jamaican Olympian Usain Bolt blasted across the finish line to win the 200-meter sprint, Bolt fans tweeted a record 80,000 tweets-per-minute as the runner overtook his competitors in the race. Two athletes, however, were kicked out of those same games for breaking IOC rules for particular social media communications. A journalist was booted off Twitter for criticizing NBC coverage of the games.

Like the Olympics, political campaigns saw a heightened awareness of a shift in how some people communicate and learn about issues. The 2012 political campaigns marked the first time a high-level campaign staffer—the “digital director”—

had a seat in the top tier of a presidential or large number of major congressional campaigns. For President Barack Obama and former Governor Mitt Romney, their digital directors were senior staffers with significantly more input than ever before (and multi-million-dollar budgets).

As demonstrated by the first true “social media” Olympics and presidential campaigns, Facebook, Twitter, blogs, and other social media channels can effectively provide a means to communicate and obtain information—but have littered in their e-path a cautionary minefield. There is always a strong focus on clients and their behavior in medical malpractice cases. Practitioners in these cases, in particular, face ethical, strategic and practical considerations in navigating social media in lawsuits. Social media issues, however, impact all types of litigation.

First and foremost, a lawyer should assess a client's social media use early in the case investigation phase. Take, for example, a

hypothetical client (Jane Doe) who outlined her journey with breast cancer on her Caring Bridge website. Jane—a physician—posted on the site that she agreed with the defendant doctors’ treatment. This would be a piece of evidence that a medical malpractice attorney would want to know in the investigation stage of the lawsuit before expensive experts are retained.

Once a suit is underway, a lawyer should be prepared if and when her client’s social media postings are requested in discovery. Even if the client restricted access through privacy settings, courts have found social media postings discoverable if those posts are shown to be material and relevant to claims or defenses in the case. *See e.g., Patterson v. Turner Constr. Co.*, 88 A.D. 3d 617 (N.Y. App. Div. 1st Dep’t 2011).

On the offensive side, social media discovery may include public and non-public information. One bar association issued an opinion that a lawyer may ethically view and access an opposing party’s Facebook and MySpace profiles as long as the party’s profile is available to all members in the network and the lawyer neither “friends” the other party nor directs someone else to do so. New York State Bar Ass’n Comm. on Prof’l Ethics, Op. 843 (Sept. 10, 2010). The Philadelphia Bar Association Professional Guidance Committee issued an opinion concluding that an attorney would violate Rules 8.4 and 4.1 if the lawyer asks a non-lawyer assistant to “friend” an unrepresented witness even if the non-lawyer uses her real name but without also disclosing the reasons for making the request. Op. 2009-02 (March 2009).

At trial, social-media discovery may prove helpful to an attorney, particularly for voir dire. A recent bar association ethics opinion allowed it, but, at the same time, cautioned against contacting jurors directly or inadvertently through the research. New York City Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2012-2 (2012). To the extent allowed, a lawyer should have the foresight to bring a laptop computer with Internet access to court to research jurors. Facebook, blogs, and other social media sites are especially appealing during jury selection because lawyers have limited time to ask questions. For example, a potential juror’s public Facebook postings may show him holding strident opinions on a host of issues or dispensing a landslide of unsolicited advice on typically delicate topics. Often juries offer opinionated people the perfect opportunity to wield their influence (and sometimes not in a way beneficial to your client). Social-networking sites often contain candid, personal information generated directly by the user—a treasure trove of potentially useful information on jurors.

As social media has become a modern replacement for

face-to-face communications, its role in litigation increased exponentially. A lawyer—particularly the medical malpractice practitioner—needs to be mindful of navigating this changing landscape to avoid ethical and discovery pitfalls while zealously advocating for families, individuals, and other clients.



Along with Partners Chris Messerly, William Maddix, Peter Schmit, Philip Sieff and Terry Wade, Partner **Kathleen Flynn Peterson** and Associate **Melissa Wendland** represent families and individuals who have been injured in cases involving

medical malpractice, personal injury, products liability and other harm caused by wrongdoers. Many of the group’s cases involve failure to diagnose, delayed diagnosis, wrong diagnosis, laboratory mistakes, cardiology, critical care, emergency medicine, gastric bypass surgery, anesthesiology, medication errors, drug overdose, family practice, infectious disease, pediatrics, radiology, surgery, and obstetrics. Kathleen can be reached at kfpeterson@rkmc.com. Melissa can be reached at mmwendland@rkmc.com.

TALK OF THE TOWN!

LET US PRINT YOUR PRESS RELEASE FOR FREE!

PROMOTE YOUR EVENTS

NEW FIRMS ♦ MERGERS & ACQUISITIONS ♦
INDUSTRY AWARDS ♦ PROMOTIONS ♦ NEW HIRES ♦
ANNIVERSARIES ♦ NEW LOCATION ♦ EVENTS ♦
BOARD MEMBER APPOINTMENTS

CALL -OR- EMAIL
612-396-1455 • tanderson@attorneyatlawmagazine.com
FOR SUBMISSION GUIDELINES