Albert Anthony Villaneda
MCGEE LERER & ASSOCIATES

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

Discovery and the social-media influencer

HOW TO PROTECT YOUR CASE DURING DISCOVERY WHEN YOUR CLIENT EARNS INCOME AS A SOCIAL-MEDIA INFLUENCER

A potential client reaches out to retain your firm after she was rear-ended, and she's seriously injured. She's 22 years old and has never been in a car accident nor involved in a lawsuit. So far, the incurred medical bills from her emergency room presentation are significant. She doesn't have any health insurance, but fortunately, the defendants have ample insurance coverage under a general commercial policy. Despite being stable enough for discharge from the hospital, she's still in pain and faces a long road to recovery. Her injuries, and resulting physical limitations, are severe enough that she cannot work without experiencing any pain or discomfort. She worries about losing income and getting behind on her rent. You ask, "How do you earn a living?" She replies, "I'm a social media influencer."

Increasingly in my practice, I meet potential clients who earn a living, or who supplement their income, derived from social media-related activity rather than classic "9 to 5" employment. For those unaccustomed to folks making a living in this manner, proving a loss of income, or earnings capacity, may be a challenge. More often (and frustratingly), I encounter *aspiring* influencers who insist on posting social-media content regularly, and publicly, despite my warnings to the contrary. Due to *sub rosa* surveillance, a client's social-media content can present a myriad of issues that can negatively impact a case. We all know of at least one talented injury attorney who lost an admitted liability case when a photo posted on their client's social media account cost the client their credibility with the jury.

Fodder for an investigator

There's nothing novel about our clients' social-media accounts being fodder for a private investigator engaged by an insurance company. Social-media accounts can represent a treasure trove of ammunition that can open the plaintiff to attack. The hope is to capture a 'gotcha' moment of a plaintiff who posted a photo or video of a weekend getaway taken after a claimed injury, engaged in sporting activity (such as skiing, snowboarding or surfing at the beach), or doing their favorite exercise, to show that they are faking or exaggerating their injury and physical limitations.

While I in no way endorse any sort of deceit designed to inflate an insurance claim, my concern is that an increase in social-media usage – coupled with a decrease in the user's privacy rights as to posted content – will lead to a higher likelihood of a false impression of the plaintiff being less injured, and ultimately, lead to a defense verdict. It also doesn't help that *sub rosa* evidence can be drastically edited or manipulated so as to create a false impression or simply be taken out of context.

Venmo is a form of social media

Social-media content includes more than just a photo or video, but includes other information like financial transactions. Venmo – the popular PayPal-owned app – combines flexible mobile-payment transactions with elements of social media that allows users to see payment transactions between other users even if they have no connections, or "friends," in common. In one of my cases, the insurance carrier's personal investigator located my client's Venmo account and accessed publicly posted financial transactions that showed the payment amount, the user the payment was made to and from, and free-form text that the payor used to describe what the payment was for. While most of the transactions were innocuous, some revealed social and physical/sporting activity that arguably could give a jury a false impression that the client was not as seriously injured. Other transaction descriptions, totally made in jest, identified potentially illegal or embarrassing activity. In a world that is increasingly less private and more digital, how does an injury attorney navigate the rough waters of discovery in the age of social media influencers?

What is a social-media influencer?

As a preliminary matter, social-media influencers ("SMI") are individuals with established online credibility who can monetize their clout with large audiences of market participants, called "followers," with content posted on their social-media account(s) that persuades, or "influences," their followers to buy certain goods or services. In return for their endorsement, SMIs are compensated by companies, or individual retailers, through sponsored content via mutually agreed-upon rates (e.g., on a per post basis), brand partnerships, or commissions derived from a variety of affiliate-marketing monetization tools.

Interestingly, SMIs need not be celebrities or famous athletes to earn impressive incomes. Rather, everyday people have risen up the ranks of social media to amass thousands, or even millions, of followers due to their charisma, expertise and perceived trustworthiness.

While many SMIs earn only passive income through their social-media activities, social media-derived income is increasingly replacing more traditional forms. The potential upside for younger folks is particularly appealing. The key factors to succeed in this arena are posting on social media regularly and *publicly*.

As alluded to earlier, information documented on social media can include photos, videos, locations, dates, times, identify activities or potential witnesses, and reveal sensitive communications – often in real time – in a manner that is easily "saved," or ascertainable in perpetuity. Content creators, like SMIs,

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

are particularly vulnerable in the context of litigation-based discovery as they regularly post content publicly and across various platforms (i.e., Facebook, "X" formerly known as Twitter, Instagram, YouTube, TikTok, etc.) to appease their follower's appetite for new content. Understanding our clients, and the digital world in which they live, is key to protecting them in litigation.

Use a written social-media disclosure early

Many injury attorneys only verbally counsel their clients about the possible perils of posting on social media. While a good first step, it is not enough. Increasingly, injury attorneys are using written social-media disclosures – which describe the impact that social media can have on their client's case and offer tips on how to how to avoid the risks. However, the disclosure is often not comprehensive enough or is tossed in a packet along with a host of other administrative paperwork requiring client review. Consequently, the disclosure is often forgotten and not acted upon, if read at all.

I use a written social-media disclosure that requires client's review and signature. It not only describes the impact that social media can have on their case, but it informs the client of the many kinds of social media that exist, including Venmo, that can inaccurately reveal content that ought not be public or that can portray them in a negative light.

I also have a focused discussion with the client concerning the salient points outlined in the disclosure. I not only advise my clients to set their social-media accounts' privacy settings from 'public' to 'private,' but if they permit me, I will review their privacy settings and make necessary changes for them. Often, before the client meeting, I will perform an internet search on my client and identify specific social-media posts that may prove harmful in the future and encourage them not to make similar posts in the future.

A written disclosure is harder for a client to forget or ignore. The disclosure form I use expressly states: "Please keep in mind that whatever you post is not private and may be subject to discovery by the defendant(s) in your case. Many cases have recently been lost, or severely compromised, as a result of what has been posted by injury victims on social media sites. Please take caution as whatever you write or post, or have written or posted in the past, can fall into the hands of the defendant(s), its insurance company, and defense attorneys for the purpose of unfairly attacking the validity of your claim."

Then, the client is urged to: (1) refrain from using social media sites altogether; (2) if not, to apply the highest possible privacy settings; (3) to be very selective about establishing connections or "friends" with strangers on social media while their case is pending; (4) to not post anything about their case, the incident, their injury or recovery; (5) to not allow others to "tag," or link, them to content posted by someone else; and finally, (6) to be cautious and to assume that their assigned insurance adjuster is going to review the content and possibly use it against them.

Lastly, I ask the client to sign the disclosure to attest their understanding to the following statement: "I have read the foregoing and understand that posting any information and/or photographs, which may be seen as contrary to my claim, could damage my case." As a final precautionary measure, before I file the client's complaint for damages, I search my client's social media accounts one last time and follow up with them directly regarding their social media privacy settings.

Even still, clients who self-identify as SMIs will be reluctant to heed the warning because doing so may cost them followers and/or income. Nonetheless, a written social-media disclosure helps the client be mindful of the kind of content they are posting, consider how it may be interpreted and/or used against them by opposing counsel, and ultimately, encourage better decision making.

Object on foundational grounds, dispute reliability and authenticity

The discovery of a plaintiff's social-media information is usually allowed by courts when the relevance to the case is established. Attorneys seeking social-media evidence should be prepared to establish the relevancy, and authenticity, of the information sought. As opponents of the disclosure, injury attorneys seeking to prevent the introduction of social-media evidence should be prepared to argue the content's inaccuracy or unreliability and advocate for reasonable limitations on the production.

In this vein, bear in mind that much, if not all, of the content that SMIs habitually post is divorced from who they actually are and often does not reflect reality in any reliable sense. Instead, the posted content displays an altered commercially focused false "reality." The influencer – him or herself – is more of a caricature of their authentic self that projects an unrealistic positive lifestyle often in a perpetually happy, and perfect, state. Accordingly, injury attorneys should be quick to educate, and point out to a judge, that social-media content from SMIs is often unreliable, unauthentic, and misleading in its depiction of the plaintiff and should be excluded.

LinkedIn and the loss of earnings claim

For a few years, and early on in my career, I was an attorney at a defense firm. In this capacity, I had an opportunity to review many written discovery responses from plaintiffs (retained by prominent firms). I was astonished by how frequently a given plaintiff's Form Interrogatory response to the 8.0 Series (Loss of Income or Earnings Capacity) were irreconcilable, inconsistent, and/or incomplete when compared to the plaintiff's LinkedIn page.

The difference between what was provided in a verified written discovery response, and what was not, tended to eventually lead to the discovery of

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

information harmful to the plaintiff's Loss of Earnings ("LOE") claim or Loss of Earnings Capacity ("LOEC") claim. In many instances, it was precisely these claims that were the most valuable components of the lawsuit, and that in due time, took the hardest hit.

I therefore suggest that injury attorneys should be mindful of their client's LinkedIn page, recognize that it may have information about earnings capacity and to take this information into account before the client's verified written discovery responses are served. Further, I ascertain all forms of income-generating activities that my clients may be engaged in, aside from their principal employment, that could prove problematic later. For instance, I once had a client who was embarrassed to initially disclose that they were moonlighting on a certain well-known social media website that sells, or grants access to, sexually explicit content for money and gifts. This was eventually discovered by the insurance company's private investigator (I was never sure how).

Sometimes, waiving the LOE or LOEC claim is the most prudent course of action. Of course, before doing so, the injury attorney should be sure to ascertain the client's informed written consent and authorization.

Proving Loss of Earnings for influencers

This article is by no means meant to convey tax advice, but it can help identify the type of documents that exist that can be used to prove a Loss of Earnings, or Loss of Earnings Capacity, claim for an SMI. SMIs are considered self-employed by the Internal Revenue Service (IRS), so they are responsible for reporting their income derived from their online activities.

Beginning in 2022, third-party settlement organizations, including banks and online payment networks, were required to report payments of $600 or more to the IRS, and payees, on a Form 1099-K (the reporting threshold for third-party settlement organizations, including payment apps and online marketplaces, was lowered to $600 by the American Rescue Plan Act of 2021). Given these rules, income collected through a third-party vendor, like PayPal or Venmo, will result in a Form 1099-K. On the other hand, income earned from YouTube, Instagram, or Google's AdSense will be reflected in a Form 1099-NEC (Non-Employee Compensation).

Tax-wise SMIs track their earned income by separating it from nontaxable personal amounts (e.g., money from personal loans or reimbursements). Third-party vendors, like PayPal or Venmo, are not currently able to distinguish between non-taxable personal amounts received (for example, when your friend reimburses you for coffee with a Venmo payment) from taxable income derived from performing services. Therefore, relying solely on an SMI's Form 1099 can possibly overstate the loss of income. The total figure reported on the 1099 will reflect total monies distributed to the SMI, but that number is not necessarily all income. The injury attorney should be mindful of this when collecting LOE documents and records from the SMI, so that their retained expert(s) have what they need to calculate the true figure.

Aside from tax documents, many SMIs use affiliate marketing tools to help them monetize their influence and keep track of their income. The affiliate marketing model is a method of generating income when a website owner promotes someone else's products or services by including an affiliate link on their own website. The respective company (or retailer) compensates the third-party SMI with a small commission for generating customer traffic to the company's website (i.e., pay-per-click) or when the customer ultimately purchases products and services.

There exists a large variety of affiliate-marketing tools, so an injury attorney proving a Loss of Income claim will need to connect with their client to ascertain the specific type of tool being used to discover the types of documents that exist, or that can be generated, within the tool's platform.

Conclusion

Take social media seriously. For better or worse, it is here to stay and is only growing more diverse, more popular and potentially more dangerous to an injury victim's claim. Be aware of at least the most popular platforms of social media that exist. Connect with your clients as soon as possible to ascertain what sites they are using, the kind of content they are publicizing, and what privacy settings are being used or not used. Don't assume that your clients will heed your advice, so be proactive. An ounce of prevention will be worth a pound of cure later.

Albert Anthony Villaneda is a senior attorney at McGee Lerer & Associates *where he focuses on catastrophic personal injury and wrongful death matters. Mr. Villaneda earned a Bachelor of Science in Business Administration from Chapman University and a Juris Doctor from Loyola Law School. Email: avillaneda@mcgeelerer.com.*