



Private Files or Public Domain

Society is still grappling with the notion of ownership of information on the Internet. Does your information belong to you or to the firm that owns the server? How can this content be used by those who have access to it? Once a piece of information is on the Internet, is it in the public domain? Aside from legal issues of ownership there are also ethical issues to consider surrounding how this online information is obtained and used.

Consider this scenario: A claims adjuster was perusing some recent photos that her friend placed on her Facebook account. While glancing at photos of the private party the claims adjuster notices the face of a claimant from a file she is adjudicating. A key aspect of this claim was limited mobility on the part of the claimant, caused by a serious automobile accident. Yet the activity in the pictures on Facebook would suggest either a full recovery or a false claim.

Can the claims adjuster use these photos as evidence to refute the claim? Should she use the photos? What about the ethical implications when doing this? Is it ethical to electronically spy on people in this way? Does the context of the photos place the claimant in an unfair and easily misinterpreted position?

"There are ethical issues that claims professionals need to be aware of when using social networking sites on the Internet to do claims investigation work," says Jim Eso, CIP, vice president, British Columbia Operations Crawford and Company (Canada) Inc. and chair of the Canadian Independent Adjuster Association

privacy committee.

Under both privacy laws such as PIPEDA, the established case law, and the professional requirements of CIPs and adjusters, the boundaries of what an adjuster should or should not do are relatively clear.

"I think the important thing about social networking sites for this discussion is understanding just what they are," says Eso. "In the past, our social network was our neighbours, family, co-workers and friends, but sites like Facebook allow the user to broadcast to all of those groups at once and allow us to broadcast some of it selectively and some of it openly."

In the past, an adjuster enquiring about the status of a claimant's injury might ask the neighbour, co-workers, other family members or friends by making cold calls at the home or business. The adjuster would identify her or himself and not mislead or misrepresent their purpose.

Now the same can be done simply by logging on to a social networking site.

By putting the information onto a publicly available website or social network site, the claimant essentially loses the right to control where it

goes from there; court decisions, which ultimately guide adjuster behaviour, have quite clearly said that if the information is on a public website, the adjuster can use that information in their investigation and it will be admissible as well in the litigation.

The trickier part of the question is what the pitfalls might be if the adjuster starts to dig deeper, having become suspicious that the information being presented in the claim is contradicted by the information that is or might be found on a protected area of a social networking site.

"I think it would be ethical, at that point, to start looking at the public portions of the claimant's 'friends' sites to see if there was corroborative evidence, which is really the modern equivalent of doing a neighbourhood canvass for information," says Eso. "This involves following the links that are established by someone who sets up a network of friends who may have greater access to photos or other items on the site than what the general public can see, and may post information publicly that started out as at least somewhat private as it was

shared first only with 'friends' who in turn made it public."

In that case, the adjuster may end up seeing the supposedly "hidden" photos or discussion because they are shared by someone who had legitimate access to the site. That would likely be especially true if the claimant allowed larger numbers of friends to access his private site, since at that point his information is, for all intents and purposes, painted on an electronic billboard.

One issue that will arise is the methodology used to gather the information from the claimant's site or their friends' sites. The ethical adjuster does not hide or disguise their identity when asking a neighbour about a claimant, nor would they when looking for information on social network sites, says Eso.

The courts, so far, appear to be leaning toward disclosure of the information if there is a reasonable suspicion that it is relevant. The challenge for the adjuster is twofold: (1) we must first become much more knowledgeable about the workings of various social network media; and (2) we must then proceed to investigate using the new technology but relying on the same ethical principles that we always have used when seeking information about a claim.

In the context of investigating a claim, while the insurer's objective is to find facts in support of the defence, there is also an obligation to assert every valid defence on behalf of the policyholder, explains Marcus Snowden, partner with Blaney McMurtry Barristers & Solicitors LLP. This is a positive obligation and an ethically important one. In the first-party context, the obligation is to entertain all valid claims for coverage in good faith. While privacy issues can sometimes trump the defendant's or insurer's right to learn the facts, in the course of investigating the so-called "public record," the advent of social networking sites offers an additional "public" area

for investigation, explains Snowden. An investigating adjuster (and the insurer instructing the adjuster) must be careful not to go beyond observation, however, particularly where the claimant has retained counsel. "The most difficult and tempting scenario involves the unrepresented claimant in the context of a supposedly large claim which, upon investigation, is brought into grave doubt. Notably, this is not confined to the personal injury context, although it may most frequently involve these types of cases. Consider that a posting of any kind may reveal to the reader informa-

direct contact with the claimant, may be tempted to "close the file early" and may feel there is a benefit to the client in so doing.

"This would not only be risky in general but, just as in the conventional context, unethical in particular," says Snowden. "Even if the claimant is unrepresented, absent some form of disclosure, the overall obligation is to address claims fairly. The better course in the independent investigating adjuster's context, tempting as more aggressive steps might be, is to do a 'screen print' of the evidence and seek further instructions."

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tion, facts or circumstances which are plainly contradictory to information that person or entity has disclosed or alleges is the case in direct communications with the investigating adjuster or the insurer."

In this context, although the medium is different, it is perhaps best to remember that the ethical rules are the same, says Snowden. An investigating adjuster would also not be acting ethically to directly confront a represented claimant with a nuisance offer, use damning surveillance video or the expected testimony of a witness in aid of persuading that claimant to settle on terms favourable to the defence or the insurer and sign a release for a low sum in the absence of counsel's knowledge and consent.

Applied in the medium of a social networking site, the investigating adjuster may be tempted to engage in

The preferred approach should be to consult knowledgeable defence counsel for further direction. Counsel's advice may well make the difference between preserving a potentially useful record to assist a liability defence or defence in the first-party context on the one hand, and losing the ability to use the evidence on the other. There may be specific steps necessary to both preserve the evidence and compel the claimant to produce it. These steps are best taken with local counsel's input to ensure the evidence is not tainted by inadvertently acting contrary to local law and practice. Snowden concludes that since "this is an evolving area even for the litigation bar, the better course is to seek counsel when it becomes apparent a social networking site's postings may be relevant to an issue in your case." ☐

The CIP Society represents more than 15,000 graduates of the Insurance Institute of Canada's Fellow Chartered Insurance Professional (FCIP) and Chartered Insurance Professional (CIP) Programs. This article is intended to generate a dialogue about ethics among professionals and we welcome comments and scenarios at cips@insuranceinstitute.ca. This series of articles is archived on The CIP Society's website at www.insuranceinstitute.ca/cipsociety.