

SPECIAL REPORT Family Law

## Step Away From the Computer: Divorce, Internet Don't Mix

Commentary by Jason Marks and Richard I. Segal

By now it should come as no surprise that content posted on Facebook, Instagram, Twitter, LinkedIn and other online forums is open for the whole world to read. Nor is it a secret that such public postings are discoverable in court.

Like social media itself, laws concerning the discoverability of social media in family law proceedings is evolving.

In January, the Fourth District Court of Appeal in *Nucci v. Target*, 40 Fla. L. Weekly D166, a personal injury case, compelled discovery of photographs from the social media accounts of the plaintiff, a customer of Target. Target argued that the images are relevant to the plaintiff's claim of injury in that it would allow a comparison of her current physical condition and limitations to her physical condition and quality of life before the date of a slip and fall.

"We agree with those cases concluding that, generally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established," the appeals court said.

The court further said that "by creating a Facebook account, a user acknowledges that her personal information would be shared with others ... indeed, that is the very nature and purpose of these social net-

working sites else they would cease to exist."

In compelling production of the images from the plaintiff's Facebook page, the court specifically found that "the photographs sought were reasonably calculated to lead to the discovery of admissible evidence and [the plaintiff's] privacy interest in them was minimal, if any."

While this case was in the personal injury context, it is fully applicable to family law proceedings.

Most of us know someone with an overwhelming compulsion to publicize every detail of his or her personal life online—including taking jabs at a soon-to-be ex-spouse. When going through a divorce, posting pictures of yourself with the hot blonde you met at a bar or telling the world what a bad parent your spouse is might seem like a good idea, but before you do, think twice and then step away from the computer.

With technology at our fingertips, our only worry is no longer don't pick up the phone angry because you might regret what you say, but has expanded to think before you text, think before you tweet, think before you update your Facebook status or post an Instagram photo.

Just like an employer can check your online identity before making a job offer, you can be sure your embittered spouse, and certainly his or her lawyer, will visit your Facebook and Twitter pages to dig up any incriminating information you



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have decided to share with the world. A variety of things can affect your eventual custody or alimony battle. Nowadays something that you perceive to be an innocent comment "can and will be used against you."

Your husband is incapable of fidelity? Call up a friend and discuss it over coffee. Your wife is an absent parent? Hash it out over happy hour. But definitely think again before bashing your spouse on the Internet. Even private posts that are limited to your friends appear now to be discoverable in litigation. Keep in mind that anything posted online is easily traceable by forensic experts and can never be truly deleted.

It is not just the written word that one might regret. Likewise, be wary of posting pictures of yourself engaging in questionable behavior. In a custody dispute, photos of you drinking, doing drugs and engaging in



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sexual contact can all be used against you in court to question your fitness as a parent.

Our policy is simple. Ask yourself: How would I feel if I saw this post or picture permanently plastered on a billboard for the whole world to see? If the thought of this even leaves you mildly embarrassed, don't post it. Because when you think about it, today's social media is as open and public as doing just that. Always err on the side of caution. No one has ever said "I really wish I had put up that picture of myself on Facebook" but plenty of people have lived to regret it.

**Jason Marks, a founding member at Kluger Kaplan Silverman Katzen & Levine, and Richard Segal, a partner at the firm, focus on commercial litigation and family law, assisting clients in a range of business and corporate litigation matters, and matrimonial disputes.**