

Manage social media to avoid legal fallout

BY MICHAEL MCKIERNAN

For Law Times

The increasing role of online evidence in family court cases has made social media skills a necessity at the province's family law boutiques, according to lawyers in the field.

With almost three decades in the business, Cheryl Goldhart admits she's no digital native, but the principal at Toronto firm Goldhart & Associates prides herself on staying up to date on the latest developments in social media on sites such as Facebook and Twitter.

"Things are different from when I started, but I think lawyers have to understand that people communicate in a very different way than we did 30 years ago," Goldhart says. "You have to be able to have a conversation and properly advise clients of the potential dangers of putting all kinds of information out there."

At London, Ont. firm McKenzie Lake Lawyers, family law partner Carolyn Lloyd says her social media warning comes almost immediately in her first meeting with clients.

"In a perfect world, our clients

would deactivate all accounts until their case is resolved, but I don't think that's realistic the way the world works now," Lloyd says. "Some will use social media as a support system, but I tell them it's something to be very careful about. If they try to rally friends to their side, it can sometimes reflect poorly on them. I think it's good to spell out some clear parameters over their use, and to emphasize that nothing they say should reference their family law case."

If they insist on continuing to use their accounts, Lloyd advises clients to boost their privacy settings as far as possible. After deactivating her own Facebook account for a time, she learned from personal experience that certain information reverts to becoming publicly available when accounts are reactivated.

"They change the privacy settings so frequently; you have to keep checking so you know who can see what you're posting," Lloyd says.

At Goldhart & Associates, the firm's extensive retainer letter specifically refers to guidance around electronic communications.

"Traditionally, our courts dealt with he-said, she-said disputes.



Andrew Feldstein says he instructs clients to remove former spouses from their social media profiles.

Now it's he-wrote, she-wrote. People are writing away, and it's all becoming evidence. We tell clients to think twice before they say something in anger without thinking of the consequences, because it could end up in front of a judge," Goldhart says. "That stuff is there forever. It doesn't die, even when you die."

"People sometimes think saying something to a friend on Facebook is the same as if you're out with them having a coffee, but it's not. When you're out for a coffee, it doesn't leave a permanent record," says Andrew Feldstein,

a Markham, Ont. lawyer who hands clients a list of social media dos and don'ts when they hire his firm, the Feldstein Family Law Group. "Whether it's Facebook, Instagram, LinkedIn or whatever, it's all fair game. If you say something negative, it could be used against you."

Feldstein instructs clients to remove former spouses from their social media profiles, but he says they still need to take care when posting, since the chances are high that information will get back to them via shared networks of friends and end up in court files.

For example, in the 2015 case of *Tran v. Tran*, Ontario Superior Court Justice Frances Kiteley ordered a trial on the issue of child support after the mother used Instagram and Facebook posts to bolster her claim that the father was employed and had bought a sports car rather than pay support.

Lloyd says courts may even place greater weight on social media posts where the evidence conflicts with information presented directly in court, pointing to the 2011 case of *B.V. v. P.V.* In that case, Ontario Superior Court Justice William Hourigan relied on the evidence of a moth-

er's Twitter feed over her testimony in court when it came to the issue of how heavily she drank.

"Based upon the respondent's Twitter postings, it is clear that she engages in a pattern of excessive consumption of alcohol. The Twitter postings reference her making inappropriate phone calls while intoxicated and being hung over," Hourigan wrote.

Feldstein says clients are often proactive about seeking information on former spouses online, but he warns they could do more damage than good to their case by hacking into accounts or duping other parties into believing they are someone else.

And online evidence doesn't always have to make it to court in order to have an effect, he says. Feldstein once negotiated a favourable settlement out of a husband on the opposing side of a file after an extensive search turned up an online boast about how many customers he had served over a 20-year period. Since his business offered a fixed-rate service, Feldstein was able to make a rough calculation of his total revenue over the period, revealing a "significant amount of unreported income," he says. **LT**