

Be Aware of Evidence on Social Media Involving Anticipated or Pending Investigations or Litigation

12/27/16

Under the recent case of *State v. Hannah*, Docket No. A-5741-14T3, (N.J. App. Div. Decided December 20, 2016; approved for publication), the courts have confirmed how Twitter postings may be authenticated. Social media postings may now be authenticated as any other “writing” under New Jersey Rule of Evidence 901. Despite the ease in which digital media may be manipulated, the court rejected an argument for a higher standard for authentication. The court confirmed that a combination of circumstantial factors related to the posting, such as context, prior communications, expressing specific knowledge of an event/issue, profile information, and photographs may establish sufficient authentication. Social media has become a rich source of information for litigation and authentication is possible through direct proof, circumstantial evidence, contents/knowledge, reply and other miscellaneous methods of establishing reliability as any other form of writing.

There are no secrets on the internet. Today people willingly post the most personal and sometimes embarrassing information about themselves, their families, their friends, and believe it or not, even their co-conspirators. If the Government was involved in investigating and compiling the detailed information that people willingly disclose, it would be accused of invading privacy and being “Big Brother.” It is remarkable as to the extent people willingly and recklessly surrender their privacy to the internet without a second thought.

People post photographs and comment about incidents that involve potential civil lawsuits, criminal investigations, and/or criminal charges. Many people voluntarily disclose the most personal and/or embarrassing information on social media sites making it readily available for the world to see. In this “brave new world” people “drink and post,” engage in gossip, conduct their own investigations, try to make identifications, and create a record that may be damaging to their personal interests or the interests of friends. It is not unusual for reckless postings to occur in incidents involving parties or clubs where allegations of physical or sexual assault arise. The posting of photos or videos of people smoking marijuana or being obviously intoxicated at a party may seem funny, but not be the wisest action if there is a related criminal investigation or if the subject is seeking employment. It sounds obvious, but people disregard the obvious and post at their peril.

In today’s world, many investigations begin with reviewing the public social media of the target of an investigation or witnesses to an incident being investigated. Social media information has become an invaluable source for the collection of evidence. It is therefore appropriate that in every case counsel should consider whether there may be evidence documented on social media and consider:

1. Warning clients not to post anything on any social media platform regarding any pending civil matter, investigation, or criminal charge;
2. Determine if your client knows of posts by other individuals that are relevant to a disputed matter. If so, find out the nature of the posting, how your client is aware of its existence, so that as counsel you may determine what steps, within counsel’s ethical constraints, be taken to review and/or preserve such information;
3. While any civil or criminal investigation is pending counsel should caution the client that it is preferable not engage in any social media activity without first discussing the issue with counsel;

4. Ascertain all social media platforms used by a client so that counsel may, if necessary, review any postings and assess the significance of such content and whether the information may be adverse/problematic in the representation;
5. As to existing posts clients should be advised that there may be a duty to preserve the evidence and therefore the client should be counseled not to delete information. Once posted, information can almost always be recovered and the deletion of posts may be considered obstruction or the spoilation of evidence. Additionally, a client will not necessarily know whether information posted out on social media helps or hurts their interest. Counsel is in the best position to determine the significance of a social media posting and how it should be handled;
6. If a client has posted information related to an investigation or litigation, until counsel has conducted a full investigation, the better practice is to simply direct the client to revise all settings to be to the narrowest level of access permitted by the platform. Counsel should then immediately review the information for relevance, preservation, and to determine how it can best be addressed;
7. While there is any potential for administrative, civil or criminal litigation, any social media activity that is material to the litigation should be discussed with counsel. At the earliest possible stage counsel must find out from the client what is out there, what it means, and how best to protect the client's interests.

The "social media conversation" with a client should be conducted at the earliest stage of any representation where social media may be a source of evidence. Counsel must be cautious because the deletion of evidence, the improper accessing of social media information through misrepresentation or fraud can have serious ethical implications for counsel and may have serious personal exposure for a client.

For information on authentication of digital information you may consider reviewing the following sources:

- New Jersey Rules of Evidence, N.J.R.E. 901, Commentary, Gann Law Books (2016 edition);
- Admissibility of Digital Evidence, Federal Bar Association, CLE Video Re-Broadcast | January 12, 2017, 2 HR CLE (2:00 pm - 4:00 pm Eastern)
- Fundamentals of Trial Techniques 3rd Edition, by Thomas A. Mauet;
- Evidentiary Foundations, by Edward J. Imwinkelried, Lexus/Nexus Publishing, (2014, Ninth Edition)

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