

## No Secrets in Cyberspace: Admissibility of Texts, Emails, and Social Media Posts in the Courtroom

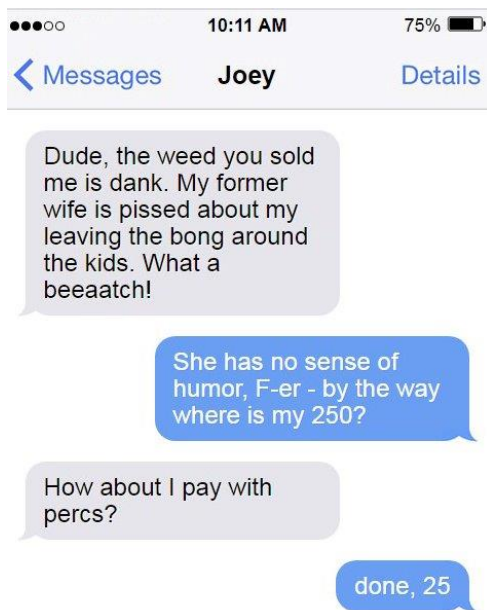
09/23/19

### What to Know about Digital Messaging, Social Media, Investigations, and Litigation

I recently saw a meme on social media that said something like “Dance Like No One is Watching, But Text, Email and Post Like it Will be Read in Court One Day.” Wise advice from the Land of Meme.

Whether the matter is a criminal investigation, criminal prosecution, civil action, and/or family law case, digital communications, texts, emails and social media posts are fertile and increasingly common sources of evidence in investigations and litigation.

Digital communications such as texts, emails, and social media posts can be introduced into evidence through simple circumstantial evidence. New Jersey Rules of Evidence 901 establishes that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.” As one New Jersey Appellate Division panel confirmed, the standard for admissibility is fairly low and does not need “certainty” or “conclusive proof.” A basic (“prima facie”) showing that the posting is authentic is all that is required.



People sometimes drink and type. People sometimes get angry and type. People sometimes get “high” and type. Whether the communication is in a text, email or a social media post, stupid, angry, or impulsive rants are creating a record, potential evidence, that may one day become a source of embarrassment, a rejection for employment, worse yet, become damaging evidence in a court room.

It is remarkable as to the extent people willingly and recklessly surrender their privacy to others through the internet without a second thought. People can text, email, and/or post personal, sensitive, embarrassing and sometimes incriminating information about themselves, their families, their friends, and believe it or not, even their co-conspirators.

Texting, emailing or posting photographs and comments about incidents that involve potential civil lawsuits, family law proceedings, investigations, and/or criminal charges is simply foolish. Sadly, people voluntarily disclose the most personal and/or embarrassing information through digital messaging platforms and social media sites, and in the process generate a digital trail that makes it easy to retrieve such

information for use in a court room.

It is not unusual for angry, reckless texts, emails, and/or postings to occur in incidents involving parties, clubs or other venues where drug use or allegations of physical or sexual assault arise. The posting of photos or videos of people smoking marijuana or being obviously intoxicated at a party or bar may seem funny to some, but may be disastrous if there is a related criminal investigation, a custody dispute, pending employment

application, or if there is civil litigation anticipated or pending. It may sound obvious, but people disregard the obvious risks and text, email, and post at their peril.

In any criminal investigation, potential or pending civil action, or family part matter, one of the first places an adversary checks for information is the history of digital communications, texts, emails, and social media profiles and posts. Simply put, the digital profile of a person is an invaluable source for the collection of evidence.

Remember that digital records may one day be read out loud, for the world to hear, in court. While you may dance like no one is watching, your digital profile is forever.

#### Additional Resources:

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

- Dynamics, Inc. v. Master, No. A-0952-17T3, 2019 WL 962839, at \*8 (N.J. Super. Ct. App. Div. Feb. 26, 2019)(email “distinctive contents reasonably support their authenticity”);
- State v. M.F., No. A-3602-15T2, 2018 WL 333493, at \*4–6 (N.J. Super. Ct. App. Div. Jan. 9, 2018) (admissibility of “What’s App” screen shots);
- Angeles v. Nieves, No. A-2302-15T4, 2018 WL 3149551, at \*6 (N.J. Super. Ct. App. Div. June 28, 2018) (foundation for admissibility of Facebook photos);
- Commissioner of the New Jersey Department of Banking and Insurance, Petitioner John Savadjian, Respondent, 2018 WL 6169075, at \*6, Order No. A18-111 OAL Dkt. No.: BKI 06053-14, Agency Ref. No.: 14-46 & 14-130, Decided: October 14, 2018;
- State v. Hannah, 448 N.J. Super. 78 (App. Div. 2016) (Twitter handle, profile photo, content of tweet, reply, and testimony established sufficient authenticity for admissibility);
- Brenman v. Demello, 191 N.J. 18, 30, 921 A.2d 1110, 1117–18 (2007) (foundation for admissibility of photos generally);
- 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).

For more information about the risks of digital messaging and any administrative, civil, or criminal law questions, phone [Eric Marcy](#) at 732-855-6004.

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