SOCIAL MEDIA POSTINGS IN SEXUAL HARASSMENT LITIGATION

By Maria C. Walsh, Esq.

Sexual harassment litigation typically involves accusations of unwelcome sexual conduct or comments in the workplace. Sometimes allegations are simply denied. More often, however, defendants assert that plaintiff either welcomed or wasn't offended by the alleged conduct or comments. Increasingly, an important evidentiary weapon in this battle comes from social networking postings, such as tweets, Facebook status posts, private messages, etc. At some point in the mutual mud-slinging, counsel find themselves debating the admissibility of the postings.

Authenticity and Relevance

As with all evidence, the question of admissibility starts with authenticity and relevance. The proponent of social media evidence has the burden to establish that the posting was generated by the person to whom it is attributed. Federal Rules of Evidence ("FRE") 901. Courts have recognized many ways to establish authenticity. In a recent criminal sexual assault case, evidence that the defendant had engaged in conduct identical to the conduct described in his Facebook page "served as a basis for concluding that the records were authentic." *Commonwealth v. Foster F.*, 86 Mass. App. Ct. 734, 20 N.E. 3d 967, 971 (Mass. App. Ct. 2014).

The relevance of proffered social media content is determined by the same analysis applicable to any other form of evidence. If the content relates directly to allegations of the complaint or to defenses, such as photos in the workplace or postings about the conduct alleged in the litigation, relevance is obvious. But when the content strays beyond the workplace, such as compromising photos of the plaintiff reveling outside the workplace, the "relevance" connection may be lost.

Special FRE 412 Considerations

Because of the sensitive, highly personal nature of allegations, defenses, and evidence in sexual harassment cases FRE 412, and state equivalents, direct courts to weigh the potential prejudice or embarrassment to the alleged victim against the probative value of the evidence. Consistent with the rationale in civil rape cases, most decisions distinguish between evidence of the alleged victim's sexual behavior in the workplace (discoverable and admissible) and evidence of non-workplace conduct, generally irrelevant and inadmissible. "What a person views as acceptable or welcomed sexual activity or solicitation in his or her private life, may not be acceptable or welcomed from a fellow employee or supervisor." *Mackelprang v. Fidelity Nat. Title* Agency of Nevada, 2007 WL 119149 (D.Nev.2007).

Evidentiary Exceptions

Early court rulings on social media evidence often excluded postings as inadmissible "hearsay." More recent decisions accept authenticated social media photos or messages as exceptions to the hearsay rule (e.g., admissions against interest, contemporaneous state of mind evidence, etc.). Uniform Rules of Evidence Rule 803(b). When considering whether evidence of a defendant's prior sexually harassing behavior can be offered to establish the defendant's current disposition toward bad behavior, courts balance probity against prejudice. The more the prior bad act resembles the currently alleged conduct, and the closer in time, the more likely the evidence will be admitted. A supervisor's text message to another subordinate attaching a pornographic photo, or a post demonstrating the employer's knowledge of a supervisor's prior sexual harassment will be hard to exclude.

"Private" Information

Why do so many litigants post incriminating photos, tweet compromising messages, and share intensely personal details of their life on social networking sites? Most assume only 'friendly' eyes will view their broadcasts and are dismayed to learn that social media pages and postings can be discovered despite "private" designations. Because a social media user's restriction of access does not prevent viewers from copying and further broadcasting the posting, courts have concluded there can be "no reasonable expectation of privacy." *U.S. v. Meregildo,* 2012 WL 3264501, at *2 (S.D.N.Y. 2012). Unlike medical records or communications

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with legal counsel, social media postings exist to be shared. The days when litigants were ordered to share their login and passwords with opposing counsel for free range discovery of social media pages have passed, however, and courts generally permit discovery only of relevant posts.

What Counsel Can Do

Counsel should review their clients' social media communications early in the life of any case. In the context of employment litigation, employer counsel must identify all personnel whose actions are alleged to create liability for the employer and review their social media postings, etc. Should your client propose "cleaning up" their online activity before discovery, explain the obligation to preserve potential evidence, and issue litigation hold notices. Sanctions have been imposed on litigants and counsel for spoliation resulting from alteration or deletion of social media postings. Also advise clients not to post new information that might compromise the litigation.

Marshall McLuhan said, "The medium is the message." Today the act of self-publication in electronic media not only creates the message, but determines its admissibility. When counsel disagree about whether social media content is discoverable, they may select a discovery master to conduct an in camera review of the potential evidence to separate relevant from irrelevant posts. Better yet, mediate the sexual harassment case, negotiate a settlement, and avoid the need to introduce social media postings into evidence. But please … no tweets from the caucus room about how well the negotiations are proceeding. Assume the other side is following. ■

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