SOCIAL MEDIA
Law, Policy & Tips
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ADMISSIBILITY, AUTHENICATION AND DISCOVERABILITY OF SOCIAL MEDIA

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State v. Smith, 192 So.3d 836 (La. 4th. Cir. 2016)

- **Criminal Case**
- **Evidentiary question arose on pretrial writ**
- **Aggravated Assault**
- **Victim alleged that Smith sent her threatening text messages/social media posts**
- **Primary question is authentication**

State v. Smith (cont).

- **State printed out these messages without any context or explanation how they were transferred from the phone to the paper**
- **Undated posts, with no names on document**
- **Not clear what social media service they came from**
- **Name showed as "DD3" - not the D's real name**
- **The social media/electronic evidence was a critical part of the State's case**
- **Included a photograph of D holding a gun**
- **Message to victim that "you better get insurance"**

State v. Smith (cont).

- **The victim did not testify at the hearing. Instead, the officer testified that the victim had "showed her" her phone with the posts**
- **Trial court denied the motion to suppress, but the court of appeal reversed**
- **Basic authentication rule applies:**
  - **"whether there is sufficient evidence from which a reasonable juror could find the proposed evidence is what the proponent claims it to be."**

State v. Smith (cont.)

- **The *Smith* court identified various problems with the officer's testimony**
  - **No evidence that Smith had created the account**
  - **No evidence of what platform it was from**
  - **No evidence whether others had access to the account**
- **Reemphasized that the burden is on the party proffering the evidence**
- **Remanded and ordered the trial court to hold a hearing to determine admissibility**

State v. Smith (cont.)

- **The court discussed two Maryland cases: *Griffin v. State*, 419 Md. 343 (2011) and *Sublet v. State*, 442 Md. 632 (2015)**
  - ***Griffin* holds that social media evidence requires "greater scrutiny."**
  - **Simply showing someone's picture on the web page does not mean it was written by that person.**
- ***Sublet* is more liberal than *Griffin* and suggests three ways to authenticate digital evidence:**
  - **Ask the creator;**
  - **Search the computer; or**
  - **Ask the social media network.**

U.S. v. Browne, 834 F.3d 403 (3d. Cir. 2016)

- **Criminal case**
- **Post-conviction appeal**
- **Defendant tried for electronic crimes related to child pornography**
  - **Lewd online chat messages with teenagers**
  - **Used images the girls sent him online as blackmail**
- **Facebook certified that the chat logs were true & accurate copies of what was posted**

U.S. v. Browne (cont.)

- **The government obtained a certification from Facebook's custodian of records**
  - **The prosecution that, as certified business records, they were self-authenticating**
  - **FRE 902 incorporates FRE 803(6) business record exception**
- **The Third Circuit held that Facebook posts are not business records**
  - **They are not self-authenticating, and require inspecting extrinsic evidence**

U.S. v. Browne (cont.)

- **"[T]he relevance of the Facebook records hinges on the fact of authorship."**
- **Business Records under FRE 803(6) must be subject to checks for accuracy and reliability**
  - **Facebook makes no attempt to verify the identity of a person who posts information**
  - **Facebook can only aver that certain communications were exchanged between particular online accounts at a certain date and time**

U.S. v. Browne (cont.)

- **Is there sufficient extrinsic evidence to link the defendant to the posts?**
  - **The Court recognizes that electronic documents are subject to falsification or unauthorized access, but the same rules of evidence nonetheless apply**
- **Direct or circumstantial evidence may be used**
  - **The government never directly asked the victims whether they recognized these chat logs.**
  - **Admissible anyway, due to circumstantial evidence**

U.S. v. Browne (cont.)

- **The court considers numerous potential ways to link the social media page to an individual**
  - **Testimony that the defendant accessed that website**
  - **Testimony that the site matches defendant's writing style**
  - **IP tracking to link to addresses**
  - **Chat logs match the victim's descriptions of conversations**
  - **Phone numbers on the account matched the defendant**
  - **Admissions by the defendant that he used the page generally, even if he denied these specific statements**
  - **Biographical information (reliable?)**

Hyles v. New York, 2016 U.S. Dist. LEXIS 100390 (S.D.N.Y. Aug. 1, 2016)

- **Predictive Coding**
  - **An increasingly common issue**
- **"Through the coding of a relatively small sample of documents, computers can predict the relevance of documents to a discovery request and then identify which documents are and are not responsive."**
  - ***Dynamo Holdings v. IRS*, 143 T.C. No. 9 (2014)**

Hyles v. New York (cont.)

- **Cheaper and quicker than manual review**
  - **More accurate?**

- **Different degrees of predictive coding**
  - **At its most basic, filters spam and other clearly irrelevant electronic documents**
  - **More in-depth projects may involve complex natural language searches run by the computers**
  - **Always subject to manual review**

- **Predictive coding can be negotiated between the parties, but can it be ordered by the court?**

Hyles v. New York (cont.)

- **Single-plaintiff employment discrimination case**
- **Parties disagreed over e-discovery protocol**
  - **Plaintiff wanted predictive coding**
  - **City wanted simple keyword searches**
- **The Court agreed that predictive coding may be more effective and cheaper than keyword searches**
  - **However, "responding parties are best situated to evaluate the procedures, methodologies, and technologies" for their electronic discovery responses.**
  - **Court cannot order the defendant to use a certain method.**
- **How will the proportionality rules affect this balancing test?**

Odeh v. City of Baton Rouge, 2016 U.S. Dist. LEXIS 41079 (M.D. La. Mar. 29, 2016)

- **Single-plaintiff harassment and employment discrimination claim**
- **Plaintiff propounded broad discovery requests**
  - **e.g., all complaints of harassment or discrimination made against the City for the prior ten years**
    - **Not limited by department, type of claim, or the term of plaintiff's employment**
  - **Defendant refused to respond without limitations; plaintiff moved to compel**

Odeh v. City of Baton Rouge (cont.)

- **Court applies December 2015 amendments and the proportionality test**
- **Plaintiff requests all e-mails he ever sent or received from his City e-mail account**
  - **Court holds that this is not a proportional request**
  - **Plaintiff's e-mails are only discoverable if they are responsive to another one of his requests**
    - **Asking for all e-mails fails to describe the items or categories of items he is seeking**

Odeh v. City of Baton Rouge (cont.)

- **The Court expressly points out that it is applying the December 2015 amendments and relies on the proportionality standard**
  - **Yet the decision relies heavily on pre-2015 caselaw**
  - **To what extent have the rules truly changed?**

Noble Roman's, Inc. v. Hattenhauer Distrib. Co., 314 F.R.D. 304 (S.D. Ind. 2016)

- **Franchise dispute regarding royalties**
- **The defendant went on the offensive by serving a subpoena on the plaintiff's main shareholder**
  - **Alleged that the plaintiff was suing franchisees to take the heat off of its own financial misdeeds, and that the shareholder had that evidence**
  - **23 document requests seeking information about any investigations or audits of Noble Roman's**

Noble Roman's v. Hattenhauer (cont).

- **Plaintiff moved for a protective order**
- **Court held that Plaintiff had standing to challenge third party subpoena**
  - **The time and expense necessary to review documents and attend deposition create standing**
- **Question of law – do the amendments to Rule 26 apply to subpoenas under Rule 45 as well?**
  - **Court holds that they do.**
  - **Rule 45 was not amended, but Rule 26 limitations are incorporated into Rule 45 by operation of law**

Noble Roman's v. Hattenhauer (cont).

- **The 2015 amendments were intended to "protect against over-discovery and to emphasize judicial management of the discovery process."**

- **The Court rejects the defendant's claim that a "clearly defined and serious injury" is necessary to obtain a protective order**

- **Defendant "beats the drum of relevancy," but "That's not good enough.**

Noble Roman's v. Hattenhauer (cont).

- **Hattenhauer already directly sought documents related to "every aspect of Noble Roman's business operations, finances, market plans, and management structure."**
- **Additional material from the shareholder was "discovery run amok."**
- **Query – does proportionality have a different meaning when 3d parties are involved?**
  - **Is plaintiff's main shareholder a true 3d party?**

Thurmond v. Bowman
2016 U.S. Dist. LEXIS 45296
(W.D.N.Y. Mar. 31, 2016)

- **Plaintiff alleges violation of the Fair Housing Act**
- **Dispute over plaintiff's use of her own social media during the litigation**
- **Plaintiff alleges that Defendant wrongfully refused to rent her an apartment.**
  - **The Complaint alleges that this caused Plaintiff to be homeless and separated her from her daughter**
    - **Defendant believes her Facebook page shows otherwise**

Thurmond v. Bowman (cont.)

- **Defense counsel found social media posts which apparently contradicted these allegations**
  - **No question of authentication here – Plaintiff admitted that these were her posts**
  - **Defendant e-mailed plaintiff's counsel specifically warning against "spoilage of her text messages and Facebook account."**
- **Defendant then noticed posts "disappearing" from Plaintiff's social media accounts**

Thurmond v. Bowman (cont.)

- **Plaintiff tentatively agreed to a protective order preventing plaintiff from altering or deleting her social media accounts**
  - **Ultimately decided to dig in her heels**
  - **Court granted a TRO pending a hearing**
- **Defendant submitted screenshots of Facebook and Instagram posts which had later disappeared from the plaintiff's accounts**

Thurmond v. Bowman (cont.)

- **The parties disputed whether the posts had been deleted, hidden, or whether plaintiff had simply changed her privacy settings**
- **The court held an evidentiary hearing on spoliation**
  - **Plaintiff's testimony was artfully worded regarding what she had done with her accounts**
  - **The Court then held a *second* evidentiary hearing**

Thurmond v. Bowman (cont.)

- **Plaintiff ultimately produced hundreds of pages of social media evidence from the relevant time period (by this point, the alleged discriminatory act was years in the past)**
- **Court ultimately denies motion for sanctions**
  - **Scolds plaintiff – she was not aboveboard and lied to the court about the date she changed her privacy settings.**
  - **However, Court does not believe that the posts were material enough to warrant sanctions**
  - **Also denied motion to disqualify plaintiff's attorneys**

Thurmond v. Bowman (cont.)

- **The Court collects cases from all across the country stating what social media posts can, and cannot, prove.**
  - **Defendants oversold their case – claimed the entire Facebook account was relevant solely because plaintiff had "garden variety" mental anguish claim**
  - **The Court cites a law review article noting that "social networking websites enable users to craft a desired image to display to others."**
- **R&R later adopted in a published decision**

Thurmond v. Bowman (cont.)

- **Defendant's claims as to relevancy of some of the posts were quite tenuous**
  - **e.g., one picture showed Plaintiff's children sitting on a couch. The Defendant claimed that the pattern of the couch was relevant to prove where Plaintiff was living at the time**
  - **There are no sanctions for destroying or deleting irrelevant documents or information.**
  - **Defendant *assumed* that Plaintiff was deleting posts wholesale, but it may have simply been privacy settings**
  - **Plaintiff was merely given a stern warning – cf. *Allied Concrete v. Lester*, 285 Va. 295 (2013), affirming sanctions & adverse inference where counsel told plaintiff to "clean up" his Facebook (and he did)**

Fischer v. Forrest

- **"Discovery wake-up call"**
- **The "new" amendments to the FRCP are no longer new**
- **Reusing pre-2015 general objections, boilerplate objections, and broad requests is no longer good enough.**

State of New Jersey v. Hannah, 448 N.J. Super. 78, 151 A.3d 99 (Super. Ct. App. Div. 2016)

- **The Defendant made rude comments to her ex-boyfriend and his date and ultimately assaulted the date with a high-heeled shoe requiring stitches and hospitalization.**

- **Sometime following the altercation, the Defendant and the assault victim bantered back and forth using Twitter wherein the Defendant basically confessed to her actions in a tirade of expletives**

New Jersey v. Hannah (cont.)

- **The Defendant was convicted to simple assault and appealed.**
- **Defendant argued that the "tweet" should not have been admitted because it was not properly authenticated.**
- **At trial the victim testified she recognized the tweet as being written by the Defendant because it displayed Defendant's photo, Twitter handle and the tweet was posted in response to the victim's posts.**

New Jersey v. Hannah (cont.)

- **The Defendant protested saying that although her photo and Twitter handle were used, she did not author the Tweet.**

- **Defendant also maintained anyone can create a fake Twitter page.**

New Jersey v. Hannah (cont.)

- **On Appeal, the Court considered two approaches to authentication of social media**
  - **The State of Maryland approach ("the Griffin Approach")** ***(Griffin v. State, 419 Md., 343, 19 A.3d 415 (Md. 2010)*** **recognizing three (3) ways to authenticate evidence**
    - **Ask the author if it belongs to him/her;**
    - **Search the computer/technology of the alleged author; and**
    - **Obtain information from the social networking site**

New Jersey v. Hannah (cont.)

- **The State of Texas approach (*Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App, 2012))* which allows circumstantial evidence to support a prima facie case of authenticity**

- **Although the Defendant argued the "Griffin Approach" asking the court to create a new test for the authentication of social media as evidence, the New Jersey Appellate Division rejected the need for new parameters.**

New Jersey v. Hannah (cont.)

- **"We need not create a new test for social media postings. Defendants argue that a tweet can be easily created on the Internet does not set it apart from other writings. Accordingly, we apply our traditional rules of authentication under N.J.R.E. 901."** *Third Circuit, New Jersey Appellate Division*

Griffin v. State, 419 Md. 343, 19 A.3d 415 (Md. App. 2011)

- **Defendant Mr. G charged with second degree murder. Defense offered printouts from Defendant's girlfriend's MySpace to demonstrate Defendant's girlfriend Ms. B had threatened a State's witness**

- **Printout showed profile owner's personal information such as DOB, location and a photograph of the Defendant and his girlfriend embracing.**

Griffin v. State (cont.)

- **Rather than using the Defendant's girlfriend to authenticate the pages, the State used an investigator's testimony.**
- **The State presented that because of the DOB, personal profile information and additionally photos of family members, it was authentic**
- **Although Defense objected saying a connection could not be established, the printouts were admitted and Defendant was convicted.**

Forman v. Henkin, 134 A.D.3d 529, 22 N.Y.S.3d 178 (App. Div. 2015)

- **Personal injury case where the plaintiff alleged that she was injured while riding one of Defendant's horses**

- **Defendant sought an order compelling plaintiff to provide an unlimited authorization to obtain records from her Facebook account, including all photographs, status updates and instant messages**.

Forman v. Henkin (cont.)

- **The court denied Defendant's Motion, holding that "[a]llowing the unbridled disclosure of such information, based merely on speculation that some relevant information might be found, is the very type of 'fishing expedition' that cannot be countenanced."**
- **The court still holds that "the discovery standard is the same regardless of whether the information requested is contained in social media accounts or elsewhere."**

QUESTIONS/COMMENTS