BIG DATA: LITIGATION TIPS AND TRENDS IN DATA PRIVACY AND SECURITY

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Overview

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   - Disciplinary Rules
   - SCA
   - Constitution
   - Public Policy
2. Formal discovery
   - Social media not immune
   - Threshold showing req'd
   - SCA compelled consent
3. Admissibility

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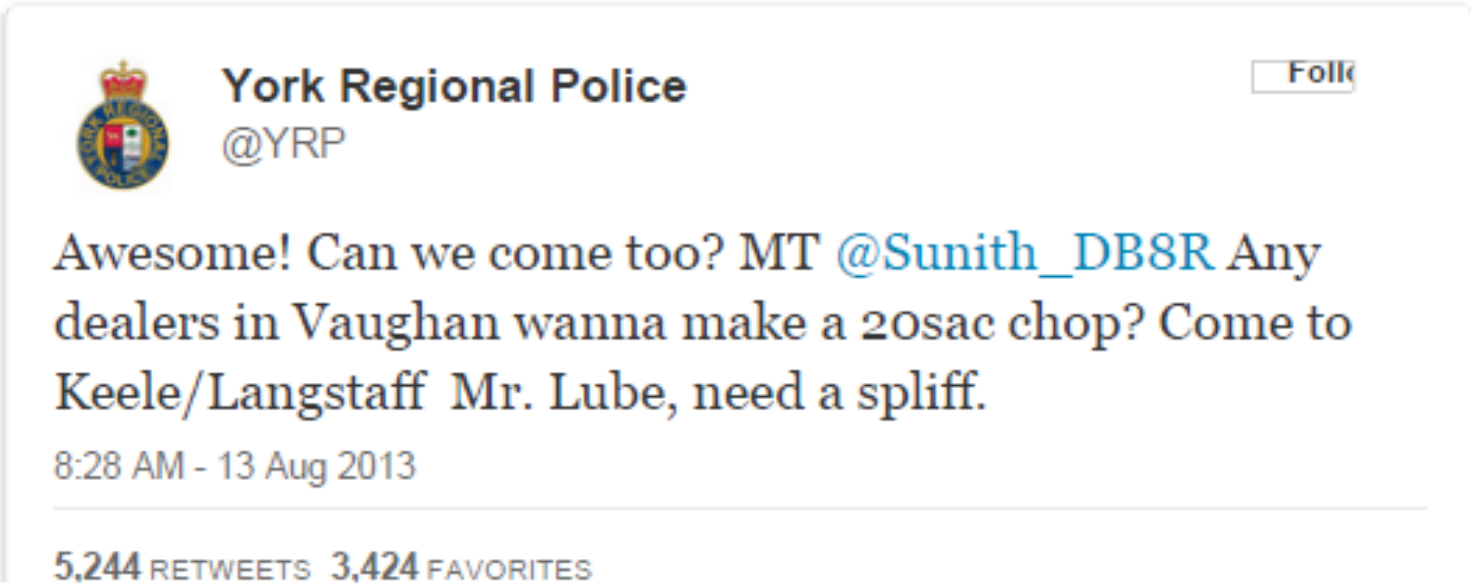
Man tweets for weed; job goes up in smoke

By **Chandler Friedman** and **Dorrine Mendoza**, CNN
updated 7:45 AM EDT, Thu August 15, 2013 |



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The Disciplinary Rules

"In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

TEX DISCIP. R. PROF. CONDUCT 4.02(a)

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The Disciplinary Rules

"'organization or entity of government' includes: (1) those persons presently having a managerial responsibility … that relates to the subject of the representation, or (2) those persons presently employed by such organization … and whose act or omission in connection with the subject of representation may make the organization … vicariously liable for such act or omission."

TEX DISCIP. R. PROF. CONDUCT 4.02(c)

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The Disciplinary Rules

"The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule."

MODEL R. PROF. CONDUCT 4.2, cmt. 3

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The Disciplinary Rules

"In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer shall make reasonable efforts to correct the misunderstanding. …."

MODEL R. PROF. CONDUCT 4.3

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Stored Communications Act

- It is an offense to "intentionally access[ ] without authorization a facility through which an electronic communication service is provided ... and thereby obtain[ ] ... access to a wire or electronic communication while it is in electronic storage. …"
- Excepts from liability "conduct authorized ... by a user of that service with respect to a communication of or intended for that user."

18 U.S.C. § 2701(a)(1), (c)(2)

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Stored Communications Act

- Nurse union president makes Facebook post re "88 yr old sociopath white supremacist" shooter and criticizes the paramedics who saved him
- Two co-workers with access to the nurse's Facebook page notify management, and the company then suspends (and later terminates) the nurse
- D.N.J. – The Facebook post was covered by the SCA, but the two co-workers were "users" who could "authorize" access to the page, so no violation

Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2d 659 (D.N.J. 2013)

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Stored Communications Act

"The authorized user exception applies where (1) access to the communication was "authorized," (2) "by a user of that service," (3) with respect to a communication … intended for that user." Access is not authorized if the "purported 'authorization' was coerced or provided under pressure." In this case, all three elements of the authorized user exception are present."

Ehling, 961 F. Supp. 2d at 669-70.

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Stored Communications Act

- Pilot creates a website critical of his employer, which can only be accessed by entering an eligible employee's name and creating a password
- Two eligible employees who never accessed the site allow management to use their credentials to access the site
- Ninth Circuit – the two employees were not "users" because they never accessed the site, so they could not authorize access under the SCA; violation

Konop v. Hawaiian Airlines, 302 F.3d 868 (9th Cir. 2002)

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Stored Communications Act

- Waiter creates a website critical of his employer, which could only be accessed by invitation
- A greeter joins and accesses the site by invitation and then permits a manager to use her credentials to access the site
- D.N.J. – Fact issues regarding whether the greeter was under "duress" when she provided her consent, thus precluding summary judgment; jury then finds duress and court concludes consent ineffective, so violation

Pietrylo v. Hillstone Rest. Grp., 2008 WL 6085437, *4 (D.N.J. 2008)

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Constitution

- Department audits officer's working-hours text messages based on overages, finds rampant sexting, and terminates officer
- Ninth Circuit – Violation of reasonable expectation of privacy
- S.Ct. – There may or may not have been an expectation of privacy, but the Department's search was reasonable at inception and in scope, so there was no violation

Quon City of Ontario, Cal. v. Quon, 130 S. Ct. 2619 (2010)

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Constitution

"Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. ... At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve. … A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. "

Quon, 130 S. Ct. at 2630

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Public Policy

- Employee uses employer's computer to access private web-based email and communicate with her attorney
- After employee quits and sues, employer uses a forensics expert to retrieve login credentials for employee's account and reviews her emails
- NJ SCT – Employer's broadly worded IT policy did not specifically address personal web-based email and thus did not destroy expectation of confidentiality

Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 657 (N.J. 2010)

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Public Policy

"Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system—would not be enforceable."

Stengart, 990 A.2d at 657

Public Policy

- Employee uses her work email to communicate with her attorney
- After employee quits and sues, employer reviews her emails, which suggested she quit and filed suit at the urging of her attorney
- CA APP– Emails were not confidential, because employer's policy advised employees emails could be reviewed and that employees had no privacy rights

Holmes v. Petrovich Development, 119 Cal.Rptr.3d 878 (Cal.App. 3d Dist. 2011)

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Public Policy

"[Holmes] used defendants' computer, after being expressly advised this was a means that was not private and was accessible by Petrovich, the very person about whom Holmes contacted her lawyer and whom Holmes sued. This is akin to consulting her attorney in one of defendant's conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by Petrovich would be privileged."

Holmes, 119 Cal.Rptr.3d at 896

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Formal Discovery

- *Palma v. Metro PCS* – Social media not protected from discovery in FLSA collective action, but speculation on potential relevance did not outweigh burden of reviewing four years' worth of posts
- *Keller v. Nat'l Farmers* – Social media not protected from discovery in auto accident insurance case, but defendant did not show requests were reasonably calculated
- *EEOC v Simple Storage* – Social media not protected from discovery in sexual harassment case and posts showing activity or emotional state during relevant period are discoverable and must be produced

Admissibility

- *Tienda v State (TX)* – Standard rules for authenticating evidence applies to social media, including use of circumstantial evidence to tie evidence to defendant
- *Griffin v State (MD)* – Social media may only be authenticated through "the testimony of the creator, documentation of the internet history or hard drive of the purported creator's computer, or information obtained directly from the social networking site."
- *Parker v State (DE)* – Texas approach better conforms to Delaware Rules of Evidence

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Admissibility

Often … posts will include relevant evidence for a trial. … But there is a genuine concern that such evidence could be faked or forged, leading some courts to impose a high bar for the admissibility. … Other courts have applied a more traditional standard. … [The traditional] approach recognizes that the risk of forgery exists with any evidence and the rules provide for the jury to ultimately resolve issues of fact."

Parker v. State, 85 A.3d 682, 685-86 (Del. 2014)

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