

Advising Clients on Social Media Use

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Overview

Social media is a very popular form of communication all over the world. People of all ages use social media to communicate – ranging from young age groups to elderly people.

As of 2017, 81% of the United States population had a social networking profile.¹



State of North Dakota v. Wangstad, 2018 ND 217

Wangstad appeals a criminal judgment after jury found him guilty of attempted murder.

On appeal, Wangstad argues district court erred in the admission of social media posts he made prior to the alleged crime.

The State offered the posts as evidence of Wangstad's state of mind (he was anti-law enforcement disposition and had violent intentions). Wangstad objected on the grounds of relevance and argued the posts were not probative; or in the alternative, if probative, were unduly prejudicial. District Court overruled the objection, admitting the evidence with a limiting instruction as to purpose.

Wangstad Continued

“In ruling on the relevancy of evidence, a trial court has broad discretion to balance the probative value of the evidence against the risk of unfair prejudice, and its decision will not be overturned on appeal absent an abuse of discretion.” State v. Valgren, 411 N.W.2d 390, 394 (N.D. 1987)

District Court noted the posts were prejudicial, but balanced that with the probative value. The court noted that social media evidence was becoming increasingly common in many different cases. The district court considered the proximity in time the posts were made to the incident being tried. The district court instructed the jury to limit the posts to Wangstad’s state of mind. North Dakota Supreme Court affirmed.

Social Media Related Evidence

Most common types of social media posts admitted into evidence:

- ❖ Facebook
- ❖ Instagram
- ❖ Twitter
- ❖ Snapchat



“Miranda” Style Social Media Warning to Clients – Gregory G. Golden

- ❖ You have the right to remain silent.
 - ❖ Anything you type can and will be used against you in a court of law.
- ❖ You have the right to exercise “common sense”.
 - ❖ Good decisions are rarely, if ever, the result of an emotionally-driven response.
 - ❖ Also, the other party may be baiting you into such a response so that your perceived irrationality will be brought up in court, to your detriment.
- ❖ You have the right to discuss the appropriateness of a post/tweet/message with your attorney before you let your emotions get the better of you and you send it.
- ❖ Do you understand the rights that I have just read to you?
 - ❖ With these rights in mind, do you still wish to send that post/tweet/message?

Social Media and Ethics

Not advisable to create fake accounts to interact with opposing party, opposing counsel or a hostile witness.

As an attorney, this could ultimately affect your license to practice law.

If your client engages in this type of behavior (fraudulent), it may result in the court disliking or disbelieving your client.

Social Media and Third Parties

Posts from third parties are admissible. May have an authentication issue – typically admissible.

Third party social media post example:

Dad has a DVPO against him. DVPO says Dad only has supervised visits with minor children.

Dad's mother (paternal grandma), picks up grandchildren and takes them to McDonalds to see Dad.

Paternal Grandma posts photo on Facebook of Dad with children at McDonalds.

Leads to Dad's arrest. Police subpoena video at McDonalds. Dad charged with violating DVPO.

Social Media Related Evidence in the Courtroom

In general, social media posts are admissible as evidence so long as that evidence is not obtained illegally.

Posts or photos that are public (those that are available to be seen) will be admissible.

Why are statements contained in posts made by opposing party not hearsay?

❖ Statement Against Interest F.R.E. 804(3)

Authenticity of Social Media Evidence

Electronic evidence is easily manipulated by sophisticated technology users. To be admitted, evidence must be what it is purported to be.

FRE 901 Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples.

- (1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

Social Media and Attorneys

- ❖ Privacy settings – as secure as possible
- ❖ If in the midst of legal action – do not delete accounts; duty to preserve
- ❖ Watch the opposing party's social media posts. These can be very helpful to win your case.



Questions?

