



Recent Developments in New Jersey Law - Social Media and More ...

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From MySpace and Facebook to Twitter and LinkedIn, online social networking platforms have radically changed the way we share, store and consume information. Today, users can tap social media outlets for everything from big data storage to daily deals and discounts; and, with recent advances in phone and tablet technology, accessing online content remotely has never been easier.

As a result, state legislatures and courts are beginning to take notice of the far-reaching implications of social and other cyber-related media. In New Jersey jurisdictions, key cases and statutes have emerged that address these broad legal implications. In fact, in 2011, New Jersey enacted the nation's most comprehensive anti-cyber bullying law: the Anti-Bullying Bill of Rights Act. It is no secret that today's social media platforms are characterized by wide-ranging functionality, and so lawyers of all practices must stay current on the laws and cases relating to social and cyber media. What follows are a few notable cases that caught our attention.

Social Media and School Speech

In *J.S. ex rel. Snyder v. Blue Mountain School District*,¹ a student created a parody MySpace profile of her principal which contained adult language and sexually explicit content. Although the profile was created at the student's home on a computer owned by her parents, the school nevertheless suspended her for ten days for twice violating the school's disciplinary code (false accusation about a school staff member and a copyright violation of its computer use policy for misappropriating the principal's photograph from the school website). The student's parents filed a Section 1983 action against the school district, claiming violation of free speech rights, due process rights, and state law.

¹ *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F. 3d 915 (3rd Cir. 2011)

Takeaway: Applying the Tinker standard, Third Circuit found that the MySpace page did not substantially disrupt the operation of the school, nor could school officials have reasonably forecasted a substantial disruption. The court also found that the speech did not make its way on-campus sufficiently to classify it as “school speech.”

Social Media and Juror Bias

In *U.S. v. Fumo*,² the Third Circuit considered whether the District Court had erred in its refusal to grant defendant a new trial on the grounds of a jury’s exposure to extraneous information, and the purported prejudice and partiality that may have resulted. Defendant claimed that a juror who posted comments relating to the case on his Facebook and Twitter accounts brought widespread public attention to the jury’s deliberations, creating a “cloud of intense and widespread media coverage ... and [the] public expectation that a verdict [wa]s imminent[,]” thereby violating his Sixth Amendment right to a fair and impartial trial.

Takeaway: Trial court’s jury instructions before and at the close of trial should include instructions not to communicate information to anyone by any means, including social media, about the case. Third Circuit found no plausible theory for how defendant suffered any prejudice, let alone substantial prejudice, from juror’s Facebook and Twitter comments.

Social Media and Shield Law Protections

In *Too Much Media v. Hale*,³ the defendant, a self-described journalist, posted Internet messages about Too Much Media, LLC (TMM), a company that produced software used in the adult entertainment industry. Specifically, defendant alleged that a breach in TMM’s software exposed the personal information of TMM customers who believed they were accessing pornographic websites anonymously. Claiming she had conducted a probe on the alleged breach, defendant posted that TMM violated New Jersey’s identity theft protection laws, threatened people who questioned its conduct, and profited from the alleged breach. TMM sued, alleging that defendant’s posts were defamatory and made in a false light. When TMM sought to depose her during discovery to ascertain her alleged “sources,” defendant moved for a protective order, asserting she was a reporter entitled to protection under New Jersey’s Shield Law.

Takeaway: While New Jersey’s Shield Law affords broad protections to news media, including non-traditional news outlets such as blogs, a self-appointed newsperson is not necessarily a reporter entitled to Shield Law protections. Those seeking to invoke the privilege must demonstrate that the means by which they disseminate “news” is similar to traditional news sources, such as newspapers, magazines, etc.

Social Media and Employment

In *Pietrylo v. Hillstone Restaurant Group*,⁴ Plaintiffs, who were employed as servers at a restaurant owned by defendant, created a MySpace group to “vent about any BS we deal with

² *U.S. v. Fumo*, 655 F. 3d 288 (3rd Cir. 2011)

³ *Too Much Media v. Shellee Hale*, 206 N.J. 209 (2011)

⁴ *Pietrylo v. Hillstone Restaurant Group* (D.N.J. 2008)

at work without any eyes spying in on us.” The group was created as a private group, and invitations were required to join. Central to the case is the fact that an invited employee, who was an authorized user of the group, accessed the page for one of the restaurant managers and later provided the password to another manager. When managers learned that comments disparaged the restaurant and its managers and customers, they terminated plaintiffs’ employment. Plaintiffs filed suit, alleging violations of federal and state stored communications statutes, wrongful termination, and invasion of privacy.

Takeaway: Content found on blogs and public social networking profiles that employees generate may still enjoy the benefit of protected privacy when restrictions on access are implemented. Employers should exercise caution when asking for access to private employee information.

Cloud computing and Legal Ethics

Advisory Committee on Professional Ethics, Opinion 701 (April 2006): Cloud computing (i.e., the delivery of computing and storage capacity as a service to users over the Internet) can offer significant benefits to lawyers in managing their practices, particularly solo and small firm practitioners for whom flexibility and cost control are a must. However, attorneys must take careful steps before employing Internet or cloud-based software programs or using remote sites to store client-related information. In a 2006 opinion, the New Jersey Advisory Committee on Professional Ethics addressed the ethical implications associated with cloud-based data storage.

Takeaway: The ethical issues underlying the use of cloud services are the duty of confidentiality owed to clients and the duty to serve competently. Attorneys must take reasonable, affirmative steps to ensure the confidentiality of client information that travels over the Internet or other network. This obligation includes assuring to a reasonable extent that a third-party cloud services provider is aware of the lawyer's obligation of confidentiality, and of its own obligation, whether by contract, professional standards, or otherwise, to assist in preserving confidentiality.

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