

Can Facebook Posts Be Used As Evidence

Social media can be a valuable source of evidence in court cases. This is especially true in family law cases (divorce, child custody, child support, etc.) where many of the parties involved might still have access to view the profiles and posts of the other parties. Parties often feel as though their Facebook posts, tweets, and other social media activities are more private than they really are – leading those people to post information that they would never otherwise volunteer. Parties can often be found posting information regarding financial affairs, adultery, improper parenting, and even dangerous or illegal activities such as drug use.

Do Not Expect Privacy

Many users believe that their Facebook pages are “private” and should not be used in a family law battle. Parties may even claim that their Facebook profiles should be excluded because they are only shared with a small group of Facebook “friends.” Courts, however, have consistently rejected this argument. The Courts have determined that there is little to no reasonable expectation of privacy with regards to actions taken on a social media platform. This fact shouldn’t be surprising to anyone since the stated purpose of these platforms is to share information with other people.

The creator of Facebook, Mark Zuckerberg, has even stated that “privacy is no longer a social norm.” While that statement is particularly biased, it is certainly true that many people fail to understand their privacy settings when using social media and, as a result, over-share their information. Even when information is more tightly controlled (say, shared with a limited number of individuals), the information can easily become public due to the privacy settings of the other individuals or by allowing access to a person who wishes to share the information with others. In fact, parties going through a domestic law case often immediately “un-friend” the opposing party but do nothing to limit the access of mutual friends or family members who may be passing information to the other party.

Even if the information has not been made publicly available through the privacy settings of the user, the information is not exempt from the discovery process, and the information could be requested by a party or his/her attorney. Judges, however, have struggled with the logistics of making social media information discoverable, and a number of different methods have been used. Judge’s have privately reviewed the information in advance to determine if it should be disclosed (*Offenback v. Bowman*); become “friends” with a party to determine if private Facebook posts were relevant (*Barnes v. CUS Nashville, LLC*); and even required parties to turn over physical access — usernames and passwords — for social media accounts to the other party (*Largent v. Reed*).

What if the other party deletes the information?

Regardless of how the social media information is gathered or used, it is possible that the other party may try to delete old social media information that they feel might be harmful. However, by intentionally deleting this information, the other party has potentially engaged in the destruction of important evidence and could subject themselves to even more trouble if the Court discovers the actions. For example, in at least one instance, a Court has fined both a party and his attorney for “cleaning up” a Facebook page to remove harmful posts and pictures (*Lester v. Allied Concrete Co.*).

For most attorneys, gathering social media evidence is one of the first steps in a case. As a result, the attorney may have social media information long before the other party thinks to delete or hide the information. Deleting the information can be doubly bad since the information is already in the possession of the other party. The deletion of the Facebook post or other social media post becomes more suspicious, and, when the deletion becomes known to the Court, the act is likely to lower the Court’s trust in that party and his/her statements.

Is the Information Admissible?

Not everything that might be offensive to a particular party is usable in all actions. While the drinking habits or social activities of an individual might be relevant in one case, they may be completely unimportant and inadmissible in the next case. Even if the information is useful in a particular case, and it is found to be relevant, the evidence must still be authenticated — it must be shown to be legitimate and to have originated from the other party. For some social media platforms this is easier than others; however, Facebook, which is by far the most popular social media platform, is generally easier than many of the others when it comes to authenticating potentially admissible evidence.

Conclusion

While you might be tempted to post pictures of a drinking binge on Facebook, or complain about what a terrible person your soon-to-be-ex is by Twitter, if you’re involved in any kind of family law case, you should think again. Just like in a criminal investigation, anything that you say can– and likely will – be used against you.

This article is not intended as legal advice nor does it create an attorney-client relationship. Sal Sellaro Thorn Culpepper is a full service law firm handling family law cases throughout West Virginia. Matthew Stout is a partner with Sal Sellaro Thorn Culpepper.

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