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When Restraining Orders Cover Social Media Communication

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Lyn Mettler

Does tagging a protected party on Facebook violate a restraining order or order of protection? What about tweeting the individual or mentioning them on Instagram? In December, a judge in New York state said it did, even though social media communication was not explicitly prohibited in the order of protection.

In The People v. Gonzalez, 15-6081M, the court ruled that when Maria Gonzalez "tagged" the protected individual in two posts, calling her "sad" and "stupid," she did in fact violate the order. The order of protection issued against her required that she "refrain from communication or any other contact, directly or indirectly through third parties, by mail, telephone, e-mail, voice mail or other electronic or any other means."

But how do you demonstrate that Gonzalez did or did not "tag" the individual beyond providing a potentially alterable screen capture, especially if parties in such cases deny the communication or delete it? Some attorneys use social media monitoring companies to provide verifiable data of the date, time and account of the post.

What Types of Communication Are Included?

While in this instance the court ruled that the social media communication was clearly in violation of the order, determining if such types of interactions are included is not always so clear-cut. "This is yet another case where the judiciary is struggling to keep up with the speed at which the technology world is moving as it impacts all of our lives," says attorney James Goodnow, who chairs the technology and cybersecurity torts practice group at Lamber-Goodnow in Phoenix, Arizona.

Requirements for restraining orders and orders of protection vary by state and according to the original language of the order, though many attorneys agree that any form of communication, including social media, is implied. "A judge can specify in the restraining order if social media is included, especially if there is a history of harassment over the particular medium," says Greg Freyberger, partner and trial attorney at Wooden McLaughlin in Evansville, Indiana. "However, I think if a judge enters a restraining order or protective order prohibiting contact, it is not unlikely that they would hold someone in contempt if that person posted something on social media and had a good idea that it would make it to the protected individual."

Lisa Connor, a family law attorney in Chattanooga, Tennessee, notes that if a restraining order has a "no

contact"
provision, then there certainly can be no direct communication over any media or social media format.

Even indirect communication may fall within the scope of the order, such as in California, where the standard restraining order precludes both direct and indirect communications, according to Bryan Sullivan, partner at Early Sullivan Wright Gizer & McRae LLP. “The issues come up with posts on social media that are not directed at the victim,” he says. “Depending on what is written, those posts can be interpreted as indirect communications or attempts to send a message to the victim.”

Connor cautions even if indirect communication is not explicitly included, “once you have reached the point where there is a restraining order or order of protection, then assume that every comment you make on social media could come into evidence in your case. Worse, if there is an angry or threatening tone, then it could be considered stalking behavior.”

She also explains that in divorce cases where there are minor children that a mutual restraining order requires the parents not to speak ill of one another to their children. “If your children are within your social network and have access to your comments, then any disparaging comments about your spouse could be considered to be in violation of the order,” she says.

Proving Social Media Communications

If such communication is not explicitly prohibited in the restraining order, the burden is on the defense to demonstrate it is not included within the requirements of the order, says Dallas attorney Peter Vogel, chairman of the Internet, e-commerce and technology industry team at Gardere Wynne Sewell LLP.

Additionally, the accuser must provide evidence of such communication to demonstrate the action did in fact take place. This is where social media monitering companies come into play, assisting attorneys with social media evidence beyond a standard screenshot that can be Photoshopped.

For example, we had an individual come to us who was accused of violating a restraining order against her by tagging the accusing party in a tweet. The accuser had taken a supposed screen capture of said tweet on her phone, which the accused claimed had been Photoshopped from an existing tweet.

In this instance, it is up to the accuser to prove that this tweet was in fact posted to the offending account at a specific date and time; however, this simple photo image capture was not verifiable. Social media monitering companies can download and preserve public social media data with verifiable metadata that capture the account, date, time and even geographic data if it was so tagged that can be submitted into evidence as proof the posting did occur. Without such data, it can certainly be argued that the image was fabricated.

Additionally, Mark McBride, a high-profile criminal attorney in Beverly Hills, says, “the moving party would need to bring in the person most knowledgeable regarding that type of media platform.” An expert in social media communications can render his/her opinion as to why the post did or did not actually occur, using factual evidence to support their statements.

Sample Cases

McBride says he’s been involved with two cases where he defended an individual accused of violating a restraining order through the tagging an individual on Facebook and the consequences were serious. “In

one, the judge gave my client a strong warning; in the other, the judge increased the terms of the restraining order from one year to three years," he says.

In 2008, in the People v. Fernino, 19 Misc3d 290 (Crim. Ct, Richmond Co., NY 2008), the court ruled that a MySpace friend request did violate a family court temporary order of protection, which only specified that the "Respondent should have NO CONTACT" with the party, but did not explicitly prohibit social media. The decision stated, "It is no different than if the defendant arranged for any agent to make known to a claimant, 'Your former friend wants to communicate with you. Are you interested?'"

In New Hampshire v. Craig,[1] the state Supreme Court in 2015 upheld Brian Craig's prior convictions of witness tampering and stalking. Craig, for whom a permanent restraining order was in place regarding contact with a bartender, posted comments directed to the individual in the "Notes" section of his Facebook page, though without tagging her. Craig admitted to a police officer that he did write the posts. For the stalking charge, the court ruled that this activity met the contact requirements to convict even though the communication wasn't sent explicitly to her, stating, "any action to communicate with another either directly or indirectly constitutes contact."

In 2013, ABC News reported that a Massachusetts man was arrested for violating a restraining order against his former girlfriend when she received an email from him asking her to join Google Plus. The man maintained that Google did it without his knowledge.

According to ABC News, a Google community manager responded in a forum, stating, "Right now the emails that go out alert people of your activity on Google+, and more importantly the sharing of content with them. We send them an email when they aren't yet on Google+ so they know that you are out there in the world [of] G+. They should only incur this email once." So the man may not have actually initiated the email, yet was jailed for it. Ultimately, the criminal charges against him were dismissed.

Best Practices for Social Media Communications

When it comes to restraining orders, it's important for attorneys to be as specific as possible in the wording of the requested order to ensure maximum clarity for both sides. "The greater the specificity of the order, the better," says Vogel, noting that lack of specificity makes it easier for the other side to argue such communication was not included.

For individuals who have restraining orders against them, it should be assumed that any form of communication on any media is included. It's also good practice to actually block the person who sought to restrain you in the first place, advises McBride.

Trying to toe the line with the restraining order is also a bad idea. "Just like the old saying about how to hit a tennis ball, you're taking a huge risk when you try to stay just inside the lines," says Jeremy Mishkin, co-chairman of the litigation department at Montgomery McCracken Walker & Rhoads LLP in Philadelphia.

It's important to remember that social media monitoring companies may be monitoring and collecting your public communications without your notice, so assume anything and everything is potentially admissible. Connor advises, "Before you make that next posting, give yourself a Miranda warning — that anything you say can, and will, be used against you."

—By Lyn Mettler, Step Ahead Social Research

Lyn Mettler is the president of Step Ahead Social Research, a company that uses automated software systems to collect, preserve and validate public social media and Web data for attorneys.

[1] http://law.justia.com/cases/new-hampshire/supreme-court/2015/2013-022.html