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LegalCURRENTS

Are police unlawfully accessing social media accounts?

It's undeniable: social media use has permeated our culture. People are sharing information about all aspects of their lives via social networking sites. Some of these disclosures are broadcast publicly while others are limited to select friends and followers.

This broad scale sharing of information has not gone unnoticed by the legal profession. In past columns I've discussed the recent efforts of lawyers to mine social media for evidence, resulting in a number of ethics opinions that attempt to provide guidance and establish ethical boundaries for lawyers as they wade into the electronic minefield of social media.

But, as an attendee asked when I recently spoke at a seminar sponsored by the Monroe County Public Defender's Office, what about law enforcement? How far can police officers go when seeking to obtain access to social media evidence in order to prove the guilt of an accused?

I thought it was a great question and suggested that it was an issue that the courts would increasingly have to wrestle with as law enforcement stampeded into uncharted social media territory.

And, an example of just such a decision arrived a few weeks later. I received an email from one of the attendees, well-known Rochester criminal defense attorney and prolific author, Gary Muldoon and he advised me of a recent case on point, *People v. Munck*, 92 A.D.3d 63, 937 N.Y.S.2d 334 (3d Dept. 2011).

One issue addressed by the court in *Munck* was whether, during a police interrogation, police had unlawfully obtained access to the defendant's MySpace account. The court briefly addressed the issue, holding that the officer's conduct was lawful, and cited a New York Court of Appeals decision as the basis for its holding:

"While defendant received oral *Miranda* warnings, which he agreed to waive, that interview was voluntary and noncustodial, no violation of his rights occurred and he was allowed to leave. Toward the end of the questioning, when Akshar feigned interest

in MySpace Web page designs, defendant voluntarily provided his username and password to his accounts and verbally agreed to let Akshar access them. In our view, contrary to defendant's claim, Akshar did not use impermissible or fundamentally unfair or deceptive tactics to gain access to these accounts (see *People v. Tarsia*, 50 N.Y.2d 1, 11, 427 N.Y.S.2d 944, 405 N.E.2d 188 [1980])."

Tarsia is a case that delves in depth into the issue of coercion during police questioning. Specifically, the court was tasked with determining whether *Tarsia's* consent to allow the police to use a voice stress test during his interrogation was the product of coercion.

In reaching its decision, the Court of Appeals examined the essence of coercion:

"However, while more subtle methods, though sometimes harder to perceive, are equally to be condemned when they trammel on the rights of those in custody ... it may take a discerning eye to tell those that are fundamentally unfair from those which are no more than permissible instances in which the police have played the role of 'midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation' ... In this case, the coerciveness argument derives from the subsidiary claims that defendant was misinformed as to the purpose of the voice stress test ... (But) there was no misrepresentation made that the test results could be admissible in a trial against him. Rather, the test was used simply as an investigatory tool ... Lieutenant Gaul explained in advance what the signs of stress would be and examined the stress chart in defendant's presence."

In other words, the court in *Tarsia* was focused on the use of coercion to induce a confession of guilt. The defendant understood that the officers were attempting to get him to admit to a crime. He knew why he was being asked to consent to the voice stress test.

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However, in *Munck*, the law enforcement tactics used were far more deceptive. This becomes obvious when, as I always suggest should be done when dealing with the online world, the situation is compared to a similar offline analogy. Here, the officer feigned an interest in Web design in order to obtain access to Munck's MySpace information. Thus, the tactics used were akin an officer claiming expertise as a book editor and then asking the defendant to disclose the location of his diary so that the officer could review it for purposes of submitting it as a memoir to a book publisher.

The reason the officer request access to Munck's MyCase password was anything but forthright. The convoluted tactics used were "fundamentally unfair" and "trammeled" on Munck's rights.

Just because the Internet is still viewed as the "Wild West"

doesn't mean law enforcement officers can ignore the Constitution and run willy nilly over the rights of the accused. Unfortunately, I think *Munck* sets that precedent. My hope is that over time, as Internet-based tools become more familiar, a new sheriff will come into town (in the form of a decision from another Judicial Department or the Court of Appeals) and will set the record straight.

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