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SOCIAL MEDIA IN CRIMINAL CASES

Every year individuals place more and more of their private information onto social media sites such as Facebook and Instagram. The communications may be explicit conversations, photos, or videos between an accuser and an accused. In a sexual crime case, for example, the evidence could provide complete exoneration.

Eisner Gorin LLP has caused numerous cases to be dismissed specifically because of the exculpatory evidence found online. But what if the government does not obtain the evidence by search warrant, or the accuser does not have access to the media account, and thus cannot comply with a subpoena for records?

Does Facebook have to produce the records then? A defendant seeking a subpoena for disclosure of information stored on the servers of social media sites faces an almost insurmountable barrier, the Stored Communications Act, which prohibits sites from "divulging" their users' information to third parties even in response to a subpoena by a defense attorney.

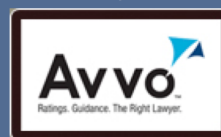
Several challenges to the SCA have been litigated in California and the federal courts unsuccessfully. The Court of Appeals has rejected defendants' constitutional claims, explaining that there is no general right to pretrial discovery for criminal defendants, and that due process cases governing disclosure of information simply prevents the government from withholding information it already possesses, but does not require the government to assist in obtaining the information in the first place. The decisions are currently under review in the California Supreme Court.

Interestingly, In Juror Number One v. Superior Court (2012) 206 Cal.App.4th 854, a juror suspected of misconduct was ordered by the court to grant the consent required under the SCA for disclosure of his Facebook postings. The court received information that the juror had been posting about the case under deliberation in violation of the court's orders. The court reasoned that Juror Number One had "constructive possession" of his social media information - i.e. while Facebook actually possessed the information sought by the court, the juror had the ability via the SCA's consent provision to obtain it at will. The court determined that it could order the juror to consent to disclosure of the juror's information by Facebook just as if it was actually in the juror's possession.

In the meantime, the plain language of the SCA, which unambiguously prevents compliance with defense subpoenas, leaves criminal defendants at a distinct disadvantage to prepare a defense.

Top 5% in California
Super Lawyers

10/10 Superb Rating
Alan Eisner
Dmitry Gorin



High-Profile Cases



About The Firm

Criminal Attorneys with over 50 years experience in courtroom and pre-filing intervention defending cases in state and federal court nationally. Our firm partners are Bar-Certified Criminal Law Specialists with extensive jury trial experience.