

Social media evidence

AUTHENTICATION & ADMISSIBILITY

Advice

The current state of the law surrounding admissibility of social media evidence (**SME**) is in a state of flux. There is limited Australian case law on this issue. In the United States, case law is divided between those cases in which there is a very high threshold of proof required to admit SME by only allowing it into evidence if the Court determines with certainty that the evidence is authentic, and other decisions in which SME is admissible if there are sufficient facts to show a reasonable juror that the proponent created the evidence. Most of the reported cases from overseas arise in the area of criminal law.

Significantly, Facebook sites and blogs are not self-authenticating and the issue has always been that Courts are, quite rightly, concerned about the ease which a person can pretend to be someone else on the World Wide Web. Indeed, a whole section of the gaming industry is based upon this pastime, eg. Second Life. Therefore, caution must always be taken when a party introduces or opposes the introduction of SME.

Key considerations

The following must be considered when determining whether SME is admissible:-

1. Is the SME **relevant**? Does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be?
2. Is the SME **authentic**? Can the proponent of the evidence show that the SME is what it purports to be?
3. Is the SME **hearsay**? And if so, is it covered by an applicable exception?

For admission of SME in court a party must show the evidence is relevant and authentic. This will necessarily involve considering the *Evidence Act 2008 (Vic)* or the *Evidence Act 1995 (Cth)*. The following rules are especially important:-

1. Section 55(1) - "*The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings*".
2. Section 183 - "*If a question arises about the application of a provision of this Act in relation to a document or thing, the court may examine the document or thing and draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.*"

3. Section 58 – “*If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.*”
4. Section 69 – the business record exception to the rule against hearsay.
5. Section 71 – the electronic communications exception to the rule against hearsay.
6. Section 167 – Permits a party to make a reasonable request to another party for the purpose of determining a question relating to the authenticity, or admissibility of a document.

Tips

1. Be prepared and plan for the introduction of SME, for example check a witness or the other party’s Facebook or LinkedIn pages.
2. Ask a witness with personal knowledge of the SME or a computer forensic expert to authenticate the SME. Consider whether a computer needs to be forensically examined.
3. Make a list of the circumstances that apply to the SME to explain why it is authentic, for example by reference to identifying characteristics.
4. Serve a Notice to Admit the authenticity of the SME.
5. Be prepared to provide the court with information to understand the technology issues and consider whether there are case management tools that could assist the court.

Recent Australian case law

In *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268, the New South Wales Court of Appeal reversed a decision allowing service by Facebook on an overseas celebrity and stated that there was insufficient evidence to establish the Facebook page belonged to Flo Rida.

In *Condon-Nixon v Rivers* [2012] FamCA, evidence posted on a Facebook page was rejected on the grounds it was not authentic in light of “*very forceful denials*”.

For more information

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