TWO SOCIAL MEDIA DATA ISSUES:

Privilege waivers and "Possession, custody, and control"

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DATA ON SOCIAL MEDIA PRESENTS SPECIAL ISSUES

SIMILAR ISSUES FOR E-DISCOVERY AND OPEN RECORDS COMPLIANCE.

TWO SUCH ISSUES:

- PRIVILEGE WAIVERS
- POSSESSION, CUSTODY & CONTROL

PRIVILEGE CLAIMS & WAIVERS AS TO SOCIAL MEDIA DATA

POTENTIAL PRIVILEGES

- Attorney-Client
- Work-Product
- Legislative
- Governmental Deliberations
- Open records exceptions other than privileges? Usually waived by disclosure to some outside the government unit (Texas rule)

PRIVILEGES UNAVAILABLE: Attorney-client

- Attorney-Client
  - Not communication with “client?”
  - Not in confidence? But if restricted group?
  - Might the other listserv-member attorneys be serving as attorneys for the attorney who posts a legal question in order to assist the posting attorney to render legal services to the municipal client? What if the other list members are authorized only to provide legal services to their employer?
  - Sometimes not legal issues.

PRIVILEGES UNAVAILABLE: Work-Product

- Work-Product
  - Not to another party in impending or pending litigation (this usually dispositive)
  - Clients of the other list members do not always share a common interest & rarely a common concrete interest in the outcome of litigation – interest too tenuous
  - Often not in anticipation of specific litigation

PRIVILEGES UNAVAILABLE: Legislative

- Legislative Deliberation as to Legislative Function
  - Has been extended to staff communications in aid of drafting legislation.
  - But too far a stretch in include staff for other gov’ts
  - Anyway, privilege is conditional

Order on Motion to Compel, *Veasey v. Perry*, Civ. Action No. 2:13-CV-193, ECF Doc. 226, slip op. n. 3 at 3 (S.D. Tex. Apr. 3, 2014) , *aff’d in part & rev’d in part sub nom. Veasey v. Abbott,* 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied,* __ U.S. __, 137 S. Ct. 612, 197 L. Ed. 2d 78 (2017).

Q. Judicial immunity for quasi-judicial functions? Related issues & equally weak theories

PRIVILEGES UNAVAILABLE: Other Open Records Exceptions

- Open records exceptions other than privileges?
- Usually waived by disclosure to some outside the government unit (Texas rule)

PRIVILEGES UNAVAILABLE: Why Courts Won't & Shouldn't buy inventive privilege arguments

- No precautions against further forwarding or downloading of posts
- No precautions against unauthorized viewing of computer monitors
- Legislative Privilege an exception because public disclosure irrelevant? – But not applicable if discovery not against legislator or staff?

ISSUES IN LOCATING & PRODUCING LISTSERV DATA

- WHERE ARE THE LISTSERV ARCHIVES?
- DOES MEMBER HAVE ACCESS TO ARCHIVES & IF NOT CAN MEMBER GET IT?
- ARE ARCHIVES SEARCHABLE?
- CAN ARCHIVED DATA BE IMAGED OR DOWNLOADED (NOT PROTECTED)
- WHAT IF ANY METADATA MAY EXIST & MAY HAVE TO BE SCRUBBED?
- WHAT NON-PARTIES MAY DESERVE RIGHT TO OBJECT TO DISCOVERY?
- POTENTIALLY MULTIPLE DUPLICATES & DRAFTS ALL OVER CYBERSPACE & ON YOUR SERVERS & DESKTOPS

Why are listserv posts not discoverable?

Not relevant

unless they (1) disclose relevant facts or (2) contain relevant admissions or statements against interest

Protecting Against Listserv Discovery

- Probably need motion for protective order
- Listserv host/manager who takes down relevant posts or restricts access or restricts ability to copy/download after notice of proceeding could have criminal exposure & possible contempt exposure too if there is subpoena or other court process for the data.
- Long arm jurisdiction? If list viewable near court, court can authorize service by posting on the list. *See, e.g., K.A. v. J.L.*, 450 N.J. Super. 247 (Ch. Div. 2016), http://8a81l32y7zy38fbezhmidzs0-wpengine.netdna-ssl.com/wp-content/uploads/sites/6/2017/08/K.A.-v.-J.L.-opinion.pdf

Are listserv posts are open records?

State law issue

– But probably disclosure required under state FOIA laws

Asking List Manager or Host to Post Questions

- They can be subpoenaed to identify all requests on a given topic, including requester: Deposition on written questions, subpoena for documents (the request to the host, host's post, & any response, plus any reply from host to original requester;
- Should we pose routine interrogatories about requests to list servs?
- Open Records (FOIA): Disclosure probably required

PART II: "POSSESSION, CUSTODY OR CONTROL"

- MEANING(S)??
- CIRCUIT SPLIT & SEDONA CONFERENCE VIEW
- WHY WE USUALLY SHOULD NOT DENY HAVING "POSSESSION, CUSTODY OR CONTROL" IF WE HAVE PRACTICAL ABILITY TO OBTAIN THE DATA EVEN IF WE MIGHT BE ABLE TO PREVAIL ON THE LEGAL ARGUMENT

POSSESSION, CUSTODY OR CONTROL

Not “title” or “ownership”! But is “custody” akin to title rather than ability to obtain?

POSSESSION, CUSTODY OR CONTROL

Origin of phrase? Cannot find substantive definition for the full phrase or first use in context of discovery, subpoenas, etc. in civil litigation.

- Not used in Blackstone
- But the phrase & variants were in use in many states & some specialized federal statutes by FRCP original 1937 draft
- Earliest usage in 1820s-1850s were in context of property that had to be transferred to a receiver, child custody, habeas corpus rendition duties, & fugitive slave rendition duties.
- Not used in NYS 1848 Field Code (inspiration for FRCP & other modern civil procedure codes)

POSSESSION, CUSTODY OR CONTROL

Sometimes, modern usage makes no attempt to distinguish among the terms:

> (b) Possession, custody, or control of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.

Tex. R. Civ. P. 192.7(b) (no mention of custody element)

Modern meaning of terms? Circuits split over "control" legal right of access on demand v. practical ability to access: Sedona Conference position.

POSSESSION, CUSTODY OR CONTROL

POSSESSION:

Physical possession

Constructive possession – how is that different from “control”?

POSSESSION, CUSTODY OR CONTROL

CONTROL

Circuits split over "control" legal right of access on demand v. practical ability to access: Sedona Conference position.

- Sedona Conference, **The Sedona Conference Commentary on Rule 34 and Rule 45; "Possession, Custody, or Control," https://thesedonaconference.org/publication/Commentary_on_Rule_34_and_Rule_45_Possession_Custody_or_Control (Aug. 2016) (advocates "legal right to obtain" definition**

POSSESSION, CUSTODY OR CONTROL

CONTROL

Sedona Conference view makes sense because of ambiguity of when a party has "practical ability" to obtain data

BUT, what if "legal right" denied. E.g., contractor, employee, lawyer, etc. simply refuse to turn over your data even though legally obligated to do so? Will you be sanctioned?

What if listserv host takes down data after you've requested it
Remedies: obstruction of justice prosecution, action for specific performance; bar ethics grievance, subpoena?

POSSESSION, CUSTODY OR CONTROL

CUSTODY

- Implies some sort of safekeeping, escrow, perhaps trust relationship to person (child, incompetent, prisoner) or thing (in custodia (held subject to court direction or control)
- CUSTODIAN SHOULD HAVE DUTY TO NOTIFY OWNER OR COURT, & ASSERT THEIR INTERESTS & OBJECTIONS.
- WHAT IF DISCLOSURE/PRODUCTION IS BEYOND SCOPE OF CUSTODIANSHIP?
- IF NOT SUCH DUTY, WHEN IS CUSTODY DIFFERENT FROM CONTROL?

POSSESSION, CUSTODY OR CONTROL

Is there an example of “custody” that is not also “control” or constructive possession if custodian doesn’t have duties to third party respecting the res?

I can’t think of any.

If custodian has such duties to third party, why should custodian have unconditional right to produce on demand or subpoena without involving that third party?

POSSESSION, CUSTODY OR CONTROL

- Why party should hesitate to deny "possession, custody or control"
  - Non-party will be subpoenaed by the other side & produce to your opponent
  - Opponent has right equal to you to review the subpoenaed data absent protective order (I've not seen such an order)
  - You won't have opportunity to review before production
  - You won't have opportunity to assert privilege or non-responsiveness

POSSESSION, CUSTODY OR CONTROL

- To preserve right to obtain data from Employees, Officers, Council Persons, Board & Commission Members (collectively, "EOCPB&CM"):
  - Ordinance giving city right to obtain business-related communications from personal devices of EOCPB&CM (personnel manual or city manager directive might not bind council members & council/board/commission members)
  - Ordinance requiring that all e-communications from or to EOCPB&CM respecting city business be made from or copied to an account on a city network.
  - Tougher call: Ordinance requiring consent to inspect personal devices.
  - *See generally*, Sedona Conference, The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations, https://thesedonaconference.org/download-publication?fid=2977 (May 2018) (free registration required).

POSSESSION, CUSTODY OR CONTROL

(a) In this chapter, "public information" means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

* * *

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;

Tex. Gov't Code § 552.002(a) .

Though

POSSESSION, CUSTODY OR CONTROL

- To preserve right to obtain data from contractors & other agents of the city including lawyers:
  - In contract that city owns all work papers & work product and has right to obtain originals & all drafts & copies in any form (paper, ESI) on request at no cost to city.
  - Texas lawyers already ethically obligated to provide client files absent written agreement to the contrary, possibly subject to payment lien.
  - Texas accountants may push back: Occupations Code gives them ownership of working papers. *Might* be varied by contract to allow them to provide copies to client.
  - Distinguish from copyright: right to make & use future copies, particularly but not exclusively for profit: Contracts could distinguish the two bundles of rights (city access v. future sue & profit).
- Cities probably cannot contract away right to access their public or official records.

POSSESSION, CUSTODY OR CONTROL

- Remedies if employee or contractor refuses to produce to or to permit access by city?
- What measures must city take to avoid sanctions?
- Can trial court provide remedies v. non-parties (yes, subpoena and contempt powers)
- But will court do so while preserving city right to review data before production to opposing party in litigation”

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