Common Evidentiary Issues in Employment Litigation: What Are They, and Best Tactics to Limit the Harm and Maximize the Benefit

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Presentation Highlights

- Address the HOT evidentiary issues in employment litigation
- After Acquired Evidence & Potential Criminal Liability
- Social Media – Recent Developments
- Admissibility of Past History of Litigation/Employment
- Spoliation
- Dealing with ESI (Electronically Stored Information)
Who Knows Their Evidence?!
TRUE or FALSE?

An attorney has an ethical duty to be competent in e-discovery?
Recent advisory Opinion from the State Bar of California Standing Committee on Professional Responsibility and Conduct warns that an attorney’s lack of competence in e-discovery may result in an ethical violation of an attorney’s duty of competence and duty of confidentiality
TRUE or FALSE?

There are special evidence rules governing the discovery of ESI
The discovery of ESI is governed by the same rules of evidence that govern “paper” discovery and is subject to the same admissibility hurdles: relevance, authenticity, hearsay, original writing/best evidence, unfair prejudice.
Attorney Frank wants to introduce an e-mail as evidence. Which of the following approaches can Frank use to authenticate the e-mail?

a. Frank can call Melissa (a witness) to testify that she recognizes a copy of an e-mail that she drafted or received.
b. Frank can authenticate the e-mail by comparing it to a similar e-mail that was previously properly authenticated.
c. Frank can authenticate the e-mail through circumstantial evidence (e.g. by the presence of a party’s name and e-mail address).
d. All of the above
D – All of the above

A – Testimony of a Witness, Rule 901(b)(1)
B – Comparison by Trier or Expert Witness, Rule 901(b)(3)
C – Distinctive Characteristics, Rule 901(b)(4)
When is the best time to develop a “checklist” or plan and exchange the same with an opposing party in order to identify potential e-discovery issues?

a. On the eve of trial.
b. At the Rule 26(f) conference.
c. When you get served with the Complaint.
d. Exchange information with opposing counsel? Never!
B – At the Rule 26(f) conference

Courts have developed checklists and guides to help parties sort through their ESI discovery plans and identify potential issues early on which the parties can exchange and discuss at a Rule 26(f) conference.
Who won Miss Universe?

A. Miss Colombia
B. Miss Philippines
C. Miss Puerto Rico
D. Miss United States
Who won Miss Universe?

B. Miss Philippines
After Acquired Evidence

**TRUE or FALSE?**

In order to avail itself of the after-acquired evidence defense, an employer must show that it was aware of the misconduct at the time of the firing?
After Acquired Evidence

FALSE

An employer does not have to be aware of the misconduct; it must only show that it would have fired the former employee for wrongdoing if it had known of the misconduct prior to the termination.

a. The wrongdoing did in fact occur;
b. The employer was unaware of the wrongdoing at the time the employee was fired;
c. The misconduct would have resulted in termination
TRUE or FALSE?

Attorneys may be criminally liable if they receive stolen documents from clients or potential clients.
After Acquired Evidence

TRUE

A word of caution - Recall that in State v. Saavedra (in your materials), decided in June 23, 2015 by the Supreme Court of NJ, the court held that an employee could be criminally liable for taking his or her employer’s documents in connection to an employment law case. Based on this, an attorney who receives “stolen property” could be charged with accomplice liability or conspiracy.
TRUE or FALSE?

An employee’s Facebook posts are off-limits in litigation if the Facebook page is deactivated.
Social Media

False

Facebook posts are fair game when it comes to discovery - even if page is deactivated - much to the dismay of individuals whose posts contradict claims they make later in litigation. See Crowe v. Marguette Transportation
TRUE or FALSE?

The following statement made in a Facebook post was successfully introduced by a party as evidence of an individual’s breach of a settlement agreement, costing them $80,000: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."
In *Snay v. Gulliver Schools*, a court of appeals in Florida held that Snay was not entitled to $80,000 due under a settlement agreement because the Facebook post (made by daughter) was evidence that the father (who had signed a confidentiality agreement regarding the settlement of a lawsuit) had discussed the settlement with his daughter and breached the non-disclosure provision in the agreement. *Snay v. Gulliver Schools, Inc.*, 2014 WL 769030 (Fla. 3d Dist. February 26, 2014).
Social Media

**Good idea or bad idea?**

When trying to find information about a particular employee (Tracy) on Facebook, you should ask another employee (Melissa) who is friends with Tracy on Facebook for her login info and password so that you can gain access to Sue’s postings.
Social Media

Terrible Idea

Why? Facebook accounts are subject to the terms of the federal Stored Communications Act (SCA). This means than employers may not use coercion or others “wicked” means to gain access to their employees’ Facebook or other social media accounts because doing so may result in a violation of the federal Stored Communications Act and/or invasion of privacy.
What was Mary’s last name in the Movie “Dumb and Dumber?”

A. Samsonite
B. Swanson
C. Swift
D. Spoliation
What was Mary’s last name in the Movie “Dumb and Dumber?”

B. Swanson

SAM..SWAMMY...SWANY..

SAMSONITE!....I WAS WAY OFF!
Admissibility of Past History of Litigation/Employment

Yes or No?

Generally speaking, is evidence offered to show that an employee has a propensity to be “claim minded,” admissible?
Admissibility of Past History of Litigation/Employment

Generally, No.

The slight probative value provided by this evidence has been deemed outweighed by the danger of prejudice.
Admissibility of Past History of Litigation/Employment

Yes or No?

Generally speaking, is evidence of prior acts admissible for any purpose besides establishing character?
Admissibility of Past History of Litigation/Employment

**Generally, Yes.**

Evidence may be admissible for another purpose other than character, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
Admissibility of Past History of Litigation/Employment

Yes or No?

Generally speaking, is evidence of an employer’s past discrimination directed at other employees relevant to the question of whether a defendant intentionally discriminated against a plaintiff?
Admissibility of Past History of Litigation/Employment

Generally, Yes.

Evidence of an employer’s prior discriminatory treatment of other employees is admissible to show the employer’s discriminatory intent, rather than to show a pattern and practice of discrimination or habit of discrimination.
Spoliation

At what point must a party suspend its routine document retention/destruction policy?
Spoliation

Once a party reasonably anticipates litigation
What is the key difference between the “old” FRCP Rule 37(e) and the amended Rule 37(e)?
Spoliation

The amended Rule 37(e) provides litigants with a weapon to pursue sanctions for spoliation.
Who is this man?

A. Miss Colombia
B. Miss Philippines
C. Ty Hyderally
D. The Most Interesting Man in the World
Who is this man?

C & D – Ty Hyderally, the Most Interesting Man in the World
Questions?

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