CHAPTER ____

SOCIAL MEDIA EVIDENCE: DISCOVERY, AUTHENTICATION, AND ETHICAL ISSUES

John G. Browning
Passman & Jones, P.C.
2500 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2599
214-742-2121
browningj@passmanjones.com

28th Annual Labor & Employment Law Institute

Texas Bar CLE
August 25-26, 2017
San Antonio, Texas

John G. Browning
Shareholder
Passman & Jones, P.C.

John Browning is a shareholder in the Dallas, Texas firm of Passman & Jones, P.C., where he handles civil litigation in state and federal courts, in areas ranging from employment and intellectual property to commercial cases and defense of products liability, professional liability, media law, and general negligence matters. Mr. Browning has extensive trial, arbitration, and summary judgment experience and has represented companies in a wide variety of industries throughout Texas. Mr. Browning received his Bachelor of Arts with general and departmental honors from Rutgers University in 1986, where he was a National Merit Scholar and member of Phi Beta Kappa. He received his Juris Doctor from the University of Texas School of Law in 1989. He is the author of the books *The Lawyer's Guide to Social Networking, Understanding Social Media's Impact on the Law*, (West 2010); the Social Media and Litigation Practice Guide (West 2014); and two forthcoming books, including a book on legal ethics and social media for the ABA. Mr. Browning is also a contributing author to seven other books, the author of over 25 published law review articles; and the award-winning writer of numerous articles for regional and national legal publications. His work has been cited in over 250 law review articles, practice guides in 11 states, and by courts in Texas, California, Maryland, Tennessee, and Florida. He has been quoted as a leading authority on social media and the law by such publications as *The New York Times*, *The Wall Street Journal*, *USA Today*, *Law 360*, *Time* Magazine, *The National Law Journal*, *The ABA Journal*, *WIRED* Magazine and *Inside Counsel* Magazine, and he is a recurring legal commentator for the NBC, CBS, and FOX news stations in Dallas. He serves as Chair of the Texas Bar Journal Board of Editors, as a member of Professional Ethics Committee of the State Bar of Texas, and is a frequent speaker at CLE seminars and legal symposia all over the country.

Social Media Evidence: Discovery, Authentication, and Ethical Issues

I. Introduction

Indiana attorney James Hanson was probably having a bad day when he wrote a Facebook post to the ex-husband of the client he was representing in both a divorce and a misdemeanor domestic battery case. And the 41-year-old lawyer says he only intended to send a message that the ex should expect a vigorous defense. Still, the profanity-laced post illustrates one of the many ethical traps luring in the digital domain for lawyers—communicating without any filters or regard for appropriate, confidential communications. Hanson wrote, "You pissed off the wrong attorney…I'm going to gather all the relevant evidence and then I'm going to anal rape you so hard your teeth come loose…Watch your ass you little [expletive deleted]. I've got you in my sights now." That online tirade resulted in Hanson being arrested and charged with felony intimidation, a crime punishable by jail time and a fine up to $10,000.[1]

Lawyers practicing in the digital age have to pay particular heed to avoiding such online missteps. Social networking platforms such as Facebook, Twitter, YouTube, and LinkedIn have certainly revolutionized the way people communicate and share information. Facebook boasts over 1.2 billion users worldwide.[2] Twitter has gone from processing 5,000 tweets a day in 2007 to over 400 million in a day in 2013.[3] According to the Pew Institute, 72 percent of adults in the United States maintain at least one social networking profile.[4] Not surprisingly, lawyers have

---

[1] Martha Neil, *Lawyer Charged with Felony Intimidation over Facebook Message to Client's Ex-Husband*, ABA J., May 23, 2014, *available at* http://www.abajournal.com/news/article/divorce_lawyer_charged_with_intimidation_over_facebook_message_to_clients.

[22] *Number of Active Users at Facebook Over the Years*, Associated Press, May 1, 2013, *available at* http://news.yahoo.com/number-active-users-facebook-over-230449748.html.

[3] Richard Holt, *Twitter in Numbers*, Telegraph, Mar. 21, 2013, *available at* http://www.telegraph.co.uk/technology/twitter/9945505/Twitter-in-numbers.html.

[4] Joanna Brenner & Aaron Smith, Pew Research Center, 72% of Online Adults Are Social Networking Site Users 2 (2013), *available at* http://www.pewinternet.org/files/old-media//Files/Reports/2013/PIP_Social_networking_sites_update_PDF.pdf.

embraced social media as well; according to a study by American Lawyer Media, nearly 75 percent of law firms in the United States employ one or more social networking platforms for marketing purposes.[5] Beyond its use as a marketing tool, social networking has proven to be a digital treasure trove of information for cases. In 2010, only 6 percent of attorneys reported using sites such as Facebook for case investigation, according to the American Bar Association. But when the ABA performed the same survey in 2012, 44 percent of the responding attorneys were doing so[6]. In an age in which people seemingly share all kinds of details of their lives online, lawyers in virtually all practice areas have found social media to be a valuable avenue for discovery.

Labor and employment attorneys, however, lag behind other specialty practice areas when it comes to using social networking platforms for business development and for case investigation. According to the inaugural Bloomberg Law Labor and Employment Practice Benchmarks Report released in November 2016, nearly a quarter of labor and employment lawyers don't use any social media platforms. Sixty-nine percent of survey respondents reported using LinkedIn, but this was the only platform reportedly receiving regular usage for "networking, marketing, and business development." However, over half of the firms responding don't curate their social media networks, nor do they require attorneys to monitor their personal pages.

II. Digital Competence

Embracing these emerging technologies also raises new ethical questions for lawyers. The first question goes to the very core of an attorney's duties to a client—the duty to provide competent representation. While lawyers who are uncomfortable with the pace of technological

[5] Highlights from the 2012 Am Law Tech Survey, Am. Lawyer, Nov. 16, 2012, *available at* http://www.americanlawyer.com/id=1202575625114/Highlights-from-the-2012-Am-Law-Tech-Survey (registration required).
[6] Robert Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, (Aug. 16, 2012), http://www.lawsiteblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html.

innovation may be tempted to stick their heads in the sand when it comes to social media, they cannot really afford to, thanks to the recent changes to the ABA Model Rules of Professional Conduct. Rule 1.1 of the Model Rules, which discusses competence, was expanded in August 2012 to make it clear that competent representation does not just mean keeping current in case law or statutory developments in one's area of practice anymore, but also now encompasses staying abreast of "the benefits and risks associated with relevant technology," including show such advances impact conducting investigations, engaging in legal research, advising clients, and conducting discovery.[7]

III. Case Investigation/ Informal Discovery

A number of jurisdictions around the county have already begun holding attorneys to a higher standard when it comes to making use of online resources, including demonstrating due diligence, research prospective jurors and even locating and using exculpatory evidence in criminal cases.[8] As "digital digging" becomes the norm, it becomes harder for an attorney to say he or she has met the standard of competence when the attorney has ignored social media avenues. For example, in an era in which it has become standard practice for divorce lawyers to comb the Facebook pages of both the client and the adverse spouse (the American Academy of Matrimonial Lawyers surveyed its members, and 81 percent reported using evidence from social networking sites in their cases[9]), can a lawyer who fails to do so truly profess competence?

---

[7] ABA Commission on Ethics 20/20, Report to the House of Delegates Resolution 105A, at 6 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/adminstrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf.

[8] *See, e.g., Cannedy v Adams*, 706 F.3d 1148 (9th Cir. 2013) (holding that a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel); New Hampshire Bar Association Ethics Committee Advisory Opinion No. 2012-13/05 (June 2013), *available at* http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp.

[9] Press Release, Am. Acad. of Matrimonial Lawyers, Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers, (Feb. 10, 2010), *available at* http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey-.

However, many of the ethical quandaries that social networking presents for lawyers arise out of the manner in which attorneys use (or misuse) these sites. Consider the practice of using social media sites to gather information about a party or witness, for example. While there generally is no ethical prohibition against viewing the publicly available portion of an individual's social networking profile, may an attorney (or someone working for that attorney) try to "friend" someone in order to gain access to the privacy-restricted portions of that profile? Ethics opinions form the Philadelphia Bar Association (March 2009), the New York City Bar (September 2010), the New York State Bar (September 2010), the Oregon Bar (February 2013) the New Hampshire Bar (June 2013), and others have made it clear that the rules of professional conduct against engaging in deceptive conduct or misrepresentations to third parties extend to cyberspace as well.[10] As the New York City Bar ethics opinion emphasizes, with deception being even easier in the virtual world than in person, this is an issue of heightened concern.

Not surprisingly, lawyers have found themselves in ethical hot water for engaging in such "false friending." A Cleveland, Ohio, insurance defense law firm, along with the insurance carrier that retained it and the investigator it hired, were slapped with a civil suit in 2012 for invasion of privacy after the investigator gained access to the Facebook page of a minor plaintiff in a dog-bite case by posing as one of the girl's friends. In June 2013, Cuyahoga County, Ohio, assistant prosecutor Aaron Brockler was fired after he posed as a murder defendant's fictional "baby mama" on Facebook in order to communicate with two female alibi witnesses for the defense and try to persuade them not to testify. County Prosecutor Timothy McGinty had to withdraw his office

[10] Philadelphia Bar Ass'n Prof'l Guidance Comm. 2009-02;Ass'n of the Bar of the City of N. Y. Comm. On Prof'l and Judicial Ethics, Formal Op. 2010-2; N. Y. State Bar Ass'n Comm. On Prof'l Ethics, Op. 843; Or. State Bar, Formal Op. 2013-189, New Hampshire Bar Association Ethics Committee Advisory Opinion No. 2012-13/05 (June 2013).

from the case and hand it over to the Ohio Attorney General, but not before acknowledging that Brockler had "disgraced this office and everyone who works here" by "creating false evidence" and "lying to witnesses."[11] Similarly, even though Rule 4.2 of the Model Rules of Professional Conduct prohibits communicating with a represented party, lawyers have had to be reminded that this applies to *all* forms of communication, including via social networking. The San Diego County Bar Association Ethics Committee addressed this in a May 2011 opinion dealing with a plaintiff's lawyer in an employment lawsuit seeking to use Facebook to contact employees of the company he had sued.[12] Two defense attorneys in New Jersey currently face disciplinary action for allegedly directing their female paralegal to "friend' the young male plaintiff during the course of a personal injury lawsuit in order to gain access to information from his privacy-restricted Facebook profile.[13]

IV. Evidence Preservation/Spoliation Issues

In addition to using social networking sites for gathering information, the ethical duty to preserve information is another concern in the age of Facebook and Twitter. While no lawyer wants to discover embarrassing photos or comments on a client's Facebook page that might undermine the case, Rule 3.4 prohibits an attorney from unlawfully altering or destroying evidence or assisting others in doing so. Clearly, a lawyer's ethical duty to preserve electronically stored information encompasses content from social networking sites. Yet this, too, is a lesson that some lawyers learned the hard way.

---

[11] James F. McCarty, *Cuyahoga County Prosecutor Fired After Posing as an Accused Killer's Girlfriend on Facebook to Try to Get Alibi Witnesses to Change Their Testimony*, Cleveland Plain Dealer, June 6, 2013, *available at* http://www.cleveland.com/metro/index.ssf/2013/06/cuyahoga_county_procesutor_fir.html

[12] *See* San Diego Cnty. Bar Ass'n Ethics Comm., Legal Ethics Op. 2011-2 (22011), *available at* http://www.sdcba.org/index.cfm?Pg=LEC2011-2.

[13] For a more detailed discussion, see John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 St. Mary's L.J. on Legal Malpractice & Ethics 204 (2013).

For example, in the Virginia wrongful death case of *Lester v. Allied Concrete* in 2013, the plaintiff's attorney directed his paralegal to instruct the client to delete content from his Facebook page that depicted him as something less than a grieving widower (the Facebook photos in question depicted the young man in the company of young women, wearing a shirt that read "I ❤ Hot Moms"). The attorney also had his client sign sworn interrogatories stating he didn't have a Facebook account. After a $10.6 million verdict for the plaintiff, the defense brought a motion for new trial based on spoliation of evidence. The trial judge cut the damages award in half (the Virginia Supreme Court later reinstated the full verdict) and imposed sanctions of $722,000 (most of which were against the plaintiff's counsel) for an "extensive pattern of deceptive and obstructionist conduct."[14] The attorney, a partner in the largest plaintiff's personal injury firm in the state and a past president of the Virginia Trial Lawyers Association, had his license to practice law suspended for five years by the Virginia Bar in June 2013.

Social media spoliation issues come up in employment as well. In *Painter v. Atwood*[15], the plaintiff was a former employee suing her employer- a dentist- for emotional distress damages suffered as a result of the defendant allegedly sexually assaulting her at work. The defendant claimed the sexual nature of their relationship was consensual and that he was only trying to tickle the plaintiff during the incident in question. The defendant filed a motion for spoliation sanctions after it was discovered that the plaintiff had deleted from Facebook both pictures from a cruise she took with the dentist and his family and posts in which she talked about how much she enjoyed her job in the dentist's office, how he was a great boss, and how much she enjoyed working with him. The defendant asserted that he knew about these posts because his wife had been Facebook friends with the plaintiff when she posted them. The defendant also alleged the plaintiff and two

[14] *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).
[15] *Painter v. Atwood*, 2014 U.S. Dist. LEXIS 35060 (D. Nev. March 18, 2014)

of her key witnesses deleted texts that contradicted her deposition testimony. The trial court declined to dismiss the case, but granted the relief the defendant requested in the alternative. The trial court held that the jurors would receive adverse inference instructions concerning the Facebook posts that the plaintiff could not retrieve, with jurors being instructed to draw the inference as described in the declaration of the defendant's wife about the plaintiff enjoying her job and working with the defendant. The Court was unsympathetic to the plaintiff's claims that she was young and naïve about litigation:

> [A]s the Court stated at the hearing, it is of no consequence that Plaintiff is young or that she is female and, therefore, according to her counsel, would not have known better than to delete her Facebook comments. Once Plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence and, further, explained to Plaintiff the full extent of that obligation.[16]

In *Hosch v. Bae Systems Information Solutions, Inc.*,[17] the defendant's motion for sanctions based on discovery abuses and spoliation was granted and the plaintiff's case was dismissed. The plaintiff filed an action for retaliation against his former employer, an aerospace and defense contractor. He claimed he was terminated from his position as the manager of the Eastern-Afghanistan Counter-Intelligence team because he was blowing the whistle about allegedly fraudulent billing practices. The court found that the plaintiff wiped his cell phone and Blackberry clean and deleted pictures, emails, texts, and social media. Most egregious, it was revealed that he started deleting content after he'd already decided to bring his case and continued deleting even after he received litigation hold and document preservation letters and discovery for which the ESI would have been responsive. The court found that the plaintiff deleted some content after he was warned by the

[16] *Id.* at 18.
[17] *Hosch v. Bae Sys. Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 57398 (E.D. Va., April 28, 2014)

court that he'd be sanctioned if he didn't comply with the court's discovery order. Much of the content wasn't recoverable, and the court saw through the plaintiff's claims that the cell phone content was inadvertently lost when he damaged his SIM card.

V. Lawyers Are Human, Too

Unfortunately, poor judgment plagues lawyers just like anybody else, and social networking sites have provided a wider audience than ever for such lapses. In 2012, an assistant public defender in Miami-Dade County (Florida) was fired after she posted a photo of her murder defendant client's leopard print underwear on Facebook along with a snarky caption (she also posted some comments that questioned her client's innocence).[18] Several veteran federal prosecutors in New Orleans resigned in the wake of revelations that they were anonymously discussing cases they were handling and parties they were investigating on a newspaper's blog.[19] An Illinois criminal defense attorney received a suspension following his posting on YouTube of a discovery video of an undercover drug buy in an attempt to sway public opinion (the lawyer, who also linked to the video on Facebook, later acknowledged that instead of depicting drugs being "planted," the video actually appeared to incriminate his client).[20] In July 2012, a former prosecutor in Virginia was charged with making a felony threat after he allegedly posted messages on Facebook threatening bodily injury to his former employer.[21] In California, a prominent commercial litigator had to explain himself in court after he tweeted about a case and linked to

---

[18] David Ovalle, *Lawyer's Facebook Photo Causes Mistrial in Miami-Dade Murder Case*, Miami Herald (Sept. 13, 2012).

[19] Sari Horwitz, *New Orleans U.S. Attorney Resigns Amid Scandal Over Anonymous Online Postings*, Wash. Post (Dec. 6, 2012), *available at* http://www.washingtonpost.com/world/national-security/new-orleans-us-attorney-resigns-amid-scandal-over-anonymous-online-postings/2012/12/06/c95c0d4a-3ef1-11e2-bca3-aadc9b7e29c5_story.html

[20] In re Gilsdorf, No. 12PR0006 (Ill. Att'y Registration & Disciplinary Comm'n Feb. 6, 2012), *available at* https://www.iardc.org/12PR006CM.html.

[21] Louis Hansen, *Ex-Norfolk Prosecutor Charged Over Facebook Posts*, Virginia Pilot (July 27, 2012), *available at* http://hamptonroads.com/2012/07/exnorfolk-prosecutor-charged-over-facebook-posts.

documents that the court had placed under seal.[22] And while Virginia may be for lovers, what happens when the relationship is over and intimate photos are leaked online by a revengeful ex? One Virginia county prosecutor is currently embroiled in a legal battle with an ex-lover (and prominent Missouri attorney) over nude photos of her that the ex had posted on Twitter.[23] Meanwhile, in Florida, assistant state attorney Kenneth Lewis has ignited a firestorm of controversy with references on his Facebook page to "crack hoes" who should get their tubes tied and a complaint about affirmative action, complete with a photo of U.S. Supreme Court Justice Sonia Sotomayor and the line, "Where would she be if she didn't hit the quota lottery? Here's a hint: 'Would you like to supersize that sir?'"[24]

VI. From Voir Dire to Voir Google: Ethical Concerns in Jury Selection

Another area in which lawyers' use of social media can raise ethical questions is jury selection. Should lawyers probe the online selves of prospective jurors? The Missouri Supreme Court actually has imposed an affirmative duty on lawyers to conduct certain Internet background searches of potential jurors (specifically that juror's litigation history), if the lawyer plans to argue juror bias related to his/her litigation history.[25] Four ethics opinions, including an ABA Formal Opinion, have addressed the issue of "Facebooking the jury."

In the first of these, the New York County Lawyer's Association Committee on Professional Ethics held in 2011 that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page" is permissible so long as lawyers have no direct or indirect

[22] John G. Browning, The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law (West 2010).
[23] Debra Cassens Weiss, *Prosecutor's Nude Photos Ended up on Twitter; She Blames Prominent Lawyer, Her Ex, in Complaint*, ABA J. (Sept. 26, 2013), *available at* http://www.abajournal.com/news/article/prosecutors_nude_photos_ended_up_on_twitter_she_blames_prominent_lawyer_her/.
[24] Mike DeForest, *Prosecutor's Facebook Comments Draw Scrutiny*, ClickOrlando, May 21, 2014, http://www.clickorlando.com/news/prosecutors-facebook-comments-draw-scrutiny/26105442.
[25] *See Johnson v. McCullough*, 306 S.W. 3d 551 (Mo. 2010) (en banc); Missouri Supreme Court Rule 69.025.

contact with jurors during trial. Subsequent opinions from the New York City Bar Association (2012) and the Oregon Bar (2013) agreed with this, while sounding a cautionary note to lawyers that even accessing a prospective juror's Twitter profile or LinkedIn profile could cause the juror to learn of the lawyer's viewing or attempted viewing. Such contact, according to both ethics committees, "might constitute a prohibited communication even if inadvertent or unintended." In other words, as with other aspect in which lawyers might use social media, ignorance or lack of familiarity will not be an excuse in committing an ethical violation.[26]

In April 2014, the ABA weighed in on this issue with Formal Opinion 466. Like the earlier state ethics opinions, it too concluded that a lawyer is ethically permitted to review a juror's social networking presence, provided that no contact is made with the juror. However, the ABA opinion diverges from its state counterparts in its consideration of whether auto alerts by sites such as LinkedIn or Twitter to the juror/user that her profile is being viewed would constitute impermissible contacts. Formal Opinion 466 doesn't see this as a problem, stating that "The fact that a juror or potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b)."[27] Still, even with the cautious seals of approval from the ABA And various state ethics bodies, "Facebooking the jury" is not without its risks. Former Travis County (Texas) assistant district attorney Steve Brand found this out after he was fired in June 2014 for alleged racially insensitive remarks stemming from his Facebook research of a potential

[26] For a more detailed discussion, *see* John G. Browning, *As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn?*, Jury Expert, Vol. 25, No. 3 (May/June 2013). In fact, this very topic recently was raised in the high profile "Hustle" mortgage fraud case brought against Bank of America over its Countrywide unit. A juror claimed improper contact in violation of the federal judge's pretrial order after a first year associate with one of the defense firms looked at his LinkedIn profile, and the juror received a notification from LinkedIn of the viewing.

[27] American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466 (Apr. 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

juror. Noting the juror's NAACP membership and a link on her Facebook page to a Jim Crow-era travel guide for African-Americans, Brand struck the "activist" during jury selection. A *Batson* challenge was asserted and rejected by one judge before being granted by another. After reviewing the transcript of the Batson hearing, District Attorney Rosemary Lehmberg terminated Brand, saying that "his statements did not reflect my opinions or my values or those of our organization."[28]

VII. Advising Clients About Their Social Media Postings

Many ethical questions regarding an attorney's use of social networking remain to be explored. For example, the Florida Bar's Professional Ethics Committee is currently considering just how far attorneys may go in advising clients about their social media postings. The questions it will weigh include, "Can an attorney advise a client to remove information that is unrelated to why the lawyer was hired? Can the lawyer advise a client on what privacy setting to use? Before litigation, does the lawyer have the duty to advise a client not to remove postings?"[29] As long as social networking platforms such as Facebook and Twitter remain a fertile area for diligent lawyers seeking information on opposing parties and witnesses (and even jurors), the potential for misusing such media will exist. Just as doctors need the occasional "Physician, heal thyself" admonishment, lawyers would do well to follow the same counsel they should be giving their clients. Treat social media no differently from more traditional forms of communication, subject to the same ethical rules. Have a working knowledge of the functionality of those sites, particularly privacy settings. And most important, refrain from posting anything online that you would not want your opposing counsel, a judge, or the bar disciplinary authorities to see.

---

[28] Tony Plohetski & Jazmine Ulloa, *DA Lemberg: Prosecutor Fired Over Racially Insensitive Statements*, Austin American-Statesman, June 11, 2014, *available at* http://www.mystatesman.com/news/news/crime-law/da-lehmberg-prosecutor-fired-over-racially-insensi-ngJ2z/.

[29] Mary Hladky, *Can Attorneys Tell Clients to 'Clean Up' Facebook Page?*, Daily Bus. Rev., June 2, 2014, *available at* http://www.dailybusinessreview.com/id=1202657279979/Can-Attorneys-Tell-Clients-To-Clean-Up-Facebook-page?sireturn=20140607163807 (registration required).

VIII. Discovery and Evidentiary Issues with Social Media Content In Employment Cases

Labor and Employment practitioners must take care to draft narrowly-tailored discovery requests, and refrain from overly broad requests. For example, *in Robinson v. Jones Lang LaSalle Americas, Inc.*,[30] the defendant had been seeking all pictures, videos, blogs, and social media activity on Facebook, LinkedIn, and MySpace that revealed or related to the plaintiff's "emotion, feeling, or mental state," or to "events that could be reasonably expected to produce a significant emotion, feeling, or mental state.[31]

The *Robinson* court relied on *E.E.O.C. v. Simply Storage Management, LLC*,[32] which it described as the benchmark case in this area, and the case that legal professionals can use to drill down and find cases in their jurisdiction. In *Simply Storage*, a sexual harassment case, the court allowed discovery of social media content beyond the events described in the plaintiff's complaint. The court found that:

> It is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant.[33]

The *Simply Storage* court recognized that social media can provide information that offers possible explanations for the plaintiff's emotional distress other than her allegation that the defendant caused it. Alternatively, the social media may also undermine her allegations of the severity of that distress. Accordingly, the court allowed the discovery of:

---

[30] See *Robinson v. Jones Lang Ams., Inc.*, 2012 U.S. Dist. LEXIS 123883 (D. Or. Aug. 29, 2012) (court allowed discovery of posts on social media sites relating to emotional distress in a race discrimination and retaliation case).
[31] *Id*. at **5-7.
[32] *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 432 (S.D. Ind. 2010).
[33] *Id*. at 435.

> [A]ny profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and [social media] applications for [plaintiffs] for the [relevant period] that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state… Third-party communications to [plaintiffs]…if they place these [plaintiffs'] own communications in context.[34]

In *Caputi v. Topper Realty Corporation*[35], a wage-hour employment action, the court ordered limited discovery of the plaintiff's Facebook account and declined to give unlimited access to the defendant:

> Defendants are entitled to a sampling of Plaintiff's Facebook activity for the period November 2011 to November 2013, limited to any "specific references to the emotional distress [Plaintiff] claims she suffered" in the Complaint, and any "treatment she received in connection [there]with." Id. at *116. Defendants may renew their application for the balance of Plaintiff's Facebook account information upon probative evidence uncovered from the sampling, if any. In addition, in mounting a defense, Defendants are entitled to any Facebook activity, for the same time period, that refers to an alternative source or cause of Plaintiff's alleged distress. *See id*. Accordingly, the motion is granted, in part, as to Plaintiff's Facebook account information to substantiate her claims of emotional distress. Plaintiff is also directed to preserve all of her Facebook activity for the duration of this litigation.[36]

[34] *Id.* at 436.
[35] *Caputi v. Topper Realty Corp.*, 2015 U.S. Dist. LEXIS 24969 (E.D.N.Y. Feb. 25, 2015).
[36] *Id.* at 19-20.

In employment cases where social media content is sought (much like personal injury and other types of cases), the party resisting discovery will raise issues regarding privacy, relevance, and undue burden in objecting to requests seen as overly broad or invasive. Some courts have taken the position that a third party in camera review by a special master or "e-neutral" is appropriate and useful. For example, in *EEOC v. Original Honeybaked Ham Company*,[37] a class action for alleged sexual harassment and retaliation with about twenty-two putative class members', the court assigned a forensic expert to collect the class members' social media activity. The defendant had been able to demonstrate that the class members had been using social media to communicate with each other and others about the case, their employment and termination from Honeybaked Ham, and other topics that the defendant argued might be admissible evidence. In deciding to use a special master (to be paid for both parties), the court was influenced by the amount at stake in the litigation – plaintiffs were seeking damages in the low to mid-seven figure range – and also that there was some evidence based on content from one class member:

> There is no question the Defendant has established that the documents it seeks contain documents it seeks contain discoverable information. Defendant has shown, for example, that Plaintiff-Intervenor Cabrera posted on her Facebook account statements that discuss her financial expectations in this lawsuit; a photograph of herself wearing a shirt with the word "CUNT" in large letters written across the front (a term that she alleges was used pejoratively against her, also alleging that such use offended her) [citation omitted]; musings about her emotional state in having lost a beloved pet as well as having suffered a broken relationship;

[37] *EEOC v. Original Honeybaked Ham Co.*, 2012 U.S. Dist. LEXIS 160285 (D. Colo. Nov. 7, 2012).

other writings addressing her positive outlook on how her life was post-termination; her self-described sexual aggressiveness; statements about actions she engaged in as a supervisor with Defendant (including terminating a woman is a class member in this case); sexually amorous communications with other class members; her post-termination employment and income opportunities and financial condition; and other information.[38]

In other words, the defendant persuaded the court that it was not "the proverbial fishing expedition; these waters have already been tested, and they show that further effort will likely be fruitful."[39]

The court outlined a process for the parties to follow:

1) The claimants give the special master the login and password information he needs to access their text messages, social media accounts, and email or web blog account that they used to communicate with one another during a set period of time;
2) The parties work jointly on parameters for the special master to use for his collection of information;
3) The court reviews *in camera* all of the information collected by the special master;
4) The court will deliver the information that is found to be discoverable to the EEOC to conduct a privilege review, and then generate a privilege log for any documents withheld under the protective order and produce the unprivileged documents to the defendant; and
5) The irrelevant documents will be returned to the EEOC.

[38] *Id.*
[39] *Id.*

This decision highlights the usefulness of having done an informal investigation to identify admissible evidence on the public pages of social media in employment cases.

Generally speaking, while discovery of the opposing party's social media content can yield potentially game-changing information, labor and employment lawyers must steer away from casting too wide a net with overly broad discovery requests, since courts are now either demanding more narrowly-drawn requests or simply denying motions to compel discovery requests that are overly broad. For example, consider *Ogden v. All-State Career School*,[40] in which the court in a gender discrimination and retaliation case ordered the plaintiff to produce social media activity relating to his emotional state during the relevant period of time or, alternatively, provide the defendant with access to his accounts and a summary of what he believes is within the scope of the authorized discovery. The *Ogden* court denied, however, the defendant's discovery of social media activity showing that the plaintiff conversed with others on his Facebook account in ways similar to what he alleged created a hostile work environment for him in the office from his female colleagues. The court held that Federal Rule of Evidence 412 is a bar to offering evidence of sexually related conduct outside the workplace to suggest that the behavior in the workplace would not have been offensive to the complaining witness, or that the complaining witness has engaged in or has a pre-disposition for sexual-in-nature conduct.

Or consider, *Smith v. Hillshire Brands*[41], in which the defendant employer was trying to get access to all of the plaintiff's social media accounts in an FMLA (Family and Medical Leave Act) and Title VII case. The defendant argued the request was justified because it provided an online diary of the plaintiff's activities that would be relevant to his emotional distress claim and, further, that it may show that he was violating his FMLA leave with some of his activities. The

[40] 299 F.R.D.446 (W.D. Pa. 2014).
[41] 2014 U.S. Dist. LEXIS 83953 (D. Kan. June 30, 2014).

court noted that the defendant may not appreciate the ramifications of its arguments, because it could potentially open up the personal social media accounts of the Hillshire Brands' managers and supervisors involved in the termination decision because the accounts might show discriminatory pretext. The court took what it described as the intermediate approach being used by courts and allowed discovery of "any content that reveals plaintiff's emotions and mental state, or content that refers to the events the could reasonably be expected to produce in plaintiff a significant emotion or mental state.[42]

As the far end of the spectrum for not allowing discovery of social media accounts is a case from the United States District Court for the Central District of California, *Mailhoit v. Home Depot U.S.A., Inc.*[43] The *Mailhoit* court criticized the intermediate approach taken in *Simply Storage* and held that asking for social media activity that relates to an emotional state or is likely to produce a strong emotional reaction does not describe the responsive documents with "reasonable particularity" as required by Federal Rule of Civil Procedure Rule 34(b)(1)(A) and, therefore, the request is not likely to lead to the discovery of admissible evidence.

IX. Conclusion

Despite a slew of ethics opinions and high-profile sanctions on everything from contacting represented parties via Facebook to instructing clients to delete damaging online content, attorneys are still getting into trouble resulting from their misuse of social media. In the past year alone, lawyers all over the country have experienced Facebook fumbles and Twitter misfires leading to public embarrassment, firing, and even disbarment.

On October 28, Vincent "Trace" Schmeltz, a partner at Barnes and Thornburg's Chicago office, was observing the "spoofing" trial of accused futures trader Michael Coscia in U.S. District

[42] *Id.*
[43] 285 F.R.D.556 (C.D. Cal. 2012).

Judge Harry Leinenweber's Chicago courtroom. While there, Schmeltz took photos of some of the evidence, and sent at least nine tweets about them from his Twitter account, including such tweets as "Prosecutor trying to impeach algo with this email. #HFT #cosciatrial," and "Screenshot of 'QuoteTrader,' the allegedly spoofing algo used by Michael Coscia. #cosciatrial #HFT." Schmeltz's actions were spotted by an FBI special agent in the courtroom. Schmeltz didn't notice the agent, or for that matter the large 4 foot tall sign posted near the courtroom's door that said "PHOTOGRAPHING, RECORDING OR BROADCASTING IS PROHIBITED." Schmeltz has been ordered to appear before U.S. District Court Judge Ruben Castillo for a show cause hearing to explain why he shouldn't be sanctioned for violating Federal Rule of Criminal Procedure 53 as well as the Court's local rules banning photography and use of handheld devices in the courtroom. The offending tweets have exposed Schmeltz not only to a contempt finding and potential censure or reprimand, but also a possible separate state attorney disciplinary investigation.

Of course, he still has his job, which is more than former Goldberg Segalla partner Clive O'Connell can say. The London attorney – named the UK's best insurance lawyer in 2014 – and avid Chelsea soccer fan was filmed following his team's loss to Liverpool unleashing a furious tirade about the Liverpool fans, calling them "scum" and making other offensive comments. As if the 120,000 views the rant received on YouTube weren't enough, O'Connell also took to a blog to vent some more. Goldberg Segalla managing partner Rick Cohen terminated O'Connell, and also posted a video to YouTube condemning the partner's comments, calling them "offensive, plain and simple" and "inconsistent with our ethos." Live by social media, die by social media?

If venting on social media about your sports affiliations can land you in hot water, imagine what an online rant about a judge or a trial can lead to. In the case of former Louisiana attorney Joyce McKool, it resulted in disbarment. Frustrated with the handling of related child custody and

adoption proceedings by judges in Louisiana and Mississippi, McKool embarked upon what the Louisiana Supreme Court called "a social media blitz to influence the judges' and this Court's rulings in pending matters." This blitz included numerous online postings and Twitter feeds that the court described as "littered with misrepresentations and outright false statements," as well as orchestrating online petitions urging the judges to make specific rulings. Concluding that McKool had violated Rules of Professional Conduct against improper ex parte communication, disseminating false and misleading information, and engaging in conduct prejudicial to the administration of justice, the Louisiana Supreme Court disbarred her on June 30, 2015.

Posting on Facebook about a trial carries consequences, regardless of whether trial has yet to start or has just concluded. Des Moines, Iowa trial lawyer Roxanne Conlin posted on Facebook just before the start of a July trial in which she represented a woman suing her former attorney for alleged false imprisonment. Besides publicly calling out that former attorney, Conlin's post also criticized Iowa's "all-white, all-male" Supreme Court for reducing that former attorney's disciplinary penalty, saying the court "really needs a woman" and expressing hope that "a jury will be a little harder on him." In response to an emergency motion by Conlin's opposing counsel, and out of concern that the jury pool had been tainted by the Facebook comments, the trial judge delayed the trial until November. And following what she characterized as "an unjust acquittal" in the New Braunfels punching death case of Logan Davidson, Comal County Criminal District Attorney Jennifer Tharp took to Facebook in May 2015 to criticize both the judge and the jury's verdict. That decision to air such unhappiness on social media has been widely criticized.

When it comes to social media, lapses in professional judgment have become all too commonplace. Following the September 18 acquittal of his client Brandon Burnside on homicide charges, Wisconsin criminal defense attorney Anthony Cotton decided to take a "victory selfie" in

the courtroom with his client and post it to Facebook. The judge didn't "like" it, and ordered Cotton back to court. Cotton apologized, and took down the Facebook post. In July, Allegheny County (Pa.) assistant district attorney Julie Jones thought it would be cute to take a picture with a uniformed police officer in which they were toting guns seized as evidence in a case, and post it to Facebook with the caption, "You should take the plea." The district attorney's office was not pleased, issuing a statement calling Jones' conduct "contrary to office protocol with respect to the handling of evidence."

Lawyers need to remember not only the speed with which the online world reacts and the ubiquitous nature of social media, but also the fact that the same ethical rules that apply to every other form of communication also apply to social networking platforms. If you wouldn't put it in a letter or publish it in a newspaper, don't post it on Facebook or tweet about it. Follow the same counsel you should be giving your clients. As an apologetic Roxanne Conlin admitted, "I tell my clients to stay off of social media, you know. But sometimes we lawyers forget to follow our own advice."