AMERICAN BAR ASSOCIATION

Formal Opinion 462 **February 21, 2013**
Judge's Use of Electronic Social Networking Media

A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.[1]

In this opinion, the Committee discusses a judge's participation in electronic social networking. The Committee will use the term "electronic social media" ("ESM") to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons. [2]

Judges and Electronic Social Media

In recent years, new and relatively easy-to-use technology and software have been introduced that allow users to share information about themselves and to post information on others' social networking sites. Such technology, which has become an everyday part of worldwide culture, is frequently updated, and different forms undoubtedly will emerge.

Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch. This opinion examines to what extent a judge's participation in ESM raises concerns under the Model Code of Judicial Conduct.

Upon assuming the bench, judges accept a duty to "respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."[3] Although judges are full-fledged members of their communities, nevertheless, they "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens...."[4] All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner "that promotes public confidence in the independence, integrity, and impartiality of the judiciary," and must "avoid impropriety and the appearance of impropriety."[5] This requires that the judge be sensitive to the appearance of relationships with others.

The Model Code requires judges to "maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives."[6] Thus judges must be very thoughtful in their interactions with others, particularly when using ESM. Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to

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[1] This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2012. The laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] This opinion does not address other activities such as blogging, participation on discussion boards or listserves, and interactive gaming.

[3] Model Code, Preamble [1].

[4] Model Code Rule 1.2 cmt. 2.

[5] Model Code Rule 1.2. *But see* Dahlia Lithwick and Graham Vyse, "Tweet Justice," SLATE (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to "de-friend" her from their ESM page when they're trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), *article available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.

[6] Model Code, Preamble [2].

compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.[7]

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.[8]

A judge who participates in ESM should be mindful of relevant provisions of the Model Code. For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed. The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.

There also may be disclosure or disqualification concerns regarding judges participating on ESM sites used by lawyers and others who may appear before the judge.[9] These concerns have been addressed in judicial ethics advisory opinions in a number of states. The drafting committees have expressed a wide range of views as to whether a judge may "friend" lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.[10] A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.[11] In this regard, context is significant.[12] Simple

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[7] *See* Model Code Rule 1.2 cmt. 3. *Cf.* New York Jud. Eth. Adv. Op. 08-176 (2009) (judge who uses ESM should exercise appropriate degree of discretion in how to use the social network and should stay abreast of features and new developments that may impact judicial duties). Regarding new ESM website developments, it should be noted that if judges do not log onto their ESM sites on a somewhat regular basis, they are at risk of not knowing the latest update in privacy settings or terms of service that affect how their personal information is shared. They can eliminate this risk by deactivating their accounts.

[8] Jeffrey Rosen, "The Web Means the End of Forgetting", N.Y. TIMES MAGAZINE (July 21, 2010) *accessible at* http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all.

[9] *See, e.g.,* California Judges Ass'n Judicial Ethics Comm. Op. 66 (2010) (judges may not include in social network lawyers who have case pending before judge); Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (2009) (judge may not include lawyers who may appear before judge in social network or permit such lawyers to add judge to their social network circle); Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (judges should be mindful of "whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship'" that should be disclosed and/or require recusal); Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline Op. 2010-7 (2010) (judge may have ESM relationship with lawyer who appears as counsel in case before judge as long as relationship comports with ethics rules); South Carolina Jud. Dep't Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2009 (magistrate judge may have ESM relationship with lawyers as long as they do not discuss anything related to judge's judicial position). *See also* John Schwartz, "For Judges on Facebook, Friendship Has Limits," N.Y. TIMES, Dec. 11, 2009, at A25. *Cf.* Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-04 (2010) (judge's judicial assistant may add lawyers who may appear before judge to social networking site as long as the activity is conducted entirely independent of judge and without reference to judge or judge's office).

[10] *See* discussion in Geyh, Alfini, Lubet and Shaman, JUDICIAL CONDUCT AND ETHICS (5th Edition, forthcoming), Section 10.05E.

[11] California Judges Assn. Judicial Ethics Comm. Op. 66 (need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent). *See also* New York Jud. Eth. Adv. Op. 08-176 (judge must consider whether any online connections, alone or in combination with other facts, rise to level of close social relationship requiring disclosure and/or recusal); Ohio Opinion 2010-7 (same).

[12] Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-06 (2010) (judge who is member of voluntary bar association not required to drop lawyers who are also members of that organization from organization's ESM site; members use the site to communicate among themselves about organization and other non-legal matters). *See also* Raymond McKoski,

designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person. [13]

Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.[14] The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally. [15] A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification.[16] For example, a judge may decide to disclose that the judge and a party, a party's lawyer or a witness have an ESM connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge's ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.

Judges' Use of Electronic Social Media in Election Campaigns

Canon 4 of the Model Code permits a judge or judicial candidate to, with certain enumerated exceptions, engage in political or campaign activity. Comment [1] to Rule 4.1 states that, although the Rule imposes "narrowly tailored restrictions" on judges' political activities, "to the greatest extent possible," judges and judicial candidates must "be free and appear to be free from political influence and political pressure."

Rule 4.1(A)(8) prohibits a judge from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4. The Code does not address or restrict a judge's or campaign committee's method of communication. In jurisdictions where judges are elected, ESM has become a campaign tool to raise campaign funds and to provide information about the candidate.[17] Websites and ESM promoting the candidacy of a judge or judicial candidate may be

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"Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from 'Big Judge Davis'," 99 KY. L.J. 259, 291 (2010-11) (nineteenth century judge universally recognized as impartial despite off-bench alliances, especially with Abraham Lincoln); Schwartz, *supra* note 9 ("Judges do not drop out of society when they become judges.... The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.") (quoting New York University Prof. Stephen Gillers).

[13] *See* Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (designation as an ESM follower does not, in and of itself, indicate the degree or intensity of judge's relationship with the person).

[14] *See, e.g.*, New York Judicial Ethics Advisory Opinion 08-176, *supra* n. 8. *See also* Ashby Jones, "Why You Shouldn't Take It Hard If a Judge Rejects Your Friend Request," WALL ST. J. LAW BLOG (Dec. 9, 2009) ("'friending' may be more than say an exchange of business cards but it is well short of any true friendship"); Jennifer Ellis, "Should Judges Recuse Themselves Because of a Facebook Friendship?" (Nov. 2011) (state attorney general requested that judge reverse decision to suppress evidence and recuse himself because he and defendant were ESM, but not actual, friends), *available at* http://www.jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/.

[15] *See* Jeremy M. Miller, "Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)," 33 PEPPERDINE L. REV. 575, 578 (2012) ("Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge").

[16] Rule 2.11 cmt. 5.

[17] In a recent survey, for judges who stood for political election, 60.3% used social media sites. 2012 CCPIO New Media and Courts Survey: A Report of the New Media Committee of the Conference of Court Public Information Officers (July 31, 2012), *available at* http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/.

established and maintained by campaign committees to obtain public statements of support for the judge's campaign so long as these sites are not started or maintained by the judge or judicial candidate personally.[18]

Sitting judges and judicial candidates are expressly prohibited from "publicly endorsing or opposing a candidate for any public office."[19] Some ESM sites allow users to indicate approval by applying "like" labels to shared messages, photos, and other content. Judges should be aware that clicking such buttons on others' political campaign ESM sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office.[20] On the other hand, it is unlikely to raise an ethics issue for a judge if someone "likes" or becomes a "fan" of the judge through the judge's ESM political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.

Judges may privately express their views on judicial or other candidates for political office, but must take appropriate steps to ensure that their views do not become public.[21] This may require managing privacy settings on ESM sites by restricting the circle of those having access to the judge's ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

Conclusion

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.

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[18] Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-28 (July 23, 2010).
[19] Model Code Rule 4.1(A)(3).
[20] *See* "Kansas judge causes stir with Facebook `like'," The Associated Press, July 29, 2012, *available at* http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook__like_.html.
[21] *See* Nevada Comm'n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) ("In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.").

FLORIDA SUPREME COURT

Judicial Ethics Advisory Committee

Opinion Number: 2009-20
Date of Issue: November 17, 2009

ISSUES

Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend."

ANSWER: No.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may post material on the committee's page on a social networking site, if the publication of the material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may establish a social networking page which has an option for persons, including lawyers who may appear before the judge, to list themselves as "fans" or supporters of the judge's candidacy, so long as the judge or committee does not control who is permitted to list himself or herself as a supporter.

ANSWER: Yes.

FACTS

Social networking sites, such as Facebook, MySpace, and LinkedIn, generally serve two functions, as exemplified by the questions posed by the inquiring judge. First, the site can be used by the member simply to post pictures, comments, and other material that visitors to the site can view. Second, the site can also be used to identify a member's "friends". The member of the social network must approve a person who requests to be identified as the member's "friend".

When used simply to post materials, social networking sites are similar to an internet webpage where information is posted and made accessible for the public to view. Certain social networking sites permit the member to set levels of privacy permitting the member to restrict information, including the identification of the member's "friends", to certain visitors to the member's page. For example, the member might be permitted to set the privacy settings in a manner such that only the member's "friends" could see the names of the member's other "friends".

In the social network, a "friend" may post comments and links to other websites on the member's home site, known as the member's "wall." The member may reply to these postings or delete them, but they will remain on the member's site until deleted. The "friend's" comments will be visible to anyone the member permits to view the site.

The Facebook website contains the following explanations about "friends" and privacy concerns:

- Your friends on Facebook are the same friends, acquaintances and family members that you communicate with in the real world.
- We built Facebook to make it easy to share information with your friends and people around you.
- We understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information. Our default privacy settings limit the information displayed in your profile to your networks and other reasonable community limitations that we tell you about.
- Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that restrict other users from accessing your information. We allow you to choose the information you provide to friends and networks through Facebook. Our network architecture and your privacy settings allow you to make informed choices about who has access to your information.

(**http://www.facebook.com/policy.php?ref-pf**)

Political campaigns may also establish pages on social networking sites which allow users to list themselves as "fans" or supporters of the candidate. However, as the practice exists on Facebook, the campaign is not required to accept or reject a "fan" in order for their name to appear on the campaign's Facebook page. Anyone desiring to be listed as a "fan" may do so unilaterally, without the campaign's knowledge or consent.

DISCUSSION

The first and third questions above, relating to the posting of materials by either the judge or the campaign committee are answered in the affirmative because they relate only to the method of publication. The Code of Judicial Conduct does not address or restrict a judge's or campaign committee's method of communication but rather addresses its substance. Therefore, this proposed conduct, whether by the judge or the campaign committee, does not violate the Code of Judicial Conduct. Of course, the substance of what is posted may constitute a violation. The Committee has previously concluded that campaign committees may establish websites for otherwise permitted campaign purposes. Fla. JEAC Op. **99-26**. See also Fla. JEAC Opns. **00-22** and **08-11** related to campaign activities and internet websites.

However, the second question poses a fundamentally different issue because the inquiring judge proposes to permit lawyers who may appear before the judge to be identified as "friends" on the judge's social networking page. Similarly, the inquiring judge contemplates the lawyers who may appear before the judge will list the judge as a "friend" on their pages, such listing requiring the consent of the judge in order to take effect.

The inquiring judge proposes to identify lawyers who may appear in front of the judge as "friends" on the judge's page and to permit those lawyers to identify the judge as a "friend" on their pages. To the extent that such identification is available for any other person to view, the Committee concludes that this practice would violate Canon 2B.

> Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

With regard to a social networking site, in order to fall within the prohibition of Canon 2B, the Committee believes that three elements must be present. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page. Third, the identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. It is this selection and communication process, the Committee believes, that violates Canon 2B, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.[1]

While judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities, some restrictions upon a judge's conduct are inherent in the office. Thus, the Commentary to Canon 2A states:

"Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

A judge's participation in a social networking site must also conform to the limitations imposed by Canon 5A, which provides:
"A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
2. undermine the judge's independence, integrity, or impartiality;
3. demean the judicial office;
4. interfere with the proper performance of judicial duties;
5. lead to frequent disqualification of the judge; or
6. appear to a reasonable person to be coercive."

The Committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the

lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

The Committee notes, in coming to this conclusion, that social networking sites are broadly available for viewing on the internet. Thus, it is clear that many persons viewing the site will not be judges and will not be familiar with the Code, its recusal provisions, and other requirements which seek to assure the judge's impartiality. However, the test for Canon 2B is not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge. Viewed in this way, the Committee concludes that identifying lawyers who may appear before a judge as "friends" on a social networking site, if that relationship is disclosed to anyone other than the judge by virtue of the information being available for viewing on the internet, violates Canon 2(B).

The inquiring judge has asked about the possibility of identifying lawyers who may appear before the judge as "friends" on the social networking site and has not asked about the identification of others who do not fall into that category as "friends". This opinion should not be interpreted to mean that the inquiring judge is prohibited from identifying any person as a "friend" on a social networking site. Instead, it is limited to the facts presented by the inquiring judge, related to lawyers who may appear before the judge. Therefore, this opinion does not apply to the practice of listing as "friends" persons other than lawyers, or to listing as "friends" lawyers who do not appear before the judge, either because they do not practice in the judge's area or court or because the judge has listed them on the judge's recusal list so that their cases are not assigned to the judge.

A minority of the committee would answer all the inquiring judge's questions in the affirmative. The minority believes that the listing of lawyers who may appear before the judge as "friends" on a judge's social networking page does not reasonably convey to others the impression that these lawyers are in a special position to influence the judge. The minority concludes that social networking sites have become so ubiquitous that the term "friend" on these pages does not convey the same meaning that it did in the pre-internet age; that today, the term "friend" on social networking sites merely conveys the message that a person so identified is a contact or acquaintance; and that such an identification does not convey that a person is a "friend" in the traditional sense, i.e., a person attached to another person by feelings of affection or personal regard. In this sense, the minority concludes that identification of a lawyer who may appear before a judge as a "friend" on a social networking site does not convey the impression that the person is in a position to influence the judge and does not violate Canon 2B.

The question then remains whether a campaign committee may establish a social networking page which allows lawyers who may practice before the judge to designate themselves as "fans" or supporters of the judge's candidacy.

To the extent a social networking site permits a lawyer who may practice before a judge to designate himself or herself as a fan or supporter of the judge, this practice is not prohibited by Canon 2B, so long as the judge or committee controlling the site cannot accept or reject the lawyer's listing of himself or herself on the site. Because the judge or the campaign cannot accept or reject the listing of the fan on the campaign's social networking site, the listing of a lawyer's name does not convey the impression that the lawyer is in a special position to influence the judge.

Although Facebook has been used as an example in this opinion, the holding of the opinion would apply to any social networking site which requires the member of the site to approve the listing of a "friend" or contact on the member's

site, if (1) that person is a lawyer who appears before the judge, and (2) identification of the lawyer as the judge's "friend" is thereafter displayed to the public or the judge's or lawyer's other "friends" on the judge's or the lawyer's page.

REFERENCES

Florida Code of Judicial Conduct: Canon 2B; Commentary to Canon 2A.
Florida Judicial Ethics Advisory Committee Opinions: **99-26**, **00-22**, and **08-11**.

The Judicial Ethics Advisory Committee is expressly charged with rendering advisory opinions interpreting the application of the Code of Judicial Conduct to specific circumstances confronting or affecting a judge or judicial candidate.

Its opinions are advisory to the inquiring party, to the Judicial Qualifications Commission and the judiciary at large. Conduct that is consistent with an advisory opinion issued by the Committee may be evidence of good faith on the part of the judge, but the Judicial Qualifications Commission is not bound by the interpretive opinions by the Committee. See *Petition of the Committee on Standards of Conduct Governing Judges*, 698 So. 2d 834 (Fla. 1997). However, in reviewing the recommendations of the Judicial Qualifications Commission for discipline, the Florida Supreme Court will consider conduct in accordance with a Committee opinion as evidence of good faith. See *Id.*

The opinions of this Committee express no view on whether any proposed conduct of an inquiring judge is consistent with the substantive law which governs any proceeding over which the inquiring judge may preside. This Committee only has authority to interpret the Code of Judicial Conduct, and therefore its opinions deal only with the issue of whether the proposed conduct violates a provision of that Code.

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[1] By way of contrast, many other websites do not have these characteristics and a judge's use of them does not conflict with Canon 2B. For example, there are many subject matter websites which people with similar interests use to communicate with one another. Parents of students in a particular club or organization in a high school, for

example, may register as a part of a parent group, with the names of all of the members of the group being visible to all of the other members. Similarly, persons with an interest in studying a particular subject, or members of a club, might be a part of a group on a website, with the names of the members visible to one another, or to the public at large. However, even if a judge is listed on one of these sites, and even if a lawyer who appears before the judge is also listed, Canon 2B is not implicated because the judge did not select the lawyer as a part of the group, nor have the right to approve or reject the lawyer's being listed in the group. The only message conveyed to a person viewing the website would be that both the judge and the lawyer both have children in the band, or are both interested in the study of a particular subject. Because the judge played no role in the selection of the lawyer whose name appears on the website, no impression is afforded to those who view the website that the lawyer is in a special position to influence the judge.

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January, 2010 Volume 84, No. 1

Journal HOME

Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers

by Ralph Artigliere, Jim Barton and Bill Hahn

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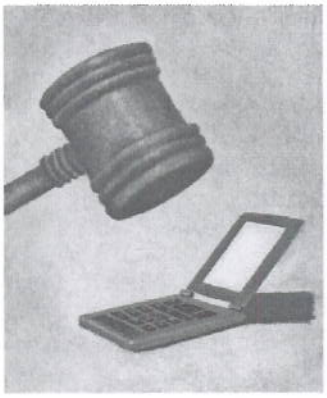


Juror misconduct[1] is not a recent problem.[2] Despite instructions from trial judges to the contrary, jurors have been too often tempted to access information from outside the courtroom.[3] Years ago, one solution to the elimination of outside influence on jurors was sequestration. Sequestration is still used in noncapital criminal cases in Florida at the trial court's discretion and is required in death penalty cases, absent waiver or special circumstances.[4] In civil cases, however, economics, not to mention inconvenience and discomfort to jurors, has all but eliminated sequestration as a viable method to prevent contact with the outside world.[5]

Why is juror misconduct on the rise? Consider the setting for today's jurors. Most jurors enter a place and a system they know little about, except through cultural sources of the press, television, movies, and now the digital media. Many of them, perhaps most, will have at least a cell phone, and an increasing number of jurors will have equipment and habits that keep them in audio, text, and visual media contact with the world and other people through phone or Internet. Some will be extremely attached, to the point of dependence, on their phone, iPod, Blackberry, or other device, a form of behavior that is a product of relatively recent cultural shifts and is fully understood only by others with similar techno-savvy skills and behavior. Judges and lawyers should take into account the motivation, capability, or dependence of such jurors on their equipment.[6] Some jurors will want to text what they are doing at any given moment and why they are doing it to friends, family, and thousands of strangers. To say that current jurors have enhanced temptation and ability to communicate about the trial with the outside world is the understatement of this still young century. Jurors have the capability instantaneously to tweet, blog, text, e-mail, phone, and look up facts and information during breaks, at home, or even in the jury room if they are allowed to keep their digital "windows to the world." Jury instruction by the judge about communication outside the courtroom has not kept pace with technology.[7]

The problem of outside influence on jurors is no longer confined to high profile cases that are covered in the press or other media. Courtroom misconduct seems to be everywhere. Recently, a witness in Miami was discovered texting his boss about his testimony during a sidebar conference resulting in a mistrial;[8] a South Dakota juror in a seat belt product liability case Googled the defendant and informed five other jurors that the defendant had not been sued previously;[9] a juror in a federal corruption trial in Pennsylvania posted his progress during deliberations on the Internet resulting in a motion for mistrial;[10] a juror in Bartow, Florida, looked up a defendant's "rap sheet" online and told fellow jurors, resulting in a mistrial; and jurors in a Florida criminal case made anti-Semitic comments to each other and consulted one of the jurors' accountants during deliberations by telephone.[11] Nine of the jurors on a deliberating panel in a federal case in Miami admitted to the judge that they had been doing research on the case over the Internet, resulting in a mistrial.[12] The judge learned that the jurors were Googling the lawyers and the parties, finding news articles about the case, researching definitions and information on Wikipedia, and looking for evidence that had been excluded in the case. All this was accomplished despite the judge's repeated instruction not to do so.[13] These examples represent recent transgressions that were *discovered*, and probably represent just the tip of the iceberg of juror behavior.[14]

Another dilemma is that jurors digitally linked to the outside world may receive unsolicited information relating to the trial from friends and family who know about their jury service. They may receive texts or e-mails inquiring about how the case is going or whether it is interesting. Outsiders thinking they are being helpful may forward articles or other materials they have found on the Internet to jurors. Texts or tweets may include unwanted advice or input of the "hang that crook!" variety. It will be hard for the juror *not* to read such incoming material. Thus, a juror who does not intend to go looking for information or influencing commentary from others gets it anyway.

Improper juror communication and research are only part of the problem. Another insidious type of juror misconduct is misrepresentation or disinformation provided to the judge and lawyers in qualification and voir dire. Deception during voir dire deprives the examining attorneys and the judge of the opportunity to obtain accurate information for challenges for cause and peremptory challenges. The level of deception ranges from jurors who puff their qualifications or hide or gloss over information to avoid embarrassment to "stealth jurors" on a mission and willing to lie to get on the jury in order to carry out an objective for or against one of the parties. Regardless of motive, jurors who betray their oath as jurors subvert the jury system and threaten the fairness of the process.

Remedies for Juror Misconduct Are Inadequate

When discovered, juror misconduct raises the potential of a mistrial or new trial.[15] The parties have a fundamental right to a proper jury, and juror misconduct invokes issues of fairness and due process.[16] However, before granting a new trial, the trial judge and lawyers must accurately get to the bottom of the circumstances of misconduct through investigation and interview of the juror or jurors if necessary.[17] When the claimed misconduct involves improper juror research, under the evidence code, the court must determine whether the misconduct was inherent in or external to juror deliberations.[18] A juror interview will not be granted unless the judge determines that the movant's affidavits establish that juror misconduct occurred as a result of some outside influence, such as the receipt of nonrecord evidence. To merit a new trial, the result of the juror interview must confirm actual juror misconduct involving an external influence.[19]

For alleged juror deception during voir dire, the judge must apply a three-part test set forth in the Florida Supreme Court case of *De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995): "[T]he complaining party must establish: 1) the information is relevant and material to jury service in the case; 2) the juror concealed the information during questioning; and 3) the failure to disclose the information was not attributable to the complaining party's lack of diligence."[20] Intentional or not, deception during voir dire warrants a new trial only if counsel was prevented from making an informed judgment that likely would have led to a peremptory challenge.[21]

The very real problem is that even if the illegal behavior is discovered, and if the court can be convinced to interview jurors, and if the *De La Rosa* standards or outside influence are established, the remedy is a new trial, an unhappy and costly outcome for both sides. Without question, the best solution is to prevent juror misconduct in the first place, or at least to reduce its incidence as much as possible.

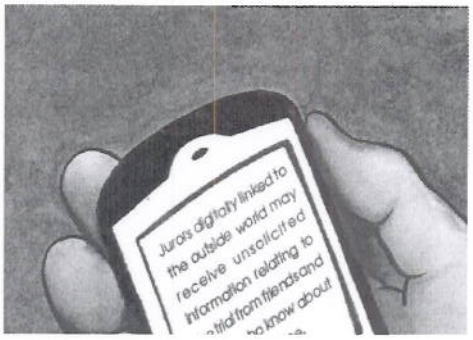
How to Head Off Juror Misconduct

Juror misconduct may occur intentionally or through juror ignorance or oversight. Perhaps better, clearer, and more comprehensive jury instructions would help motivate most jurors to avoid mistaken misconduct. Of course, regardless how clear an instruction is, it may not be enough to prevent intentional misconduct. Jurors need to know the consequences of their misconduct. Toward that end, the standard jury instructions already reference perjury during voir dire.[22] Moreover, in a letter dated August 26, 2009, Justice Fred Lewis requested that the Florida civil and criminal jury instruction committees consider and jointly propose a "uniform approach [to the problem of electronic communications and research by jurors during the case] along with uniform jury instructions to be used in all cases" by January 11, 2010. In his letter, Justice Lewis referenced a new Michigan rule requiring the judge to instruct against the use of electronic devices at the time the panel is sworn.[23] It remains to be seen what results from this request.

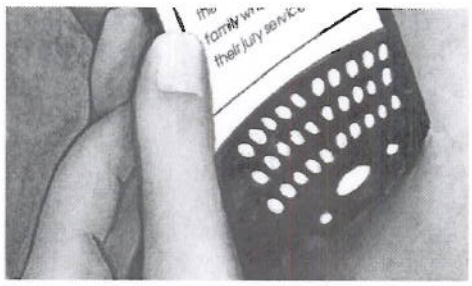
In the meantime, should the judge or parties do more? For example, the judge or lawyers could inform the jurors that the lawyers will be checking on them to see whether jurors were truthful in voir dire. The disadvantage is the potential of creating a hostile atmosphere in court, where such does not need to exist. Who would not feel uncomfortable with such a representation? Likewise, specifically delineating what activities are prohibited may be counterproductive. First, the off-limits behavior may not otherwise occur to jurors until the judge raises it. By instructing on what not to research, jurors may speculate on what the judge and lawyers are keeping from them.[24] Worse yet, some jurors may experience what has been termed the "reactance effect," when denying jurors freedom causes them to try to obtain the forbidden information.[25] That approach could result in conjecture or, worse yet, suggestion of research for jurors subject to temptation. Judicial instruction should be tempered with these potential downsides in mind. But something can and should be done to improve judge and lawyer communication with jurors about juror misconduct.

This article suggests tempered enhancement of the standard jury instructions and practical methods for judges and lawyers to express clearly to jurors what is expected of them. Good communication with jurors is more than words: It is timing, delivery, and creating the best climate for juror acceptance of the message. Jurors should hear the message, understand it, and be motivated to follow the instructions. This goal is best accomplished if the jurors are as comfortable as possible, and the judges and lawyers present a congruent and clear message with reasonable and consistent reminders throughout the trial. It helps if the judge tells jurors they will be held accountable for their behavior without threat or intimidation. And yes, all of this instruction needs to fit in the context of all the other important things the jurors need to hear about the case, because brevity and scale are important.

Practical Ways to Prevent Improper Juror Communication and Research



Judges around the state take different approaches in addressing juror misconduct. In the end, every judge and lawyer must employ the tools and use words that fit their character, personality, and ability, but some approaches that stand out are mentioned here. Regardless of the measures taken in court, jurors will have their equipment plus their computer and other temptations outside the courtroom during overnight and other recesses. Nonetheless, some judges have started to remove distraction and temptation during court time and deliberations by taking charge of jurors' phones, iPods, and other devices.[26] To alleviate juror anxiety, these judges give jurors an emergency court telephone number so loved ones can reach them in a true emergency. Other judges simply require electronic equipment to be turned off in the courtroom and to be turned in to the bailiff during deliberations. Some judges are still reluctant



to take charge of the juror's property and lifeline to their loved ones at all and instead admonish jurors against improper use of the equipment in trial and in deliberations. It is hard to see how allowing electronic equipment during deliberations squares with removal of magazines, calendars, calculators, and other sources of information from the jury room. Many "phones" have calculators and access to far more potentially damaging information on the Internet, not to mention the distractions of e-mail, games, and phone contacts while jurors are trying to deliberate.

What is the correct message to send jurors about research and communication? Part of the answer, of course, is already in the standard jury instructions. A few years ago, the word "Internet" was added to combat the danger that jurors may go beyond the traditional media to a bountiful and available source of interesting information about the parties, lawyers, judge, or the case.[27] Basically, jurors are told not to talk with anyone about the case or to allow anyone to talk with them. They are asked not to talk to each other about the case and not to read or hear or look up anything from any source outside the courtroom, including the Internet.[28] Does that mean jurors should not put their experience on Facebook as it unfolds? Can they text it to friends and tell recipients not to respond? Clearly, all of this is off limits, but some jurors seem to transgress all the time these days. Do they know they are doing wrong?[29] Can we do a better job of communicating? Can we remove some of the temptation? Yes, we can.

There are probably more complete instructions that can be given to today's juror than the current standard instruction.[30] The Florida Supreme Court Standard Jury Instruction Committee (Civil) is already working on enhancements to the standard instructions to arm judges with clear, concise, more comprehensive instructions to combat what seems to be a wave of juror misconduct.[31] But standard instructions take time for drafting, presentation to the court, publication to the Bar, and consideration and acceptance by the Supreme Court.[32] Thus, even apart from the standard instructions, judges and lawyers can prepare and use their own instructions to address this problem, as long as they are consistent with the law (if not objected to) or deemed necessary and appropriate for the case by the judge and justified as such in the record.[33]

Some judges are already enhancing the standard instructions on their own.[34] Many judges employ repetition in the form of brief reminders during the trial. For example, the judge may tell jurors early on that he or she will be checking back with them to make sure they have been following instructions. Then the judge follows up by briefly reminding before, or questioning after, certain recesses or all recesses, depending on the length of the trial and the judge's feel for the jury. The judge, after greeting the jurors, can simply ask, "Have you been able to follow all my instructions, including not discussing the case and not doing any research? Has anyone contacted you or have you contacted anyone or done any writing or research on the case?"[35]

Some judges tell jurors *why* it is important to follow the instructions. Many jurors respond better to direction if they understand the reason the requirement has been placed on them. The judge may briefly explain sequestration and how it was used in the past to prevent outside influences. Then the jurors are told that, instead of sequestration, we rely on the jurors as part of their duties to remain free from outside influences and information. This admonition places on the jurors themselves the responsibility to keep free from outside influence. Further, just prior to swearing the jury, the judge can once again explain the instructions the jurors must follow about equipment, communication, and research in detail, ask if there are any questions, and then ask if any juror cannot follow the instructions throughout the entire trial. Getting individual responses from each juror emphasizes the requirement and commits each juror about as well as can be done. Another tactic is to "empower" all jurors to report transgression by informing them of their duty to report any violation of the court's instructions, including any communication of any juror with the outside about the case or any attempt to bring into court information from outside the trial.

If there is a concern about incoming messages during trial, perhaps judges could give jurors the following suggestion for an outgoing e-mail, text, and/or tweet that they can immediately send to friends and family right after they are sworn in:

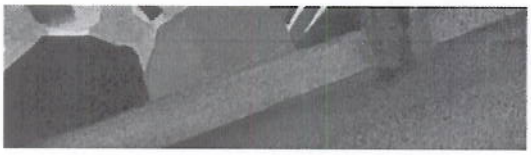
I am sending this note to you as instructed by Judge _____. I am now a sworn juror in a trial. I am sequestered. This means I am not allowed to read or comment upon anything having to do with the subject of the trial, the parties involved, the attorneys, or anything else related to my service as a juror. Please do not send me any materials; don't e-mail, text, or tweet me any questions or comments about this case or my service as a juror. Please do not text or e-mail me during the course of this trial except in an emergency. I will send you a note when I am released from my duty as a juror.

Jurors could leave a variation of this message as the greeting in their voice mail during their service, including an emergency number for use by a caller when warranted. They could then turn off their phones for as long as necessary.

Most of all, judges and trial lawyers should regain control by changing the fabric of jury duty. Jurors should be required to take personal responsibility for "sequestering" themselves and for ensuring that the jury as a whole performs its duty untainted from influences outside the trial. The goal is to eliminate inadvertent misbehavior and reduce intentional misconduct as much as possible. Clear instructions, reducing temptation, motivating, and empowering jurors are steps toward the goal.

How to Minimize Juror Misconduct During Voir Dire

Both sides suffer from trying a case twice when a jury member has intentionally withheld information that would have resulted in either a cause or peremptory challenge. Worse yet, the misinformation may not be discovered, or if it is, the imperfect system for remedy does not result in a new trial. This is not a new problem, and it continues to occur. We live in a culture in which media figures on one side or another of a cultural debate may incite listeners or viewers to get on juries to achieve their social agenda through their



verdict. These potential jurors are coached not to disclose strong feelings they may have about certain subjects even if the lawyers ask about them. Lawyers term such jurors as "stealth jurors" who remain "under the radar" of the lawyers and judge. Certainly, some jurors inadvertently withhold information, a problem that is no less toxic to a fair trial,[36] but one for which there are clearer and more direct solutions.

Dealing with the lesser of two evils first, how can trial lawyers and judges prevent, or at least reduce, as much as possible inadvertent nondisclosure? As a start, the judge needs to give the standard instruction which gives the breadth and consequences of responsibility for telling the whole truth by honest answers and not leaving the wrong impression through failing to respond.[37] When explaining the voir dire process to jurors, the judge should instruct the venire to make sure that they understand the questions and, if not, to ask for clarification. The venire should be informed that if they have a doubt about whether to disclose something, that they should make the disclosure and let the judge or lawyers sort out whether it is important. Finally, a technique that one judge used in voir dire was to tell jurors:

> There is no such thing as "forever hold your peace" in a trial. Even after giving an answer, if something someone else says jogs a memory or a more complete response, tell us about it. This is true any time up to the end of the case and beyond. The accuracy of your answers is that important. For example, we will read you a list of witnesses' names to see if you know any witness. Let's say you don't recognize the name of a witness until the witness appears in trial a couple days from now and you then realize you know the witness. You should tell us then and there to correct your answer.[38]

This approach does two things: It encourages jurors to correct mistakes in their answers, and it emphasizes the importance of absolute truth in the process.

Trial lawyers can help avoid problems with inadvertent nondisclosure by conducting crisp, pertinent, and thorough questioning. Lawyers who ask unnecessary questions distract and annoy jurors and the judge. This makes it less likely that the judge will be tolerant of extended or somewhat repetitive questioning when the lawyer feels it is necessary. If every juror is polled on general issues (such as "Can you be fair and impartial?"), or on issues the judge has already covered, voir dire will be lengthy, boring, and ineffective. Save individual polling of each juror for the important information. If there is any inkling of a juror missing the point of a question, the lawyer must diligently pursue the matter until it is clear the juror understands the question and is being responsive. Doing less may not only fail to elicit the answer you need to make a challenge, it may eliminate your remedy under the third prong of the *De La Rosa* test, in which the failure to disclose must not be a result of a lack of diligence on the part of the requesting party.[39]

Discovering and eliminating a juror who is on a mission is an art for trial lawyers, as they must look for subtle clues and inconsistencies to ferret out what the juror will not tell them. The judge can be of assistance in this difficult task in a number of ways. First, a juror may be more forthcoming if questions are coming from the judge rather than the lawyer (whom a juror may tacitly dislike and distrust). For example, if the issue is how a juror feels about personal injury attorneys or lawsuits, the juror may be more inclined to discuss the issue when the judge asks the questions, especially if the judge is asking the question of the entire panel with followup when some jurors give their honest response.[40] Depending on the judge, lawyers may request that certain sensitive questions be put to jurors, at least at first, by the judge.[41] This subject should be discussed and resolved at the pretrial conference.

Second, the judge must give the lawyers sufficient time in voir dire to deal thoroughly with weighty issues. Lawyers can help the judge make the right decision on time allotted by not wasting time, by clearly expressing far enough in advance why a certain amount of time is needed for voir dire, and by requesting additional time during voir dire as soon as unexpected complications arise. If the judge is going to limit time in voir dire, the limits must be reasonable and should preferably be announced at the pretrial conference.[42]

Finally, in the interest of a fair trial, the judge and lawyers need to be cognizant of incongruent behavior or responses with regard to key issues. Uncovering, or even sensing, answers that do not square with other responses, or behavior such as facial expressions inconsistent with answers to certain questions or cooperation with one attorney and hostility toward another should lead to further questioning and, if necessary, a peremptory challenge. If the behavior is acknowledged for the record by the judge, request a challenge for cause or an additional peremptory challenge.[43]

Another approach during voir dire is for the trial lawyer to remind the jurors what the judge said in the beginning about truthfulness, the consequences of untruth, and the fact that an incomplete answer or lack of an answer can be just as much of an untruth as a false answer. If necessary, the trial lawyer can inform jurors that whoever loses in the case will investigate the answers given by the jurors to see if they were truthful. This seems drastic, but it may get some jurors' attention. The only question is whether the lawyer believes the downside of telling the juror about post verdict investigation will do more harm with the jurors as a whole than it will help eliminate a less than truthful juror.

Regardless of the care taken by the judge and the trial lawyers, stealth jurors with coaching or knowledge of how to avoid giving answers that will cause them to be taken off the panel may make it to the jury. For that reason, some lawyers inform jurors that each one of them has a duty not to be influenced by anything outside the evidence in the case. They encourage the jurors to disclose any improper conduct of fellow jurors when it occurs, including information about a juror that they may learn is not consistent with what the juror said in voir dire. Again, this is drastic. Whether it is worth the risk is up to the lawyer. If it draws an objection, some judges may not like the way the message is delivered, if not the underlying message. One can always discuss the issue with the judge first.[44]

Planning for Success

By now it should be clear that the authors consider addressing juror misconduct to be a team affair involving the lawyers and the judge. Lawyers should find out about the judge's propensities and preferences in advance from colleagues and by raising specific issues on the subject at the pretrial conference. Prepare requested jury instructions in advance and ask the judge to be proactive in heading off potential misconduct. Trial lawyers and judges should share methods that work and should warn of those that do not, both informally and in judicial and continuing legal education conferences. Failure to

consider and adapt to the evolution of cultural and technological impacts on juror behavior risks your case being one of the examples of unnecessary injustice and cost.

Conclusion

Because juror misconduct threatens the fundamental fairness of a trial and is a due process issue, judges and trial lawyers should consider methods supplemental to the current standard and routine jury instructions throughout the trial. Practical methods to reduce juror temptation, such as taking away cell phones and other digital devices during deliberations, are needed in light of the current culture and technology that constantly connect jurors to other people and the Internet. Clear, strong instructions with follow up and reminders from the judge and the lawyers that clearly define right from wrong and disclose the consequences to jurors are part of the solution to reduce as much misconduct as possible. While the standard instructions are being considered for revision, judges and lawyers must be attuned to ways to minimize intentional or unintentional behavior which, left unchecked and unaddressed, will undermine fairness of jury trials. Judges and lawyers who learn better ways to address these issues should share them with the common goal of eliminating as much juror misconduct as possible from trials.

[1] For purposes of this article, juror misconduct is intentional or unintentional behavior by jurors in contravention of jury instructions, including 1) exchanging information about the case with persons or sources outside the courtroom or jury room, or 2) providing misinformation or disinformation during voir dire.

[2] *Miami v. Bopp*, 158 So. 89 (Fla. 1934) (order granting new trial affirmed where jury verdict was influenced by consideration of matters outside the evidence brought about by unlawful and illegal means).

[3] *See Keene Bros. Trucking, Inc. v. Pennell*, 614 So. 2d 1083, 1084 (Fla. 1993) (juror who was an accountant brought an accounting textbook into jury room and referred to it during deliberations resulting in a mistrial).

[4] *See* Fla. R. Crim. P. 3.370.

[5] If jurors are to be sequestered, the pool of available jurors decreases substantially, and those who participate tend to develop personal problems that lead to departure from the jury, increasing the chances of a mistrial. Change in our culture caused sequestration to fall into disuse in Florida civil cases and elsewhere. In Arizona, for example, a court committee on jury management found that no one could remember sequestration occurring in the past 20 years. *See* Arizona Judicial Branch, Guidelines for Sequestration of Jurors, http://www.supreme.state.az.us/jury/Jury2/jury2n.htm#. Sequestration has fallen into disfavor because the disadvantages outweigh the advantages. Sequestration, American Judicature Society, http://www.ajs.org/jc/juries/jc_privacy_sequester.asp, *citing* Marcy Strauss, *Sequestration*, 24 Am. J. Crim. L. 63 (1996). *But see State ex rel. Miami Herald Pub. Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976) ("inconvenience suffered by jurors who are sequestered to prevent exposure to excluded evidence which may be published in the press is a small price to pay for the public's right to timely knowledge of trial proceedings guaranteed by freedom of the press").

[6] Douglas L. Keene & Rita R. Handrich, *On-line and Wired for Justice: Why Jurors Turn to the Internet*, 21 The Jury Expert 14 (2009), *available at* http://www.astcweb.org/public/publication/article.cfm/1/21/6/Why-Jurors-Turn-to-the-Internet. For some jurors, staying in constant touch with family, friends, and thousands of strangers may be a habit. A great many jurors have mobile research and communication capability that was only a few years ago available only from fixed facilities.

[7] In 2006, the Florida Supreme Court approved changes to the Standard Jury Instructions in Civil Cases adding the words "including the Internet" to prohibitory language regarding research in Preliminary Instruction 1.1. *In re Standard Instructions in Civil Cases*, 943 So. 2d 137 (Fla. 2006). However, Instruction 1.1 is not given until after voir dire is completed and the jury is empanelled and does not specifically address all the current methods of improper communication. The Civil Standard Jury Instructions Committee recently formed a subcommittee to consider additional changes to address the apparent increase in improper juror communication and research. Meanwhile, judicial education and common sense have led judges on their own to exercise their discretion to develop more specific and detailed instruction for jurors on improper communication and research. *See* endnotes 33-34.

[8] Alana Roberts, *Mistrial Declared Over Witness Texting*, Daily Business Review, May 15, 2009, *available at* www.dailybusinessreview.com/Web_Blog_Stories/2009/May/Witness_texting.html. According to the article, the witness' boss was in the courtroom when the texting occurred, and the boss admitted to texting the witness twice. After declaring a mistrial and holding further hearing, the trial judge dismissed the case with prejudice and awarded fees and costs to the defendant as a sanction for the party's intentional misconduct of witness tampering. *See* the unpublished *Order Granting Defendant's Motion to Dismiss and Motion for Attorney's Fees and Costs*, Case No. 07-32308-CA06 (Fla. 11th Jud. Cir. August 11, 2009) (Silverman, J.).

[9] *Russo v. Takata Corp.*, 2009 SD 83 (S.D. 2009). In *Takata*, a trial judge's order granting a new trial was upheld by the state supreme court. A juror looked up the defendant manufacturer on Google after receiving juror summons, but before voir dire. During deliberations, the juror informed five other jurors that he had Googled the corporation and did not find any prior lawsuits against defendant.

[10] John Schwartz, *As Jurors Turn to the Internet, Mistrials are Popping Up*, N.Y. Times, Mar. 18, 2009, *available at* http://www.nytimes.com/2009/03/18/us/18juries.html. The juror reportedly told his Internet readers that a "big announcement" was coming up Monday.

[11] *The Florida Bar v. Heller*, 473 So. 2d 1250, 1252 (Fla. 1985) (Boyd, C.J. concurring). Chief Justice Boyd described the following "shocking" undisputed jury misconduct during an underlying criminal jury trial: "1) During the trial, several of the jurors made comments showing a substantial anti-Semitic bias. These jurors ridiculed respondent, his attorney, and several of his witnesses because they were Jewish. One of the jurors made a comment using words to the effect that respondent was 'a rich Jew. I say let's hang him.' There were other comments like this, including not only ethnic slurs against Jews but also anti-black racial slurs. 2) Not only did the jurors improperly discuss the facts of the case before hearing all the evidence, but they also expressed their opinions about guilt-or-innocence before hearing all the evidence. The facts alleged by respondent raise a strong inference that the jury prejudged his guilt, in large part because of the religion-based antipathy referred to above. 3) One juror consulted an accountant, a complete stranger to the case, on a question of accounting practice which the juror thought was relevant to the issues, received an answer and reported the extraneous information to the other jurors. There is no way of knowing how this highly improper information affected the jury's deliberations."

[12] John Schwartz, *As Jurors Turn to the Internet, Mistrials are Popping Up*, N.Y. Times, Mar. 18, 2009, *available at* http://www.nytimes.com/2009/03/18/us/18juries.html.

[13] *Id.*

[14] *See* Hoenig, *Juror Misconduct on the Internet*, New York L. J. (October 9, 2009), in which the author notes that juror forays to the Internet are a "growing phenomenon" of unknown magnitude because post-trial interviews are generally forbidden or discouraged.

[15] Fla. R. Civ. P. 1.530; Fla. R. Crim. P. 3.600. *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995) (nondisclosure of prior litigation by juror during voir dire merits new trial); *State v. Matzov*, St. Petersburg Times, August 5, 2009 (mistrial declared in murder trial after jurors admitted discussing evidence).

[16] *Kelly v. The Comm. Hosp. of the Palm Beaches, Inc.*, 818 So. 2d 469, 476 (Fla. 2002).

[17] The ethical and procedural rules for post-verdict interviews of jurors must be strictly followed. Fla. R. Civ. P. 1.431(h); Fla. R. Crim. P. 3.575; Rules of Professional Conduct 4-3.5(d).

[18] Fla. Stat. §90.607(2)(b) (2009) ("Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.").

[19] *Baptist Hosp. of Miami v. Maler*, 579 So. 2d 97, 100 (Fla. 1991).

[20] *Kelly*, 818 So. 2d at 474.

[21] *Id.* at 475.

[22] "You [will take] [have taken] an oath to answer all questions truthfully and completely and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates this oath, it not only may result in having to try the case all over again but also can result in civil and criminal penalties against a juror personally." Fla. Std. J. Inst. 1.0. Not all judges give the standard instruction. Pursuant to Fla. R. Civ. P. Form 1.985, the parties are entitled to the standard instruction if requested, and if the judge fails to give the standard when requested by a party, the judge must make a finding on the record why the standard instruction was not adequate for the given case and the legal basis for the finding. It would be unusual for a judge to refuse to give the standard instruction. The standard instruction is entirely consistent with the law of juror misconduct. "It is the duty of a juror to make full and truthful answers to such questions as are asked him [on the voir dire], neither falsely stating any fact nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct, is prejudicial to the party, for it impairs his right to challenge." *Loftin v. Wilson*, 67 So. 2d 185, 192 (Fla. 1953).

[23] *See* Rule 2.51, Michigan Court Rules (amended June 30, 2009). The Supreme Court Florida Standard Jury Instruction Committee (Civil) is undertaking the task of modifying the standard instructions to address the issues raised in this article.

[24] Jurors often believe that one or another of the parties is trying to keep important evidence out of the case and that they are not being told the "real" truth.

[25] Amy Posey & Lawrence S. Wrightsman, Trial Consulting at 145 (Oxford Univ. Press 2005).

[26] Judge Kest in Orlando reported to the authors that he alleviates the problem of witnesses accessing information on the stand (endnote 8) by requiring witnesses to leave cell phones and communication devices on a small table just inside the bar as they approach the witness stand.

[27] "You cannot obtain any information on your own about the case or about anyone involved in the case, from any source whatsoever, including the Internet...." Fla. Std. J. Inst. 1.1.

[28] *In re Std. Jury Inst. in Civil Cases*, 943 So. 2d 137 (Fla. 2006).

[29] This year while on jury duty, TV weatherman Al Roker tweeted his jury duty experience to others, including pictures of fellow jurors. Roker said he did not realize he was doing wrong. Dareh Gregorian, *Oh What a Twit: Tweeting Roker Sorry for Taking Juror Pix*, The New York Post, May 29, 2009, *available at* http://www.nypost.com/p/news/regional/oh_what_twit_orPeW3RKHabFGbsbXOYCXI.

[30] As part of their "plain English" initiative in jury instructions, California now has the following instruction on the subject of juror communications with others during trial: "Before we begin, I need to explain how you must conduct yourselves during the trial. Do not allow anything that happens outside this courtroom to affect your decision. During the trial, do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and co-workers, spiritual leaders, advisors, or therapists. Do not post any information about the trial or your jury service on the Internet in any form. Do not send or accept any messages, including e-mail or text messages, to or from anyone concerning the trial or your service. You may say you are on a jury and how long the trial may take, but that is all." CACI Instruction 100.

[31] Other states have taken or are considering action to address this problem. In an administrative order issued June 30, 2009, the Michigan Supreme Court ordered trial judges, beginning September 1, 2009, to tell jurors not to improperly use electronic devices during an ongoing trial. MCR 2.511. As a result of an opinion by the Indiana Supreme Court discussing the use of a cellular telephone by a juror during deliberations, the Indiana Judicial Conference's jury committee is drafting a rule limiting jurors' use of electronic devices while deliberations are occurring. Miami Herald, July 31, 2009.

[32] On October 15, 2009, the Standard Jury Instructions Committee (Civil) voted unanimously to recommend to the Supreme Court new standard instructions on communication and research misconduct at various stages of the proceedings, and further to recommend that the potential jurors receive such instruction in the jury assembly room. The Florida Supreme Court has the authority to direct that all potential jurors receive instruction on these subjects in the jury assembly room before they are sent to courtrooms to head off research or communication prior to receiving instructions in the courtroom. Instruction in the courtroom can build on information provided in the jury assembly room.

[33] Fla. R. Civ. P. Form 1.985.

[34] Judges Lucy Chernow Brown and John Kest have been giving more detailed instructions about use of the Internet and the telephone. Judge Brown informed the authors that she instructs jurors they are not to talk to anyone about the case or the lawyers or parties in person, by phone or by tweeting, blogging, texting, e-mailing, writing, or any other method of communication, and they are not to do research or look up anything in books, papers, or on the Internet. Judge Kest provided the authors with a copy of his instruction: "I know that most, if not all of you, have cell phones and that many of those cell phones have computer access. I also suspect that most of you are computer literate — certainly much more than I am. I have cautioned you not to do an independent research and that your verdict must be based on the facts you hear in this courtroom from the witness box and the evidence. Let me extend that caution. You are not to conduct any independent research on computers, your cell phones, or in any other manner. Not the old fashioned kind in encyclopedias, or the newer methods of 'googling' and 'tweeting' on your computer-based research tools. Lastly, you have been advised not to discuss this case with anybody except your fellow jurors and then only when you retire at the conclusion of the case to deliberate. Therefore, you must not e-mail or otherwise electronically contact other people about this case nor seek their opinions, advice, or even thoughts on the issues before you."

[35] There are a number of ways to handle the situation of a juror who admits hearing or reading something. The juror should be questioned further out of the hearing of other jurors to determine if a curative instruction or dismissal from the jury is required or if it is best to ignore the event if it is trivial. The judge and lawyers should confer on the approach and the exact wording to jurors to hopefully develop a measured response to the threat. If appropriate, use the experience to educate the juror or the entire jury on the need to carefully avoid outside influences.

[36] *Brenal v. Lipp*, 580 So. 2d 315, 316-317 (Fla. 3d D.C.A. 1991) ("Although the juror did not intend to mislead plaintiffs' counsel, the omission nonetheless prevented counsel from making an informed judgment — which would in all likelihood have resulted in a peremptory challenge.").

[37] *See* Fla. Std. J. Inst. 1.0, which reads in part: "You have taken an oath to answer all questions truthfully and completely and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates this oath, it not only may result in having to try the case all over again but also can result in civil and criminal penalties against a juror personally."

[38] This language was used by circuit judge (ret.) Ralph Artigliere in criminal and civil trials.

[39] *De La Rosa*, 659 So. 2d at 241.

[40] Typical follow up might be: "Is there anyone else who feels the same as Mr. ____?", or "Does anyone else have strong feelings about this subject?"

[41] The lawyer has the added advantage of not being a lightning rod for contempt by the juror being questioned or others due to sensitive subject matter.

[42] *Carver v. Niedermayer*, 920 So. 2d 123, 125 (Fla. 4th D.C.A. 2006) (holding that "even reasonable limits on juror selection should be made known some fair time before trial begins").

[43] Judges should grant a challenge for cause if there is even a reasonable doubt as to veracity or fairness of a juror. "[I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him [or her] to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by [the] court on its own motion." *Tizon v. Royal Caribbean Cruise Line*, 645 So. 2d 504, 506 (Fla. 3d D.C.A. 1994). However, some judges may be more willing to grant a peremptory challenge to each party to

remedy a situation where the literal responses by the juror in the record do not facially rise to a basis for granting a challenge for cause.

44 When there is suspicion about a juror's motives which persists through the trial of the case, lawyers should consider mentioning in their closing argument that jurors should feel empowered now to do all the things a jury does as well as they can: "studying the evidence, discussing it, considering the testimony, weighing and evaluating thoughtfully and thoroughly..." and including a reminder that they must "police themselves" during deliberations. The key problem behaviors discussed above should be detailed, and the jurors reminded that any attempt to use information improperly gained outside of the evidence from research or other sources, displays of prejudice, "stealth" jurors revealing their true intentions to the other jurors, etc., needs to be reported to the judge.

Ralph Artigliere *graduated with honors from the U.S. Military Academy at West Point and high honors from University of Florida Law School. After 24 years as a civil trial lawyer and seven years as a circuit judge in the 10th Judicial Circuit in Bartow, Artigliere is now retired from the bench but continues to teach judges and lawyers and write on the law. Artigliere was Florida Bar Board Certified Lawyer of the Year in 2007 and The Florida Bar's 2006 Hoeveler Award recipient for judicial professionalism.*

Jim Barton *is a circuit court judge in Hillsborough County, currently serving in the civil division as administrative judge. He received his undergraduate degree from Tulane University and his law degree from Vanderbilt University. He is the vice chair of the Supreme Court Committee on Standard Jury Instructions in Civil Cases.*

Bill Hahn *is an AV-rated, board-certified civil trial lawyer in sole practice with the firm of William E. Hahn, P.A., in Tampa. Since his admission to the Bar in 1972, his practice has involved the trial of complex personal injury matters first for the defense, and now for the plaintiff. He was elected the 2009 Plaintiff's Trial Lawyer of the Year by the Florida chapters of the American Board of Trial Advocates (FLABOTA), a national, invitation-only organization of both plaintiff and defense attorneys.*

[Revised: 02-10-2012]

Journal HOME

FL Supreme Court Standard Jury Instructions – Civil Cases

Section 200 – Preliminary Instructions

QUALIFICATIONS INSTRUCTION

Many of you have cell phones, computers, and other electronic devices. Even though you have not yet been selected as a juror, there are some strict rules that you must follow about using your cell phones, electronic devices and computers. You must not use any device to search the Internet or to find out anything related to any cases in the courthouse.

Between now and when you have been discharged from jury duty by the judge, you must not provide or receive any information about your jury service to anyone, including friends, co-workers, and family members. You may tell those who need to know where you are that you have been called for jury duty. If you are picked for a jury, you may tell people that you have been picked for a jury and how long the case may take. However, you must not give anyone any information about the case itself or the people involved in the case. You must also warn people not to try to say anything to you or write to you about your jury service or the case. This includes face-to-face, phone or computer communications.

In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages, including e-mail and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.

After you are called to the courtroom, the judge will give you specific instructions about these matters. A judge will tell you when you are released from this instruction. All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution of every case.

NOTE ON USE

This instruction should be given in addition to and at the conclusion of the instructions normally given to the prospective jurors. The portion of this instruction dealing with communication with others and outside research may need

to be modified to include other specified means of communication or research as technology develops.

Source: Eleventh Circuit Civil Pattern Jury Instructions (2013)

1. PRELIMINARY INSTRUCTIONS

1.1

General Preliminary Instruction

Members of the Jury:

Now that you've been sworn, I need to explain some basic principles about a civil trial and your duty as jurors. These are preliminary instructions. I'll give you more detailed instructions at the end of the trial.

The jury's duty:

It's your duty to listen to the evidence, decide what happened, and apply the law to the facts. It's my job to provide you with the law you must apply—and you must follow the law even if you disagree with it.

What is evidence:

You must decide the case on only the evidence presented in the courtroom. Evidence comes in many forms. It can be testimony about what someone saw, heard, or smelled. It can be an exhibit or a photograph. It can be someone's opinion.

Some evidence may prove a fact indirectly. Let's say a witness saw wet grass outside and people walking into the courthouse carrying wet umbrellas. This may be indirect evidence that it rained, even though the witness didn't personally see it rain. Indirect evidence like this is also called "circumstantial evidence"—simply a chain of circumstances that likely proves a fact.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Your job is

to give each piece of evidence whatever weight you think it deserves.

What is not evidence:

During the trial, you'll hear certain things that are not evidence and you must not consider them.

First, the lawyers' statements and arguments aren't evidence. In their opening statements and closing arguments, the lawyers will discuss the case. Their remarks may help you follow each side's arguments and presentation of evidence. But the remarks themselves aren't evidence and shouldn't play a role in your deliberations.

Second, the lawyers' questions and objections aren't evidence. Only the witnesses' answers are evidence. Don't decide that something is true just because a lawyer's question suggests that it is. For example, a lawyer may ask a witness, "You saw Mr. Jones hit his sister, didn't you?" That question is not evidence of what the witness saw or what Mr. Jones did—unless the witness agrees with it.

There are rules of evidence that control what the court can receive into evidence. When a lawyer asks a witness a question or presents an exhibit, the opposing lawyer may object if [he/she] thinks the rules of evidence don't permit it. If I overrule the objection, then the witness may answer the question or the court may receive the exhibit. If I sustain the objection, then the witness cannot answer the question, and the court cannot receive the exhibit. When I sustain an objection to a question, you must ignore the question and not guess what the answer might have been.

Sometimes I may disallow evidence—this is also

called "striking" evidence—and order you to disregard or ignore it. That means that you must not consider that evidence when you are deciding the case.

I may allow some evidence for only a limited purpose. When I instruct you that I have admitted an item of evidence for a limited purpose, you must consider it for only that purpose and no other.

Credibility of witnesses:

To reach a verdict, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, part of it, or none of it. When considering a witness's testimony, you may take into account:

- the witness's opportunity and ability to see, hear, or know the things the witness is testifying about;
- the witness's memory;
- the witness's manner while testifying;
- any interest the witness has in the outcome of the case;
- any bias or prejudice the witness may have;
- any other evidence that contradicts the witness's testimony;
- the reasonableness of the witness's testimony in light of all the evidence; and
- any other factors affecting believability.

At the end of the trial, I'll give you additional guidelines for determining a witness's credibility.

Description of the case:

This is a civil case. To help you follow the evidence, I'll summarize the parties' positions. The Plaintiff, [name of plaintiff], claims the Defendant, [name of defendant], [describe claim(s)]. [Name of defendant] denies those claims and contends that [describe counterclaims or affirmative defenses].

Burden of proof:

[Name of plaintiff] has the burden of proving [his/her/its] case by what the law calls a "preponderance of the evidence." That means [name of plaintiff] must prove that, in light of all the evidence, what [he/she/it] claims is more likely true than not. So, if you could put the evidence favoring [name of plaintiff] and the evidence favoring [name of defendant] on opposite sides of balancing scales, [name of plaintiff] needs to make the scales tip to [his/her/its] side. If [name of plaintiff] fails to meet this burden, you must find in favor of [name of defendant].

To decide whether any fact has been proved by a preponderance of the evidence, you may—unless I instruct you otherwise—consider the testimony of all witnesses, regardless of who called them, and all exhibits that the court allowed, regardless of who produced them. After considering all the evidence, if you decide a claim or fact is more likely true than not, then the claim or fact has been proved by a preponderance of the evidence.

[Optional: On certain issues, called "affirmative defenses," [name of defendant] has the burden of proving the elements of a defense by a preponderance of the evidence. I'll instruct you on the facts [name of defendant] must prove for any affirmative defense. After considering all the evidence, if you decide that [name of defendant] has successfully proven that the required

facts are more likely true than not, the affirmative defense is proved.]

[Optional: [Name of defendant] has also brought claims for relief against [name of plaintiff] called counterclaims. On these claims, [name of defendant] has the same burden of proof that [name of plaintiff] has for [his/her/its] claims.]

Conduct of the jury:

While serving on the jury, you may not talk with anyone about anything related to the case. You may tell people that you're a juror and give them information about when you must be in court. But you must not discuss anything about the case itself with anyone.

You shouldn't even talk about the case with each other until you begin your deliberations. You want to make sure you've heard everything—all the evidence, the lawyers' closing arguments, and my instructions on the law—before you begin deliberating. You should keep an open mind until the end of the trial. Premature discussions may lead to a premature decision.

In this age of technology, I want to emphasize that in addition to not talking face-to-face with anyone about the case, you must not communicate with anyone about the case by any other means. This includes e-mails, text messages, and the Internet, including social-networking websites such as Facebook, MySpace, and Twitter.

You also shouldn't Google or search online or offline for any information about the case, the parties, or the law. Don't read or listen to the news about this case, visit any places related to this case, or research any fact, issue, or law related to this case. The law forbids the jurors to talk with anyone else about the case and forbids anyone else to talk to the jurors about

it. It's very important that you understand why these rules exist and why they're so important. You must base your decision only on the testimony and other evidence presented in the courtroom. It is not fair to the parties if you base your decision in any way on information you acquire outside the courtroom. For example, the law often uses words and phrases in special ways, so it's important that any definitions you hear come only from me and not from any other source. Only you jurors can decide a verdict in this case. The law sees only you as fair, and only you have promised to be fair—no one else is so qualified.

Taking notes:

If you wish, you may take notes to help you remember what the witnesses said. If you do take notes, please don't share them with anyone until you go to the jury room to decide the case. Don't let note-taking distract you from carefully listening to and observing the witnesses. When you leave the courtroom, you should leave your notes hidden from view in the jury room.

Whether or not you take notes, you should rely on your own memory of the testimony. Your notes are there only to help your memory. They're not entitled to greater weight than your memory or impression about the testimony.

Course of the trial:

Let's walk through the trial. First, each side may make an opening statement, but they don't have to. Remember, an opening statement isn't evidence, and it's not supposed to be argumentative; it's just an outline of what that party intends to prove.

Next, [name of plaintiff] will present [his/her/its] witnesses and ask them questions. After [name of plaintiff] questions the witness, [name of defendant] may

ask the witness questions—this is called "cross-examining" the witness. Then [name of defendant] will present [his/her/its] witnesses, and [name of plaintiff] may cross-examine them. You should base your decision on all the evidence, regardless of which party presented it.

After all the evidence is in, the parties' lawyers will present their closing arguments to summarize and interpret the evidence for you, and then I'll give you instructions on the law.

[Note: Some judges may wish to give some instructions before closing arguments. See Fed. R. Civ. P. 51(b)(3).]

You'll then go to the jury room to deliberate.

March 18, 2009

As Jurors Turn to Web, Mistrials Are Popping Up

By JOHN SCHWARTZ

Last week, a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet, directly violating the judge's instructions and centuries of legal rules. But when the judge questioned the rest of the jury, he got an even bigger shock.

Eight other jurors had been doing the same thing. The federal judge, William J. Zloch, had no choice but to declare a mistrial, a waste of eight weeks of work by federal prosecutors and defense lawyers.

"We were stunned," said a defense lawyer, Peter Raben, who was told by the jury that he had been on the verge of winning the case. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."

It might be called a Google mistrial. The use of BlackBerrys and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges.

Last week, a building products company asked an Arkansas court to overturn a $12.6 million judgment, claiming that a juror used Twitter to send updates during the civil trial.

And on Monday, defense lawyers in the federal corruption trial of a former Pennsylvania state senator, Vincent J. Fumo, demanded before the verdict that the judge declare a mistrial because a juror posted updates on the case on Twitter and Facebook. The juror had even told his readers that a "big announcement" was coming on Monday. But the judge decided to let the deliberations continue, and the jury found Mr. Fumo guilty. His lawyers plan to use the Internet postings as grounds for appeal.

Jurors are not supposed to seek information outside of the courtroom. They are required to reach a verdict based on only the facts the judge has decided are admissible, and they are not supposed to see evidence that has been excluded as prejudicial. But now, using their cellphones, they can look up the name of a defendant on the Web or examine an intersection using Google Maps, violating the legal system's complex rules of evidence. They can also tell their friends what is happening in the jury room, though they are supposed to keep their opinions and deliberations secret.

A juror on a lunch or bathroom break can find out many details about a case. Wikipedia can help explain the technology underlying a patent claim or medical condition, Google Maps can show how long it might take to drive from Point A to Point B, and news sites can write about a criminal defendant, his lawyers or expert witnesses.

"It's really impossible to control it," said Douglas L. Keene, president of the American Society of Trial Consultants.

Judges have long amended their habitual warning about seeking outside information during trials to include Internet searches. But with the Internet now as close as a juror's pocket, the risk has grown more immediate — and instinctual. Attorneys have begun to check the blogs and Web sites of prospective jurors.

Mr. Keene said jurors might think they were helping, not hurting, by digging deeper. "There are people who feel they can't serve justice if they don't find the answers to certain questions," he said.

But the rules of evidence, developed over hundreds of years of jurisprudence, are there to ensure that the facts that go before a jury have been subjected to scrutiny and challenge from both sides, said Olin Guy Wellborn III, a law professor at the University of Texas.

"That's the beauty of the adversary system," said Professor Wellborn, co-author of a handbook on evidence law. "You lose all that when the jurors go out on their own."

There appears to be no official tally of cases disrupted by Internet research, but with the increasing adoption of Web technology in cellphones, the numbers are sure to grow. Some courts are beginning to restrict the use of cellphones by jurors within the courthouse, even confiscating them during the day, but a majority do not, Mr. Keene said. And computer use at home, of course, is not restricted unless a jury is sequestered.

In the Florida case that resulted in a mistrial, Mr. Raben spent nearly eight weeks fighting charges that his client had illegally sold prescription drugs through Internet pharmacies. The arguments were completed and the jury was deliberating when one juror contacted the judge to say another had admitted to her that he had done outside research on the case over the Internet.

The judge questioned the juror about his research, which included evidence that the judge had specifically excluded. Mr. Raben recalls thinking that if the juror had not broadly communicated his information with the rest of the jury, the trial could continue and the eight weeks would not be wasted. "We can just kick this juror off and go," he said.

But then the judge found that eight other jurors had done the same thing — conducting Google searches on the lawyers and the defendant, looking up news articles about the case, checking definitions on Wikipedia and searching for evidence that had been specifically excluded by the judge. One juror, asked by the judge about the research, said, "Well, I was curious," according to Mr. Raben.

"It was a heartbreak," Mr. Raben added.

Information flowing out of the jury box can be nearly as much trouble as the information flowing in; jurors accustomed to posting regular updates on their day-to-day experiences and thoughts can find themselves on a collision course with the law.

In the Arkansas case, Stoam Holdings, the company trying to overturn the $12.6 million judgment, said a juror, Johnathan Powell, had sent Twitter messages during the trial. Mr. Powell's messages included "oh and nobody buy Stoam. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter" and "So Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money."

Mr. Powell, 29, the manager of a one-hour photo booth at a Wal-Mart in Fayetteville, Ark., insisted in an interview that he had not sent any substantive messages about the case until the verdict had been delivered and he was released from his obligation not to discuss the case. "I was done when I mentioned the trial at all," he said. "They're welcome to pull my phone records."

But juror research is a more troublesome issue than sending Twitter messages or blogging, Mr. Keene said, and it raises new issues for judges in giving instructions.

"It's important that they don't know what's excluded, and it's important that they don't know why it's excluded," Mr. Keene said. The court cannot even give a full explanation to jurors about research — say, to tell them what not to look for — so instructions are usually delivered as blanket admonitions, he said.

The technological landscape has changed so much that today's judge, Mr. Keene said, "has to explain why this is crucial, and not just go through boilerplate instructions." And, he said, enforcement goes beyond what the judge can do, pointing out that "it's up to Juror 11 to make sure Juror 12 stays in line."

It does not always work out that way. Seth A. McDowell, a data support specialist who lives in Albuquerque and works for a financial advising firm, said he was serving on a jury last year when another juror admitted running a Google search on the defendant, even though she acknowledged that she was not supposed to do so. She said she did not find anything, Mr. McDowell said.

Mr. McDowell, 35, said he thought about telling the judge, but decided against it. None of the other jurors did, either. Now, he said, after a bit of soul-searching, he feels he may have made the wrong choice. But he remains somewhat torn.

"I don't know," he said. "If everybody did the right thing, the trial, which took two days, would have gone on for another bazillion years."

Mr. McDowell said he planned to attend law school in the fall.

TRIALS & LITIGATION

A Shock for Judge Zloch: 9 Jurors in 1 Trial Doing Web Research

POSTED MAR 17, 2009 08:20 PM CDT

BY MARTHA NEIL (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/5/)

When U.S. District Judge William Zloch recently learned last week that a juror in a big federal drug trial in Florida had been doing Internet research, in violation of the court's instructions, he was shocked.

But the judge was even more amazed to find out, when he then questioned other jurors, that eight others had been doing Web research on the case, too, reports the New York Times (http://www.nytimes.com/2009/03/18/us/18juries.html). At that point, the judge had no choice but to declare a mistrial.

He wasn't the only one to be hit hard by today's Internet communication rage:

"We were stunned," says defense attorney Peter Raben, who was told by jurors that they had been headed toward acquittal before Zloch declared a mistrial. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."

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Comments

Comment on this article

carmen said:

I'm not sure whether to think of Judge Zloch as naive or woefully behind the times. Rule # 1 is ask all jurors to surrender their cell phones and blackberries during the trial. Inconvenient yes, but worth it in the long-run.

Posted: Mar 17, 2009 08:28 pm CDT
Reply to this comment

anon said:

#1, true, but unless these jurors' wireless devices are a lot faster than mine, I suspect they were doing their research at home. Should jurors surrender their home and work computers, too, or should judges just sequester the jury on every trial for which any relevant information might be found online?

Posted: Mar 17, 2009 09:03 pm CDT
Reply to this comment

J.D. said:

It would be helpful to get the description of these jurors so that we could better focus our selections during voir dire.

Posted: Mar 17, 2009 09:31 pm CDT
Reply to this comment

tim said:

Every juror is surfing the web on his blackberry to find info on the case even when they are in deliberation. You have to know that going in and make sure you win the PR battle in the press as well as your case in the courtroom.

We should probablly do away with that rule since no one follows it anyway.

Posted: Mar 18, 2009 01:18 pm CDT
Reply to this comment

Uno Hu said:

This makes clear what has only been suggested by jury selection techniques in the past - the only suitable jurors of the future will be sponges and related porifera; someone will have to determine how to keep them wet in the jurry box and jury room without creating a mess in court!

Posted: Mar 19, 2009 08:16 pm CDT
Reply to this comment

P. Bryson said:

I suspect that jurors go to the internet when they think they aren't getting the real story (on either the law or the facts) during the trial. Focusing on 'faking sincerity' and the clear presentation of evidence and argument could help reduce the amount of research the jury feels it needs to do.

Posted: Mar 25, 2009 12:22 pm CDT
Reply to this comment

BIG RON said:

"We should probablly do away with that rule since no one follows it anyway."...yeah, and legalize crack for the same reason. Here's a thought...tell them to stop or face contempt. The parties at trial deserve to not have to fight a two-front war...particularly a PR battle controlled by our completely objective media

Posted: Mar 25, 2009 12:24 pm CDT
Reply to this comment

Bob said:

Tim - most courts take away cell phones and any other potential connection with the outside world during deliberations. Jurors better be careful, or their going to find themselves sequestered more and more often.

At least it's being caught prior to the verdict sometimes. I'd had to imagine how many cases were decided by juries using bad law they found online instead of the court's instructions.

Posted: Mar 25, 2009 12:46 pm CDT
Reply to this comment

mindblown said:

Well, it's certainly an argument for asking for a bench trial - though I swear some of those guys are even looking for the answers on the internet at night as well.

Posted: Mar 25, 2009 04:15 pm CDT
Reply to this comment

B. Fare said:

Hmmmm. Can't we just tell the jurors to ignore what they read elsewhere, the same way we tell them to ignore certain comments made in court? Or, if humans are incapable of that, then shouldn't we also prohibit the judge from using the internet or watching TV news when involved in a trial?

Posted: Mar 25, 2009 04:33 pm CDT
Reply to this comment

BMF said:

#1@#2: Swearing on a stack of Bibles that they'll ignore the media means nothing in a secular society. Better idea would be to require all prospective jurors to provide the court with a list of their home ISP numbers--just as we require certain other information during voire dire, e.g. occupation, and certain other relevant personal info. You can find it by googling: www.myipaddress.com

Upon either attorney's motion, and for good cause--which must be more than the fact that the moving party lost, the court could order that the ISPs of the chosen jurors provide information related to searches or, blogging activity that may be related to the trial.

Posted: Mar 25, 2009 05:14 pm CDT

Reply to this comment

arantxa said:

I'm surprised that the article doesn't say what the jurors were researching. It could be that the jurors didn't understand what was going on (ie too many terms they didn't understand, presentations that were sped through, etc). This should be a sign to all in the community to make their presentations more explanatory and concise.

Posted: Mar 25, 2009 07:33 pm CDT
Reply to this comment

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Herald-Tribune

Juror jailed over Facebook friend request

By ROBERT ECKHART
Published: Thursday, February 16, 2012 at 12:38 p.m.

STAFF PHOTO / ELAINE LITHERLAND
Jacob Jock is taken to Sarasota County jail after being found guilty on a criminal contempt of court charge on Wednesday after he Facebook-friended a defendant in a trial for which he had just been selected as a juror on Dec. 12, 2011. (POOL PHOTO, Elaine Litherland/Sarasota Herald-Tribune)

Circuit Judge Nancy Donnellan on Thursday handed a stern rebuke, and a three-day jail sentence, to a juror who sent a Facebook message to the defendant in an auto negligence case.

Jacob Jock, a 29-year-old graduate of Ringling College of Art and Design, was dismissed from jury duty after the defendant, a young woman, disclosed that he had contacted her via the Facebook social media website as the trial began in December.

But what most angered Donnellan was Jock's bragging on Facebook about it after the fact, when he wrote: "Score ... I got dismissed!! apparently they frown upon sending a friend request to the defendant ... haha."

Donnellan got the last word on Thursday.

"I cannot think of a more insidious threat to the erosion of democracy than citizens who do not care," she said after a two-hour hearing.

She found him guilty of criminal contempt of court, a misdemeanor.

Jock, also faulted by Donnellan for showing up nine minutes late to his trial, was handcuffed and ushered to a holding cell. His girlfriend cried as he was taken to jail; she would not comment.

Jock testified during the trial that the friend request he sent to Violeta Milerman was a mistake.

Lawyers had asked potential jurors if they knew anyone involved in the case.

Jock said Milerman looked familiar, but he wasn't sure, so he looked her up on Facebook. He has 1,300 "friends" and said he wasn't sure whether she was one or not, he said.

When her picture came up on his cell phone, Jock said he tried to push the "mutual friends" button to refresh his memory, but instead he hit "friend request."

He knew the request would be sent to Milerman, and said he regretted that he did not mention it during a daylong jury selection process that ended with him on the seven-member panel.

"I was just hoping she'd forget about it," Jock said. "It was a total mistake ... I kind of thought what happened wasn't that big a deal. Little did I know."

Milerman saw the request and told her attorney, who told the judge who removed Jock from the jury.

Keeping jurors from researching cases independently, or from gossiping about them online, is a growing preoccupation for judges and attorneys. Potential jurors are warned several times not to research places, people or events linked to cases.

Jock, owner of JJ Custom Screen Printing, also irked the judge by showing up 20 minutes late for his arraignment in January.

And then on Thursday he was late again, though his attorney said he had been told to go to the wrong floor of the courthouse.

"He was 20 minutes late the last time, so we'll wait — again — for him to show up," Donnellan said. "I don't know what the excuse was last time."

Juror, witness Facebook exchange imperils Tennessee murder conviction

By Greg Botelho , CNN
updated 1:27 PM EDT, Thu September 12, 2013

CNN.com

William Darelle Smith was charged with the 2007 shooting death of Zurisaday Villanueva.

(CNN) -- A Tennessee juror's laudatory Facebook message to a medical examiner during a murder trial could nullify the jury's conviction of William Darelle Smith, the state's Supreme Court ruled Wednesday.

The high court did not immediately throw out the first-degree murder conviction of Smith, who was sentenced to life in prison in 2010. But in concluding the trial judge erred upon learning of the juror's social networking communication with a key prosecution witness, state justices unanimously decided a new trial may be necessary unless the state proves the juror shouldn't have been disqualified.

"If, for any reason, the trial court is unable to conduct a full and fair hearing with regard to juror (Glenn Scott) Mitchell's improper extrajudicial communication with Dr. Lewis, then the trial court shall grant Mr. Smith a new trial," the Supreme Court ruled, referring to the juror by name, as well as Dr. Adele Lewis, the medical examiner who testified.

The Davidson County, Tennessee, District Attorney's Office did not have an immediate reaction Wednesday to the ruling. Smith's public defender declined to comment.

A county grand jury indicted Smith in the death of Zurisaday Villanueva, whose body was found June 4, 2007, off a Nashville road along with two .9 millimeter shell casings. The two had been living together, according to court documents.

Smith went on trial in March 2010. After the jury was set, jurors were told by the judge they "should not talk with any witnesses, defendants or attorneys involved in this case."

Testimony followed, including from Smith's cousin, who said the defendant told her a pistol "went off" while he and Villanueva were arguing and again when Smith was trying to move Villanueva's body.

The prosecution also presented evidence indicating Villanueva's blood was in an automobile driven by Smith and owned by his father. The second-to-last person to testify for the prosecution was Lewis, a Vanderbilt-trained assistant medical examiner. She conducted an

autopsy on Villanueva and classified her death as a homicide, saying Villanueva was shot in the chest and the back of the head.

The next day, about an hour after the jury began deliberating on Smith's fate, Lewis e-mailed presiding Judge Seth Norman that she had been contacted via Facebook by a juror who was an acquaintance.

"A-dele!!" the juror wrote, according to the e-mail included in the state Supreme Court ruling. "I thought you did a great job today on the witness stand. ... I was in the jury ... not sure if you recognized me or not!! You really explained things so great!!"

Lewis responded by saying she thought she recognized the juror, then warned of "a risk of a mistrial if that gets out." The juror wrote back that he was aware of the risk, saying he hadn't mentioned he knew Lewis.

The first time the juror-witness communication came up in official court proceedings was after the verdict was delivered, but before sentencing. That's when public defender Mike Engle asked if the court asked the juror about the exchange, to which the judge replied, "No, I'm satisfied with the communication that I have gotten with Dr. Lewis with regard to this matter."

Smith later asked for a new trial, in part because the defense wasn't allowed to question the juror. The trial court ruled against him, as did a state appeals court that characterized the Facebook communication as "mere interactions" and noted it is up to the court to decide if a juror is impartial.

The state Supreme Court's ruling on Wednesday overruled those decisions. Stressing that "the public's confidence in the fairness of the system" requires that all jurors be held "accountable to the highest standards of conduct," the justices said the trial court should have taken "steps to assure that the juror has not been exposed to extraneous information or has not been improperly influenced."

In Smith's trial, this could have been addressed at a hearing at that time or a "full-scale investigation," the court said. Neither occurred, leading the state Supreme Court to send the case back to the trial court for a hearing on the Facebook communication and the jurors' impartiality.

Conversations between jurors and people involved in a case have long been forbidden in state law. But the court admits that technology -- including the Internet, which allows jurors to conduct research and more readily communicate -- has complicated matters.

"Even though technology has made it easier for jurors to communicate with third parties and has made these communications more difficult to detect, our pre-Internet precedents provide appropriate (guidelines)," the ruling states.

The state court also said trial courts need to "give jurors specific, understandable instructions that prohibit extrajudicial communications with third parties and the use of technology to obtain facts that have not been presented as evidence."

"Trial courts should clearly prohibit jurors' use of devices such as smartphones and tablet computers to access social media websites or applications to discuss, communicate, or research anything about the trial," the court said.

CNN's Joe Sutton contributed to this report.

John Goodman retrial: Juror arrested on contempt of court charge apologizes

Travis Van Vliet, a 23-year-old criminal justice student, faces a misdemeanor charge for Googling the case and telling another potential juror what he learned: that it was a retrial.

By Brittany Shammas,
Sun Sentinel

OCTOBER 10, 2014, 7:40 PM | TAMPA

At the start of jury selection for polo magnate John Goodman's DUI manslaughter retrial, criminology student and prospective juror Travis Van Vliet told the judge and attorneys the case would be a chance for him to see the inner workings of the criminal justice system.

By the end of the four-day process, the 23-year-old got that opportunity — but not in the way he'd expected. Instead of heading to West Palm Beach Friday for the trial, he spent the morning being arraigned for contempt of court after bonding out of jail on $250 bail. Dressed in a suit and tie, Van Vliet pleaded not guilty to the misdemeanor charge.

"I just want to apologize to you, your honor," he told Palm Beach County Circuit Court Judge Jeffrey Colbath, who presided over the proceedings in a Tampa courtroom. "I'm sorry that these allegations came up, and I just want to say I'm sorry to everyone involved."

The judge had just wrapped up a lengthy reprimand of Van Vliet, who was hauled out of the same courtroom in handcuffs Thursday just hours before jurors were announced for the estimated three- to four-week trial set

to begin Saturday. His arrest was based on the discovery he did a Google search about the case and told another man in the jury pool what he learned: It's been tried before.

Selected outside Palm Beach County because of intense media coverage there, jurors are not allowed to know the case is a retrial. The pool was told not to discuss or research the trial against 51-year-old Goodman, heir to a family fortune and founder of the International Polo Club.

Van Vliet's defiance of those orders struck a nerve with Colbath, who was forced to throw out Goodman's 2012 conviction and 16-year prison sentence for the death of Scott Patrick Wilson, 23, because of misconduct by juror Dennis DeMartin.

"I only wanted to do this once," Colbath told Van Vliet on Friday. "Now I have to do it a second time. And because of your behavior, I nearly had to start jury selection over for a third time.

"Your actions jeopardized the entire judicial process in this case."

Outside the courthouse, Van Vliet said little to a gaggle of reporters that followed him as he walked arm-in-arm with his mother. Asked how he felt about the judge's admonishment, he asked: "How would you feel if you were in that situation?"

Prosecutors say Goodman had a blood-alcohol level of .177 when his Bentley blew through a stop sign and slammed into Wilson's Hyundai. Wilson's car was pushed into a canal, where he drowned. Goodman is accused of walking away from the crash and waiting an hour to call 911.

The conversation that landed Van Vliet in jail happened in a courthouse hallway during a break Thursday and was overheard by a defense assistant. Under questioning from Colbath and the attorneys, Van Vliet admitted seeking out information after becoming confused by questions the defense asked and ones the prosecution challenged.

William Van Vliet, Travis's father, said Friday his son is a curious, bright kid who had hoped for a spot on the jury and didn't mean to go against the judge's orders.

"We never expected this, because he was looking forward to this," William Van Vliet said. "He just didn't understand."

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May, 2014 Volume 88, No. 5 Journal HOME

Streamlining and Modernizing Florida's Pre-litigation Preservation Standard: Modern Technology Demands a Modern Solution

by William F. Hamilton, Lindsay M. Saxe, and Stephanie Moncada

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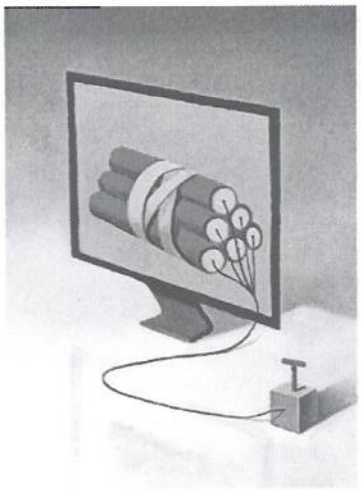

Florida law on the pre-litigation duty to preserve evidence is unclear, and precedent antedating the prevalence of electronically stored information (ESI) is conflicting and inconsistent.[1] Florida precedent often muddles and confuses basic principles and rarely confronts the phenomenon of ESI — most precedent involves the failure to preserve physical evidence, such as objects and paper. The Florida Rules of Civil Procedure[2] and the Florida Statutes provide little guidance on the duty to preserve ESI in anticipation of litigation.[3] This article attempts to bring some order to the chaos.

Florida's confusing law on the pre-litigation duty to preserve relevant evidence derives from a fundamental misconception — that the duty to preserve is an element of a quasi tort claim held by the aggrieved party. In fact, the duty to preserve relevant evidence runs to the court. The destruction of evidence strikes the heart of the judicial process and the court's truth-seeking function:

> What heretofore usually has been implicit — but seldom stated — in opinions concerning spoliation is that, with the exception of a few jurisdictions that consider spoliation to be an actionable tort, the duty to preserve evidence relevant to litigation of a claim is a duty owed to the *court*, not to a party's adversary.[4]

Whether occurring before or during litigation, the wrongful failure to preserve relevant evidence offends the dignity of the court, impairs the integrity of the judicial process, and diminishes the legitimacy of judgments. As explained in *Tramel v. Bass*, 672 So. 2d 78, 84 (Fla. 1st DCA 1996), the seriousness of the offense warrants a severe sanction to vindicate the judicial process, such as an adverse inference and the striking of pleadings: "The intentional destruction or alteration of evidence undermines the integrity of the judicial process and, accordingly, may warrant imposition of the most severe sanction of dismissal of a claim or defense, the striking of pleadings, or entry of a default."[5] The destruction of evidence is such a grave offense that counsel and litigants may face additional sanctions including a fine and disbarment.

In Florida, conflicting precedent and the failure to clearly recognize a pre-litigation preservation duty has numerous debilitating consequences. Litigants risk the loss of relevant data and the imposition of sanctions. Courts struggle to avoid a miscarriage of justice. When documentary evidence existed primarily in paper and other tangible forms, the lack of a clearly articulated pre-litigation preservation duty — *i.e.*, a duty simply to avoid intentional destruction of evidence — caused mischief of a limited scope. However, ESI is now the principal form of documentary evidence and brings the problem into full relief. ESI is both voluminous and easily altered, modified, and deleted. Computer systems are configured to routinely change and delete ESI through automatic processes and internal "cleansing" to enhance computer performance.

Without affirmative intervention, parties will likely lose important ESI.[6] Although the necessary scope and exact moment of preservation is debatable,[7] as is the range and the severity of sanctions, this article contends that Florida should, at the very least, uniformly recognize a pre-litigation preservation duty. Once such a duty is recognized, our courts can begin (with the guidance of persuasive federal authority) to navigate the knotty problems of preservation timing, scope, culpability, and remedies.[8] This is an important and necessary first step toward modernizing Florida law.

Absent a clear recognition of the pre-litigation preservation duty, Florida courts must apply awkward, result-driven logic and artfully ignore frequently cited precedent holding that Florida lacks a pre-litigation duty to preserve relevant evidence. And absent a framework permitting a nuanced analysis of the prospect of litigation, the burden preservation, and the principles of proportionality, courts employ an ad hoc analysis dependant on salient, case-specific facts to reach the right conclusion. A court might reach the right result, but with flawed reasoning, which creates further confusion in our preservation jurisprudence.[8]

Federal Law and the Advent of ESI

As electronic documents became increasingly prevalent, groups of federal and state practitioners began to recognize the need to establish standards and "best practices" for the preservation and production of ESI.[9] One group, which later formed the Sedona Conference,[10] began an industry-wide dialogue on key electronic discovery principles, including ESI preservation.[11] At the turn of the century, disputes over ESI and helpful guidance on resolving those disputes were rare.[12] However, with the collapse of Enron and Arthur Andersen, the enactment of Sarbanes-Oxley,[13] and the unrelenting 21st century data deluge, the importance of handling ESI in a "defensible manner" became increasingly paramount.[14]

The Sedona Conference recognized that "the way in which information is created, stored and managed in digital environments is inherently and fundamentally different from the way in which that is done in the paper world."[15] Prevailing principles governing physical objects and paper provide, at best, an awkward guidepost.[16]

U.S. District Judge Shira Scheindlin led the charge through several opinions in *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).[17] As Judge Scheindlin recognized, the premise of the Federal Rules of Civil Procedure — notice pleading followed by vigorous and expansive discovery — "hit a roadblock" with the advent of ESI.[18] ESI expanded exponentially the scope of discoverable information and the cost of preserving and producing that information: "The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, 'discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.'"[19] *Zubulake* provided a "textbook example" of the need for balance and the need for guidance beyond the federal rules.[20]

Ultimately, *Zubulake* establishes a ubiquitously cited federal pre-litigation preservation standard. "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[21] *Zubulake* also provides a framework for whose documents must be retained, what documents must be retained, and when courts should shift the cost of retention and production. Although this standard (like most legal standards) can present difficult questions in practice (*e.g.*, What is the scope of relevant evidence?),[22] the standard nonetheless provides a modern and nuanced framework for preserving ESI in federal litigation.

Pre-litigation Preservation in Florida

Under Florida law, a party cannot intentionally destroy, mutilate, alter, or conceal evidence.[23] In other words, a party must avoid "spoliation."[24] A court will impose a sanction for spoliation only after determining[25] "(1) whether the evidence existed at one time, (2) *whether the spoliator had a duty to preserve the evidence*, and (3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense."[26]

The key question in applying this standard is whether a duty to preserve exists. Florida courts often vacillate here. Some hold that only a contract, a statute, or a discovery request triggers the duty to preserve.[27] Others seem to hold that, absent a contractual or a statutory duty, a party possesses no duty to preserve evidence *before* litigation begins — and, thus, courts are seemingly mesmerized by logic suggesting that the filing of the complaint (rather than the anticipation of litigation) is a momentous demarcation that alters the analysis.[28] And yet others recognize a pre-suit obligation to preserve evidence, albeit only if both the potential claim and the relevance of the evidence are reasonably foreseeable to the party controlling the evidence before the litigation begins.[29] How did this stark divergence in opinion happen?

In part, the confusion arises from Florida's early treatment of spoliation as an independent tort. Spoliation by a party to a lawsuit is different from a tort, yet Florida courts treat these claims similarly.[30] Party spoliation primarily offends the judicial process; the primary problem is not a tort-like harm to the opposition. Although Florida no longer recognizes an independent cause of action for the spoliation of evidence,[31] our courts are burdened by the legacy of viewing spoliation as a tort.

For example, in *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843 (Fla. 4th DCA 2004), a fire partially burned a yacht.[32] The fire inspector collected debris from the fire, stored the debris in barrels, and, sometime thereafter, the contents of the barrels were destroyed.[33] The court dismissed Royal's spoliation claim and held that the Lauderdale Marine Center had no common law duty to preserve evidence in anticipation of litigation.[34]

Similarly, in *Gayer v. Fine Line Constr. and Electric Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007) (quoting *Flagstar Cos. v. Cole-Ehlinger*, 909 So. 2d 320, 322-23 (Fla. 4th DCA 2005)), the court wrote:

> Generally, to establish a claim for spoliation, the plaintiff must prove six elements: "(1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment and the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages."

Gayer concludes that no common law preservation duty exists if litigation is reasonably anticipated but that a statutory preservation duty existed under the unusual facts of the case. Even though the court arguably reached the right result, precedent such as *Gayer* perpetuates a flawed standard. If common sense demands preservation, as in *Gayer*, courts find extrinsic facts to create an exception to the "no duty" jurisprudence. This result-driven analysis is very dangerous. The clear cases escape the "no duty" precedent and usually reach the right result, but the less clear cases requiring a more sophisticated

analysis typically fall victim to the simple but flawed requirement of a statute, contract, or demand letter.[35]

We recognize the difficulty in preserving relevant evidence when litigation is reasonably foreseeable — the inherent breadth of "relevance," the volume of ESI, the multitude of locations, and the variety of electronic artifacts. "[D]ay-to-day business activities contain innumerable possibilities for future litigation, including employment, product liability, business, and regulatory litigation."[36] Perhaps this is why some courts are more inclined to find a preservation duty only after a lawsuit begins. But the intent of this article is not to suggest that the answer is easy or that the challenges facing clients, lawyers, and judges are small. Rather, the purpose is to suggest that we deal with these issues honestly, forthrightly, and sensibly. Florida must adopt a workable and uniform pre-litigation preservation standard that allows a balance between foreseeability, burden, proportionality, and to changes in technology and information storage.

If the preservation analysis begins with a firm grasp of the principle that spoliation of evidence is a species of fraud on the court[37] and duty to the tribunal,[38] Florida courts can stop reasoning from a weak foundation. The preservation duty derives from the solemn command that parties, lawyers, and judges respect the court's integrity and uphold the legitimacy of the judicial process. The hard work of preservation should not be the lever of poor jurisprudence.

Florida Must Modernize Preservation Law

Osmulski v. Oldsmar Fine Wine, Inc., 93 So. 3d 389 (Fla. 2d DCA 2012), is a good example of Florida's struggle with the "no pre-litigation preservation duty" precedent. A customer suffered injuries after a slip-and-fall in the defendant's store. Within a week of the incident, the customer communicated several times with the defendant's insurer.[39] Because the insurer failed to settle the customer's claim, the customer sued.[40] A few months later, the customer requested production of the defendant's electronic surveillance videos.[41] In discovery, the customer learned that the defendant's surveillance cameras recycle videos older than 60 days.[42] The defendant maintained no standard procedure for preserving videos.[43] The storeowner claimed he never thought to interrupt the automatic deletion and to preserve the relevant videos because, according to the defendant, no one asked him to.[44]

At trial, the customer requested jury instructions adverse to the defendant. Specifically, the customer requested jury instructions 1) that the videos would have been unfavorable to the defendant, and 2) that the jury could draw an adverse inference from the defendant's negligent failure to preserve the videos. The trial court denied both requests.[45]

On appeal, the Second District Court of Appeal affirmed the trial court's decision. The court found that the defendant possessed no pre-litigation duty to preserve because the plaintiff (among other things) failed to request preservation of the surveillance videos.[46] At the same time, the court explained that "in the absence of a written request to preserve such evidence, as long as a plaintiff's claim is reasonably foreseeable, a formal request to preserve the evidence is not required."[47] The court concluded that the customer's lawsuit was not reasonably foreseeable, despite the customer's prompt claim with the defendant's insurer.[48] Ultimately, "uncertainties regarding video technology" and considerations of fairness tipped the balance in favor of the defendant.[49]

Despite the questionable outcome of the case, *Osmulski* identified a fundamental principle of preservation — a party must preserve relevant evidence if litigation is reasonably foreseeable. Although *Osmulski* seems to suggest that a written preservation request is integral to the defendant's duty to preserve, the plaintiff ultimately loses in *Osmulski* on reasonable foreseeability. A defendant cannot possibly possess carte blanche to destroy evidence simply because the plaintiff failed to request preservation of evidence unknown to the plaintiff. *Osmulski* reasoned that a party must preserve relevant evidence, such as electronically stored digital videos, when litigation is reasonably foreseeable. Thus, *Osmulski* appears to align Florida with established federal preservation law.[50]

Other Florida courts have also recognized the reasonable foreseeability standard that is necessary to protect the judicial process.[51] For example, *Am. Hospitality Mgmt Co. v. Hettinger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005), holds that "a defendant could be charged with a duty to preserve evidence when [the defendant] could reasonably have foreseen the claim." In *Hettinger*, the defendant destroyed evidence (a ladder) within hours after a repairman fell from the ladder on the defendant's premises.[52] Although the defendant argued that neither a legal nor a contractual duty to preserve attached anytime before destruction of the ladder, *Hettinger* finds that, based on the plaintiff's allegations, a jury "could reasonably conclude that [the ladder's] unavailability was something other than fortuitous."[53]

The facts and allegations in *Hettinger* suggest that the defendant's destruction of the ladder was intentional. Thus, at first glance, *Hettinger* appears inapplicable to ESI — unless a party intentionally destroys ESI, *e.g.*, by manually deleting emails. However, intentional destruction assumes many forms. Computers are designed and configured to delete, reorganize, move, and alter ESI to promote efficient operation. Allowing a computer to continue this pre-programmed process qualifies as intentional destruction.

In other words, if an email server is configured to delete emails after 30 days, the failure to disable that automatic deletion process is the same as intentionally, manually deleting the emails on day 29. Thus, parties must affirmatively act to preserve relevant ESI when litigation is reasonable foreseeable. A party cannot create a process that destroys information and fail to suspend that destruction when the electronic information scheduled for destruction appears relevant to anticipated litigation.

In 1996, the Fourth District Court of Appeal recognized a cause of action for the spoliation of evidence in *St. Mary's Hospital v. Brinson*, 685 So. 2d 33 (Fla. 4th DCA 1996).[54] In *Brinson*, a 19-month-old infant was admitted to St. Mary's hospital to undergo a surgery for a drooping eyelid.[55] The infant required life support and died 10 days later after receiving increased amounts of anesthesia.[56]

Sometime after her death (and before litigation began), the vaporizer's manufacturer disassembled the vaporizer used in the anesthesia machine during

her surgery. The Fourth District Court of Appeal held that the hospital had a duty to preserve the vaporizer because the hospital "knew of the potential civil claim against the vaporizer's manufacturer" and, thus, recognized plaintiff's cause of action for spoliation of evidence.[57]

Judge Gunther tried to explain in *Royal & Sunalliance* that *Brinson* established no duty to preserve evidence when litigation is anticipated.[58] However, that is precisely what *Brinson* did when *Brinson* recognized plaintiff's cause of action for spoliation of evidence. The Brinsons' sole claim was that St. Mary's hospital knew of the potential civil claim against the vaporizer's manufacturer and based on this claim, the court recognized the hospital's duty to preserve evidence and the Brinsons' cause of action for the spoliation of evidence.[59]

Similarly, the Fourth District Court of Appeal in yet another case dodged the issue and reversed a directed verdict for the defendant in *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1092 (Fla. 4th DCA 2001). In *Hagopian*, the plaintiff sustained injuries after a glass soda bottle exploded and fell off of a shelf near the plaintiff's feet.[60] The plaintiff's attorney notified Publix of the plaintiff's claim but did not request that Publix save the bottle parts. The bottle parts were discarded and Publix admitted to not preserving the bottle.

The court held that the manager's preparation of an incident report and Publix's refusal to give a copy to the plaintiff on work product grounds was evidence of Publix's anticipation of litigation.[61] This evidence created Publix's duty to preserve the bottle before suit was filed.[62] Furthermore, the court held that plaintiff's ability to proceed against Publix was hampered because "neither side could furnish any kind of definitive explanation of the incident" without the bottle parts.[63]

Conclusion

As illustrated in *Osmulski* and *Hettinger*, Florida's pre-litigation duty to preserve relevant evidence is alive, if not well. Stuck in an immature and flawed jurisprudence, our state courts appear hesitant to clearly articulate and apply the pre-litigation preservation duty. However, courts cannot tolerate the wrongful destruction of relevant evidence if litigation is reasonably foreseeable. By so doing, courts undermine the foundation of the legal system and destroy public confidence in our judicial process, which depends on the evidence.

ESI heightens the urgency of this cause. ESI is quickly becoming the principal locus of the litigation truth-seeking process. We are surrounded by an exponentially expanding plethora of nearly contemporaneously created emails, tweets, social media, Instagram uploads, documents, GPS reports, and text messages detailing our thoughts, actions, and communications. Tampering with such evidence when litigation is anticipated and imminent cannot be condoned or tolerated. More importantly, clients and counsel must take affirmative steps to preserve this evidence when litigation is reasonably anticipated.

Florida jurisprudence cannot turn a blind eye to pre-litigation preservation of evidence. As shown in *Osmulski* and *Hettinger*, Florida is finally beginning to articulate the fundamental principles of preservation that underlie the integrity of the judicial process already established in federal courts. No party may destroy evidence with impunity — regardless of whether the destruction occurs during litigation or in anticipation of litigation.

Of course, pre-litigation preservation creates tough questions. What is reasonable anticipation? What is the scope of preservation? Do proportionality principles govern preservation? When are sanctions appropriate? Should sanctions seek ground leveling or should sanctions be dispositive? What level of willfulness and culpability is required to trigger the harshest sanctions? With the help of decades of federal precedent, Florida courts can answer these questions rather than avoiding them through fact-driven rules and exceptions. Our jurisprudence and judicial process demand nothing less.

[1] *See, e.g., Osmulski v. Oldsmar Fine Wine*, 93 So. 3d 389, 393 (Fla. 2d DCA 2012); *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004).

[2] In 2012, Florida adopted rules pertaining to discovery of ESI, effective September 1, 2012. *In re Amendments to the Florida Rules of Civil Procedure — Electronic Discovery*, 95 So. 3d 76 (Fla. 2012). The amended Florida Rules of Civil Procedure in large part follow the Federal Rules of Civil Procedure and provide protection for a party from the undue burden of ESI discovery. The Sedona Conference is reviewing whether to amend the federal rules to ameliorate the burden, cost, and inefficiencies of preservation of electronically stored information and the difficulty of determining what is reasonably required to be preserved.

[3] Ralph Artigliere, William Hamilton, Ralph Losey, *Comment as to Amendments to the Rules of Civil Procedure Related to Electronic Discovery*, In re: Amendments to the Florida Rules of Civil Procedure — Electronic Discovery, Case No. 11-1542 (Fla. 2011), *available at* http://www.law.fsu.edu/library/flsupct/sc11-1542/11-1542CommentsArtigliere.pdf.

[4] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 525 (D. Md. 2010) (J. Grimm).

[5] *Tramel v. Bass*, 672 So. 2d 78, 84 (Fla. 1st DCA 1996) (citing *Metro. Dade Cnty. v. Bermudez*, 648 So. 2d 197, 200 (Fla. 1st DCA 1994)).

[6] Ralph Artigliere, William Hamilton, Ralph Losey, *Comment as to Amendments to the Rules of Civil Procedure Related to Electronic Discovery*, In re: Amendments to the Florida Rules of Civil Procedure — Electronic Discovery, Case No. 11-1542 at 1-2 (Fla. 2011), *available at* http://www.law.fsu.edu/library/flsupct/sc11-1542/11-1542CommentsArtigliere.pdf.

[7] Proportionality ensures that the burden of production in discovery does not outweigh its benefit in light of the value of the case. Proportionality is recognized in Florida at common law and in the Florida Rules of Civil Procedure, effective September 1, 2012. *See Alvarez, v. Cooper Tire & Rubber Co.*,

75 So. 3d 789, 795 (Fla. 4th DCA 2011); *Chrysler Corp. v. Miller*, 450 So. 2d 330, 331 (Fla. 4th DCA 1984); Fla. R. Civ. P. 1.280(d)(2)(ii) (Court may limit discovery of electronically stored information where "the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.").

[8] Currently proposed changes to the Federal Rules of Civil Procedure pertaining to e-discovery, particularly the proposed amendments to Rule 37(e), offer a sanctions framework based on culpability and prejudice and list some factors that a court may consider in evaluating a failure to preserve. The ultimate fate and form of these proposed changes is an open question; however, this is precisely the debate that Florida needs. The national challenge is to articulate parameters of reasonable pre-litigation preservation in terms of scope, cost, burden, culpability, and remedies. Florida cannot join this important debate until our jurisprudence unequivocally recognizes the fundamental duty and obligation of pre-litigation preservation. For more information and to view public comments to the proposed federal rules changes, *see* U.S. Courts, Proposed Amendments Published for Public Comment, http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx; and U.S. Courts, Advisory Committee on Civil Rules (April 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

[8] Spoliation and the failure to preserve evidence are prominent and controversial issues in Florida and nationally, especially with increasing prevalence of ESI. *See, e.g.,* Interim Report on Preservation and Spoliation of the New York State Bar Association's Special Committee on Discovery and Case Management in Federal Litigation (July 28, 2011) (hereinafter referred to as "Interim Report"), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/New%20York%20Bar%20Association.pdf .

[9] Sedona Conference, Sedona Conference J. (Fall 2003).

[10] The Sedona Conference is a non-profit research and educational institute dedicated to the advanced study of law and policy. Through the financial support of members, the Sedona Conference sponsors conferences at which judges, lawyers, and experts discuss important issues of law and policy. *See* About Us: Who We Are, How We Achieve Our Mission, *available at* https://thesedonaconference.org/aboutus.

[11] Sedona Conference, Sedona Conference J. (Fall 2003).

[12] *Id.*

[13] Pub. L. No. 107-204 (116 Stat. 745).

[14] Sedona Conference, Sedona Conference J. (Fall 2003).

[15] *Id.*

[16] *Id.*

[17] *See also Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003).

[18] *Zubulake*, 217 F.R.D. at 311-12.

[19] *Id.* (quoting *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002)).

[20] *Id.* at 311-312, 315-16.

[21] *Zubulake*, 220 F.R.D. at 216 (quoting *Fujitsu Ltd. v. Federal Exp.Corp.*, 247 F.R.D. 423, 436 (2d Cir. 2001).

[22] Judge Paul W. Grimm *et al.*, *Proportionality in the Post-Hoc Analysis of Pre-litigation Preservation Decisions*, 37 U. Balt. L. Rev. 381, 395-97 (2008).

[23] *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (Fla. 4th DCA 2006) (quoting Black's Law Dictionary 1437 (8th ed. 2004)).

[24] However, some courts define spoliation as the "negligent" failure to preserve evidence. *See Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 26 (Fla. 3d DCA 1990). The Fourth District has followed the Third District. *Brown v. City of Delray Beach*, 652 So. 2d 1150 (Fla. 4th DCA 1995); *St. Mary's Hosp., Inc. v. Brinson*, 685 So. 2d 33 (Fla. 4th DCA 1996); *DiGiulio v. Prudential Prop. and Cas. Ins. Co.*, 710 So. 2d 3 (Fla. 4th DCA 1998), *rev. denied*, 725 So. 2d 1109 (Fla. 1998).

[25] *Golden Yachts*, 920 So. 2d at 781.

[26] *Id.* (emphasis added) (citing *Jordan ex rel. Shealey v. Masters*, 821 So. 2d 342, 347 (Fla. 4th DCA 2002)). In other words, a party must suffer case-ending prejudice to obtain a sanction for spoliation. No reason to apply sanctions exists if no harm results from the spoliation. *Reed v. Alpha Prof'l Tools*, 975 So. 2d 1202,1204 (Fla. 2d DCA 2008). *See also Fleury v. Biomet, Inc.*, 865 So. 2d 537, 540 (Fla. 2d DCA 2003) (holding that where the spoliation was inadvertent and resulted in no prejudice, there was no basis for sanctions); *Rosario v. Miami-Dade Cnty.*, 490 F. Supp. 2d 1213, 1226 (S.D. Fla.

2007); *Pub. Health Trust of Dade Cnty. v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987) (holding that a rebuttable presumption should not be imposed unless the absence of the spoliated evidence "hinders [the plaintiff's] ability to establish a prima facie case"); *Reed*, 975 So. 2d at 1204 (Dismissal of a case as a spoliation sanction is appropriate when the aggrieved party is left with a "complete inability to defend, not the inability to defend completely." The court in *Reed* noted that "[s]poliation is not a strict liability concept — 'lose the evidence, lose the case.'" The goal of the court in spoliation cases is to ensure that the nonspoliator does not bear an unfair burden.).

[27] *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (4th DCA 2004).

[28] *Id.* ("We find Royal's argument that there was a common law duty to preserve the evidence in anticipation of litigation to be without merit."); *Gayer v. Fine Line Constr. & Electric, Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007) ("Because a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request."); *Golden Yachts*, 920 So. 2d at 781 (internal citations omitted) (holding that although no adverse presumption could lie where a spoliator was not duty-bound to preserve evidence, that nevertheless "an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence"); *but see Pa. Lumberman's Mut. Ins. Co. v. Fla. Power & Light Co.*, 724 So. 2d 629, 630 (Fla. 3d DCA 1998) (neither rejecting nor accepting the argument that there might be "some type of common law duty to preserve [evidence] after being notified of possible legal action"). *See also In re Elec. Mach. Enters., Inc.*, 416 B.R. 801, 873 (M.D. Fla. 2009) ("The majority of Florida courts have held that there is no common law duty to preserve evidence before litigation has commenced").

[29] *See Osmulski*, 93 So. 3d at 393 (citing *Am. Hospitality Mgmt. Co. of Minn. v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005)) (finding that if evidence is within the defendant's control, the defendant possesses "a duty to preserve evidence where it could reasonably have foreseen the [plaintiff's] claim.").

[30] *See St. Mary's Hosp., Inc.*, 685 So. 2d at 35 (allowing plaintiffs to proceed on an action for the spoliation of evidence and consolidating the spoliation and negligence actions).

[31] *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005) (overruling *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3d DCA 1984)).

[32] *Royal & Sunalliance*, 877 So. 2d at 844.

[33] *Id.* at 845.

[34] *Id.* at 846.

[35] *See Palmas y Bambu, S.A.. v. E.I. Dupont De Nemours & Co.*, 881 So. 2d 565, 579 (Fla. 3d DCA 2004) (recognizing plaintiff's duty to preserve evidence based on its knowledge of litigation); *see also Royal & Sunalliance*, 877 So. 2d at 845 (concluding that no common law duty exists to preserve evidence when litigation is merely anticipated but recognizing that a duty can arise by contract, statute, or a properly served discovery request).

[36] Maria P. Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. Rev. 7, 18 (2006).

[37] *Tramel*, 672 So. 2d at 84.

[38] *Victor Stanley. Inc.*, 269 F.R.D. at 525.

[39] *Osmulski*, 93 So. 3d at 391.

[40] *Id.*

[41] *Id.* at 391-92

[42] *Id.* at 391.

[43] *Id.*

[44] *Id.* at 392.

[45] *Id.*

[46] *Id.* at 392-93.

[47] *Id.*

[48] *Id.* at 393.

[49] *Id.*

[50] *See Zubulake*, 220 F.R.D. at 216-17 (finding that the duty to preserve attaches "when a party should have known that the evidence may be relevant to future litigation"); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006).

[51] Additionally, in *Golden Yachts*, 920 So. 2d 777, the plaintiff suffered an injury while aboard a boat owned by the defendant. Approximately 10 days after the incident, the plaintiff's counsel requested in writing that the owner preserve the boat cradle. A year after the lawsuit began, both the boat cradle and the photographs of the cradle and other debris were gone. The trial court allowed an adverse inference jury instruction and admitted evidence of the loss of the boat cradle evidence. The owner appealed and argued that the trial court erred in allowing both a jury instruction and evidence of loss.

On review, *Golden Yachts* affirms. Specifically, as *Golden Yachts* (internal citations omitted) explains: "Unlike an adverse presumption instruction, where the court must find the spoliator was duty-bound to preserve the evidence, an adverse inference may arise in any situation [in which] potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence." Thus, because the evidence existed, because the owner last possessed the evidence, because the owner had notice of the need to preserve, because the owner failed to preserve, and because the lack of evidence hindered the proof of claims, an adverse inference instruction was warranted.

[52] *Am. Hospitality Mgmt.*, 904 So. 2d at 548.

[53] *Id.* at 549.

[54] *St. Mary's Hosp.*, 685 So. 2d at 35 (adopting the Third District's characterization of the spoliation of evidence elements).

[55] *Id.* at 34.

[56] *Id.*

[57] *Id.*

[58] *Royal & Sunalliance*, 877 So. 2d at 846.

[59] *St. Mary's Hosp.*, 685 So. 2d at 34.

[60] *Hagopian*, 788 So. 2d at 1089.

[61] *Id.* at 1090.

[62] *Id.*

[63] *Id.* at 1092 (explaining that if the expert had the bottle pieces, "he would be better able to determine fault for the bottle explosion").

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The authors thank the International Center for Automated Information (ICAIR) at the University of Florida Levin College of Law for funding research related to this article.

The authors also thank Judge Ralph Artigliere, Thomas Y. Allman, and Kevin D. Johnson for providing keen insight, critical comments, and valuable guidance on early drafts of this article, even though not necessarily agreeing with the authors' opinions.

Journal HOME

[Revised: 05-27-2014]

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January, 2014 Volume 88, No. 1

Journal HOME

Social Media Evidence: What You Can't Use Won't Help You -- Practical Considerations for Using Evidence Gathered on the Internet

by Michael R. Holt and Victoria San Pedro

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"My life is an open book." These words, used long before the advent of the Internet, sum up the impact of what is now known as "social media." Social networking is an exploding phenomenon. It not only impacts our daily lives, but legal matters as well. And if used wisely, it provides a treasure trove of information for counsel on either side of a dispute. Thanks to sites like Facebook, Twitter, LinkedIn, and Pinterest, to name just a few, we are now privy to a limitless array of data. This includes personal comments, messages, photographs, and information such as a person's hometown, date of birth, address, occupation, ethnicity, height, relationship status, income, and education.

In the span of just a few minutes, one gains insight into someone's state of mind by scanning tweets or posts. Or they can track the physical condition and activities of a party by viewing his or her photographs and activities. This information can be useful for a variety of reasons ranging from mediation to impeachment or rehabilitation. As a result, information shared through social networks — social media evidence — has assumed a prominent role in a variety of litigation contexts and has taken on particular importance in criminal matters, family law, personal injury cases, criminal law, business torts, and employment disputes.

Social networking is, relatively speaking, a fairly new concept. Emerging approximately 10 years ago with the development of MySpace and LinkedIn in 2003,[1] social networking sites have grown from a few thousand users to more than a billion.[2] These sites have become a preferred form of electronic communication, surpassing email in 2009.[3] The world's population now spends more than 110 billion minutes on social networks and blog sites.[4] As of March 31, 2011, 9,370,620 Floridians had registered for a Facebook account, which is approximately half of the state's population.[5] Based on these statistics, it is inevitable that the social media accounts of at least one person involved in a dispute will have potentially relevant and discoverable information. But finding an online "smoking gun" does not guarantee that it will ever find its way into a courthouse or before a jury.

In the wake of social media's explosion as a communication device, judges and juries throughout Florida are being asked to evaluate the information provided by it in their deliberations. While the Florida Rules of Civil Procedure were amended in 2012 to provide guidelines pertaining to the discoverability of electronically stored information (ESI),[6] the Florida Evidence Code is still silent on the topic of the admissibility of this potential evidence. Now that Florida's rules of procedure and its courts have confirmed that social media evidence is discoverable,[7] parties are calling upon courts to answer the question of whether this evidence is admissible, and under what circumstances.

This article examines some of the challenges counsel encounter when dealing with social media evidence, from location and preservation to trial presentation. This includes obtaining information directly from social media sites, such as Facebook, and difficulties presented when key evidence exists only on the Internet Archive. The article also discusses unique evidentiary concerns posed by social media evidence and how courts have dealt with those challenges thus far. Ultimately, by following the proper procedures in finding, preserving, and presenting social media evidence, attorneys can ensure that this key material reaches the jury.

Finding and Preserving Social Media Evidence

Preserving social media evidence is just as critical as its presentation. The gathering process can begin within minutes of an attorney receiving a client inquiry or a new assignment. A brief Internet search can quickly assist counsel in finding potentially powerful evidence supporting or refuting a claim. Assuming that the website is "publicly available,"[8] preservation of the content becomes important. Preservation involves printing the home page of the website along with screen shots.

Although social media evidence might be a fairly new concept, the rules of procedure can help counsel preserve it. If the opposing party has some direct affiliation with the site, spoliation letters and/or motions to preserve are appropriate. These devices can ensure that opposing parties do not delete or alter social networking sites, online blogs, or any other potentially useful accounts. Individuals who have potentially damaging information stored on their social media accounts may be quick to alter or destroy that information after being contacted regarding the websites. This conduct opens up a host of issues which are beyond the scope of this article.

Parties may also obtain social media information through traditional discovery. Interrogatories should ask the respondent to identify all websites that he or she uses to communicate with other individuals; the name, account, or user name information associated with that website; the names of all individuals who have access to that account; the last time the account was accessed; and the individual's email addresses, phone number, home address, and other typical biographical information. Likewise, requests for production of this information can seek printouts evidencing each account and copies or screen shots of all photographs and messages included within the account.

• *A Word About Subpoenaing Facebook: Exemplary Futility* — Parenthetically, one might wonder why a litigant would send written discovery to an opposing party when third-party discovery might work just as well or perhaps even better. The classic example is Facebook, on which users post massive amounts of personal information. Under the Stored Communications Act,[9] however, Facebook may not disclose the contents of an account pursuant to a subpoena or court order to any nongovernmental entity. Facebook describes its user content as messages, timeline posts, and photos.[10] Therefore, Facebook will only provide and preserve user content in response to a valid law enforcement request.[11]

Facebook *will* provide "subscriber information," but not user content, pursuant to a lawful subpoena.[12] To ensure compliance, the party seeking the information must establish that the requested information is indispensable to the case and not within the party's possession.[13] Additionally, Facebook requires that it be served with a valid California or federal subpoena.[14] It further requires that out-of-state subpoenas be domesticated in California and personally served on Facebook's registered agent.[15] Parties must provide Facebook with the user's email address, Facebook user ID (UID), and vanity URL.[16]

Simply providing a user's name, birthday, and location will not allow Facebook to correctly identify the user's account.[17] The information should be propounded upon Facebook's registered agent, along with a processing fee.[18] To ensure that Facebook complies, limit the subpoena to the following categories of information: name, length of service, credit card information, email address(es), and a recent login/logout IP address(es), if available. Facebook will reply to your request typically within 30 days.[19]

• *The More Practical Way of Obtaining Social Media Evidence* — One can avoid the many aforementioned hurdles by obtaining a complete history from the user. A simple click of a button can easily retrieve a complete copy of any personal data kept on Facebook. Additionally, parties and their counsel may contact Facebook and request a copy of the personal data.[20] Alternatively, Facebook users may download a copy of their personal data by selecting Account Settings, General, and Download a copy of your Facebook data, which is located at the lower left-hand corner of the main content.[21]

This activity log includes a user's timeline information, posts, messages, photos, and more.[22] The activity log also includes information that will be helpful in establishing the admissibility of the evidence; for example, it logs the IP address used when logging into or out of Facebook. Using the IP address, an expert witness will be able to identify the physical address from which the posts were made, thereby establishing the party posting the Facebook item.[23]

• *Using the Wayback Machine* — The Internet Archive is a website that provides access to a digital library of Internet sites and other cultural artifacts in digital form.[24] The Internet Archive has created a service known as the "Wayback Machine" that permits a person to surf more than 150 billion pages stored in the Internet Archive's Web archive.[25] A visitor to the Wayback Machine can type in a website address, select a date range, then surf on an archived version of the Web.[26] The Internet Archive site captures past images from websites, and then creates an archive of how websites look over time.[27]

The Internet Archive would prefer to have parties' stipulate to the authenticity of the Internet printouts. The nonprofit organization does, however, provide affidavits to corroborate the authenticity of its printouts.[28] As one might imagine, this can prove extremely useful when litigants change the online content of a website, particularly if this occurs after a dispute or initiation of a lawsuit.

Florida courts appear reluctant to introduce Wayback Machine documentary evidence without proper testimony explaining how the machine works. For example, in *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 WL 1320242 (M.D. Fla. May 12, 2006), the plaintiff attempted to offer printouts from the Internet Archive website to prove how two other websites looked at various times in the past.[29] The U.S. District Court for the Middle District of Florida ruled that the plaintiff would need to present evidence from an Internet Archive official with personal knowledge of how the archive worked.[30]

The court found that the plaintiff failed to meet the requirements for authentication under Fed. R. Evid. 901, explaining that two affidavits from the plaintiff's employees did not sufficiently establish how the Wayback Machine works.[31] The plaintiff also contended that it submitted a certified copy of an affidavit from the administrative director of Wayback Machine used in an unrelated matter, which was sufficient to authenticate the printouts plaintiff sought to admit in the case.[32] The court disagreed.

Notably, the Wayback Machine usually does not archive copies of Facebook pages. However, should counsel attempt to introduce other website evidence, it would be prudent to obtain the affidavit executed by a director of the Internet Archive that would aid in the foundational aspects of admissibility of the evidence. Without the affidavit or an expert with knowledge as to how the Internet Archive works, the proponent of the information risks exclusion.

Presenting Social Media Evidence

While numerous Florida courts recognize that social media evidence is discoverable,[33] the admissibility of this information is not automatic. The primary concerns dealing with the admissibility of social media evidence center around the authenticity of the evidence and its relevancy.

• *Authentication* — The Florida Evidence Code requires the proponent of an item to produce evidence supporting a finding that the item is what its proponent claims it to be.[34] Authentication is a condition precedent to admissibility.[35] The major concerns surrounding the authentication of social media evidence is that there is little certainty that the post is what it purports to be. These concerns stem from the risks of anonymity and fraudulent presentation of identity present with electronic evidence.

Most noteworthy are the concerns that the declarant is not in fact who posted or transmitted the message. For example, a declarant might claim that someone else accessed his or her account and sent the messages under his or her name, thereby damaging the authenticity of this evidence. Many fear that because the evidence is electronic, it can be easily manipulated, thereby misrepresenting what was actually posted. Additionally, not all posts on a social media account are made by the user. And the "tagging" phenomenon[36] establishes additional difficulties regarding authenticity. Some courts appear uncomfortable and highly skeptical of the admissibility of social media evidence.

In Florida, however, as long as proponents present sufficient evidence for a reasonable juror to find that the item is genuine, the authentication threshold is met under F.S. §90.901. Therefore, proffering parties need not prove each step of creation in order to guarantee its authenticity. While Florida Evidence Code §90.901 does not, like its federal counterpart, provide a nonexhaustive list of how parties may authenticate evidence,[37] established Florida precedent holds that parties may employ several methods, including a witness with personal knowledge, through distinctive characteristics, or self-authentication.[38]

• *Personal Knowledge* — The most commonplace and traditional form of establishing authenticity is through the testimony of witnesses who personally know of its authenticity.[39] These witnesses may testify that an item is what it purports to be. In application to social media, parties can establish that the photograph or status is in fact a post or picture either of them, or taken by them. In fact, Facebook alleges that its representatives are not required to testify at trial since an "account owner, or any person with knowledge of the contents of the account, can authenticate account content."[40] When parties deny making the post, courts have been reluctant to admit the piece of evidence merely because it is identified with the person's name and photograph. Nonetheless, when witnesses can identify the person making the posts, the evidence is generally admissible.[41]

In *U.S. v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010), the 11th Circuit held that the district court abused its discretion in admitting the defendant's MySpace profile page, subscriber report, and photographs to prove that he committed a string of bank robberies because the material was inadmissible character evidence under Fed. R. Evid. 404.[42] The opinion details a thorough description of the prosecution's efforts to introduce the MySpace page into evidence.

To do so, the prosecution called the defendant's co-conspirator to the stand.[43] While on the stand, the co-conspirator established that the defendant had a MySpace account and identified the defendant as the person pictured in the posts.[44] Upon this testimony, the district court admitted the photograph of the defendant but not the profile page or subscriber report.[45] Soon thereafter, the government called a MySpace employee to the stand who laid the foundation for the subscriber report.[46] The district court admitted a redacted version of the subscriber report, which included the defendant's profile pictures, username, location, and email address.[47] The 11th Circuit ultimately affirmed the defendant's conviction and sentence, finding that the government had sufficiently established its modus operandi wholly apart from the MySpace evidence. Based on the foregoing, it is apparent that, at a minimum, social media evidence can be authenticated by personal knowledge.

Once again, in *U.S. v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012), the 11th Circuit dealt with the admissibility of MySpace evidence, namely, the admissibility of Internet chat printouts. The defendant, who was convicted by a jury of producing child pornography and attempting to entice a child to engage in unlawful sexual activity, claimed that admission of the printouts violated the authentication requirement of Fed. R. of Evid. 901.[48]

In *Lebowitz*, the prosecution introduced the chat printouts during the direct examination of the victim.[49] The victim testified that he printed out the chats, and that the printouts accurately reflected the messages between himself and the defendant.[50] While the victim could not establish the specific information as to how the printouts were created, the 11th Circuit held that the prosecution sufficiently established its prima facie case that the proffered evidence is what it purports to be, leaving the ultimate determination of admissibility with the jury.[51]

Since F.S. §90.901 mirrors Fed. R. Evid. 901, the previous cases are instructive in establishing the proper procedure for offering social media evidence into evidence. First, counsel must identify a witness who can establish that the item is what it purports to be and has personal knowledge of the item. Second, the relevance of the social media evidence must be established during the witnesses' direct examination. Finally, counsel should request that the witness identify the item and establish the witness' personal knowledge of the item, and whether the exhibit accurately reflects what the witness identifies as Mr. Doe's Facebook page. Once the foregoing predicate is laid, counsel should offer said exhibit into evidence.

• *Distinctive Characteristics* — Counsel may also establish the authenticity of social media evidence through its distinctive characteristics. As remarked by

the Florida Supreme Court, authentication of evidence may include examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics, such as barcodes, serial numbers, or signatures, in conjunction with the circumstances.[52] Therefore, it would aid counsel in offering social networking items into evidence if the items display distinctive characteristics that can be readily identified by the witness.

In 2011, in *U.S. v. Benford*, 479 F. App'x 186 (11th Cir. 2011), the U.S. Court of Appeals for the 11th Circuit held that a district court did not abuse its discretion in admitting two photographs from the defendant's MySpace page.[53] The prosecution alleged that the photographs depicted the defendant posing with two pistols charged in the indictment.[54] During the trial, the government elicited testimony from an ATF agent identifying one of the pistols in the picture as the same type of pistol found at the defendant's residence.[55] He further testified that the guns in the second photograph had markings consistent with that type of pistol.[56] The 11th Circuit held that the photographs were admissible. The 11th Circuit distinguished the case from *Phaknikone* in that the photos to be introduced specifically depicted the weapons charged in the indictment and, thus, not extrinsic evidence.

While the character implications of the aforementioned ruling are of value, the admissibility of the evidence, which was contingent upon the identification of the weapons therein, provides insight to future litigants. When photographic evidence from a social networking site presents distinctive characteristics, such as the guns in the photo, counsel should elicit testimony from witnesses regarding the distinctive characteristics as further evidence of the item's authenticity.

• *Self-authenticating Documents* — Pursuant to F.S. §90.902, certain classes of documents can be admitted into evidence at a trial without proof of authentication, as the documents are considered self-authenticating. The Florida Evidence Code lists a variety of documents that are classified as self-authenticating, including public records and newspapers, among others. Facebook takes the position that its websites are self-authenticating.[57] However, Florida courts recently held that websites are not self-authenticating documents,[58] therefore, although no Florida court has explicitly held that a social media website is not a self-authenticating document, a Florida court would likely also find that a social media website is not a self-authenticating document.

• *Expert Witness Testimony/Using Internet Consultants* — Other commentators suggest that the use of Internet consultants can enhance the odds of successfully admitting social media evidence.[59] A survey of Florida case law on the use of "Internet consultants," however, reveals that the use of these personnel is not as prevalent as one might imagine.[60]

Nonetheless, it appears as though Florida courts are comfortable with the use of Internet consultants to establish the authenticity of websites.[61] For example, in *Tiffany (NJ) LLC v. 954JEWELRYMAX.COM*, No. 12-23518-CIV, 2012 WL 4896644 (S.D. Fla. Oct. 15, 2012), the court considered an Internet consultant's testimony as to how he was able to retrieve information of the defendant's website as well as copies of what the consultant was able to retrieve from the Internet.[62] In *Tiffany*, the consultant attempted to purchase counterfeit Tiffany's products, which were available through the defendant's website, and printed the materials from the defendant's website.[63] The court considered the consultant's testimony and, in granting a preliminary injunction, relied upon that evidence.[64]

• *Relevance* — The Florida Evidence Code defines "relevant evidence" as "evidence tending to prove or disprove a material fact."[65] The code further provides that evidence that is not relevant is not admissible.[66] Under F.S. §90.403, relevant evidence is inadmissible if its probative value is substantially outweighed by either the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.[67] In regard to social media, evidence can be relevant for a number of reasons: to impeach credibility, prove or disprove injuries, and demonstrate a witness' bias. Florida courts have addressed the relevancy of social media evidence in two criminal proceedings, which provide insight to trial lawyers, not only for criminal proceedings but also civil cases.

For example, *U.S. v. Castillo*, 409 F. App'x 250 (11th Cir. 2010), involved a prosecution for illegal weapons possession. The government introduced evidence of a photograph from the defendant's MySpace account, wherein he wore a ski mask, held an assault rifle, and displayed his middle finger.[68] The district court admitted the MySpace photograph at trial, concluding that the website was probative of the defendant's possession of the guns charged in the indictment, namely an AR-15, which was depicted in the photograph.[69] The 11th Circuit held that the district court did not abuse its discretion in admitting the social media evidence.[70]

First, the 11th Circuit noted that website was probative of Castillo's possession of the illegal firearms, especially when considered in light of the defendant's defense that firearms found at his residence had belonged to someone else and that Castillo had not possessed them.[71] Therefore, the website was probative of the issue at trial — whether Castillo knowingly possessed the illegal firearms.[72] The 11th Circuit also rejected the defendant's argument that the commentary accompanying the photograph was prejudicial because the judge's limiting instruction maximized the probative value and minimized the prejudicial effect of the commentary.[73] Therefore, the 11th Circuit deemed the social media evidence properly admitted.[74]

In a civil proceeding, counsel may use social media to locate photographs that refute the extent of a plaintiff's injuries. For example, claimants may allege that they have been bedridden for several weeks, yet counsel may find pictures on Facebook showing the plaintiff participating in physical activities during the period in question. Under this scenario, the evidence would be relevant because it has a tendency to make a fact of consequence in the proceeding more or less probable, specifically the plaintiff's claims of being bedridden as a result of the accident.[75]

• *Demonstrating Witness Bias* — Social media evidence may also be offered in order to evidence a witness' bias or motive to lie. For example, in *State v. Harden*, 87 So. 3d 1243 (Fla. 4th DCA 2012), the Fourth DCA found that MySpace messages were relevant because they demonstrated intent or motive to be untruthful.[76] Further, the Fourth DCA disagreed with the trial court's conclusion that the probative value of the messages was substantially outweighed by the danger of unfair prejudice.[77] This holding benefits trial lawyers because it establishes the various levels of relevancy served by social

media evidence. Therefore, when counsel locates social media evidence, which at least tends to make it more likely that the witness is biased or has a motive to be untruthful, a court may admit the evidence for that limited purpose.

• *Other Concerns* — As previously explained, Florida courts have had limited opportunities to discuss the admissibility of social media evidence. In June 2013, the U.S. District Court for the Southern District of Florida considered the admissibility of Facebook comments during its ruling on a motion for summary judgment.[78] The motion stemmed from a dispute between a *Jersey Shore* cast member, Michael Sorrentino — also known as "The Situation"— and apparel retailer Abercrombie & Fitch regarding a t-shirt that was sold by the retailer, which displayed the phrase "The Fitchuation," and a subsequent press release issued by the retailer.[79] In opposition to the motion, Mr. Sorrentino attempted to introduce Facebook comments in order to establish that Abercrombie's press release was a publicity stunt.[80] The court briefly remarked that the comments were inadmissible hearsay and, thus, could not be considered on a motion for summary judgment because they would be inadmissible at trial. The court ultimately granted Abercrombie's motion for summary judgment, finding that neither the t-shirt nor the press release constituted trademark infringement, unfair competition, false advertising, nor misappropriation of likeness for commercial purpose.

Conclusion

Social media is everywhere. Nearly everyone uses it. Litigants who understand social media — and its benefits and limitations — can immeasurably help their clients resolve disputes. If not properly researched, preserved, and authenticated, the best social media evidence is worthless. By working within the presently existing system of rules, taking special nuances into consideration, counsel can ensure that social media evidence sees the light of day in a courtroom.

[1] JC Torpey, Milestones and Statistics: LinkedIn, Facebook and MySpace, Yahoo! News, (March 23, 2011), http://news.yahoo.com/milestones-statistics-linkedin-facebook-myspace-20110323-155500-663.html.

[2] Facebook, Key Facts, https://newsroom.fb.com/Key-Facts (reporting over 1.1 billion users worldwide).

[3] *See* The Nielsen Co., *Global Faces and Networked Places: A Nielsen Report on Social Networking's New Global Footprint* 2 (March 2009), *available at* http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2009/03/nielsen_globalfaces_mar09.pdf.

[4] The Nielsen Co., *Social Networks/Blogs Now Account for One in Every Four and a Half Minutes Online*, http://www.nielsen.com/us/en/newswire/2010/social-media-accounts-for-22-percent-of-time-online.html.

[5] Internetworldstats, Florida, United States, http://www.internetworldstats.com/unitedstates.htm. This number is up from 7,839,520 Facebook users on March 31, 2010.

[6] The Florida Rules of Civil Procedure were amended six years after its federal counterpart. *See* Fed. R. Civ. P. 26 advisory committee note.

[7] *See, e.g.*, Fla. R. Civ. P. 1.350 advisory committee notes; Christopher B. Hopkins & Tracy T. Segal, *Discovery of Facebook Content in Florida Cases*, 31 No. 2 Trial Advoc. Q. 14 (Spring 2012); *see also Beswick v. Northwest Medical Center et. al.*, No. 07-020592 (17th Cir. Broward Cty, FL, Nov. 3, 2011), *available at* http://www.internetlawcommentary.com/materials/2012_bent_social_media_order.PDF.

[8] Counsel and their staff should not set up fake user names to "friend" the opposing party. *See* Shane Witnov, *Investigating Facebook: The Ethics of Using Social Networking Websites in Legal Investigations*, 28 Santa Clara Computer & High Tech. L. J. 31 (2011) (exploring various ethical considerations in the context of Facebook investigations and numerous disciplinary decisions on the issue).

[9] 18 U.S.C. §2701 (2012).

[10] Facebook, Information on Civil Subpoenas, https://www.facebook.com/help/473784375984502/.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* Facebook explains that a user's UIDs and/or vanity URLs may be found in the uniform resource locator available in a browser displaying the account in question. For example, in the URL, "http://www.facebook.com/profile.php?id=ADMISSIBILITY," "ADMISSIBILITY" is the UID.

[18] *Id.*

[19] *Id.*

[20] *See* Facebook, I Would Like to Request Access to My Personal Data Stored by Facebook, http://www.facebook.com/help/226281544049399.

[21] *See* Facebook, Privacy, https://www.facebook.com/about/privacy/other; *see also* Facebook, Accessing Your Facebook Data, http://www.facebook.com/help/contact/?id=166828260073047#!/help/326826564067688.

[22] *Id.*

[23] *See, e.g., United States v. Cray*, 450 F. App'x 923, 934 (11th Cir. 2012) *cert. denied*, 133 S. Ct. 265 (2012).

[24] *Lorentz v. Sunshine Health Products, Inc.*, No. 09-61529-CIV, 2010 WL 3733986 (S.D. Fla. Aug. 27, 2010), *report and recommendation adopted*, 09-61529-CIV, 2010 WL 3733985 (S.D. Fla. Sept. 23, 2010).

[25] *Id.*

[26] *Id.*

[27] *Saadi v. Maroun*, No. 8:07-CV-1976-T-24 MA, 2009 WL 3736121 (M.D. Fla. Nov. 4, 2009).

[28] Internet Archive, About the Affidavit, Frequently Asked Questions, http://archive.org/legal/faq.php#wayback.

[29] *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, No. 8:06CV223TMSS, 2006 WL 1320242 at *1-2 (M.D. Fla. May 12, 2006).

[30] *Id* at *2.

[31] *Id.*

[32] *Id.* at *1.

[33] *Id.*

[34] *See* Fla. Stat. §90. 901 (2013).

[35] *See* Fla. Stat. §90. 901.

[36] *Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-cv-632-J-JBT, 2012 WL 555759 at *2 n. 3 (M.D. Fla. Feb. 2012) (citing *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 n. 3 (S.D. Ind. 2010)) ("'Tagging' is the process by which a third party posts a picture and links people in the picture to their profiles so that the picture will appear in the profiles of the person who 'tagged' the people in the picture, as well as on the profiles of the people who were identified in the picture.").

[37] Fed. R. Evid. 902.

[38] *Casamassina v. U.S. Life Ins. Co. in City of N.Y.*, 958 So. 2d 1093, 1099 (Fla. 4th DCA 2007) (citing *ITT Real Estate Equities, Inc. v. Chandler Ins. Agency, Inc.*, 617 So. 2d 750, 751 (Fla. 4th DCA 1993)).

[39] *See generally Sunnyvale Mar. Co., Inc. v. Gomez*, 546 So. 2d 6, 7 (Fla. 3d DCA 1989).

[40] Facebook, Information on Civil Subpoenas, https://www.facebook.com/help/473784375984502/.

[41] *See United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010).

[42] *Id.* at 1108.

[43] *Id.* at 1105.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1105-1106.

[47] *Id.* at 1106.

[48] *Leibowitz*, 676 F.3d at 1000, 1008.

[49] *Id.* at 1009.

[50] *Id.*

[51] *Id.*

[52] *See Coday v. State*, 946 So. 2d 988, 1000 (Fla. 2006) (explaining that an item's appearance, contents, substance, and internal patterns are distinctive characteristics).

[53] *Benford*, 479 F. App'x at 191.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Fla. Stat. §90.902 (2012).

[58] *Nationwide Mut. Fire Ins. Co. v. Darragh*, 95 So. 3d 897, 900 (Fla. 5th DCA 2012), *reh'g denied* (July 10, 2012), *review denied*, SC12-1714, 2013 WL 3064815 (Fla. June 18, 2013) (citing *St. Luke's Cataract and Laser Inst., P.A. v. Sanderson,* No. 8:06-CV-223-T-MSS, 2006 WL 1320242 (M.D. Fla. May 12, 2006) ("Websites are not self-authenticating. To authenticate printouts from a website, the party proffering the evidence must produce 'some statement or affidavit from someone with knowledge [of the website]...for example [a] web master or someone else with personal knowledge would be sufficient.'")); *see also Sun Prot. Factory, Inc. v. Tender Corp.*, 604CV732ORL19KRS, 2005 WL 2484710 at *6 n. 4 (M.D. Fla. Oct. 7, 2005) (noting in dicta that "[t]he websites are not self-authenticating").

[59] *See* Monique C.M. Leahy, *Consulting and Retaining Experts: Use at Trial*, 122 Am. Jur. Trials 421 (updated May 2013).

[60] *See Tiffany (NJ) LLC v. 954JEWELRYMAX.COM*, No. 12-23518-CIV, 2012 WL 4896644 (S.D. Fla. Oct. 15, 2012).

[61] *Id.* at *2-4.

[62] *Id.* at *2-3.

[63] *Id.* at *2.

[64] *Id.* at *2-5.

[65] Fla. Stat. §90.401 (2012).

[66] Fla. Stat. §90.402 (2012).

[67] Fla. Stat. §90.403 (2012).

[68] *U.S. v. Castillo*, 409 F. App'x 250, 252 (11th Cir. 2010).

[69] *Id.*

[70] *Id.* at 253.

[71] *Id.* at 252.

[72] *Id.*

[73] *Id.* at 253.

ABOVE THE LAW

08 Nov 2011 at 1:53 PM
ATTORNEY MISCONDUCT, DEATHS, FACEBOOK, LEGAL ETHICS, PATTON BOGGS, SCREW-UPS, SOCIAL NETWORKING WEBSITES, TECHNOLOGY, TRIALS

Facebook Spoliation Costs Widower and His Attorney $700K in Sanctions

By CHRISTOPHER DANZIG

When a tipster sent us an e-mail with the subject, "Court awards $700,000+ in sanctions for destruction of FB page," I thought it sounded like it might be interesting. Because hey, that's a lot of money.

I didn't realize it would also be one of the most depressing legal news stories I've read since this tragic murder-suicide.

The three-quarters-of-a-million-dollar sanction award was levied against the widower of a woman killed in a car accident and the widower's lawyer. The ruling was an abrupt table-turn for Isaiah Lester, who had previously won a $10 million wrongful death suit against the driver whose truck overturned and killed his wife.

Keep reading for the depressing details....

In 2008, truck driver William Donald Sprouse pleaded guilty to charges of involuntary manslaughter for the accidental death of 25-year-old Jessica Lester. According to a bluntly-written news article from the time of the trial, Sprouse's "truck rounded a corner on two wheels, flipped and rolled over onto Lester's car, a crushing sixty thousand pounds landing where Jessica sat."

Jessica's parents and her widower, Isaiah Lester, won a massive wrongful death suit in 2010 against Sprouse and his employer at the time of the accident, Allied Concrete Company. A Virginia jury awarded them a massive $10.6 million. Clearly, the family's wounds were still fresh.

But the courtroom odyssey was not over.

On October 21 (nearly a year later), Judge Edward Hogshire signed a "final order" (PDF) cutting the jury verdict in half in *Lester v. Allied Concrete Company and William Donald Sprouse*, and penalizing Lester and his attorney, Matt Murray, a combined $722,000 in sanctions:

> Whereas, the court, having reviewed the evidence and arguments of counsel and carefully considered the extensive pattern of deceptive and obstructionist conduct of Murray and Lester resulting in the sanction award, finds that most of the substantial fees and costs expended by Defendants were necessary and appropriate to address and defend against such conduct...

"Extensive pattern of deceptive and obstructionist conduct." Ouch. Not what you want to hear after you thought you cashed in on one of the biggest wrongful death verdicts in Virginia history.

Unsurprisingly, the majority of the sanctions will go to the defense's attorneys at Patton Boggs. Murray is on the hook for $542,000, and Lester owes $180,000.

The whole thing makes me sad and a little queasy, especially because of the weirdness of the withheld and spoliated Facebook evidence. According to The Hook:

> According to a September 1 order from Judge Hogshire, the spoliation began in March 25, 2009, when Murray received a discovery request for the contents of Lester's Facebook account. Attached was a photo of Lester wearing a "I [heart] hot moms" t-shirt, and holding a beer can with other young adults.
>
> Murray instructed a paralegal to tell Lester to "clean up" his Facebook page because, "we don't want blowups of this stuff at trial," the assistant, Marlina Smith, said in a deposition. She emailed that message to Lester the next day.
>
> On March 26, 2009, according to the judge's order, Murray came up with a scheme to take down or deactivate Lester's Facebook account so that he could respond that he had no Facebook page on the date the discovery request was signed.
>
> When defense attorneys filed a motion to compel, Murray instructed Lester to reactivate the account. But in a December 16, 2009, deposition, Lester denied deactivating the account.
>
> Murray is also accused of withholding the email from Smith instructing Lester to clean up his Facebook page when he was ordered to produce it shortly before the trial began. Murray falsely claimed after the trial that the omission was the paralegal's mistake, according to the court order.

Hey Murray, CHECK YOU FEDERAL RULES OF CIVIL PROCEDURE.

At this point in time, it's pretty standard for opposing parties to dig through social media in cases like this. "He couldn't have been THAT sad about his wife's death. He was wearing a crazy t-shirt and partying with his buddies."

But destroying and hiding discoverable material is *clearly* not the way to avoid the issue. Mostly because it's illegal, but also because it might not turn out to be that big a deal. (E.g., "My client was so distraught, he didn't know what clothes he was wearing. He started drinking heavily to numb the pain." Whatever.)

Murray has since left his position at Allen, Allen, Allen, and Allen, the largest personal injury firm in Virginia. Judge Hogshire turned him over to the Virginia State Bar.

Are his days as a licensed attorney numbered?

Lester v. Allied Concrete Company and William Donald Sprouse: Final Order [PDF]
Unusual outcome: $722K in sanctions, juror judges judge [The Hook]
Sanctions: Allied Concrete attorneys want $900K in legal fees [The Hook]

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TOPICS Allied Concrete Company, Attorney Misconduct, Civil Procedure, Deaths, Depressing stuff, Depressing Things, Discovery, Edward Hogshire, Facebook, Federal Rules of Civil Procedure, Isaiah Lester, Jessica Lester, Judge Edward Hogshire, Legal Ethics, Marlina Smith, Matt Murray, Patton Boggs, Screw-Ups, Social Networking Websites, Technology, Trials, Virginia, William Donald Sprouse, Wrongful Death

EVIDENCE

Plaintiffs in EEOC Suit Must Turn Over Cellphones and Facebook Account Passwords, Judge Rules

POSTED NOV 20, 2012 09:27 PM CST

BY MARTHA NEIL (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/5/)

Saying that the plaintiffs in an employment discrimination case have not produced all material relevant to the defendant employer's somewhat unclear discovery requests, a federal magistrate judge has ordered them to provide their cellphones and passwords to Facebook and other social media accounts.

A special master will compile their text messages and posts on Facebook and other pages, then determine what is and is not relevant. The plaintiffs will also have a chance to object before the material is produced, explains Judge Michael E. Hegarty in a Nov. 7 order (http://www.workplaceclassaction.com/HBH.pdf) (PDF) in the District of Colorado case.

He partially granted a motion to compel after the defendant, The Original HoneyBaked Ham Co. of Georgia Inc., got hold of material from lead plaintiff Wendy Cabrera's Facebook page. It contained her thoughts about how much money she might get from the lawsuit, as well as her emotional state after losing a pet and ending a relationship and other information relevant to the damages she is seeking, the judge says.

"As a general matter, I view this content logically as though each class member had a file folder titled 'Everything About Me,' which they have voluntarily shared with others," Hegarty explains. "If there are documents in this folder that contain information that is relevant or may lead to the discovery of admissible evidence relating to this lawsuit, the presumption is that it should be produced. The fact that it exists in cyberspace on an electronic device is a logistical and, perhaps, financial problem, but not a circumstance that removes the information from accessibility by a party opponent in litigation."

The plaintiffs and the defendants will share the cost of the discovery, the judge said.

Observers are questioning whether the ruling is overly broad. Writing at Technology & Marketing Law Blog (http://blog.ericgoldman.org/archives/2012/11/court_orders_pa.htm), attorney Venkat Balasubramani points out that providing passwords gives a third party carte blanche to access the entire account and perhaps unwittingly make changes to it. He argues that the plaintiffs should simply be required to export the information sought by the court.

"It's also worth mentioning that online conversations among class members should be avoided," he notes. "They take place prior to when lawyers are involved, but these conversations are sure to contain some juicy bits that are useful to defendant."

The suit, which was filed last year by the Equal Employment Opportunity Commission, seeks damages on behalf of approximately 20 women who allege they were sexually harassed at the defendant's stores in Colorado and suffered retaliatory treatment, including being fired, when they complained up the chain of command.

An EEOC press release (http://www.eeoc.gov/eeoc/newsroom/release/10-3-11j.cfm) and an article posted online by The Denver Channel (http://www.thedenverchannel.com/news/eeoc-sues-honeybaked-ham-for-sexual-harassment), an ABC News affiliate provide further details about the suit, which was filed last year.

An Associated Press (http://denver.cbslocal.com/2011/10/04/honeybaked-ham-no-tolerance-for-sexual-harassment/) article reports that the HoneyBaked Ham Co. said it doesn't tolerate harassment and investigated Cabrera's complaints when they arose the previous year.

A tip of the hat to Ars Technica's Law & Disorder (http://arstechnica.com/tech-policy/2012/11/judge-orders-sex-harassment-plaintiffs-to-produce-facebook-passwords/) blog and NBC News (http://www.nbcnews.com/technology/technolog/judge-sex-harassment-plaintiffs-turn-over-facebook-passwords-1C7175651).

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Comments

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Fred said:

It's not just overly broad, it's asinine and completely ridiculous. It's as if there might be a diary in a person's home and the judge ordered the person to give their house key to a third party and let them rummage through the house to see if the could find the diary and anything else they might decide could be useful and with no supervision to make sure they didn't steal the silver.

Posted: Nov 21, 2012 02:58 pm CST
Reply to this comment

Walt Fricke said:

Fred - I see your first point, but do you think the special master can't be trusted not to steal the silver?

I have always wondered about the appropriateness of filing a lawsuit based "on information and belief" as to key elements of culpability, with not enough information to survive a motion for summary judgment without discovery. Seems to me that if someone has been wronged, they ought to possess at least that quantum of admissible evidence, after which they could use particularized discovery to uncover more as they seek to have a preponderance to present at trial.

Posted: Nov 21, 2012 11:29 pm CST
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04-09-2013 | 04:11 PM *Author:* Margaret (Molly) DiBianca

Spoliation of Facebook Evidence

Discovery of social-media evidence can be a valuable tool, particularly in employment and personal-injury litigation. Employers' lawyers should be aware not only of the potentially relevant evidence in a plaintiff-employee's Facebook account. They also should be *very* aware of the ethical implications relating to their own client's social-media activities. One such implication is the potential spoliation of evidence. A new decision from the U.S. District Court of New Jersey offers an important reminder of this critical duty.

The plaintiff, a baggage handler, alleged that he was injured when a set of feuler stairs crashed into him. He claimed that, because of his injuries, he was permanently disabled, was unable to work, and was limited in his physical and social activities.

During litigation, the defendants sought discovery regarding the plaintiff's damages and social activities. Plaintiff signed authorization forms form eBay, PayPal, and some social-networking sites but not for his Facebook account.

At a settlement conference, the Magistrate Judge ordered the plaintiff to execute an authorization for his Facebook account. The plaintiff agreed to change his password so the defendants' counsel could access the contents of his Facebook account. After the conference, the defendants' counsel logged in and printed some of plaintiff's profile page.

As a result, the plaintiff got a notice from Facebook informing him that his account had been accessed from an unauthorized ISP address. According to the plaintiff, he deactivated the account upon receiving the alert from Facebook but, 14 days later, Facebook "automatically deleted" the account and all of its contents. Therefore, all of the contents were lost permanently. The court ordered spoliation sanctions against the plaintiff in the form of an adverse inference.

Now, the reality is that the plaintiff *actually* deleted the account. Deactivating your Facebook account does not result in the "automatic deletion" of the account. Apparently, the plaintiff thought that he was deactivating it but actually deleted it.

News to me was that Facebook *permanently* deletes contents of any account that is deleted and that it does so just 14 days after the account is deleted.

Either way, this case should serve as an important reminder to lawyers of their duty to take an active role in the preservation and/or production of clients' social-media contents.

Gatto v. U. Air Lines, Inc., No. 10-cv-1090-ES-SCM (D.N.J. Mar. 25, 2013) [an enhanced version of this opinion is available to lexis.com subscribers].

See also,

EEOC Sanctioned for Failure to Produce Social-Media Evidence

Employees Must Turn Over Facebook Info For Harassment Claim

Discovery of EEOC Claimants' Social-Media Posts

Call Me, Maybe. Discovery of Employee Identities

Manager's Drunk Facebook Post Leads to Retaliation Claim

Read more Labor and Employment Law insights from Margaret (Molly) DiBianca in the Delaware Employment Law Blog.

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Tags: ***social media accounts*** ***discoverability of social media accounts*** *spoliation*

Gatto v. United Air Lines, Inc.
United States District Court, D. New Jersey. March 25, 2013 Not Reported in F.Supp.2d 2013 WL 1285285 (Approx. 5 pages)

2013 WL 1285285
Only the Westlaw citation is currently available.
United States District Court,
D. New Jersey.

Frank GATTO, Plaintiff,

v.

UNITED AIR LINES, INC., Allied Aviation Services, Inc., and John Does 1–10 (fictitious names), Defendant.

Civil Action No. 10–cv–1090–ES–SCM. March 25, 2013.

Attorneys and Law Firms

J. Silvio Mascolo, Rebenack Aranow & Mascolo LLP, New Brunswick, NJ, for Plaintiff.

Jeffrey W. Moryan, Stacie Lynn Powers, Laurie Beth Kachonick, Connell Foley LLP, Roseland, NJ, Kenneth Joseph Gormley, Locke Lord Bissell & Liddell LLP, New York, NY, for Defendant.

ORDER

STEVEN C. MANNION, United States Magistrate Judge.

*1 THIS MATTER comes before the Court on joint motion of defendants United Air Lines, Inc., (hereafter, "United") and Allied Aviation Services, Inc., (hereafter, "Allied"; collectively, "Defendants") for spoliation sanctions related to the deletion of plaintiff Frank Gato's (hereafter "Plaintiff") Facebook account. [D.E. 33]. Specifically, Defendants request that this Court: (1) enter an Order issuing an instruction at trial that the jury draw an adverse inference against Plaintiff for failing to preserve his Facebook account; and (2) award Defendants with expenses, including attorneys' fees, associated with discovery and the filing of the instant motion. *Id.* Plaintiff opposes Defendants' motion. [D.E. 34]. The Court has considered the parties' submissions and, for the reasons set forth herein, Defendants' motion for sanctions is hereby **GRANTED IN PART** and **DENIED IN PART.**

BACKGROUND

This is a personal injury action arising out of an alleged accident that occurred on January 21, 2008, at the John F. Kennedy Airport. (*See* D.E. 1, Complaint at *1). Plaintiff was employed as a ground operations supervisor for JetBlue Airways Corporation, and the alleged accident occurred in the course of Plaintiff's employment. *Id.* at *2. Essentially, Plaintiff asserts that while he was unloading baggage an aircraft, owned and operated by United, caused a set of fueler stairs, owned and operated by Allied, to crash into him. *Id.*

Plaintiff alleges to have sustained a number of injuries as a result of the accident, including a torn rotator cuff, a torn medial meniscus, and back injuries. *Id.* Plaintiff also alleges that said injuries have rendered him permanently disabled, and that his disability limits his physical and social activities. *Id.* Furthermore, Plaintiff claims that he has been unable to work since July of 2008. (*See* Defendants' Brief in Support of Motion at *6, D.E. 33–4).

Defendants have sought discovery related to Plaintiff's damages and his social activities. *Id.* at *7. Defendant United's Third Request for Production of Documents to Plaintiff was served on July 21, 2011, and included a request for documents and information related to social media accounts maintained by Plaintiff as well as online business activities such as eBay. *Id.* On July 27, 2011, Defendant Allied joined in United's discovery requests, and on November 21, 2011, Plaintiff provided Defendants with signed authorizations for the release of information from social networking sites and other online services like eBay and PayPal. *Id.* However, Plaintiff did not include an authorization for the release of records from Facebook. *Id.*

After Defendants again requested authorization for the release of Plaintiff's Facebook records, the parties raised their discovery issue before Magistrate Judge Cathy L. Waldor during an in-person settlement conference on December 1, 2011. *Id.* at *8. Judge Waldor ordered Plaintiff to execute an authorization for the release of documents and information

from Facebook, and Plaintiff agreed to change his account password to "alliedunited." *Id.* While the parties dispute whether it was agreed that defense counsel would directly access Plaintiff's Facebook account, the parties do not dispute that the password was provided to counsel for the purpose of accessing documents and information from Facebook. *Id.; (see also* Plaintiff's Brief in Opposition, D.E. 34). Similarly, Plaintiff alleges that "assurances were given by Counsel for the Defendants at the December 1, 2011 conference that there would not be unauthorized access to the Facebook account online," whereas Defendants allege that there were no assurances given that the account would not be accessed.*Id.*

*2 Plaintiff changed his password on December 5, 2011. (*See* Defendants' Brief in Support of Motion at *8, D.E. 33–4). Shortly thereafter, counsel for United allegedly accessed the account "to confirm the password was changed," and printed portions of Plaintiff's Facebook page. *Id.* Counsel for Allied allegedly did not access or view any portion of Plaintiff's Facebook account.*Id.* at *9. On December 9, 2011, counsel for Plaintiff sent an email to defense counsel indicating that Plaintiff had received an alert from Facebook that his account was logged onto from an unfamiliar IP address in New Jersey, and asked if Plaintiff's Facebook account had been accessed directly by defense counsel. *Id.* On December 15, 2011, counsel for United confirmed that Plaintiff's Facebook account had been accessed and that Plaintiff's authorization "had been sent to Facebook with a Subpoena in order to obtain the entire contents of the account directly from Facebook."*Id.*

While Facebook did respond to the subpoena served upon it, Facebook objected to providing certain information related to Plaintiff's account due to concerns regarding the Federal Stored Communications Act. *Id.* Facebook instead recommended that the account holder download the entire contents of the account as an alternative method for obtaining the information. *Id.* Defendants allege that this issue was discussed with the Court during a telephone status conference on January 6, 2012, where Plaintiff's counsel advised that he would be willing to download the account information and provide a copy to the parties. *Id.* Defendants allegedly agreed to Plaintiff's proposal, with the condition that Plaintiff would also provide a certification that the data was not modified or edited since the December 1, 2011 settlement conference. *Id.*

However, on January 20, 2012, Defendants were advised by Plaintiff's counsel that Plaintiff's Facebook account had been deactivated on December 16, 2011, and that all of Plaintiff's account data was lost. *Id.* at *10.Plaintiff allegedly deactivated his account because he had received notice that it was accessed on December 6 and 7 by a New Jersey IP address that was unknown to him, despite counsel for United having already confirmed that it had directly accessed Plaintiff's Facebook account. *Id.* United's counsel requested that Plaintiff immediately reactivate his account, but the account could not be reactivated because Facebook had "automatically deleted" the account fourteen days after its deactivation.[1] *Id.* As a result, the contents of Plaintiff's Facebook account no longer exist and cannot be retrieved. *Id.*

Defendants contend that some of the contents of Plaintiff's Facebook account that were printed in black and white by counsel for United contain comments and photographs that contradict Plaintiff's claims and deposition testimony. *Id.* at *13.This information allegedly includes physical and social activities in which Plaintiff engages, trips taken by Plaintiff, and evidence of Plaintiff's online business activities. *Id.* Defendants contend that the above constitutes discoverable evidence relevant to Plaintiff's claims for damages and overall credibility. *Id.*

DISCUSSION

*3 Spoliation occurs where evidence is destroyed or significantly altered, or where a party fails to "preserve property for another's use as evidence in pending or reasonably foreseeable litigation."*Mosaid Technologies v. Samsung Electronics,* 348 F.Supp.2d 332, 335 (D.N.J.2004) (internal citations omitted). Litigants in federal court have a duty to preserve relevant evidence that they know, or reasonably should know, will likely be requested in reasonably foreseeable litigation, and the Court may impose sanctions on an offending party that has breached this duty. *See Scott v. IBM, Corp.*, 196 F.R.D. 223, 248 (D.N.J.2000)."Potential sanctions for spoliation include: dismissal of a claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the spoliation inference; fines; and attorneys' fees and costs."*Mosaid,* 348 F.Supp.2d at 335.

In determining which sanction is appropriate courts consider the following:

(1) The degree of fault of the party who altered or destroyed the evidence;

(2) The degree of prejudice suffered by the opposing party; and

(3) Whether there is a lesser sanction that will avoid substantial unfairness to the opposing party, and where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir.1994). Here, the Court will limit its focus to the adverse inference instruction and monetary sanctions, as they are the only sanctions that Defendants request. (*See* Defendants' Brief, D.E. 33–4).

An adverse inference, or "spoliation instruction," permits a jury to infer that the fact that a document was not produced or destroyed is "evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him."*Scott,* 196 F.R.D. at 248.The adverse inference instruction is predicated "upon the common sense observation that when a party destroys evidence that is relevant to a claim or defense in a case, the party did so out of the well-founded fear that the contents would harm him."*Mosaid,* 349 F.Supp.2d at 336. Before giving an adverse inference instruction, the Court must find that four factors are satisfied: (1) the evidence was within the party's control; (2) there was an actual suppression or withholding of evidence; (3) the evidence was destroyed or withheld was relevant to the claims or defenses; and (4) it was reasonably foreseeable that the evidence would be discoverable. *Id.;Brewer v. Quaker State Oil Refining Co.*, 72 F.3d 326, 334 (3d Cir.1995); *Veloso v. Western Bedding Supply Co.*, 281 F.Supp.2d 743, 746 (D.N.J.2003); *Scott v. IBM Corp.*, 196 F.R.D. 223, 248 (D.N.J.2000).

Here, the deletion of Plaintiff's Facebook account clearly satisfies the first, third, and fourth of the aforementioned factors. Plaintiff's Facebook account was clearly within his control, as Plaintiff had authority to add, delete, or modify his account's content. *See Arteria Property Pty Ltd. v. Universal Funding V.T. O., Inc.*, 2008 WL 4513696 at *5 (D.N.J.2008). It is also clear that Plaintiff's Facebook account was relevant to the litigation. Plaintiff alleges to have sustained serious injuries in this personal injury action, and further alleges that said injuries have limited his ability to work and engage in social and physical activities. The Facebook information sought by defendants focused upon posts, comments, status updates, and other information posted or made by the Plaintiff subsequent to the date of the alleged accident, as such information would be relevant to the issue of damages. Thus, the first and third factors are both satisfied.

***4** With regard to the fourth factor, the Court finds that it was reasonably foreseeable that Plaintiff's Facebook account would be sought in discovery. Defendants requested Plaintiff's Facebook account information as early as July 21, 2011, nearly five months before Plaintiff deactivated his Facebook account. Furthermore, Plaintiff's Facebook account was discussed during the December 1, 2011, Settlement Conference, where Plaintiff was present and the Court order related to the discovery of information associated with Plaintiff's Facebook account. Accordingly, it is beyond dispute that Plaintiff had a duty to preserve his Facebook account at the time it was deactivated and deleted.

It follows that the only point of discussion that remains with regard to the appropriateness of an adverse inference instruction is the second factor, whether there was "actual suppression or withholding of evidence."Plaintiff argues that he did not intentionally destroy evidence or violate a Court Order, and that his actions fall short of the "actual suppression" standard. (*See* D.E. 34, Plaintiff's Brief at *6). Plaintiff alleges that he had recently been involved in contentious divorce proceedings, and that his Facebook account had been "hacked into" on numerous occasions prior to this lawsuit and the settlement conference held in December of 2011. *Id.* Accordingly, Plaintiff asserts that he acted reasonably in deactivating his Facebook account after receiving notice from Facebook that his account had been accessed from an unauthorized IP address that he was unfamiliar with. *Id.* Plaintiff asserts that the permanent deletion of the account was accidental, and entirely the result of Facebook "automatically" deleting the account 14 days after its deactivation in accordance with company policy. *Id.* Relatedly, Plaintiff's counsel notes that Plaintiff was never personally advised that it was actually defense counsel that accessed his account until after the account had been permanently deleted, and at this point Plaintiff allegedly attempted to reactivate the account to no avail. *Id.* at *6–7.

The Court is not persuaded by Plaintiff's arguments regarding whether the evidence at issue was intentionally suppressed. As noted in *Mosaid,* the spoliation inference serves a remedial function, leveling the playing field after a party has destroyed or withheld relevant evidence, thereby prejudicing the opposing party. *Mosaid.* 348 F.Supp.2d at 338.With regard to "actual

suppression," the court in *Mosaid* is clear in finding that, so long as the evidence is relevant, the "offending party's culpability is largely irrelevant," as it cannot be denied that the opposing party has been prejudiced. *Id.* Even if Plaintiff did not intend to permanently deprive the defendants of the information associated with his Facebook account, there is no dispute that Plaintiff intentionally deactivated the account. In doing so, and then failing to reactivate the account within the necessary time period, Plaintiff effectively caused the account to be permanently deleted. Neither defense counsel's allegedly inappropriate access of the Facebook account, nor Plaintiff's belated efforts to reactivate the account, negate the fact that Plaintiff failed to preserve relevant evidence. As a result, Defendants are prejudiced because they have lost access to evidence that is potentially relevant to Plaintiff's damages and credibility. In light of all of the above, a spoliation inference is appropriate. *See id.*

***5** Finally, the Court will address Defendants' request for attorney's fees and costs. Monetary sanctions are used to compensate a party for "the time and effort it was forced to expend in an effort to obtain discovery" to which it was entitled. *Mosaid,* 348 F.Supp.2d at 339.There is no rule of law mandating a particular sanction upon a finding of improper destruction or loss of evidence; rather, such a decision is left to the discretion of the court." *Kounelis v. Sherrer,* 529 F.Supp.2d 503, 520–21 (D.N.J.2008) (quoting *Hawa Abdi Jama v. Esmor Corr. Servs.,* 2007 U.S. Dist. LEXIS 45706, at *126, 2007 WL 1847385 (D.N.J.2007)). While the Court appreciates that Defendants wish to be compensated for the time and effort expended in obtaining the discovery at issue in this matter, the Court, in its discretion, does not find that an award of attorney's fees and costs is warranted. Here, Plaintiff's destruction of evidence does not appear to be motivated by fraudulent purposes or diversionary tactics, and the loss of evidence will not cause unnecessary delay. Therefore, considering the particular circumstances presented in this matter, the Court, in its discretion, finds that an adverse inference instruction without monetary sanctions is sufficient. *See Kounelis,* 529 F.Supp.2d at 522.

CONCLUSION

For the reasons set forth above, Defendants' request that an instruction be given at trial to the jury that it may draw an adverse inference against Plaintiff for failing to preserve his Facebook account and intentional destruction of evidence is GRANTED. Defendants' request for attorney's fees and costs is DENIED. An adverse inference should be provided to the jury at an appropriate time, as determined by the Honorable Esther Salas, U.S.D.J.

Footnotes

1 There is some dispute between the parties regarding whether the Plaintiff did, in fact, merely deactivate the account and then neglect to reactivate it within fourteen days, thus causing the account to be "automatically deleted." As noted by Defendants, the procedures for deactivating versus permanently deleting a Facebook account are not identical. (*See* Defendants' Brief in Support of Motion at *12, D.E. 33–4). While Plaintiff argues that his account was merely deactivated, it appears from the record that Plaintiff must have taken additional steps required to permanently delete his account. *See id.*For the purposes of deciding the instant motion, the Court finds that it is irrelevant whether plaintiff requested that his account be deleted or merely deactivated, as either scenario involves the withholding or destruction of evidence.

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