Preservation of Social Media

From the perspective of representing individual employees in litigation, the task of preserving social media evidence is relatively straightforward. Attorneys representing institutional clients face a much more difficult task in preserving electronically stored information (“ESI”), as they must deal with multiple individuals, multiple computers and other devices, and multiple social media accounts. In contrast, the employee’s counsel is dealing with one person, who must be advised to preserve all evidence relating in any way to the claims at issue, including social media content. As a practical matter, the most effective way to do that is to include a provision advising the client of the duty to preserve evidence in the retainer agreement. All of the author’s retainer agreements include the following paragraph:

I understand that as a party to a legal matter, I have a duty to preserve documents and other types of evidence that may be in any way relevant to the legal matter, regardless of whether a lawsuit has been filed yet or not. I understand that my failure to preserve evidence could cause me to suffer negative consequences, including but not limited to monetary penalties, paying the costs and legal fees of the employer’s counsel to retrieve or reconstruct documents, instructions to jurors that they may conclude that the party altered, destroyed, or hid evidence, dismissal of claims, and suppression of defenses. I agree to preserve all documents or other evidence in my possession that may be related to my case. Such evidence is not limited to paper documents; it includes electronic evidence such as e-mails, word processing documents, text
messages, web pages, and voicemails, as well as tangible items such as photographs, thumb drives, laptop computers, desktop computers, cell phones, PDAs, and any other type of device or medium that can store communications or information in any form. I will not alter, destroy, or get rid of any such evidence, even if it is harmful to my case.

Memorializing in writing the advice to the client regarding preservation of evidence protects the lawyer from being subjected to sanctions if the client fails to comply.

**Discovery of Social Media**

For attorneys representing employees, social media discovery generally involves placing reasonable limits on overbroad requests by the employer’s counsel. The rules of discovery do not change just because the information at issue is in electronic form. Discovery requests must still be reasonably calculated to lead to the discovery of admissible evidence. Consequently, requests for an employee’s entire Facebook page will usually be ridiculously overbroad and should be vigorously opposed. When one considers that personal social media pages function as a means of communication with others, the issue is put in clear focus for a court. Before the days of social media, judges did not order parties to produce any and all correspondence in their possession, regardless of whether the content was related in any way to the subject matter of the litigation. Rather, courts limited discovery to those portions of those documents that concerned the claims and defenses in the case. The principles are no different when applied to social media. Just as a litigant should not be required to produce every letter he or she has written to anyone regarding anything, a party should not be required to produce his or her entire social media page, regardless of whether the content is related to the issues in dispute. See, e.g., *Root v. Balfour Beatty Construction, LLC*, 132 So.3d 867 (Fla. Ct. App. 2014) (holding in personal injury action that defendant was not entitled to discovery of Facebook postings regarding
plaintiff’s mental health history, familial relationships, substance abuse history, and litigation history).

All of that being said, plaintiffs’ counsel should remember that what’s good for the goose is good for the gander, and should not overlook the possibility of seeking discovery of the social media postings of alleged discriminators and harassers. For example, a targeted request for any postings containing specific racial epithets in a race discrimination case would likely pass muster. However, if the social media account is personal and the individual at issue is not a party to the litigation, defense counsel may not have the power to produce the requested information. This is one of many reasons to name individual defendants if the statute at issue provides for individual liability. If the discriminator or harasser is a party, defense counsel will not be able to avoid the issue by pleading powerlessness. However, even if the statute at issue does not allow individuals to be named as defendants, the plaintiff can still seek the postings by subpoenaing the individual.

Authentication of Social Media

As many courts and commentators have observed, ESI such as social media content is governed by the same evidence rules as traditional paper documents. This is an important practical point in making arguments regarding the admissibility of ESI. Making analogies to more traditional forms of evidence may often assist a judge who perhaps is not particularly familiar with the technology at issue.

Federal Rule of Evidence 901(b) provides a non-exclusive list of ways to authenticate documents for admission in evidence. The specified bases that are most likely to apply to social media content are the following:
1) **Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.

****

(3) **Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) **Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

As a practical matter, authentication should not be an obstacle in any civil matter, given the extensive pretrial discovery that is available. Counsel will likely first attempt to authenticate the social media content at issue by serving a request for admission on the author or recipient, or by deposing the author or recipient. That would meet the requirements of Federal Rule of Evidence 901(b)(1). If the witness at issue denies the authenticity of the social media communication, the proponent of the evidence could use comparison with other communications by the same author that contain similar distinctive characteristics, thereby fulfilling the requirements of Federal Rules of Evidence 901(b)(3) and (4).

Finally, counsel should always remember that bases for authentication in the evidence rules are only illustrative; the proponent of evidence is simply required to “produce evidence sufficient to support a finding that the time is what the proponent claims it is.” F.R.E. 901(a). Thus, attorneys should feel free to be creative and “think outside the box”. It should also be noted that the threshold for authentication is “relatively low” and does not require the proponent of the evidence to prove authenticity beyond any doubt; disputes regarding authenticity can be resolved by the fact-finder, so long as there is adequate evidence for a reasonable fact-finder to

Ethics Issues

The two most common ethical problems that arise in connection with social media issues in litigation concern preservation of evidence and ex parte contacts.

In Lester v. Allied Concrete Co., a Virginia trial court reduced a $6.2 million loss of consortium award to a plaintiff in a wrongful death action to $2.1 million, sanctioned the plaintiff’s attorney in the amount of $544,000, and sanctioned the plaintiff in the amount of $178,000, because plaintiff’s counsel advised the plaintiff to delete social media photos. The case arose out of the death of the plaintiff’s wife. One of the photos showed plaintiff holding a beer can, wearing a shirt saying “I ♥ Hot Moms”, and wearing a garter belt on his head. While the Virginia Supreme Court ultimately reversed the remittitur, the sanctions award stood. The lawyer later consented to a five-year suspension of his license to practice law.

Ethics authorities have begun to address the extent to which attorneys can access the social media of represented adverse parties. The New York State Bar Association has concluded that counsel may view the social media page of an adverse party, provided that “the lawyer does not ‘friend’ the party and instead relies on public pages posted by the party that are accessible to all members in the network.” NYSBA Ethics Opinion 843 (2010). Put another way, accessing publicly available social media information is no different than accessing other types of public information. However, making direct contact with a represented party for purposes of obtaining access to information constitutes an impermissible ex parte contact. An attorney will compound the ethical violation if he or she uses deception to “friend” a represented party, such as using a
pseudonym or having someone else (such as an associate, paralegal, secretary, or investigator) “friend” the party.

**Privacy Issues**

While courts take privacy into consideration in resolving discovery disputes, privacy is not a per se bar to discovery. The more common context in which privacy becomes an issue in employment litigation regarding social media concerns employer liability for obtaining employees’ social media communications by impermissible means.

In Pietrylo v. Hillstone Restaurant Group, 2008 WL 6085437 (D.N.J. July 25, 2008), the court denied summary judgment to the defendant employer on the plaintiff employees’ federal and New Jersey Stored Communications Act claims, privacy-based common law wrongful discharge claims, and common law invasion of privacy claims. The case involved employees of a restaurant who created and maintained a members-only MySpace page for employees to discuss their workplace. A manager asked an employee to give him her password to the website so he could see what was written there. Subsequently, the employee who created the site and an employee who made comments there were fired. The employee who provided access did so because she was afraid of adverse employment consequences if she refused. The court’s denial of summary judgment was premised on the genuine issue of material fact as to whether the employee who gave access did so voluntarily. The jury found for the plaintiffs on the SCA claims and for the defendants on the invasion of privacy claims. The parties consented to dismissal of the wrongful discharge claims based on the jury’s verdict on the invasion of privacy claims. The court denied defendant’s motions for judgment notwithstanding the verdict and for a new trial. 2009 WL 3128420 (Sept. 25, 2009).
In *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 872 F.Supp.2d 369, 374 (D.N.J. 2012), the court held that an employee’s posts to Facebook that are only available to her friends on Facebook are sufficiently private to sustain a cause of action for invasion of privacy under New Jersey common law when the employer has a co-worker with access to the employee’s Facebook page show it to the employer.