

***When a Simple Status Update Can Backfire:  
The Growing Effects of Social Media in Family Law Issues***

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**A. Introduction: Currents in Social Media**

1. Social Media Revolution. Really?

Social media is described as a “revolution” or social movement because it has radically changed the manner in which people, across the board, make use of their computer and their time “on-line”. Not only are people getting on-line more often, when they do, they are spending a majority of that time with social media applications. Assuming these basic facts, this so-called “revolution” will have consequences within the legal context in general and within family law specifically. So it looks like the makings of a revolution.

One aspect of this “revolution” is people’s willingness to relinquish their *privacy* when interacting with social media. In the social media realm, there is really no legitimate expectation of privacy.

2. Influencers in Social Media and the Law

a. *Kevin O’Keefe* - Seattle-based solo practitioner specializing in web-based law firm marketing & the promotion of law blogs. All topics covered.

b. Privacy Law Blog – this blog does a great job collecting and commenting on the steady stream of cases emanating from the courts that deal with the burgeoning subject of privacy law.  
Here is the link: <http://privacylaw.proskauer.com/>

3. Social Media Monthly

This hip “glossy”-style monthly magazine can be delivered to your door. Published by Cool Blue, LLP, this magazine provides fresh looks into the social media movement each month. Annual subscription \$29.99.

4. ABA Webinar – “*The Impact of Social Media on a Divorce Case: Big Brother is Watching.*” September 13, 2011. Great primer on these issues. Contains good analysis of privacy caselaw. On DVD.

## B. Privacy Issues in Social Media

### 1. "What They Know" - Top websites install tracking devices onto your computer.<sup>1</sup>

a. Wall Street Journal's "What They Know" series in 2010 shined a bright light on the extent to which web-based companies gather your information to sell to advertisers;

b. On average, the top sites download more than 50 pieces of tracking software onto a user's computer without notifying that user;

c. These sites include:

[dictionary.com](http://dictionary.com)

[careerbuilder.com](http://careerbuilder.com)

[photobucket.com](http://photobucket.com)

[flicker.com](http://flicker.com)

Google, Google's Buzz and Picasa

d. Smart cell phones disclose owner's username, password, contacts, age, gender, location, and unique phone identification to advertisers.

### 2. Forensic Recovery of Electronically Stored Information [ESI]

a. Electronically Stored Information (ESI) - now defined by the federal rules of evidence to include, "any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained."

b. e-Discovery Amendments. The 2006 e-discovery amendments to the rules of evidence adopted a broad definition of ESI, intended to include all its present and future forms. The definition is imprecise so as not to limit a particular form of data within the scope of the rule. Your client's Facebook page is ESI and therefore, discoverable.

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<sup>1</sup> Balow, Brian and Tatiana Melnik, "Internet Privacy Concerns Reignited in 2010", *Michigan Bar Journal*, July 2011, citing Anguin, Julia, "The Web's New Goldmine: Your Secrets", *Wall Street Journal*, July 30, 2010.

c. Admissibility of ESI depends on the source of the data. Data is stored or obtained in the following 3 ways:

- stored on a computer [i.e. hard drive];
- captured in transit [keystroke loggers, spyware]
- stored at on-line service [Gmail, FB, Social Media]

d. General Rule of ESI Admissibility - if there is an expectation of privacy, then the ESI is not discoverable; if such information comes into your client's hands, then it will not be admissible to the tribunal.

e. Federal and State Wiretap Statutes

- Electronic Communications Privacy Act & Federal Wiretap Act - single party consent statutes; so long as one party to the communication consents to the wiretap, the evidence is admissible. Oddly, although the statute calls for pecuniary damages, federal judges have ordered preclusion of evidence as remedy for violations.
- Michigan Eavesdropping Statute - MCLA 750.539a - applies to oral and auditory communications only; a single party consent statute, meaning the participant in the conversation is not "eavesdropping" within the meaning of this criminal statute.

f. Texting & Instant Messaging - ephemeral type of data; exists on hand held devices; Instant Messaging exists, temporarily, on the C-drive of a computer; therefore, while there are expectations of privacy, if the device is used for employment, the evidence can be produced if it can be captured. Think Kwame.

g. Best Practices with Client's ESI

- Client Presents with Evidence. If presented with data from a client that was formally ESI, request your client to disclose the source of the data. If there was any deception involved in obtaining the information, the lawyer must turn it away. Not doing so has resulted in formal discipline in some jurisdictions, as well as legal and even criminal liability.
- Client Eliminates Evidence. There is a software program known as "evidenceliminator.com" which boasts that not even the FBI can locate the data once eliminated. Even the use of this program can lead to adverse inferences against the client; this type of program should not be endorsed by the lawyer; instruct the client in writing.

- Family Computer. A family computer is a shared computer and thus, the ESI is “fair game” and admissible; there is no expectation of privacy. Characteristics include: separate logins; separate folders; storing the children’s homework on the hard-drive.

### 3. Summary of Internet-Based Privacy Litigation

#### a. Cases in Family Court

- Moore -v- Moore - laptop taken by wife from husband’s car trunk; both parties had logins; both parties had documents stored on the hard drive; NY eavesdropping laws and federal wiretapping challenges to evidence were unsuccessful due to fact that docs were sitting on the computer hard drive without password protection. The machine was determined to be a family computer.
- David Simon’s Case - Multi-million dollar hedge fund manager directed his investment firm, Twin Capital Management, to sue his ex-spouse and her divorce lawyers in New York state court in Manhattan, claiming she hacked into his work password-protected computer, and her lawyers knew this, thus violating New York’s eavesdropping statute.

#### b. Recent Privacy Suits

- City of Ontario, California -v- Quon [SCOTUS] - California SWAT team members, police officers, asserted their privacy rights in an employment law case where the employer, the City of Ontario, sought the officers’ & dispatchers’ text messages from their employer-provided cell phones. Some of the employees had been sexting and, in one case, even tipped off a drug dealer about an imminent raid. There were four separate outcomes issued from the 20 federal judges that touched the case along its tortuous procedural route to SCOTUS immortality.<sup>2</sup>

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<sup>2</sup> See Manchester, New Hampshire labor lawyer Cameron Shilling’s analysis of this case presented to the American Bar Association’s webinar, “The Impact of Social Media on a Divorce Case: Big Brother is Watching”.

Ultimately, SCOTUS dodged the issue of whether the text messages retrieved in the case were subject to the privacy provisions of the SCA, and limited its holding to the employee's claimed right to privacy, finding that the employer's review of the texts in this case was reasonable.

- Crispin v Christian Audigier, Inc. [717 F Supp 2d 965 (CD Cal 2010)] – Believed to be the first published case to apply the federal Stored Communication Act to social media. In this case, subpoenas were served on various social media sites, including Facebook. The dispute involved an oral license being used for artwork in the garment industry. The court held that the social media sites were “electronic communication services” on the basis they provided private messaging and email services; the messages stored on the service were private and thus, not accessible to the public.
- Valdez, Edward -v- Quantcast Corporation [California Central District Court], filed June 2010, settled July 2011 - class action lawsuit alleging that users' privacy rights were violated through the covert installation of Flash cookies designed to re-spawn once deleted.
- Intzekostas -v- Fox Entertainment [California Central District Court], filed September 2010 - class action suit alleging violation of privacy by circumventing browser controls of users visiting the American Idol website and covertly installing Flash cookies.
- Graf -v- Zynga [California Northern District Court], filed October 2010 - class action suit that alleged invasion of privacy when collecting personal information about players of FB's “Farmville”, and sharing with 3rd party advertisers without players' consent.
- Class action lawsuits against Apple alleging Apple's apps invaded privacy by collecting information from users without consent.<sup>3</sup>

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<sup>3</sup>See *Lalo v Apple*, No. 5:2010-cv-05878 [CD Cal filed 12/23/2010] and *Freeman v Apple*, No. 5:2010-cv-05881 [CD Cal filed 12/23/2010], both cases dealing with Apple's practice of sharing information obtained from customer apps with 3rd party vendors or advertisers, without the customers' consent or knowledge.

c. Subpoenas have resulted in compulsory production of social media ESI:

- Bass -v- Miss Porter's School [U.S. District Court, Connecticut, filed November 2008] - Plaintiff, alleging she was cyber bullied into cheating by her classmates at this exclusive private school, was ordered to produce hundreds of pages from her Facebook page; FB complied with the court order and produced the plaintiff's wall postings, messages and pictures from its servers where the information was stored.
- Ledbetter v Wall Mart Stores, Inc. [U.S. District Court, Colorado, filed October 2006] - holding that information from Facebook and MySpace was properly within the scope of a Rule 45 Subpoena. This federal court enforced Wall-Mart's third party subpoena of Facebook & MySpace, seeking information about plaintiff's alleged injuries, posted to these sites, and stored on their servers.
- Stored Communications Act [18 USC 2702] - proscribes an electronic communication service provider from divulging any data stored, carried or maintained on the site to third parties. Exceptions exist for government subpoenas in criminal matters, but not civil subpoenas.

Although the Act does not define "*electronic communication service provider*", subsequent court decisions have held the scope of the Act applies to web-based email services such as Gmail and Yahoo.<sup>4</sup>

No caselaw to date holding that any social media site is a "*remote computer service*" within the scope of that phrase in the Act. Social media sites typically store much more than Internet-based email communications.

d. Recent Examples from the Annals of Criminal Law:

- The DOJ has requested Julian Assange's [Wikileaks founder] twitter information from Twitter.com, a third party social media platform, in the federal criminal case against Assange.

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<sup>4</sup>J.T. Shannon Lumber Co. v Gilco Lumber Inc., No. 2:07-CV-119, 2008 WL 3833216, at \*1 (N.D. Miss. Aug. 14, 2008).

- This past summer, Jesse Hippolite, a 23-year old from Brooklyn posted tantalizing but vague details about his side-business on Facebook; robbing Chase bank branches all over Gotham. Unbeknownst to Jesse, his FB profile was under surveillance based on a tip from an eye-witness Chase employee. When he changed his handle to "Willie Sutton, Jr.", after the professional bank robber, law enforcement arrested and charged Jesse with serial bank robbery.

## C. Family Law & Social Media

### 1. Basic Lay of the Land.

- The basic problem: overexposure of people's lives, playing out on the Internet, before, during and after the divorce process. The electronic posts are damaging for divorcing couples. The data posted is becoming standard evidence in a divorce case. A litigant's electronic profile is a "treasure trove" for legal evidence.
- 80% of adults in the U.S. that have computers use social media; most say they spend a **majority** of their time on their computer interacting with social media sites.
- Standard interrogatories and discovery requests are less effective in social media context; formal discovery requests are slow-motion tools used in a fast-paced environment.
- Facebook is the site most often cited by attorneys, polled by the *American Bar Association*, for evidence to introduce into family court proceedings.<sup>5</sup>
- CNN recently reported that 30% of divorces filed in the United States reference social media sites at some point in the proceedings.

### 2. Problem areas where Social Media can provide clues to a litigant's conduct:

- New employment & raises
- adulterous relationships
- hiding money and resources, including resources devoted to paramour
- social contacts; new contacts
- leaving children during parenting time
- status updates can impeach credibility of litigants;
- pictures of children with illicit items [drugs & alcohol] in the background
- information is available without deposition; saves money and time

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<sup>5</sup>ABA Webinar, "The Impact of Social Media on a Divorce Case: Big Brother is Watching", comments by Attorney Dolly Hernandez.

3. LinkedIn is a wide-open source for information.

- Anyone can search for an individual's public profile on LinkedIn;
- No password is required to conduct a search;
- Job prospects and evidence of litigants earning capacity are easily obtained from this site;
- Impeach a litigant's claims relative to their earning potential;
- Useful to obtain specific employment and industry opportunities;
- Good source to locate expert witnesses in a specific industry or field.

4. Blogs [Web-based logs or journals]

Pennsylvania blogger and father of two minor children, Anthony Morelli, has made a name for himself, his ex-wife, the family court judge [Judge Diane Gibbons], and his case with his highly controversial blog: [thepsychoexwife.com](http://thepsychoexwife.com). This past summer, Judge Gibbons ordered Morelli to take down his blog. Temporarily, the father-litigant complied with the judge's order and removed the original blog, putting up a substitute titled "savethepsychoexwife.com". He fired his lawyer and hired appellate counsel to appeal Judge Gibbons' ruling.

In the meantime, Morelli is back on the Internet, blogging away, in contravention of Judge Gibbon's injunction. He is claiming a First Amendment violation. This is a case to watch.

#### D. The Anti-Social Media Movement

- Jaron Lanier - Virtual Curmudgeon or Visionary. Author of *You Are Not A Gadget*, Alfred A. Knopf (2010) - The following is a review of this book from Amazon.com:

*Jaron Lanier, a Silicon Valley visionary since the 1980s, was among the first to predict the revolutionary changes the World Wide Web would bring to commerce and culture. Now, in his first book, written more than two decades after the web was created, Lanier offers this provocative and cautionary look at the way it is transforming our lives for better and for worse. The current design and function of the web have become so familiar that it is easy to forget that they grew out of programming decisions made decades ago. The web's first designers made crucial choices (such as making one's presence anonymous) that have had enormous—and often unintended—consequences. What's more, these designs quickly became "locked in," a permanent part of the web's very structure. Lanier discusses the technical and cultural problems that can grow out of poorly considered digital design and warns that our financial markets and sites like Wikipedia, Facebook, and Twitter are elevating the*



*“wisdom” of mobs and computer algorithms over the intelligence and judgment of individuals. Lanier also shows: How 1960s antigovernment paranoia influenced the design of the online world and enabled trolling and trivialization in online discourse; How file sharing is killing the artistic middle class; How a belief in a technological “rapture” motivates some of the most influential technologists; Why a new humanistic technology is necessary. Controversial and fascinating, You Are Not a Gadget is a deeply felt defense of the individual from an author uniquely qualified to comment on the way technology interacts with our culture.*

- Professor Derek Witte [Cooley Law School]<sup>6</sup> - expert electronic discovery; advocates a cautious approach to the use of social media on the basis of potential exposure. On the other hand, Professor Witte admitted in a recent SBM webinar that, if he was in private practice, he would consider utilizing social media tools in order to market his law practice.
- Malcolm Gladwell [*New Yorker*] - Canadian journalist and author on sociology and social trends who has been writing articles for the *New Yorker* since 1996.
- Will Heaven [*The Telegraph* - UK] - British journalist and blog editor for the *Telegraph*, a daily newspaper published in London, England.

The common thread among these academics and commentators is their dismissal of social media as a weak force, incapable of generating a sustained social movement or revolution. These critics view social media as simply enabling “slacktivism”, lacking in leadership and professional discipline. Perhaps, but social media, in one form or another, is here to stay.

## **E. Conclusion**

Family Law attorneys must at least consider integrating Social Media into their practices. Even if a divorce lawyer elects not to actively participate in social media marketing, or enhancing their e-profile, the attorney must at least understand the Social Media movement because more than ¾ of their family law clients will be immersed in that medium one form or another. Eventually, one of

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<sup>6</sup> Professor Witte's most recent publication is the law review article: “Your Opponent Does Not Need a Friend Request to See Your Page: Social Networking Sites and Electronic Discovery”, 41 *McGeorge L. Rev.* 891 (2010).

the issues covered in this webinar [i.e. privacy violations, spoliation or source of evidence issues] will show-up in one of your cases.

Laws, particularly the common law, is slow to address the problems that have surfaced and are surfacing in such a fast-paced medium. Currently, some states are attempting to limit lawyers' professional involvement in Social Media; Michigan is not one of those states.

As statutes, case law and ethics opinions are eventually compiled, Social Media will have moved on; advancing into ever shifting realms. Like all lawyers, family law attorneys must develop best practices to effectively manage this constant flow of data.