

1-1-2014

Keynote Address

John G. Browning

Follow this and additional works at: <http://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

John G. Browning, *Keynote Address*, 68 U. Miami L. Rev. 353 (2014)

Available at: <http://repository.law.miami.edu/umlr/vol68/iss2/4>

This Key Note is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

KEYNOTE ADDRESS

JOHN G. BROWNING*

Good morning and thank you for that warm welcome. I would like to thank Namrata Joshi and the entire *University of Miami Law Review* staff for the very kind invitation to take part in this wonderful and very timely symposium, and I would also like to thank Professor Jan Jacobowitz for her assistance in facilitating this opportunity.

The rise of social networking sites like Facebook, Twitter, LinkedIn, YouTube, and others represents a paradigm shift in how people communicate and share information. Social media has transformed how we view ourselves and how we view the world. What was once dismissed as a fad or “something the kids are into” now spreads its digital tendrils worldwide and permeates virtually every aspect of our lives. Facebook has over 1 billion users worldwide; if “Facebook Nation” were indeed its own country, it would be the third most populous country on the face of the Earth. YouTube has over 800 million unique users each month, and seventy-two hours of video are uploaded to that site each minute. LinkedIn has surpassed 200 million users. And Twitter has risen from its humble beginnings—processing 5,000 tweets a day in 2007—to become a social juggernaut in its own right, handling over 400 million tweets daily by the end of 2012. Sixty-five percent of all adult Americans maintain at least one social networking profile. Corporate America now proudly touts its social media outreach, exhorting consumers to “like us on Facebook” or “follow us on Twitter.” It is not enough to simply live our lives; we now have to document our existence, whether it is “checking in” on social media platforms like Foursquare to tell the world where we are and what we are doing, tweeting about the most mundane observations, taking a photo of a meal and posting it to Instagram, updating our Facebook status or our Tumblr feed, “pinning” an item of clothing or furniture we saw on Pinterest, or uploading a video to YouTube or Vine. Watch the evening news, and you are as likely to encounter reporters accessing information from a criminal suspect or victim’s Facebook page as quoting a local law enforcement official’s stock pronouncement that “the investigation is ongoing.” Even President Obama was scooped by Twitter in announcing the killing of

* John G. Browning is a partner with the Dallas office of Lewis Brisbois Bisgaard & Smith, where he handles a wide variety of civil litigation in state and federal courts. He is a graduate of Rutgers University and the University of Texas School of Law, and he serves as an adjunct professor at SMU Dedman School of Law.

Osama Bin Laden. Social media has proved vital in everything from organizing political protests that have toppled governments—witness the Arab Spring—to mobilizing humanitarian aid in disaster-stricken countries to galvanizing political campaigns.

And social media has transformed the legal landscape. Here in Florida, the Casey Anthony case demonstrated the influence that social media can have on the modern trial, and the case of *State v. George Zimmerman* is serving as a modern blueprint for deploying social media in a murder case. Part of the reason that social media is having such an impact on the legal system is, of course, the sheer numbers involved. People are, whether unwittingly or not, providing attorneys with a digital treasure trove of information about themselves. And the degree to which people are obsessive about sharing information has been equally important. Consider the case of Joseph Wayne Northington, for example. Mr. Northington robbed a bank in South Carolina, escaping with several thousand dollars in cash after a brief exchange of gunfire with a security guard in which he was grazed in the ear. But instead of concentrating on making his escape, Mr. Northington decided it was more important to update his Facebook status! He posted that he was “[o]n the run for robbin da bank/One in the head, Still ain’t dead/Love to all of y’all.” Now, I’m no prosecutorial genius, but I don’t think you have to be in order to win a conviction when Exhibit A is the defendant’s own online admission that he is “[o]n the run for robbin da bank.”

Social media has changed the very way in which we look at fundamental legal concepts like service of process. Eight countries outside the United States permit service of process via social networking platforms. Countries like Australia, New Zealand, Canada, and the United Kingdom have allowed parties to be served with suit papers via sites like Facebook, reasoning that when traditional modes of service have been unsuccessful, a form of “substituted service” like using Facebook is more likely to reach an individual and provide notice in the digital age than service by publication in the cramped, forgotten legal notices section of a newspaper dwindling in circulation. In fact, to date, three states in the United States have also permitted service by social networking platform: Minnesota, Texas, and Utah. A few months ago, a federal judge in the Southern District of New York was presented with a request for permission to serve a party through Facebook after more mainstream methods had proven unsuccessful. In *Fortunato v. Chase Bank*, the court declined to grant this request. However, I predict that we will soon see other judges in the United States coming around to what some of their brethren have already recognized: that with the ubiquitous nature of social networking, a party who has evaded a process server or who has

moved physical addresses is far more likely to be tracked down and provided notice online.

Social media is also changing the way we look at traditional notions of jurisdiction. We have seen jurisdiction become a more malleable concept with the advent of the Internet and particularly e-commerce, as the *Zippo Manufacturing* case and its progeny have demonstrated. But increasingly, courts now have to analyze a party's social media activities when conducting a jurisdictional analysis. Nationwide, there are cases that go both ways on this issue. There are cases like the case of *Lyons v. Rienzi & Sons, Inc.* (E.D.N.Y. 2012), that say "no," a mere presence on Facebook or Twitter is not enough to convey jurisdiction. And there are cases, like *Waterman Steamship Corp. v. Ruiz*, a 2011 appellate case out of Texas, in which the court reached the opposite conclusion that a party's tweets or Facebook posts, if targeted toward a forum state, could result in jurisdiction there.

We have also seen the rise of new causes of action, such as libel by Twitter (or "Twibel," as some like to call it). Yes, you can defame someone in 140 characters or less, as Courtney Love has effectively demonstrated (she is the only person to date to be a defendant in not one, but two, cases of libel by Twitter). Social media has also led to new defenses being offered, such as the "Facebook alibi," as well as novel theories of duty, such as a purported duty to tweet in the case of an emergency or threat.

The impact of social media has also ushered in a new dimension in constitutional law, forcing us to view protected rights like freedom of speech or Fourth Amendment protections through a new prism. Can you be punished for "shouting 'fire' in a crowded hashtag?" That's the issue at the heart of the prosecution of hedge fund analyst Shashank Tripathi. During Superstorm Sandy, the New Yorker tweeted outright lies about power being shut down and other issues, causing panic. It resulted in his criminal prosecution for the false tweets, under a section of the New York Penal Code that criminalizes "falsely reporting an alleged crime, catastrophe, or emergency involving danger to life or property." Another First Amendment issue revolves around whether activity on social media qualifies as speech. Last year, a federal judge in the Virginia case of *Bland v. Roberts* ruled that a "like" on Facebook was not protected speech. Like most legal scholars, I believe that such a holding ignores a substantial body of precedent affording First Amendment protection to nonverbal speech and I expect that the Fourth Circuit will reverse the

trial judge later this year.¹ In other cases involving constitutional considerations, we have seen laws in multiple states banning convicted sex offenders from social media held unconstitutional. And as states simultaneously try to respond to problems like cyberbullying while balancing students' First Amendment rights with a school's authority to maintain order and a safe learning environment, we have witnessed a split in the federal circuits. Do schools have the right to punish students' expressions on social media? It depends on where you live.

Privacy rights and expectations are at the core of the debate over social media. In *United States v. Meregildo*, a criminal defendant challenged his conviction after it was based in part on incriminating content from his set-to-private Facebook page that was provided to prosecutors by a cooperating witness who had access to the profile. The court in the Southern District of New York ruled that there was no Fourth Amendment violation in a true case of "with friends like that, who needs enemies?" And in response to universities turning to third-party vendors, like UDiligence and Varsity Monitor, to monitor the social media activities of student athletes, several states have passed laws restricting schools from requiring that students provide their social networking passwords or log-in information.

Social media concerns also permeate the workplace as Facebook has become a kind of "digital water cooler." Employers have long used social media to research job candidates, and many have come under fire for demanding the social media passwords of prospective and current employees. In response, thirteen states have passed legislation banning such practices, and at least twenty more states have considered such laws. Social media policies governing an employee's online behavior continue to proliferate, even as the National Labor Relations Board pushes back against policies it deems so overly broad as to deny employees certain rights to organize. And not only does evidence from social networking sites appear in all manner of employment-related litigation, there is a growing body of case law nationwide centering on the ownership of a company's often carefully cultivated social media presence. When the valued employee responsible for developing the Facebook fans and the Twitter following leaves for greener pastures, who is entitled to said following and other online goodwill? Cases like *Phonedog v. Kravitz* (N.D. Cal. 2012), *Artis Health v. Nankivell* (S.D.N.Y. 2011), and *Eagle v. Morgan* (E.D. Pa. 2011) are forcing employers and employees alike to confront such questions.

1. Seven months after Mr. Browning gave his Keynote Address, the Fourth Circuit Court of Appeals did indeed reverse the trial judge on the issue. See *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013).

Regardless of the area in which you practice or will practice, social media's impact is being felt and will continue to be felt. It is hardly surprising to observe the value of social media in such fields as personal injury law, where a supposedly "severely injured" plaintiff can watch her case unravel after the revelation of incriminating statements or damaging photographs on Facebook. (Practice tip: try not to let your client post about her "personal best" performance in the local 10K while she claims to be barely able to walk thanks to the negligence of the defendant.) In family law, the uses of social media content are seemingly endless, and one study estimates that 81% of divorce lawyers have made use of such content in their cases. Whether it is photos posted that allude to drug use that make or break a custody arrangement, online evidence of infidelity, or a LinkedIn profile that undermines a "deadbeat dad" by boasting about a recent promotion or bonus, family law cases are fertile ground for social media-savvy attorneys. Criminal law is also a hotbed of social media activity. A LexisNexis Risk Solutions survey of federal, state, and local law enforcement revealed that 83% of officers are using social media, particularly Facebook and YouTube. The NYPD even has its own social media unit. Social media content is increasingly being used for everything from eyewitness identification (such as in the 2012 Texas case of *Bradley v. State*), to sentencing considerations to monitoring for parole or probation violations. In addition, social media evidence has been used to prove motive, opportunity, and state of mind.

But the applicability of social media is also seen in many other types of cases. In intellectual property matters, Facebook fans and "likes" have served as evidence of secondary meaning in trademark infringement cases, as well as to establish recognition of famousness in trade dress cases. And with new means of sharing information come new implications for copyright law, as the recent decision in *AFP v. Morel* (S.D.N.Y. Jan. 14, 2013) illustrates in a case involving the rights associated with Haiti earthquake photos that had been posted to Twitter. Social media issues have also figured prominently in securities law, health law, bankruptcy litigation, and class action suits.

And once a lawsuit has been initiated, social media concerns rise to the forefront. Whether it concerns pre-suit investigation and the discovery of relevant evidence, the admissibility of that evidence, or the ethical guidelines for gathering and using that evidence, social media cannot be ignored. In 2012, there were well over a thousand reported opinions in which social media discovery or evidentiary concerns played a prominent role (not to mention, of course, the innumerable occasions at the trial court level that are not reported). How much of a party's social networking profile will be discoverable, for example? May a party com-

pel the production of the opposing party's Facebook password or similarly unfettered access to that party's entire Facebook profile? While courts around the country have gone both ways on this issue, the general trend is that courts—while not buying the argument that privacy concerns control—are becoming more and more insistent upon a showing that some good cause exists to believe that a party has relevant social media evidence hiding behind the privacy settings on a given profile. Courts are also wrestling with evidentiary questions when it comes to social media. Some states, like Texas, California, and Arizona, have followed a less strenuous standard of authenticating social media evidence. They reason that, given the high degree of individualization inherent in social networking profiles (which often feature nicknames, photos, and other personal information tying a particular individual to that profile), concerns about the reliability of this evidence are diminished. Other states have taken a less trustful approach to online sources of evidence. States like Maryland, Connecticut, and Massachusetts have rejected such circumstantial authentication, and instead require more direct evidence of authorship of electronic statements before they will be admitted.

One of the overarching areas in which social media continues to impact the legal system is in the area of ethics. The changes brought about by the revisions to the Model Rules of Professional Conduct—proposed by the ABA Ethics 20/20 Commission and adopted in August 2012 by the ABA's House of Delegates—will resonate throughout the legal profession for decades to come. The most fundamental professional duty, the duty to provide competent representation as articulated in Rule 1.1, now requires that lawyers must be conversant in “the benefits and risks of technology” in order to competently represent their clients. This is not an abrupt or sudden development, but rather the culmination of a national trend of courts holding lawyers to a higher standard with regard to widely available and relatively easy-to-use technology. Lawyers can no longer afford to be Luddites, content to stick their heads in the sand as innovations in technology pass them by.

Despite this, as cases, disciplinary proceedings, and ethics opinions from all over the country demonstrate, the use—or perhaps more appropriately, misuse—of social media remains a murky area for lawyers to navigate. Conduct that is ethically prohibited when traditional communications platforms are used, such as *ex parte* contact with a represented party or deceiving a witness about one's identity, is just as improper when undertaken in cyberspace. Yet there have been ethics opinions from bar associations and ethics authorities in Philadelphia, New York, San Diego, Oregon, and other areas that have had to address this. Attorneys have also breached client confidentiality and commented on pend-

ing legal proceedings by tweeting, posting, or blogging. Perhaps most disturbing is the 2012 case of *Lester v. Allied Concrete Co.*, a Virginia wrongful death case in which the plaintiff's attorney directed his client to delete photos and other content from his Facebook page that might hurt his portrayal as a grieving widower. After a multimillion-dollar verdict for the plaintiff, the defense came forward with evidence of this spoliation and the plaintiff counsel's role in it. The verdict was slashed in half, and sanctions of \$722,000 were levied against the plaintiff's lawyer and his client (the vast majority of this—\$540,000—was against the lawyer). Today, that attorney—once the president of the Virginia Trial Lawyers Association and a partner in the largest plaintiffs' personal injury law firm in the state—no longer has a license to practice law. Consider that a cautionary tale for the digital age.

Another ethical area that continues to pose questions is that of judges' activities on social media, the subject of my paper for the symposium issue of this law review. Can a judge be "Facebook friends" with lawyers? What limitations do the Canons of Judicial Conduct place on a judge's ability to post or tweet? To friend or not to friend, that is the question—just not in Florida, where judges' being Facebook friends with attorneys is grounds for automatic disqualification (as the 2012 case of *Domville v. State* holds). Although most of the other judicial ethics opinions from around the United States adopt a less draconian standard, the issue of judges participating in social networking activities remains rife with controversy and the potential for ethical miscues.

Certainly, the panels at this important symposium examine some of the most cutting-edge issues in the law today, from the ownership of online content, to the expanding area of the "digital afterlife" and the ability of testators to control their digital assets after death, to the accessibility of the Web, and whether judges and lawyers can be "friends" on Facebook. These are but a few of the many intriguing facets of this brave new world in which lawyers find themselves in the digital age, a world where technology and the law intersect. The collision between emerging technologies like social media and our legal system has resulted in what often seems like a seismic shift in the legal landscape. Attorneys have new weapons in their arsenal, thanks to social networking, but they also have new questions to confront as they use them. Social media is having a transformative effect on society as it revolutionizes the way we share information and ourselves. Social media has helped build business empires, even as errant tweets and posts have helped destroy careers. And in ways too numerous to count, social media is impacting the legal system and those participating in it. The thoughtful examination of this subject that this symposium represents is

a step toward a greater understanding and a critical acknowledgment that our appreciation for and understanding of technology's influence on the law must begin here, in law school. Thank you.