THE PLEASURES AND PITFALLS OF SOCIAL MEDIA AND OTHER ELECTRONICALLY STORED INFORMATION IN FAMILY LAW CASES

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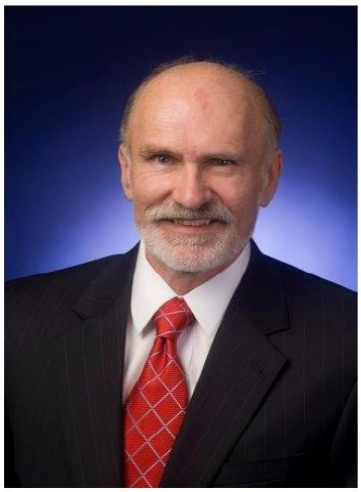

Ken Raggio is a shareholder of the Dallas firm Raggio Family Law and has been a certified Family Law specialist for 35 years. He first presented to the Texas Bar and to the Academy of Matrimonial Lawyers (AAML) on use of technology in family law in 1985 and has continually been in the forefront of applying technology to law practices and trials, including making presentations about technology-assisted opening statements. He was the first lawyer in Texas to use an Ipad to present evidence in a family law case. He most recently presented on the challenges of Electronically Stored Information (ESI) in a family law case to the AAML's 2013 spring meeting, moderated the 2013 Technology Symposium at the AAML's annual meeting, moderated the AAML's webinar on ESI and Ethics of Technology in 2014 and presented at the State Bar's 2012 Technology Conference and to the 2012, 2013, and 2014 Advanced Family Law Courses.

Ken combines his traditional matrimonial practice with resolutions by collaborative law divorce and by mediation when appropriate. He is known to have tremendous command of facts and figures both in negotiations and in trials.

Ken is as vital in activities outside the courtroom and his law practice as within, winning gold medals in track events at the National Senior Olympics as well as age group wins in major stair climb races such as the Willis (Sears) Tower and the Empire State Building.

Ken practices at the firm with his two brothers, Grier and Tom, both AAML Academy fellows and with other attorneys. They strive to carry on the tradition of excellence, compassion, and professionalism exemplified by the founding members of the firm, the late Louise Raggio and Grier Raggio, Sr. Shareholder Barbara Van Duyne carries on Louise's feminist traditions in the firm.

Ken is a Past Chair of the American Bar Family Law Section and has chaired or vice chaired several committees with th AAML. He was the producer of the first Ultimate Trial Notebook for Family Law seminar while chair of the ABA Family Law Section. He is also a Fellow of the International Academy of Matrimonial Lawyers. He has been named to D Magazine's *Best Lawyers in Dallas* in 2014, and has been perennially listed in *Best Lawyers in America* and as a *Texas SuperLawyer*.

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I. INTRODUCTION

Social media and electronically stored evidence ("ESI") continues to give lawyers anxiety. However many pitfalls may exist in this brave new "paperless" world, there are also many pleasures. This article examines some fun (pleasures) and not-so-fun (pitfalls) issues regarding social media and other ESI.

II. PLEASURE – MINING FOR SOCIAL MEDIA AND OTHER ESI

One of the pleasures one can find in a divorce or other family law case is finding proof of a party's own words proving that such party is a liar, is violating court orders, or, in the period prior to the current court proceeding, was displaying a persona and attributes that are not consistent with what that party chooses to convey now. You just hope that the leopard trying to change his spots is not YOUR client.

Clearly the most fertile field for out of court statements that may have a damning influence in a family law case is social media postings. Not surprisingly, tools have been developed to make the collection of such data easier and with built in robustness to answer authenticity and chain of custody challenges.

A. No Reasonable Expectation of Privacy

In terms of use in a family law proceeding, there is no expectation of privacy with social media postings and messages even if there are restrictions on who can see the Facebook, Linked In, MySpace, Twitter, or other social media entries for a party. That horse has left the barn. So the tools that aggregate such postings will survive that feeble challenge, if made.

B. X-1 Social Discovery Software

X-1 is software which aggregates social media data in real time. This product differs from other methods of capture that typically only archive or image a specific social media account at a particular time. Therefore, because X-1 can crawl, it can capture and instantly search contents from websites, web mail, You Tube, Facebook, Twitter, and other web posts. It may capture even the Facebook "one time only viewing" that "disappears" after one use.

X-1 is expensive; a single license costs over $1,000 per year. But the software can be set up to track many "persons of interest" (the other party in a divorce or custody case?) and preserve the data in a way that is intended to be easily authenticated and therefore admissible in legal proceedings.

C. Archive Social

Archive Social is a social media archiving solution for record keeping and compliance for companies. It provides for 100% capture of social media in pure native format that satisfies legal requirements and insures compliance with industry standards. It is used by banks and the like, and is intended for banks and other large institutions to be able more easily to produce their social media generated from their businesses such as Facebook, Twitter, You Tube and Linked In in a manner that complies with subpoenaed requests for information. So the company employing a spouse in your case may be able to give you some relevant information gleaned internally. (Which is one reason we always tell our clients to NEVER use the Company email for any communications.)

D. Next Point Social Media Collection

This tool gives lawyers the ability to collect websites, social media, blog content and immediately begin reviewing it for purposes of litigation. The software automatically collects, preserves, archives and indexes on line content including social media and provided a comprehensive fully searchable archive of online data.

E. Hanzo Social Media Collection

Hanzo's social media collection and preservation for e-discovery software is designed to do the same collection and preservation of web content. It has a subspecies Hanzo-On-Demand for single instance collection, preservation, and production of websites, web pages, Facebook, Twitter, Linked In, You Tube and other social media sites when required as evidence in litigation. It allows for the immediate capture of requested web content and can export to high end litigation support systems.

Internet Evidence Finder is another tool that does similar mining in or on websites or social media accounts.

F. Celebrite Touch

Celebrite Touch Can download EVERYTHING on a Smart Phone. Celebrite Touch is the latest version of a machine that was initially used by the cell phone providers to transfer contacts and other data between a user's old and new cell phone. Not surprisingly, this tool has made its way into our realm, most commonly with the court ordered "capture" of a phone at the courthouse during a hearing, followed by a forensic download complete with chain of custody

authentication by a certified examiner. The capture may be followed by an in-camera review of the data to preserve attorney-client privilege or to possibly ferret out other inadmissible or irrelevant information. Sometimes the courts are delegating this task to a discovery master. The data captured from the phone will include the Facebook and Twitter posts, emails, and other data either "natively" on the phone, or preserved in memory caches that have not yet been overwritten. Many times data intentionally deleted from a phone can be recovered just like with a computer.

G. Blackberry vs. iPhone for Data Mining

And then there is the Blackberry. It is a very secure phone that is mostly immune from efforts to retrieve most data. This is just one reason why the President and other top officials use it.

III. PITFALLS – NON-SOFTWARE DOS AND DON'TS

Clients may suspend access to their social media pages in an attempt to defeat both the mining software previously mentioned and also to allow anyone but a specific class of users to access to the data. As explained herein, sanctions for destroying social media data can be quite severe where there is a duty to preserve.

A. The Poor Man's Way to Preserve Facebook Data

It is important that the client understands the power of settings in Facebook, and that the client actually uses them. Instruct the account holder (client) to go into "Settings" of their Facebook account and navigate to the "Backup" screens/menus. Here the account holder can preserve, at that point in time, the complete history and the entire content of a Facebook account holder's account with all posts, time lines, and everything in the account. So it is preserved before it is "hacked" or bogus postings appear. Go to Home, Settings, then Click "Download a copy of your Facebook data," enter your password, and you will eventually be sent a link with the archive of your Facebook. Similarly one can get their Twitter archive.

It takes about and hour or so to complete the process. Although information from the download is abundant, it may not include 100% of a person's Facebook account. If a person uses a mobile device/application to access their Facebook page, some of those postings may not show up in the archived page, depending on the application. Additionally, it will not reveal any information that has been deleted from an account, even if that information was recently deleted. It is important to find out what application your client or the opposing party uses to access their social media sites.

B. Protect the Relationship with Your Client

Make sure that you have direct written authority to communicate with your client by email. Inform the client that there is no guarantee of security and that the client may want to utilize some encryption of email to communicate with you as the attorney. A simple but useful insert into your retainer letter is:

"Electronic mail is the Firm's preferred means of communication and is often more responsive to the client's needs, but may be less secure. Client _____ does [or] ____ does not wish to communicate with Attorney via e-mail, given the risks of inadvertent disclosure of privileged information. The e-mail address to use is: _____."

A more robust authorization is attached as Appendix 1.

Another good practice tip is to encourage clients to get a new email account used solely for the purposes of communication with their attorney. Often spouses know, or can easily guess, each other's passwords. Make sure your client uses random numbers and letter for any new accounts and changes to all of their old accounts.

C. Spoliation – Remind Your Clients

There are many legal and ethical issues surrounding the use of social media in legal cases. That means there is a lot of advice and information you should share with your client as soon as you are hired. As early as the initial consultation, you should advise your client to avoid comments regarding the lawsuit or judicial system in any social media environment.

However, you must also advise your client that they may not destroy any evidence, including evidence (prior posts and pictures) found on their social networking sites. In 2011, a Virginia court sanctioned one lawyer $542,000.00 because his legal assistant advised their client to remove Facebook pictures that were detrimental to his case. When the defendant's lawyers learned this had happened, they filed a *Motion for Sanctions for Plaintiff's Spoliation of Evidence*. The motion was granted, and both the lawyer and client were fined. The lawyer was disbarred.

In Texas, spoliation is defined as the as the improper destruction of evidence relevant to a case. *Kang v. Hyundai Corp.*, 992 S.W.2d 499, 502 (Tex. App. – Dallas 1999, no pet.). To the extent there is information on a party or witnesses' Facebook page which reveals facts or information relevant to custody, then the deletion of same could be characterized a spoliation.

If you believe a party has purposely destroyed evidence relevant to the case, the burden is on you to move for sanctions and/or a jury instruction regarding the presumption that the evidence was detrimental to the spoliator. *Trevino v. Ortega*, 969 S.W.2d 950, 954 (Tex. 1998). If you fail to file a motion and get a ruling, you will waive your complaint of spoliation on appeal. *Adkison v. Adkison*, 2007 Tex. App. LEXIS 677 (Tex. App. – Tyler 2007, pet. denied).

It is also good practice to include in your temporary restraining orders and injunctions a prohibition against deleting any information from any social media site. The *Texas Family Practice Manual* provides for the following injunction: "Destroying, disposing of, or altering any e-mail or other electronic data relevant to the subject matters of this case, whether stored on a hard drive or on a diskette or other electronic storage device." This injunction should cover social media, but the better practice would be to include a separate injunction which specifically targets and social media accounts of the parties.

D. Social Media Questionnaire

At the initial consultation or initial hiring, have your client fill out a social media questionnaire. An example is attached as Appendix 2. Such will focus both the client and the attorney on potential problems that exist and how to ameliorate them. Again, explain the duty of preservation of evidence no matter how strongly the client feels there are adjustments the client wants to make in the Social media postings. The preservation of data example in Appendix 3 can be used to formally make the client aware of the duty to preserve evidence, and to prevent any later confusion of when the client knew of the duty. For more information: The Appendices are courtesy of the American Academy of Matrimonial Lawyers ESI Committee and the AAML's Webinar 4-1-2014 entitled "For Your Eyes Only Confidential Information and The Ethics of Technology in the Law Office."

In addition to the questionnaire – do your own investigation about and with your client. Keep in mind that you can use social media before you ever meet you client. Whether you do your own screening of clients or whether your legal assistant does it, you should at least do a Google search of your client's name and also their spouse or ex-spouse. Often, a Google search will lead you to a person's Facebook page. If not, you should proactively review Facebook, LinkedIn, MySpace, Instagram and Twitter. Although these are not the only social media outlets, they are the most common, and therefore the most likely place you will find your information about your client and your case.

If your client has privatized their social media pages, ask them for their passwords or have them pull up all of their social media accounts in your office for your viewing. Although your client may feel like this is an extraordinary invasion, you might want to remind them that all of this information may be requested by opposing counsel and/or be ordered to be produced by a judge.

E. Warning Your Client

Your clients need to know all of the issues regarding social media. In addition to some of the examples already provided, you can alert them that one Ohio judge ordered a litigant to write an apology on his Facebook page or go to jail after he had used the site to post a status update complaining about his wife as well as the judicial system. It is unclear as to whether a prohibition on Facebook speech is a violation of a Constitutional right. However, Texas law is clear that a judge can make any order in the best interest of the children. TEX. FAM. CODE §105.001.

Additionally, the *Texas Disciplinary Rules of Professional Conduct* generally provide that a lawyer may not advise a client to disobey the order of a tribunal. Therefore, if there is a court order or injunction in place which prohibits the parties from making negative or derogatory remarks about the opposing party and their family, you must advise your client that this will likely pertain to social media as well. Under no circumstance should you tell a client that it is okay for them to vent their anger or frustration in any public setting, but especially on social media where it may be preserved forever.

F. Watch Out! Tools that Limit the Social Media Footprint

There are tools that help an account holder set restrictions not just on who can view, say a Facebook wall, but also on the time that a post or message can be viewed before it, like in the Mission Impossible TV series, self-destructs. Snapchat, a tool that deletes text postings, has been around for some time, but there are newer kids on the block.

1. Cyber Dust.

A free messaging App for iOS devices that automatically deletes text message within 20 to 100 seconds, depending on the message's length.

2. Xpire.

Allows users to set an expiration time for their Facebook and Twitter Posts.

3. Background.

Both apps have Mark Cuban's hand in this. After he was torched by his own texts and the like in his federal prosecution, he became very interested in limiting his – and other's – digital trails. A valid point for use of such software is to keep digital words and

pictures from being taken out of context to influence or hurt.

4. Dilemma for Lawyers and Clients.

Is suggesting a client utilize Cyber Dust or Xpire a potential violation of the Court's Standing Order (or a Temporary Injunction) about preserving data? Do we have a duty to inform our clients of ways to minimize FUTURE digital tacks utilizing tools like these?

G. Don't Forget These Names

1. Wiretap Act
2. Stored Communications Act 18 USC 2701
3. The Computer Fraud Act 18 USC 1030
4. Electronic Discovery Act
5. State Acts, using Texas, New York, and South Carolina as Examples

H. "Lawyer Stupid" or "Client Stupid" to Avoid

1. Client "Stupid"
   - Passwords/Access to Data
   - Emails and Texts
   - Social Media Postings and Settings
   - Cell Phones
   - Recordings
   - Stalking

2. Lawyer "Stupid"
   - Spoliation by by Ignorance - Duty to Preserve
   - Duty to Inform Client to Preserve
   - Knowledge of Illegal Evidence
   - Reliance on Client's Representations
   - Client Cannot Disclosure Illegal Evidence

3. Other "Beware Ofs…"
   - Spoof/ Trap card calls
   - Recording devices

IV. PLEASURE – REQUESTING ESI IN DISCOVERY

If you have not had the opportunity to cross-examine the opposing party, discovery is an excellent method to obtain social media content. Your discovery requests should include a request that the opposing party provide a true and correct copy of each of their social media sites. Remember that when asking for electronic evidence, you must provide the "form" in which you want that information produced.

A. Requesting Hard Drives or Information Therein

One of the biggest mistake attorneys make is to treat ESI like it is completely different than the paper documents we typically request. In our new "paperless" world, everything people use to keep in their filing cabinet is now staying on the computer. Therefore, requesting said items on the computer does not require a different set of rules.

However, there are some aspects of collecting electronic data which are different than collecting paper evidence. You must ensure that you have taken the proper steps in requesting the ESI. As the Supreme Court enunciated in *In re Weekley Homes*, L.P., 295 S.W.3d 309 (Tex. 2009), a proper 196.4 discovery dispute should look something like this:

Step 1: Requesting party must make a "specific request for electronic information."

Step 2: The responding party must object if the information cannot be obtained by reasonable means in the form requested.

Step 3: Either side may request a hearing, but the burden remains on the responding party to offer evidence to prove that the information is not available by reasonable means in the form requested.

Step 4 (optional): The trial court may order additional discovery such as testing, sampling or depositions to determine the reasonability of the request.

Step 5: If the responding party fails to meet their burden, the court may order discovery but is still limited by Tex. R. Civ. P. 192.4.

Step 6: If the responding party meets their burden, the burden shifts to the requesting party to prove that the "benefits of ordering production outweigh the costs."

Step 7: If the court order production of "not-reasonably-available information" the court must also order the requesting party to pay the expenses of the extraordinary steps.

V. PITFALLS – AUTHENTICATION & OTHER EVIDENCE ISSUES

Once you have the information, it is important to analyze and determine how you will use it at trial. As stated earlier, many of the rules we currently use are applicable to social media evidence.

A. Authentication of ESI

Authentication is the first burden to offering any evidence, electronic or otherwise. TEX. R. EVID. 901 governs authentication. However, under the discovery rules, social media pages can be authenticated if a true and correct copy was received pursuant to a production request and provided that you give notice to opposing counsel of your intent to use same.

Pursuant to 901(b)(1), you can also try authenticating the information through the witness themselves. The Beaumont Court of Appeals affirmed a trial court who considered MySpace evidence wherein the witness validated much of the information contained on his MySpace page. *In re K.E.L.*, 2009 Tex. App. LEXIS 1382 (Tex. App. – Beaumont 2009, no pet.).

Also, 901(b)(4) can be used to authenticate social media evidence by a witness other than a party. For example, in the *Tienda* case, a witness testified that she could identify and authenticate the MySpace page of the accused by identifying specific characteristics unique to the accused's page. *Tienda v. State*, 2010 Tex. App. LEXIS 10031, No. 05-09-00553-CR, (Tex. App. – Dallas 2010, (unpub. op.).

B. Hearsay

If your properly authenticated evidence meets a hearsay objection, consider the following responses as appropriate for your case:

1. Admission by a party-opponent – if the statement you are trying to use at trial was (a) written by the party, or (2) a statement in which that party has manifested a belief in its truth, or (3) a statement authorized by the party to make.
2. Present sense impression – use if the statement you are trying to offer at trial describes or explains an event or condition and was made while the person was perceiving the event or condition, or immediately thereafter.
3. Excited utterance – use if the statement you are trying to offer at trial is related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
4. Then existing mental, emotional or physical conditions – use if the statement you are trying to offer at trial explains the declarant's then existing state of mind, emotion, sensation or physical condition.
5. Recorded recollections – use if the statement you are trying to offer at trial is a memorandum or record concerning a matter about which the witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately and the statement is shown to have been adopted by the witness when the matter was fresh in the witness' memory to reflect the knowledge correctly.

VI. PLEASURE – SOCIAL MEDIA FOR ALTERNATIVE SERVICE

In rare and extreme cases, you may want to consider asking the court to permit service via Facebook. As of the publication of this paper, there is no jurisdiction with rules related to service via social media. Australia may have been the first country to permit service via Facebook through interpretation of their substituted service statute. The substituted service statute in Texas does not seem to differ substantially from the one relied on in the Australia. In Texas, if citation by publication is appropriate in a case because the whereabouts of a party are unknown, a judge may order substituted service other than publication. You must be able to prove to the court that the method you are asking for to obtain service (ie. Facebook), would be as likely as publication to give the defendant actual notice. In this day and age, it would seem that Facebook is more likely to effect service than any publication traditionally used for service.

VII. PLEASURE – OLD CASES THAT STILL APPLY TO ESI

One of the most interesting things about social media and ESI, is that the old discovery cases still apply! Read them and pretend that all of the items that are being requested are actually on a hard drive.

A. Hastings Oil Company – We Know a Motion to Compel When We See One

Hastings Oil Co. v. Tex. Co., 149 Tex. 416, 234 S.W.2d 389 (1950) is an old Supreme Court case that has new relevance in the electronic discovery era. In this case the trial court issued a temporary injunction requiring a "directional survey for Petitioners' well hole." *Hastings* at 423. The Supreme Court stated that "Texas courts have no inherent powers, either in law or in equity, not even to originate new process to enable parties to secure evidence in support of their cases." Hastings at 423 citing *Messner v. Giddings*, 65 Texas 301, 309; *Austin & N.W. Ry. Co. v. Cluck*, 97 Texas, 172 77 S.W., 403; *and Ex Parte Hughes*, 133 Texas, 505, 129 S.W. 2d 270. However, under the "substance over form" theory, the Supreme Court sustained the trial court ruling because in 1950 a "bill for discovery" was proper "in accordance with the usage of courts of equity." *Hastings* at 425. This case stands for the

proposition that good, creative drafting can get you want you need.

This Hastings case is interesting with regards to current ESI requests, because when dealing with ECI, the pleadings you use will be the exact same, but the substance of the form will have to be tailored to the type of ESI requested.

B. Texaco – No Access to the File Cabinet

In *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451 (Tex. App. – San Antonio, 1991, no writ) discovery requests were propounded Texaco, and Texaco search through hundreds of boxes to find documents relevant to the various requests. *Texaco* at 453. Unconvinced that all the relevant documents had been produced, the plaintiffs filed a *Motion to Compel* and requested they be granted permission to review the boxes; the trial court granted the plaintiff's request. *Id.*

In a well-written opinion the Fourth Court overrules the trial court's order. The Fourth Court criticized the trial court's failure to limit the plaintiffs: "[t]he trial court limited the search of Texaco's files to those file boxes from which a document had already been produced. But this limitation does not affect the characterization of the invasion into a party's files. Texaco's attorney testified that the file boxes from which documents were pulled contain more documents than just those related to the Tijerina lease. Leases and documents concerning unrelated persons and fields are filed in the box." *Texaco* at 456.

The Court further opined that the discovery request was based in part on the frustration of the plaintiffs at the possibility of the existence of relevant documents; not the probability. *Texaco* at 455. The Court states: "[t]hey are in a situation in which they believe that Texaco might be overlooking or ignoring documents in its records which are responsive to plaintiffs' requests. However, the remedy they obtained, the perusal of certain of Texaco's file boxes, is beyond the scope of discovery. Plaintiffs have not pointed to specific documents they contend have not been produced. Indeed, plaintiffs would not, in all likelihood, be able to do so because Texaco's files are not open to them. It is this lack of knowledge that compels them to seek a searching expedition through their adversary's files. But this is what the rules of discovery were promulgated to prevent. There can be no fishing expeditions. Plaintiffs are not entitled to search through their adversary's files for documents they deem to be responsive to their requests. Their contention that they could not possibly memorize any non-discoverable document they stumble across is not persuasive. The trial court clearly exceeded the bounds of permissible discovery." *Texaco* at 455-456.

This opinion makes it clear that the requesting parties will not get extraordinary relief just because they think a document might exist; the requesting party has the burden of proof to show that relevant evidence is not being produced. This same rule can and does apply to computer hard drives. If you are searching for ESI, you cannot simply request the hard drive. Your requests must be tailored to information that is actually relevant to your case. In other words, if the courts will not require you to "open your filing" cabinet, then they should not require you to open your hard drive.

C. Colonial Pipeline – Discovery is to Reveal Not to Conceal

In re Colonial Pipeline Co., 968 S.W.2d 938 (Tex. 1998) is a case in which the Supreme Court was reviewing several discovery rulings by the trial court including: abating discovery, requiring production of an inventory list, and enlarging plaintiff's response time to defendant's discovery requests. The Supreme Court reversed the trial court on all of these orders.

In reversing the trial court order, the Supreme Court reaffirmed their prior rhythmic ruling stating: "the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed." *In re Colonial* at 941 quoting *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984).

Therefore, a threshold question for a discovery request is whether the request is likely to lead to relevant information and thus should be revealed. Conversely, the threshold questions for a discovery response is whether you are attempting to obfuscate relevant facts or if the request is truly over-broad and burdensome.

VIII. PLEASURE – THE FUN FACTUAL SITUATIONS

This article leads to some practical questions we see in our everyday practices. We may discuss these during our live presentation.

A. Fact Pattern 1

You are at your client's deposition. Questions are asked that you and your client agree that there is no way the other side should know to inquire about. What is going on?

B. Fact Pattern 2

Your client, the wife, suspects that her husband has an interesting personal and financial life with their small business outside of her knowledge as a stay-at-home mom. She sees the second page of a tax return - enough to see the place for her to sign - every year for 12.5 seconds. She knows that her husband keeps his laptop computer with him everywhere, and... How do you get, use, and possibly present the potential goldmine of data on the notebook computer?

C. Fact Pattern 3

Wife is sure that her husband is not only smoking dope/cheating on her/whatever, and tells him she has proof of same - in writing. Your client, the husband, says she must have gotten into his Facebook/My Space pages. What steps or missteps next?

D. Fact Pattern 4

Husband suspects wife is having an affair. He decides to follow her. He wisely tells his business lawyer, who refers him to you for a consultation. What next?

E. Fact Pattern 5

The wife discovered her husband was involved in an affair. The husband admitted to the affair and admitted he communicated by email with his paramour. The wife informed her daughter-in-law of the situation. The daughter-in-law knew the husband had a Yahoo email account and correctly guessed the password and security questions to access the account. She then printed copies of emails from the account and gave them to the wife's divorce attorney. The husband sued the wife, the daughter-in-law and the attorney alleging several violations, including violations of the Stored Communication Act (SCA).

IX. CONCLUSION

ESI pervades our society and our cases with similar challenges that we experienced in the paper-based world, as well adding significant new challenges in the cloud world to which we are all evolving. From enormous data storage capacities and redundant backup systems, to smart phone or iPhone storage and backup, to cloud storage and computing, among others, we have us an ever widening number of sources containing information that was never recorded (or easily retrievable) previously. The ability of third parties to receive and, perhaps, manipulate data either to change it or to act upon it in ways not intended by the original author or recipient is troubling.

The tools and issues presented here, and questions perhaps answered, will continue to evolve and be asked again – often with different variations on the answers we have now given, just as our answers a short time ago dealing with devices like a simple flash drive or an iPhone or smart phone has changed due to the new tools. So come to the Technology Seminar in December or to AFL next year to find out what's new or different.

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LOUISE B. RAGGIO (2011)
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TEXAS BOARD OF
LEGAL SPECIALIZATION

E-MAIL COMMUNICATION

As you are undoubtedly aware, there is a danger of unintended disclosure of confidential client information when you communicate with us or we communicate with your via e-mail as a result of inadvertent dissemination of e-mails. Thus, our office has developed a policy regarding e-mails, and it is set forth below. After you read the policy, we ask that you check the appropriate box at the end of this letter, sign the acknowledgment and return it to our office.

The e-mail policy of the firm is:

1. No one can guarantee the security of e-mail communications. We do not employ encryption methods. Any use of e-mail is at your own risk.

2. Do not send an e-mail from an address where you do not want a reply to be sent. We assume that, if we receive an e-mail communication from you, it is safe to send a reply message back to that address.

3. Do not rely upon e-mail for urgent matters. Please use the telephone to transmit urgent messages.

4. We may choose to respond to an e-mail received from you by telephone or regular correspondence at our discretion.

5. When the attorney working on your case is in court or unavailable, your e-mails may not be reviewed until the attorney returns to the office. Again, do not rely upon email for urgent matters.

6. You are billed for attorney and/or paralegal time for reviewing and responding to emails.

7. Do not e-mail particularly sensitive, confidential, or potentially embarrassing information. There is a risk, however slight, that your e-mail could be intercepted. There is also a risk that your e-mail could be misdirected, inadvertently disseminated, and read by others.

If you have any questions with regard to the foregoing, do not hesitate to contact our office. Again, we request that you check the appropriate box below and sign the acknowledgment below and return it to our office.

☐ I desire to include e-mail as a method of communication with Raggio & Raggio, P.L.L.C.
My email address is: _____

☐ I decline to communicate with Raggio & Raggio, P.L.L.C., via e-mail.

Dated: _____ Signature: _____

APPENDIX 1

GRIER H. RAGGIO (1988)
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INFORMATION REGARDING
SOCIAL NETWORKING AND ELECTRONICS

Because the Internet could be a source of much public information about yourself, I need to know what presence, if any, you have there. Just "Googling" a name often provides valuable information and is permissible. To properly advise you, I need to know the following:

1. Do you have a profile on a social network like Facebook, Twitter, Linked-in, MySpace, Google Plus, etc.? _____
   a. Is it in your name? _____
   b. How many such profiles do you have? _____
   c. Are they open to the public? _____
   d. What is posted? _____
      _____
   e. Where else to you post your communications?
   f. Have you commented on articles, blogs, or pictures on other people's social media sites?

2. Do you have your own website? _____
   a. If so, what is the site(s) name? _____
      _____
   b. How long have you had it? _____
   c. When did you first launch the site? _____

3. Do you have a blog? _____
   a. If so, what is the name? _____
   b. What do you post there? _____
      _____

4. Do you post material on YouTube? _____
   a. What exactly to you post? _____

APPENDIX 2

_____

5. Do you buy or sell on eBay, Craigslist, or similar services? _____

6. Does you cell phone have video? _____
   a. Do you have a Flip Video or other similar recorder? _____
   b. Where is the content stored? _____
   c. Do you upload any of it to the internet? _____

7. Do you email from a computer, Blackberry, iPhone, iPad, iTouch, or other smart phone?

   _____

   _____

   a. List all email addresses you have used: _____
   b. Do you use: *(include user names)*

      Skype? _____ Google +? _____

      FaceTime? _____ Instant Message? _____

      Or any other? _____

8. Do you text message from your cell phone? _____

9. Do you use LimeWire or similar peer-to-peer programs? _____

   Why? _____

10. On what media do you store files or photos?

    PC _____ Mac _____ Laptop _____

    PDA _____ DVD _____ CD _____

    Compaq Flash cards _____ Flash drives _____

    External hard drive _____ Thumb drives _____ SD Card _____

    Or do you back up files to an internet site such as DropBox, iCloud, Mozy, or similar resource?

    _____

APPENDIX 2

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LEGAL SPECIALIZATION

July 2, 2014

Name
Address

RE: IMOMO ____; Cause No. _____

Dear :

Recent changes in the law require that you now protect from change and destruction all electronically stored information (ESI) during your case. This means that until your case is over and you are told otherwise by me, you must not delete any email, text messages or voice-mails. If you are using Quick books, Microsoft Money or other accounting software at home, you cannot delete those files. Frankly if in doubt, keep it.

If you suffer a hardware failure such as a hard drive that stops working, it is imperative that you let my office know so we can notify the opposing counsel. You will need to keep that broken hard drive until I tell you that you can dispose of it. This is also true for your cell phone. If you decide to replace your phone, you cannot turn in your old one, you must keep it safe until your case is over and I tell you it is now okay to get rid of your old phone.

This rule of keeping old, broken or inoperable hardware also applies to:

iPods or any music player,
iPads or any computer tablet,
thumb drives and portable hard drives,
GPS devices, handheld or built into your car,
Security systems that record video or audio,
Digital audio recorders,
Media used to hold your digital photos, even the ones on your cell phone. This includes CD's, DVD's, flash drives, SD drives, Compact Flash Drives or any type of device used to hold the digitalphoto, video or audio.

If you have any question, before you delete anything, before you through anything away, call the office and speak to me. The penalties the court can impose on you for what the court deems to be the destruction of evidence or potential evidence can be very severe. This includes the court prohibiting you from presenting certain evidence yourself, deciding issues without any input from you or making you pay for the recreation of the lost or damages ESI.

You are likely wondering why any of this is necessary. The answer is simply that now the

APPENDIX 3

law requires it and it is my duty to make sure you are informed of your responsibilities to protect and preserve all electronically stored information while your case is pending.

Do not take this responsibility lightly as the court takes it very seriously. If you have any questions at all, please call me and I will be happy to answer them for you.

Sincerely,

Raggio & Raggio, P.L.L.C.

_____

I, _____, acknowledge receipt of this letter and the instructions have been explained to me.

Date: _____ _____
Client Name

APPENDIX 3