THE GAVEL

Ave Maria School *of* Law
Moot Court Board Journal

Fall 2014
Volume 6,
Issue 1

Innovative Lawyer in a Digital Age

FEATURING:
Professor Richard S. Myers on Religious Freedom

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MOOT COURT BOARD PRESIDENT'S MESSAGE

The Ave Maria School of Law Moot Court Board attracts a special kind of student. Our board is comprised of those who have unique litigation skills and a desire to serve the law school through the application of those skills. The Board's primary goal is one of service. We serve the law school by representing Ave Maria at local and national competitions. Our goal is to show our adversaries and judges in these competitions that Ave Maria School of Law puts forth students that exemplify oral advocacy and professionalism. Our members willingly take on exciting new work in preparation for these competitions. We believe that it is through this work and preparation that we can also instill in our own student body a desire to work diligently and faithfully towards a legal vocation.

The Moot Court Board competes in seven different competitions at various schools across the country. These competitions cover relevant legal issues and give students practical and professional litigation experience. Our competitions include appellate advocacy, trial work and Major League Baseball arbitration. The competitors are vetted and coached by our esteemed faculty members who graciously give up their time to help the teams prepare for any legal challenges they may face. However, no member is entitled to a spot on one of these teams; Moot Court members work fervently to compete for a spot on one of these teams.

The Moot Court Board also hosts two internal competitions. The Robert H. Bork Appellate Competition takes place during the Fall semester and our trial competition takes place in the Collier County court house during the Spring semester. The Board works throughout the year to make sure these competitions run smoothly and professionally. The goal of these internal competitions is to provide the Ave Maria student body at large with an opportunity to compete and hone their oral advocacy skills.

Each student has accepted his or her position on the board because he or she understands that Moot Court is the best opportunity for them to grow as a student and as a future litigator. Our Board's success is dependent on our local judges, attorneys and our own Ave Maria faculty members who all give up their time and energy year after year. The way we do things here at Ave Maria School of Law will help create a culture of lawyers who are faithful to their clients, diligent in their work and moral in their judgments. The Ave Maria School of Law Moot Court Board is honored to be an integral piece in fulfilling the mission of our school.

Sincerely,

Christopher Antonino
President, Moot Court Board, Ave Maria School of Law
mcp@avemarialaw.edu

INSIDE

A VICTORY FOR RELIGIOUS FREEDOM, but Don't Break Out the Champagne Yet

By Richard S. Myers
Professor of Law, Ave Maria School of Law

In a narrowly-tailored victory, the Court beat back one threat to religious liberty, but an Administration that values contraception and abortion more than religious liberty is not going to give up.

The Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* is an important, albeit limited, victory for religious liberty. By a 5-4 vote, the Court (in an opinion written by Justice Alito and joined by Chief Justice Roberts, and Justices Scalia, Kennedy, and Thomas) ruled in favor of Hobby Lobby. The Court ruled that the so-called HHS mandate could not be applied to closely held corporations that have a religious objection to being forced to provide insurance coverage for contraceptive services. To do so, the Court held would violate the Religious Freedom Restoration Act (RFRA).

Because Congress had alternatives to the mandate (such as paying for the contraceptives itself or by providing the accommodation the government already provides to non-profits—requiring that the objecting employer self-certify that it opposes providing coverage for certain contraceptive services), the HHS mandate was not the least restrictive means of furthering the government's objective of providing access to contraceptive services.

The Court's ruling is certainly important. It is a victory for Hobby Lobby and Conestoga Wood Specialties, whose Christian owners have sincere religious objections to providing insurance coverage for "contraceptive" services that may have the effect of operating after fertilization. It is also a victory for religious liberty more generally.

The Court held that RFRA applied to closely held for-profit corporations. There has been a disturbing trend that maintains that religious liberty is only about the religious worship of individuals. In Hobby Lobby, the Court made it clear that that is a far too narrow view. Religion is not simply about religious belief or religious worship. Religious liberty is also about actions out in the world that are done for religious reasons. Religious individuals don't stop exercising their religion when they are outside of church. They may even exercise religion when they are running their business, even through the corporate form and even if the corporation is a for-profit entity.

The Court also made it clear that it wouldn't second guess the religious views of those asserting RFRA claims. The government had argued that the HHS mandate did not burden the exercise of religion because there was too attenuated a connection between providing insurance coverage and the immoral acts (the destruction of an embryo) to which Hobby Lobby's owners objected. The Court though made it clear that it wouldn't second-guess the claimants view of religion and moral philosophy relating to permissible degrees of cooperation. RFRA's protections apply whenever a claimant's sincere religious beliefs are substantially burdened. The religious claimant need not convince the government that its religious beliefs are reasonable or well-founded.

But the Court took steps to limit the scope of the ruling. The Court's ruling was based on RFRA and not on the Free Exercise Clause of the First Amendment. As a consequence, the Court's ruling is subject to legislative revision. If Congress eliminated the protection provided by RFRA, then the Court would have to face the far more difficult question of whether the First Amendment provided such protection. The Court made it clear that it was not deciding the fate of the HHS mandate as applied to publicly traded corporations or to non-profit corporations. The Court made it clear that it was not deciding the fate of the accommodation that HHS has already offered to non-profit corporations—the self-certification option. That issue is still pending before the courts.

The Court also made it clear that its interpretation of RFRA did not necessarily extend to other insurance mandates (regarding vaccinations for example) or provide a shield for employers who might try to cloak discrimination (the Court specifically mentioned racial discrimination) as a religious practice. Moreover, RFRA only applies to federal legislation and so the Court's ruling doesn't control how similar cases would be decided in the context of state mandates on religious practice.

Hobby Lobby is an important, although a limited, victory for religious liberty. The decision is also a decisive rebuke to the Obama Administration's exceedingly narrow view of religious liberty.

But the Court took pains to limit the ruling and there is likely to be much additional litigation over the HHS mandate as applied to non-profit corporations. ○

CLOUD COMPUTING AND LAWYERS

By Luis Cortinas

What is Cloud Computing?

What is cloud computing, and how can we, as lawyers, take advantage of it? The American Bar Association defines cloud computing as "a category of software and services delivered over the Internet rather than installed locally on a user's computer."[1] However, cloud computing is more of a service than software. Traditionally, one would have to purchase licensed software and install it onto his or her computer, but with cloud computing, the software exists on the service provider's server, thus eliminating the burden of having to update and maintain it.

Cloud computing services provide for an efficient way of handling and managing your documents and files, and it is not limited to any one or few types of files. We are all familiar with services like iCloud, Drop Box, and OneDrive. These services allow you to upload and back up files such as documents, music, video, and photos.

These types of services assist lawyers in managing files and documents both in and out of the office. Cloud-based services permit you to pull up your documents anywhere, and many of the services on the market even have applications for smart phones.

Cloud Computing and Ethics

Cloud computing can be a cost-effective way of storing all of your files in one place, ensuring quick and easy access. Because an attorney has an obligations to safekeep their client's information, the ethical issues presented by such obligation become apparent. The question is, can a lawyer secure client information on cloud-based services without having to worry about security, or should they avoid it all together? Well, some states have addressed the issue. For example, Florida allows an attorney to use cloud-based services provided they take reasonable care to ensure the provider has an enforceable obligation to:

- preserve confidentiality and security;
- the attorney must investigate providers security measures; and
- guard against reasonably foreseeable attempts to infiltrate data.[2]

Your clients' confidentiality obligations exist regardless of whether their files are stored on the cloud or on your own computer. For this reason, you may question whether you want to take the risk. However, an argument can be made that not storing your client files on a cloud provider's servers presents a greater risk of loss or security. Today, many of these cloud-service providers have invested in elaborate and expensive security measures, such as firewalls and back-up servers to prevent data loss. Arguably, depending on the service provider one chooses, a client's data will not only be more protected on the cloud than on an attorney's computer, but it can also be safer from loss.

Nevertheless cloud computing is a risk, no matter what measures you take to ensure your files are safe. As such, you should consider the chance that someone is going to hack your cloud account against the chance of losing your files due to faulty computer hardware or loss.

Where can you go to learn more about cloud computing?

There are many vendors out there that will tell you their services are the best and that promise secure services. However, when considering to plunge in to the realm of cloud computing, do your research first. The American Bar Association provides a list of "Popular Cloud Computing Services for Lawyers" on its website, and some cloud services have even started their own association in order to help lawyers learn more about cloud computing.[3]

As an attorney, you must manage your business in a way that ensures you provide adequate legal representation for your client. Cloud computing can be one more tool an attorney can take advantage of to make his or her legal practice more efficient.

1 *Cloud Computing Definition*, American Bar Association, http://www.americanbar.org/groups/dep-artments_offices/legal_technology_resources/resources/cloud_computing (last visited Sep. 17, 2014).

2 *Cloud Ethics Opinions*, American Bar Association, http://www.americanbar.org/groups/dep-artments_offices/le-gal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (last visited Sep. 17, 2014).

3 www.legalcloudcomputingassociation.org

CAUTION USING SOCIAL MEDIA

By Kelsey Briggs

We live in a day and age where technology controls almost all aspects of our lives. One of the most popular technological advances is social media. Social media includes a variety of platforms such as Facebook, Twitter, LinkedIn, Myspace, Instagram, Blogs, etc. These platforms can be very beneficial to lawyers and judges in the legal profession, but they can also come with severe consequences such as potential ethic violations. Have you stopped to consider the potential ethical issues that could arise while using one of these social media platforms?

Before you hit send on that Facebook request, you might want to think about whether or not this could be a potential ethical violation. The Florida Supreme Court Judicial Ethics Advisory Committee has stated that a judge cannot friend request lawyers on Facebook who appear before the judge.[1] This ruling has also been extended to Judges who use Twitter [2] or LinkedIn.[3] In *Domville v. State*, 103 So. 3d 185 (Fla. 2014), petitioner Domville moved to disqualify a trial judge who was friends with the prosecutor on Facebook based on the theory that the judge could not be fair and impartial due to the relationship. The Court held that this violated the Florida Code of Judicial Conduct Canon 2B because it conveys the impression that the judge and the attorney are in a special position that may influence the judge. Judges and Attorneys in other states need to be cautious as well since this would also be a violation of the ABA Model Code of Judicial Conduct Canon 2.4.

Before you start any informal investigation on an adverse party, you might want to make sure your investigation does not violate the "no-contact" rule. The two rules to look out for here in regards to a potential ethical violation include Rule 4.2 and Rule 4.3. ABA Model Rule of Professional Conduct Rule 4.2 states that a lawyer shall not communicate with a person who the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or authorized to do so by law or a court order. ABA Model Rule of Professional Conduct Rule 4.3 states that a lawyer, who is communicating with a person who is not represented by counsel, shall not state or imply that the lawyer is disinterested and shall not give legal advice other than the advice to secure counsel. Potential ethical violations during an informal investigation include such things as a friend request or obtaining information that is private on a social medial site. There are many states in which it is permissible for a lawyer to obtain information from an opposing party's publicly available social media page. Because it's permissible to conduct these informal investigations on adverse parties' social media pages, lawyers need to make sure, that while conducting the investigation, they aren't engaging in acts involving moral turpitude, corruption, or dishonesty in order to avoid an ethical violation.[4]

Before you list your "Skills and Expertise" on LinkedIn, you might want to make sure that you are in fact a specialist or expert in that area as required by your state bar. According to ABA Model Rule 7.1, a lawyer is not to make any false or misleading claims about his or services. Thus, a lawyer can only state or imply that the lawyer is "certified," a "specialist," or an "expert," if the lawyer is certified by either their state bar or by a certification program accredited by the American Bar Association. The Advisory Committee also noted that a lawyer cannot list areas of practice under the header "Skills and Expertise" even if it was noted elsewhere on their page that they are in fact not certified or an expert in that area of law.

Before you send out that tweet, you might want to make sure your tweet isn't violating the advertising rules of the Florida Bar.[5] The Florida Bar Standing Committee on Advertising Guidelines for Network Sites ruled that lawyers promoting on social media are subject to the advertising rules of the Florida Bar. Based on these rules, a tweet for advertisement purposes must state the law firm's name and the location of at least one of the offices. This causes a dilemma for longer named firms and cities since twitter puts a 140-character limit on each tweet. For example, one of the larger firms in Florida, Carlton Fields Jordan Burt in St. Petersburg, Florida, is going to have a hard time getting a statement in after having to comply with the Florida Bar ethical rules. "Carlton Fields Jordan Burt, St. Petersburg, FL" is almost 50 characters. That leaves less than 100 characters to make a statement and include a hashtag, because let's not forget, what's a tweet without a hashtag? Also, it's common Twitter courtesy to leave character room for other twitter users to retweet and comment on the tweet you posted, so by using the maximum characters allowed, other twitter users will be unable to properly respond to the tweet.

Before you post that blog to your website, you might want to review it first to make sure it's not offensive or insulting. Blogs are another social media platform that can cause potential ethical violations for attorneys. For many people, writing out their frustrations is a nice way to vent but sometimes that could have severe repercussions. That's exactly what happened to one Florida attorney who called a judge a witch on his blog. Attorney Sean Conway posted a blog on October 31, 2006 that addressed his frustrations with Judge Aleman over her mistreatment of lawyers and unreasonable orders. In the article, he referred to Aleman as an "evil, unfair witch," having an "ugly and condescending attitude," and "clearly unfit for her position."[6] Due to the blog Conway posted, the Florida Bar opened an investigative hearing against Conway for five bar violations, and he ended up being fined $1,200 for his remarks in the blog against Judge Aleman.

Although these potential ethical violations exist, social media can still provide many benefits to the legal profession such as promoting greater competency, fostering the legal community, and educating the public about the law and the availability of legal services. In this day and age, it's important to be involved in at least one social media platform. So what are a few things you can do to reduce your risk of an ethical violation? First, stay up to date on the current ethical rules in regards to social media and second, always think twice before hitting send or posting anything on your page.

1 Fla. JEAC Op. 2009-20 (Nov. 17, 2009)
2 Fla. JEAC Op. 2013-14 (Jul. 30, 2013)
3 Fla. JEAC Op. 2012-12 (May 9, 2012)
4 Carole Buckner, *Ethical Informal Discovery of Social Media*, County Bar Update (May 2011), http://www.lacba.org/showpage.cfm?pageid=12927.
5 Margaret Grisdela, *Law Firm Twitter Posts Must Comply with Advertising Rules, says Florida Bar* (Sept. 9, 2011), http://www.rainmakingclub.com/2013/09/law-firm-twitter-posts-must-comply-with.html.
6 Jonathan Turley, *Florida Supreme Court Upholds Sanction Against Lawyer Who Called Judge a "Witch"* on a Blog (Sept. 30, 2009,) http://jonathanturley.org/2009/09/30/florida-supreme-court-upholds-sanction-against-lawyer-who-called-judge-a-witch-on-a-blog/.

MODERN LAWYERS, SOCIAL MEDIA, AND HOW TO COPE WITH IT.

By Jessica Martinez

The modern lawyer faces attacks on more than just his work and his performance. The rise of social media subjects the modern lawyer to scrutiny from a larger audience.

As opposed to lawyers of previous generations , and those of generations to come, the attorneys of this generation grew up alongside social media. Social media was in its infancy as we were, and it is now a full-blown industry, as we are adults. For those of us in this generation, we have experienced our teenage and college years in the public forum. MySpace, Facebook, Twitter, Instagram, Vine and LinkedIn (among others) were handed to us without a manual, and we began to use these social media outlets without a paddle. This being the case, how do modern lawyers cope with or balance their social life and their professional life? Can the two live in harmony?

Firstly, it is important to remember that this social phenomenon is not something we have lived with forever. Some of us, myself included, remember a time without the Internet; a time when one went to a library to research, read a book or rent a video. Although I was just a kid, I remember using the "dinosaur" computers equipped with programs (which are now equivalent to apps) on floppy disks and CD – ROMs. These programs were used for both fun and educational purposes. Imagine that. Apps OUTSIDE of the computer because computers did not have enough space to store all of the data. We now walk around with smart phones that carry 300 times the amount of space than that of the prehistoric computer. That's a lot of power.[2] To quote Spiderman's Aunt May,[3] "with great power, comes great responsibility." The lawyers of this generation have to learn to cope with technology as it is thrown at us. As social beings, our audience is much larger than the audience of lawyers past: it's global!

So, what ARE these social phenomena? The main social juggernauts include Twitter, Vine, Instagram, Facebook, and LinkedIn.

Twitter is an application where users "tweet" messages that are a maximum of 140 characters in length. Should they choose to add a photo to their message, they just simply upload a picture, and voilá. Users' tweets are posted to their profile page. Profile pages include the user's name and an optional "bio" line. Users tend to get creative in expressing themselves in these bio lines, which tend to be remarkable one-liners, quotes, lyrics, bible verses, or actual biographical information. Under the name and bio are the users' posts.

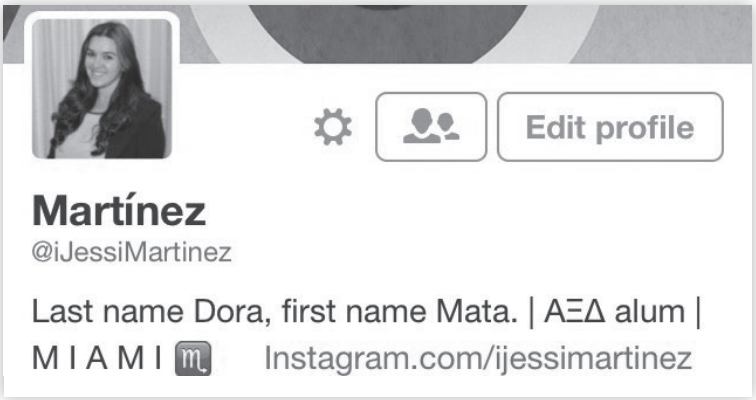
Twitter also coined the use of the "hashtag," also known as the pound sign (#). This little gem is used as a means to connect. If you take a look at Footnote 4, you will see a screenshot of my very own Twitter profile. In the first Tweet you see, I hashtag the phrases "3LHeaven" and "used to it." The hashtag converts the phrase connected to it into a link. Therefore, by clicking it, you can see all the other tweets that others have tweeted regarding the same subject matter. Most of the other apps have included the hashtag feature as a result of its popularity.

This app, in my opinion, will replace news stations in the future. Because it is so readily accessible for both the updater and the updated, Twitter will likely be the primary source of news at some point. This app also coined the phrase "following" in reference to creating social media relationships. People interested in your tweets will simply "follow" you, and your tweets show up on their timeline. The timeline is a user's feed that shows tweets, as they are posted, from everyone the user follows. Twitter , like most social media outlets, allows the user to make their profile either private or public.

Vine is formatted in the same way as Twitter, except this app is for videos. Users can upload videos that are a maximum of 6 seconds long. The great thing about vine is that there are a select number of famous "Viners" who are ordinary people like you and me, except they have a knack for making the rest of us mere mortals laugh in 6 seconds. Vine has become so popular lately, that companies have

started to hire Viners to make vines about their products and apps as part of their advertising campaign. Also, commercials have recently hit the air featuring a few famous vine magicians! The fact that this app has made its way into the mainstream in such a way that it is featured in commercials is astounding.

Instagram , my personal favorite, is the third application in this lineup. It is an application formatted like Twitter and Vine, where users post photographs or videos up to 15 seconds in length.

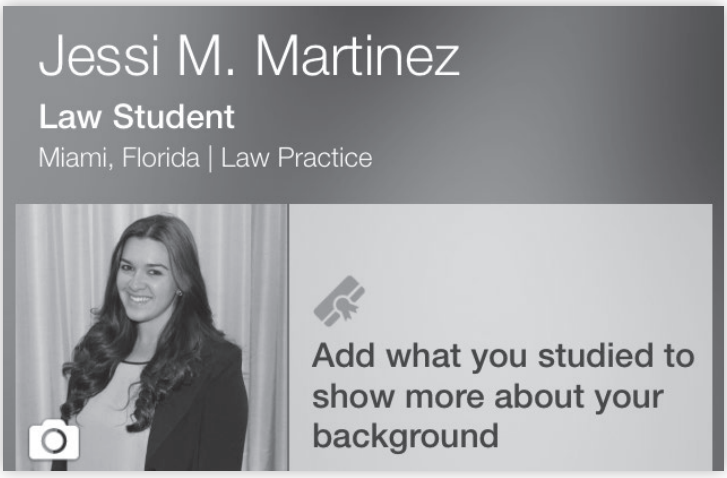


Facebook is the social media outlet everyone is most familiar with. For my readers that are unfamiliar with Facebook, each user gets a profile page, which allows the user to post just about anything they like. In essence, the user can post statuses (like tweets but without a word limit), create albums and post photos (whereas Instagram does not allow albums), and videos (with a longer time limit than Vine and Instagram). Aside from these, the user can share links as posts on Facebook, and upon posting, the link will manifest itself within the post. For example, if a user wanted to post a music video, all they would have to do is post the link, and the video would show up on their page for their friends (or whomever has access to their page) to enjoy.

Lastly, LinkedIn is unlike all of the other apps in its nature. This is the purely professional version of Facebook. You are only allowed one picture, and you do not have "friends" or "followers," you "make connections." Although Facebook does have an option to post your professional information, LinkedIn focuses on just that.

Now that we have examined what the social media phenomenon is, let us explore exactly why balancing the social and professional spheres is a #Struggle . As I have mentioned before, Gen Y lawyers grew up at the same time that social media did. We are not like the lawyers of tomorrow who were born into a world where social media is a norm. We have posted photos and tweets that may be deemed unprofessional, or we may have even been tagged in these photos if someone else posted them. We may have posted a status expressing our feelings that may have left a bad taste in someone's mouth. These are the struggles. We were not equipped with the do's and don'ts for aspiring professionals, and now, we may be jeopardizing our futures because our social and personal lives are pretty much public record. So, what are the trends that some Gen Y lawyers follow in order to balance the social and professional spheres?

- Two of each social media. This is a trend I see most with teachers, college professors and college advisors. During my undergraduate studies, I was heavily involved in extra curricular activities. My teams and I would spend more time with each other and our advisors than we would spend at home. Also, social media was a great means of communication. Via Facebook, we could create group messages that were accessible to all. Because these messages had to include the advisors, they would usually choose to have a professional Facebook account for communication with us, and, as a treat, would sometimes post more than one picture for us to look at!
- Keeping it "Private." Many of us have decided to keep things private for now. I, for example, have kept my Instagram private while the rest is public. Because I tend to post more personal things on Instagram, I feel much more comfortable having an option as to whether I allow someone to follow me. Your privacy is always up to you.
- Don't have social media. This is a simple one. Not everyone is a social butterfly. Many people prefer to have



a select number of the apps, or none at all. Eliminating social media could be the best remedy of all.

Comes now Jessi Martinez, pro se, and does hereby Motion to establish the Do's and Don'ts for aspiring lawyers on social media.

- Keep your personal life personal. Relationships, family, potential work opportunities, and things of a very personal nature should always be kept offline.
- Do not be afraid of your friends. If someone else is posting inappropriate photos or tweets with you AT ALL (tagged or not), ask them to take it down. They should understand where you are coming from.
- Watch the nature of your posts. If you want to be seen as professional, put forth only professional –grade material. This does not mean you should never post a photo of a day at the beach with your friends on Instagram. But, a simple picture on the shore is very different from a picture on the beach in a party pose sporting a mason jar full of some mystery liquid.

Thanks for reading, and let's get social!

1 For a look at established lawyers embracing social media, and some interesting cases featuring social media failures, please see: https://www.bloomberglaw.com/document/XC73F358000000?jcsearch=bna%2520a0f4d1v4u4&-js=0#jcite

2 Lawyers to come will have already been accustomed to life with the Internet and what I like to call portable power cubes (smart phones). This: http://youtu.be/PF7EpEnglgk is a video from the "Kids React" series on YouTube.com. In this video, Kids react to old computers, thus showing how accustomed kids at such a young age, and even those that are a bit younger (16 or 17) than me (I am 24) have grown up with social media as a norm in their lives.

3 Aunt May is Spiderman's custodian because he is left orphaned at a young age. She is his motherly figure for most of his life.

E-FILING. THE GOOD, THE BAD AND THE UGLY.

By Timothy Culhane

In the advent of computers, electronic filing (e-filing) has become a phenomenon within the judicial system. The emergence of e-filing has led to cost and time savings, things every lawyer appreciates. The federal courts were the first to delve into the area of e-filing, followed by state and counties. E-filing began with a system called P.A.C.E.R (Public Access to Court Electronic Records) in the late 1990s, with the approval at the Judicial Conference of the United States in 1988. E-filing has taken on a life of its own across the nation; nearly every Judicial District is on board. The major obstacle, according to clerks' offices, is the lawyers' inability to use the system properly and efficiently.

Prior to e-filing, lawyers (or their representatives) spent countless hours drafting a document, drove to the courthouse, waited in line, filed the documents in person, and then followed up with calls to verify the documents were received and filed timely. Nowadays, one must simply upload and submit a document online, through an appropriate system, on time. There are numerous benefits associated with e-filing. There are no distance barriers; you can work right up until the deadline for submission (provided you have no electronic glitches when submitting). E-filed documents are instantly available online for immediate access. In an age of "going green," this is yet one step closer to a paperless environment. No special software for this application is needed, and all the filing fees are automatically calculated and billed to your account. In addition, as more documents are e-filed, filing fees should be lowered due to a diminished need for personnel in the courthouse.

Uploading documents should be the easiest part, but it seems to be the area that lawyers are facing the most difficulties because of timing mishaps or technological difficulties. Due to non-adherence of the specific rules relating to e-filing, some cases have been dismissed and sanctions have been issued as a result of untimely filing because of time restrictions, confidentiality issues, filing the wrong documents, or failure to abide by size-limit restrictions on the uploaded files.

There are some steps lawyers can take to circumvent issues that may arise. Lawyers should be cognizant of the rules in their respective jurisdiction, as there are specific types of file extensions that courts generally accept. For example, in Florida, as well as many other states, the uploaded documents have to be a Microsoft Word document, a WordPerfect document, or an Adobe PDF file. In the Federal System P.A.C.E.R, they only accept Adobe PDF files. File size limits are important, as most states have a 25 MB size limit and the Federal System P.A.C.E.R has only 1.5-2 MB size (25-150 pages) limit.[1] Each jurisdiction will have filing deadlines; some courts have a 5:00 p.m. deadline while others extend it until 11:59 p.m. If you fail to file the documents according to the time constraints of your jurisdiction, it could be problematic for you and your client. For instance, in *Stark v. Right Mgmt. Consultants*,[2] the Plaintiff had 90 days to file his suit, and the attorney filed the suit on day 90 at 11:27 p.m. The court concluded the suit was untimely filed because the deadline in that jurisdiction was 5:00 p.m.

Despite the technological advances we utilize to make our lives more efficient, it can be the smallest of details that make a big difference, especially when it affects your reputation. When filing your documents electronically, you need to ensure you have attached the correct document with the right case. This may seem like a simple task, but double and triple checking your work can save you time and aggravation. An attorney who filed a "notice of appeal" with the court, actually re-filed a previously filed "notice of

motion service," and the motion was denied and an order for summary judgment (SJ) was issued. The attorney attempted to file the correct notice, but it was not completed until 30 days after SJ was ordered, and the SJ order stood.

Electronics sometimes have technical issues, and in August 2014, the Federal Government experienced a loss of "tons of cases" according to an email sent from the Administrative Office of the U.S. Courts. The loss of the files was during an upgrade to the system; however, the cases are still available through local courts. The premise behind P.A.C.E.R is to centralize all of the records, and this loss of cases is counter-intuitive if you have to go to the local courts to retrieve the records. Theses glitches are still being worked out nationally.

Florida has shown to be one of the leading states in the area of e-filing in both the trial and appellate courts. Alabama has electronic filing for its courts, but the system is voluntary, while Oklahoma ran into problems and changed vendors after spending $20 million. Colorado's appellate courts will still require paper filings for its court of criminal appeals to back up electronic submissions when the system is completed. California spent millions trying to get an integrated statewide system, gave up, and started again.

Despite some possible issues with e-filing, attorneys, who take the time to get all the kinks worked out on the front end, will ultimately see the benefits of e-filing.

1 See https://www.pacer.gov/cmecf/developer/dev_faq.html

2 247 Fed Appx. 855 (8th Cir. 2007)

THINK FAST ABOUT THAT METADATA: MORE REASONS TO CARE ABOUT YOUR CARRIER

By Ashley Dorwart

Cellular phones and the data the phones both produce and share with others never ceases to make new headlines. What are the data-basics attorneys should know for practicing law?

It is not uncommon to hear tech-lingo in everyday conversations, and it is vital to know the basics of electronically produced data. A good foundational starting point to knowing these basics is Electronically Stored Information or ESI. As defined by the International Standards Organization (ISO), ESI is "[d]ata or information of any kind and from any source, whose temporal existence is evidenced by being stored in or on any electronic medium . . . [this] also includes system, application, and file associated metadata."1 ESI, therefore, is any kind of information, regardless of the type of file or dataset, which exists because of its electronic nature.

One hot-button word is "metadata." What is it? The ISO states, "[d]ata that defines and describes other data." Id. For example, the act of sending a text message, picture, Snapchat, etc. produces data that details or "describes" the nature of the data itself. All of this information, both the content of the message and the metadata created when it was sent, can be Digital Evidence. Digital Evidence is "[c]omputer generated information or data . . . stored or transmitted in binary form may be relied on as evidence." Id. at 23-5. This binary form is the language spoken by all computers and is the skeleton of the metadata. This Digital Evidence may contain not only content that could be vital to an investigation for law enforcement but material case information. For example, while the content of a text message could be important, the time the message was sent, received, read, and where each of the devices was located at these times, (the metadata), could also prove to be invaluable.

Attorneys, particularly those working with law enforcement during an investigation, face a few issues in reference to data. Among these are how this information is stored or tracked and how long it exists. In essence, the issue is how can law enforcement or an attorney access it. There are numerous cellular service providers in the United States, and each has its own policies, typically encompassed in the company's retention policy, on how data is collected, stored, and retained. These providers are extremely protective when it comes to these retention plans. In researching for this article, four of the nation's top carriers were researched and personally contacted. In each case, the response was the same: get a subpoena if you want information. However in 2010, a summarized file produced by the United States Department of Justice categorized the various retention policies in place for six major carriers. This file was leaked and revealed the array of differences in how carriers deal with data. (See chart below)

	Verizon	AT&T/Cingular	Sprint
Subscriber Information	post-paid: 3-5 years	Depends on length of service	Unlimited
Call detail records	1 rolling year	Pre-paid: varies post-paid: 5-7 years	18-24 months
Cell towers used by phone	1 rolling year	From July 2008	18-24 months
Text message detail	1 rolling year	Post paid: 5-7 years	18 months (depends on device)
Text message content	3-5 days	Not retained	Not retained
Pictures	Only if uploaded to website (customer can add or delete pictures any time)	Not retained	Contact provider
IP session information	1 rolling year	Only retained on non-public IPs for 72 hours, if public IP, not retained.	60 days
IP destination information	90 days	Only retained on non-public IPs for 72 hours, if public IP, not retained.	60 days

If a victim has a series of text messages with a suspect, and the victim's cell phone has gone missing while the suspect has wiped his phone of the contents of these messages, is there a way to recover them? Not only does this depend upon the carrier, but also on the method in which the message was sent. Take the iPhone for example. If the victim used the iMessage feature to send a text, the length of time that data is stored will not only depend upon the cellular provider, but will now also depend upon how the actual cell phone sent the message—either by using data from the carrier or through Wi-Fi. If the message was sent using data, then the carrier, in theory, would have information about the message. If the message was sent through Wi-Fi, then the carrier may not. It should be noted, however, that Apple's iCloud would also come into play as the iMessages, if the customer has enabled the feature, can be backed up into the iCloud. Additionally, the way in which the data is encrypted is a major factor to consider. One can see how quickly data retrieval can become a mess. The important thing to remember is that all of this could be time sensitive. As previously mentioned, the actual content of the text message could be lost after twenty-four hours or may not even be stored by the carrier at all.

In the grand scheme of this introduction to cell phone providers and metadata, it is important to remember there are forensic ways to find metadata—it just may be there is no way to restore this data to the nature in which you want it.

The moral of the story is one must work in an extremely timely manner to make sure potential evidence is not lost. Become educated about Digital Evidence and educate those in crucial positions to recognize the importance of awareness of preserving potential case evidence.

1 Chapter 24, *Electronic Discovery*, Business Litigation in Florida, 23-6, (Fl. Bar CLE 8th Ed. 2014)

IS THERE A REASONABLE EXPECTATION OF PRIVACY WITHIN THE CYBER WEB?: WARNING, POST AT YOUR OWN RISK

By Rosekate Ibe

If a client wants settlement money from a personal injury lawsuit, it is not the best idea for the client to post those white-water rafting photos or better yet those bungee jumping videos that your client claimed he or she was supposedly prevented from partaking in due to injuries. Clients are and should be warned to maintain a guarded amount of discretion when it comes to what is posted on social media and sent via text or email. Why? Electronically stored information (ESI) is believed by many to be private, but the reality is that social media contents are discoverable. Issues with ESIs arise frequently in litigation, but the courts have drawn a line as to how far to intrude on an individual's privacy. The courts are establishing rules protecting an individual's right of privacy while enabling the courts to view only social media contents that are relevant to the issue.

The Supreme Court in *Romano v. Steelcase Inc.*, 30 Misc. 3d 426 (Sup. Ct. 2010), ruled that the Plaintiff's social networking site contained material that was contrary to her claims and deposition testimony. Therefore, she did not have a reasonable expectation of privacy when the defendant sought to obtain information from her website detailing her physical activities. The Court's rationale is supported by the fact that the materials were relevant to

the litigation and were made available to a third party.

The Romano case is similar to frequent personal injury cases presented in court where the plaintiff sues the defendant for negligence and alleges severe physical injuries that have limited his or her mobility. However, a week later he or she is embarking on mountain climbing or ju jitsu training and then posting it on his or her social networking site or even texting a friend about the amazing experience he or she had. When the opposition seeks to obtain that information, the plaintiff cries out a defense. The plaintiff asserts a privacy defense, however his or her defense is shattered by the Civil Practice Law and Rules §3101. The Civil Practice Law and Rules §3101 states that "There shall be full disclosure of all material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ."CPLR §3101 (a). When the courts have access to ESI, the content proves to be more reliable than oral testimony, thereby affording litigants impartial procedural posture. In addition, only the contents that are relevant to the issue at matter are permitted access to.

In the Supreme Court case, *Katz v. United States*, 389 U.S. 347, 348 (1967), the Defendant's Fourth Amendment was violated when the government attached an electronic listening and recording device to the outside of the public telephone booth where he wagered information by telephone in violation of a federal statute. Here, the Supreme Court held that the government's activities violated the privacy upon which the Defendant relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. *Id.* at 353. *Id.* The rational of the court was that the Fourth Amendment protects people, not place. *Id.* What a person knowingly exposes to the public is not a subject of Fourth Amendment protection. *Id.* But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Id.*

The *Katz* court's holding might seem ambiguous based on the notion that there is not a distinctive bright-line rule on what determines how far the government's intrusive scope extends. But, in Smith v. Maryland, 442 U.S. 735 (1979), the Supreme Court attempts to define a scope. In Smith, the police installed a pen register without a warrant when they discovered that the petitioner committed robbery and made telephone calls to the victim's house. The Court concluded that a person has no legitimate expectation of privacy in information he voluntarily turns over to a third party. Id. at 744. The Court declined the petitioner's argument that the telephone company decided to automate. *Id.* at 745.

The rationale in *Smith* tightens the gap between the ESI that is perceived to be private and ESI that is voluntarily made public. When an individual's ESI is within the cyber web, courts have held that they do not have a reasonable expectation of privacy if they voluntarily disseminate it. The underlying principle is that accessibility of an individual's electronic-stored information that is released to a third party does not constitute an intent to conceal the material. Opponents to the discovery argue that when the Fourth Amendment does not secure electronic stored information, it opens up a fishing expedition during litigation. However, the courts have narrowed the viewing scope to permit only material that is relevant to the issue. The Civil Procedure Law and Rules §3103(a) states that, "The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning, or regulation the use of any disclosure device. CPLR § 3103 (a). Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." CPLR § 3103 (a).

In applying a bright line rule standard, the court in *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty Dec. LEXIS 270 (Pa. County Ct. 2010) held that the plaintiff was required to provide his Facebook and MySpace user names and passwords to counsel for Defendants to view relevant material that pertained to his damages claim. The court concluded that the benefit of acquiring information relevant to the litigation outweighed an intrusion upon an individual's privacy. In *McMillen*, the plaintiff did not have a reasonable expectation of privacy because he alleged significant and substantial injuries, some of which he claimed may become or are already permanent. However, the defendants discovered posts on the plaintiff's website which showed that McMillien exaggerated his injuries. *Id.* at 11.

Going forward, it is safe to advice everyone that they should assume electronically stored information is discoverable. Discoverable contents include items such as posts on social media, emails, and text messages. While this might seem alarming to many, one should not shriek in horror. The courts have implemented rules and procedures to protect one's constitutional rights to limit discovery to only material relevant to the issue. Although, an individual's electronically stored information is protected, even in litigation, one has to be aware of what is made available in cyberspace. Big Brother is watching, therefore rethink before you click, "Send" or "Post".

RESEARCH: DIGITAL ADVANCES V. TIME-HONORED TRUTHS

By Monica Kelly

The cornerstone of legal research is efficiency. With today's plethora of resources, the question remains, what is the most efficient way to compile accurate legal information? Historically, cases, statutes, and legislation could only be located in law libraries. However, today that information can be accessed anywhere and anytime with the help of the Internet.

Internet-based research offers conveniences that are foregone in law library research, but with the advent of this new source of information comes drawbacks. The immense increase in access to information is accompanied by the problems of information overload, competing interests, and unverified factual assertions. For successful Internet research, the reader must evaluate the authorship, professional or institutional affiliation, and specialization of each article used. With legal libraries, this added component of assessment of validity is less necessary, and credibility is rightfully implied by the text's placement in the library.

The Internet allows information to be updated in "real time," meaning changes in the law are instantly reflected online, as opposed to the delay that is faced with publishing new editions of tangible books and resources. However, drawbacks exist when old information remains online, and Internet information providers fail to update their sources. With library research, however, there may be a delay in information updates. Each legal publication offers "pocket arts" that provide accurate and updated information regarding case law, legislation, and statutes. These updates, though less costly than printing new editions of each book, are still more costly than interjecting the updates on a website or a legal database.

"Real time" updates are particularly useful when new laws are enacted, both federally and within one's state. Websites like regulations.gov (http://www.regulations.gov), United States Courts (http://www.uscourts.gov), and Uniform Law Commission (http://www.uniformlawcommission.com) are sources of regulations, court rules, and administrative law. These sources are offered free of charge or at a low cost to the consumer.

Cost efficiency is another major area of concern for legal professionals. The expenses associated with both Internet research and library research concern two major areas: the actual expense of the resources and the opportunity cost of the legal professional's time. Though Internet databases, such as Lexis (http://www.lexis.com), Bloomberg (http://www.bloomberglaw.com), and Westlaw (http://www.westlaw.com) provide verified information and various search tools to optimize search results, large price tags are attached to them. There are several free or low cost sources of legal information online, such as VersusLaw (http://versuslaw.com), Google Scholar (http://scholar.google.com), and Fastcase (http://www.fastcase.com), though these are generally not as advanced as the more expensive options. Many legal libraries are public and offer free access to visitors. However, the opportunity cost of physically visiting a law library and doing book research may outweigh the benefits of the saved Internet database cost, depending on the individual's price for billable hours and efficiency when researching.

Because of the benefits and drawbacks of both sources, Lexis (http://www.lexis.com) has attempted to merge two concepts: the traditional law library and online legal research, resulting in the LexisNexis Digital Library. The goal of this new technology is to offer law practitioners access to a vast collection of authoritative content while reducing the overhead and administrative costs associated with a print library. This system is intended to increase access to legal documents while decreasing the cost of legal research.

The ever-evolving field of legal research is complex in its quest for simplicity and efficiency. Both online research and research in a law library have their drawbacks; however, they both have significant benefits that can be utilized depending on the type of research that needs to be done and the individual skills of the researcher.

SECURITY BREACH: WHO IS A TARGET?

By Nicholaus Michels

Even though we live in an age with rapidly expanding technology, not even your average member of Generation 'Y', is completely fluent in computer jargon. This writer certainly couldn't tell you the difference between bitmap and vector graphics, the best way to defrag a hard drive, or how many bytes it takes to reach the tootsie roll center of a tootsie pop. Nevertheless, there are many people out there who are not only fluent in this language but are developing it. Some of these gifted few are using their powers for evil. You all know of whom I speak: The Hackers! These individuals are largely responsible for the growing threat of data breaches throughout the United States and across the globe. You may recall Target making headlines late last year when it was hit by an extensive theft of its customers' credit and debit card data over the Black Friday weekend. The theft affected roughly 40,000 card devices at store registers and put millions of cardholders in a dangerous and vulnerable position.[1] This is just one incident among many that happens more and more frequently every year. What is a peon like me to do in the face of a threat like this?

Here's the good news — there are data and/or notification laws on both the state and federal level. Uncle Sam enacted the Gramm-Leach-Bliley Act (GLBA) in 1999, which protects an individual's personal information when dealing with financial institutions.[2] Likewise, the Health Insurance Portability and Accountability Act (HIPPA) of 1996, was enacted to protect your average American's health information.[3] In addition, more exist in many of these United States personal data protection laws, as well as laws that require notice to be provided to affected individuals when a breach has occurred.[4]

Here's the not-so-good news — a majority of the states have not mandated specific security measures for the protection of consumer data.[5] Likewise, there does not exist any sort of data protection and breach notification law on the federal level excepting those industry-specific laws mentioned above.[6]

The really bad news is that the F.B.I. has warned law firms that they are the prime targets for hackers.[7] One major security firm, Mandiant, has been spending 10% of its time investigating data breaches in law firms;[8] yet most lawyers do not have cyber insurance to cover the expense of complying with the existing data breach laws.[9] Law firms, particularly smaller firms, are notorious for pinching pennies in the cyber security department.[10] Why? For the same reason that anybody does something stupid in the face of certain consequences: "[fill in the blank] won't happen to me." Why should a small firm believe that they are in any danger? They aren't anywhere near the size of a corporation like Target. The likelihood of them being affected by a security breach must be minimal in comparison, right?

Since technology is rapidly advancing, information that is shared between people is becoming increasingly harder to keep private. This is especially true when one considers how many different avenues information can be accessed: e-mail, flash drives, text messages, social media and the holy grail of convenience, The Cloud. This information can be accessed through so many different devices: computers, cell phones, tablets and iPads. These are tools that are being used by all businesses, big or small. When one considers the type of information a law firm is communicating via these mediums, it is easy to see why hackers would want to target law firms. For example, let's consider a firm that practices family law. This hypothetical firm would have social security numbers, birth dates, credit card numbers and plenty of other detailed financial information on hand. This is the type of information that identity thieves are looking to swipe and a problem that all law firms cannot continue to ignore.

Since there is a rise in data breach cases similar to Target, the United States Congress appears poised to begin introducing legislation geared toward national data protection and breach notification.[11] Not surprisingly however, there are various proposals being considered which have their political bents.[12] Time is of the essence here and rather than waiting for Washington to act, it would behoove America's law firms to begin educating themselves on what to do; like understanding how data breaches happen, taking steps to increase security on their networks and investing in I.T. departments that understand how the wireless world works behind the scenes.

Your Average Joe may not be able to understand how sophisticated technology has become, but he can no longer avoid its intruding presence. It is imperative that all who take part in the practice of law be prepared to take the necessary steps to make sure that technology's presence doesn't cross the line of confidentiality. As Abraham Lincoln once said, "You can't trust everything that is being passed around on the Internet."

1 Robin Sidel, Danny Yadron, Sara Germano, *Target Hit by Credit-Card Breach*, Wall ST. J. (Dec. 19, 2013), http://online.wsj.com/news/articles/SB10001424052702304773104579266743230242538
2 Mauricio F. Paez, Richard J. Johnson, Steven. G. Gersten, Mina R. Saifi, *U.S. Congress Ready to Enact Data Security and Breach Notification Rules After Recent Consumer Data Breaches*, Jones Day Pub. (Feb. 20, 2014), http://www.jonesday.com/us-congress-ready-to-enact-data-security-and-breach-notification-rules-after-recent-consumer-data-breaches-02-14-2014/#_edn14
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 Sharon D. Nelson, John W. Simek, *Cyberthreats and Defenses*, 31 No. 3 GPSOLO 37 (2014)
8 *Id.*
9 *Id.*
10 *Id.*
11 Mauricio F. Paez, Richard J. Johnson, Steven. G. Gersten, Mina R. Saifi, *U.S. Congress Ready to Enact Data Security and Breach Notification Rules After Recent Consumer Data Breaches*, Jones Day Pub., Feb. 20, 2014, http://www.jonesday.com/us-congress-ready-to-enact-data-security-and-breach-notification-rules-after-recent-consumer-data-breaches-02-14-2014/#_edn14
12 *Id.*

THE VIRTUAL LAWYER: PROS AND CONS TO GOING CYBER

By Kimberlee Mitton

By 2014, the Internet and cyber space have entered into most aspects of an individual's life. More and more jobs are using technology and specifically the Internet to complete basic functions such as scheduling appointments, providing initial paperwork and questionnaires, and some forms of communication such as email. Some offices, including law offices, have taken an additional step and created a virtual

law office. These virtual law offices rely on technology to provide their legal services rather than a physical office.

Virtual law offices range from completely online offices in which meeting face-to-face with the lawyer is not common to physical offices only using computer software for scheduling, filing, and some communication, or somewhere in between. In 2013, seven percent of solo practitioners and five percent of all lawyers said they were using purely a virtual law office, meaning they did not occupy a physical office.[1] Additionally, many other lawyers are using a hybrid of virtual lawyering and meeting clients face-to-face in an office setting. The software used varies from simple case management software, usually cloud based, to software such as Second Life®, a three-dimensional video game type software in which meeting with the lawyer looks like a cartoon.

The benefits of this kind of freedom in lawyering are counterbalanced by very real risks involving ethical rules such as the ABA's Model Rules of Professional Responsibility. Some of the most discussed benefits and risks are outlined below.

Virtual lawyering provides the ability to provide services from anywhere. You do not have to be in the state or even the same country as your clients. The lawyer could hypothetically provide services from his boat in the middle of the Caribbean only coming to shore to appear in court. However, this transient nature makes it easy to cross jurisdictional boundaries. The unauthorized practice of law is the basis for many malpractice actions, and therefore, the lawyer must be careful where they are marketing and delivering services. Additionally, some states such as New Jersey require physical offices within the state.[2] If this is the case, a pure virtual lawyer cannot practice in that state.

An additional benefit is that the services are often unbundled, meaning that a client can pick a lawyer and have them do a few things on the case and then switch lawyers for the next issue or to resume previous case. This is cost effective for the client and therefore appealing. Conversely, clients who shop on the Internet for a lawyer are often doing so out of convenience, both monetarily and time wise. Clients might find a cheaper, more convenient lawyer, but small firms and solo practitioners often cannot compete with the larger non-lawyer organizations such as Legal Zoom.

The client and lawyer can share documents, files, and communication online in a secure password-protected site, making communication convenient. The convenience of scanning documents into the file from home or work is beneficial to most clients. Additionally, meeting with their attorney through a Skype®-type app is far better than paying for the gas and time to drive to the lawyer's office. On the other hand, the cyber world is not nearly as secure as many would like to think. The risk of losing the laptop, hacking into the secure site, emails being intercepted, and security being compromised is not out of the ordinary. The lawyer is responsible for the property such as documents that are uploaded or stored in the virtual office. If the security is compromised, then the lawyer has not safely kept the property as required by most state bar rules.[3] Therefore, if there is a breach of security, a lawyer could be sued for malpractice and/or subject to discipline.

There are many other risks and benefits to virtual lawyering that have been discussed, and as they come to light, many states have spoken on the issue. In an opinion published by the Florida Bar Journal, many of the issue are addressed and specific requirements have been put into place for attorneys wishing to incorporate virtual lawyering into their practice.[4] While there is "no express provision in the Rules of Professional Conduct that prohibit the inquiring attorney from practicing law through the Internet,"[5] the attorney must be mindful of the Rules and how they apply to various aspects of virtual lawyering.

Regarding the issue of unauthorized practice of law, the lawyer should let the client know that he/she is only authorized to practice law in Florida. Additionally, the lawyer must be careful when advertising on a website to ensure they comply with ABA Model Rules of Professional Conduct, Rule 4-7 regarding advertising and 4-7.6(b) regarding electronic communications. Furthermore, the lawyer is obligated to provide competent representation to his or her client. The Florida Bar states that, if the client's situation "is too complex to be easily handled over the Internet," the lawyer must inform his or her client, and if the client is unable or unwilling to meet in person, the lawyer "must decline representation."[6] Moreover, "[w]hile the Professional Ethics Committee has yet to issue an opinion on the confidentiality implications of using email to communicate with clients, almost all of the jurisdictions that have considered the issue have decided that an attorney does not violate the duty of confidentiality by sending unencrypted email as long it is not "highly sensitive" material.[7] Highly sensitive material should not be electronically communicated unless it is via encrypted email.

All and all virtual lawyering can be beneficial depending on each lawyer's inclination. However, the risks can be dangerous to the lawyer's reputation. It is important to be educated on the rules and guidelines, not only of the ABA, but also of the state in which the lawyer practices. The lawyer must be careful to think in the client's best interest when taking each case and deciding if virtual lawyering is appropriate.

1 Crews, Kevin, *The Door to a Virtual Law Practice is Always Open: And the P can Keep it That Way*, The Florida Bar Journal (June 2014).
2 Crews, Kevin, The Door to a Virtual Law Practice is Always Open: And the P can Keep it That Way, The Florida Bar Journal (June 2014).
3 MODEL RULES OF PROF'L CONDUCT R. 1.15
4 Fla. JEAC Op. 2000-4 (Jul. 15, 2000)
5 Fla. JEAC Op. 2000-4 (Jul.15, 2000)
6 Fla. JEAC Op. 2000-4 (Jul.15, 2000)
7 Fla. JEAC Op. 2000-4 (Jul.15, 2000)

TRIALS OF E-DISCOVERY: INADVERTENT DISCLOSURE

By John Spurlock

e-Discovery

The question before Florida attorneys today is whether the convenience and benefits of e-discovery are outweighed by the increased risk of inadvertent disclosures leading to privilege waiver? The issue posed is serious because every practicing attorney must balance the benefits and risks involving a client's interests, and the legal profession. Ignoring these realities can equate to liability, therefore every law firm using e-discovery must make an informed decision. Knowledge of privilege law and the specific facts of the case only reach the threshold for screening such confidential materials.[1]

The benefits of e-discovery include decreased discovery expenses, decreased time in discovery, and a manageable solution for storage of thousands of pre-trial documents. Conversely, the technological nature of e-discovery promotes opportunity for numerous problems to manifest, including inadvertent disclosure of privileged documents. Relying on technology alone to distinguish privileged material from other pre-trial documents is failing to adequately screen said material.[2]

Inadvertent Disclosure

Discovery is the process of disclosure, more precisely controlled disclosure of non-privileged material. Whereas, inadvertent disclosure goes beyond the scope of discovery process and into judicially privileged areas. These protections are not absolute and can be waived, thus opening the floodgates and diminishing the chance for a favorable ruling at trial.[3]

Courts formed an analysis of inadvertent disclosure to determine whether a disclosure amounts to a waiver of privilege; many different approaches exist. The following are approaches courts have taken: strict, middle, and lenient.

Strict Liability Approach. The principle that disclosure of a privileged document, even when inadvertent, results in a waiver of the attorney-client privilege regarding the document, unless all possible precautions were taken to protect the document from disclosure. 159 A.L.R. Fed. 153; Black's Law Dictionary (9th ed. 2009).

Middle Approach. A principle for deciding when an inadvertent disclosure of a privileged document is a waiver of the attorney-client privilege, whereby the court considers the following factors: (1) reasonableness of the precautions taken to prevent the inadvertent disclosure, (2) the number of disclosures involved, (3) the extent of the disclosure, (4) the promptness of any efforts to remedy the disclosure, and (5) whether justice would be best served by permitting the disclosing party to retrieve the document. Black's Law Dictionary (9th ed. 2009).

Lenient Approach. The principle that the attorney-client privilege applicable to a document or other communication will be waived only by a knowing or intentional disclosure, and will not usually be waived by an inadvertent disclosure. Black's Law Dictionary (9th ed. 2009).

Federal Approach—Codification of the Middle Test

The Federal Rules of Evidence adopted Rule 502(b) to diminish ambiguity in this area of the law, hoping to make cases more predictable and disclosure less common.

Rule 502(b) reads as follows:

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure;

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B). Fed. R. Evid. 502.

Florida's Approach The Relevant Circumstances Test

Florida adopted the Federal Rules of Evidence, but there is no parallel provision in Florida state law. Instead, like a majority of other jurisdictions, Florida courts apply the Relevant Circumstances Test and look to the following circumstances surrounding the disclosure to determine whether privilege has been waived:

(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;

(2) the number of inadvertent disclosures;

(3) the extent of the disclosure;

(4) any delay and measures taken to rectify the disclosures; and

(5) whether the overriding interests of justice would be served by relieving a party of its error. 1 LN Practice Guide: Florida E-Discovery & Evidence 3.11

Opinion

Inadvertent disclosure is an issue today because it has become easier to disclose confidential information. In the past, lawyers held paper files and were aware of the contents before allowing opposing counsel access. Whereas today, inadvertent disclosure can manifest without actual knowledge and until opposing counsel has already seen the confidential information. For example, a legal assistant

sends out emails to clients and opposing counsel. This assistant inadvertently sends an e-mail to opposing counsel with confidential material attached. If the disclosure contained outcome determining information—the case, the associated attorney, and possibly the law firm could all experience negative implications. Both Federal and Florida analysis beg this question: did the disclosure appear to be careless?

New technology and e-discovery may increase the likelihood of inadvertent disclosure. Some common sense steps can be applied to mitigate the risks: (1) make reasonable decisions when applying the facts and the law, (2) organize the material accordingly (separate the privileged documentation as quickly as possible) and (3) communicate effectively to all lawyers, paralegals and legal assistants on the case.

Even though inadvertent disclosure is still possible after taking the above recommended common sense steps, the likelihood of disclosure is diminished; and the court might allow the inadvertent disclosure to be rectified–meaning no privilege waiver.

1 159 A.L.R. Fed. 153.
2 Id.
3 Fed. Rul. Civ. Pro. 26C(5).

THE NEW WAY TO LAW SCHOOL – INTERNET AND COMPUTERS AS THE NORM

By Deanna Vella

For students who are currently in law school, it is hard to believe that anyone passed law school without a computer. Successfully completing legal research without an online database like LexisNexis or Westlaw seems like an impossible task – or at least a very inefficient one. Taking law school exams without a computer seems daunting – all that writing in three hours surely would break your hand, right? Well, at one point, that was how it was done; law students would research their legal papers in a library with real books and would then write their legal papers the long way – with a pen and paper. Many of us now take our technology for granted. Information is always just at our fingertips, and that is always the way it has been for us. But, even with all the obvious benefits of online legal research, are there downsides? Then, taking a step back, are there downsides to having computers in the classroom in general? Perhaps permitted computer use in class has its downsides, too.

This article will address the pros and cons of both online-based legal search and computer usage in the classroom.

Online Legal Databases

According to a 2012 article, new associates at law firms (big and small) spend, on average, 73% of their work time using a computer or digital device. Steven A. Lastres, the Director of Library and Knowledge Management at Debevoise & Plimpton, says, "the strong preference for online legal research resources is supported by an overwhelmingly digital workplace."[1] It is evident from this information that online legal research is the norm. Not only is it beneficial because of its efficiency and ease, but it is also expected amongst employers.

Moreover, the article shows that 56% of associates indicated their employers expected them to have strong research skills, but did not provide any formal training.[2] This shows the importance of law school training on legal research databases such as LexisNexis and Westlaw. Law schools need to train their students as much as possible on these legal databases to make their graduates more marketable and more successful in the legal field. On a whole, law schools agree with that consensus; a 2008 study by Stanford Law School shows that of the 231 law schools surveyed, 230 of them provide both LexisNexis and Westlaw to their students.[3] It is imperative that law schools provide both legal databases, as students do not know which database their future employers will have. (Note, however, that according to that same study, 73% of law firms use Westlaw over LexisNexis. With the new interface that LexisNexis rolled out in September 2014, though, it is likely that the percentage of those firms that use LexisNexis will slightly increase – but that is still yet to be determined.)

There really is not a downside to online legal research. It is substantially more efficient and allows students to produce work in a smaller amount of time. This, in turn, will produce more effective research skills for students when they enter the workforce.

Computers in the Classroom

The admissibility of computers in classroom settings is generally up to the individual professor. Through my research and my own personal experience, it seems that the real issue is not the actual computer in the classroom – it is the access to the Internet.

In a 2011 study of Elon Law students, over 95% of them used computers in classrooms. About 80% of them stated they use computers frequently. Further, more than half of the participating students in the survey said they use computers more than 80% of the class time.[4] More than 80% of the students said relying on the computer during class is helpful because they take notes either by transcribing or paraphrasing what the professor says. I understand the point of view of the students because I, too, use my computer during class to take notes – at least in the classes that allow it. Taking notes on the computer is much faster and I get a more accurate representation of what the

professor was trying to say during class. My notes are also more organized, saving me time after class and increasing my study time.

However, the flip side to that is this: in that same survey, 90% of the students admitted to at least occasionally using their computers for something unrelated to the actual class they are in. Elon School of Law Professor Friedland wrote the following: "Computers with Internet access provide an easy avenue to another venue, such as Facebook, IM'ing, and email. These competitive venues can be addicting and provide difficult habits to break. Ignoring the reality that some students and professors are addicted to their smart phones, the Internet, Facebook and like does not add value to the classroom and educational experience, but rather places it at a greater risk."[5] Further, many believe that these Internet venues do not only distract the person using them – they distract others who are in the same class. The Internet causes students to disconnect from the class, so they no longer are actively engaged in what the professor is trying to teach them.

In 2008, The University of Chicago Law School announced its approach to getting the benefits of computer use in the classroom but without the unwanted disadvantages. The law school pledged to eliminate Internet access in some classrooms, providing students with the easy note-taking capabilities of their computers but blocking out the true distraction of Facebook and other sites. Saul Levmore, the Dean of the law school, said this: "As soon as we discovered that we had the capacity to turn off Internet access during class time, we felt that we ought to move in that direction. Our goal is to provide the best legal educational experience in the country, with students and faculty focused on the exchange of ideas in a thorough, engaging manner." [6]

The University of Chicago Law School has a great idea to counteract the competing positive and negative interests of computers and Internet in classrooms. However, I find that having the Internet during class is helpful. While I admit that the Internet can be a distraction to some, the Internet also allows students to access classroom materials online. Without Internet access, we would not be able to have this medium of learning. Further, I believe that easily distracted students will be distracted during class with or without the Internet. Tic-tac-toe, note passing and doodling are still effective ways for students to disengage from class if they really want to. Therefore, allowing access to the Internet during class is more helpful than harmful.

Conclusion

Overall, the online legal databases and computers in classrooms have been more helpful than harmful. It is true students don't know how to complete book research as effectively, and they do not know how to organize their notes as much on paper, but these on-paper skills seen unnecessary today in the legal profession. Law schools are now training students to use these online databases and get comfortable with using computers for a reason – it is what lawyers do. And for good reason – the efficiency and ease of the Internet is just something we cannot live without.

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\NON-CONTROLLED SUBSTANCES AND THE FOCAL SHIFT IN DUI DEFENSE

By Elizabeth Humann

The Supreme Court has established that the state must prove every element of a criminal offense beyond and to the exclusion of a reasonable doubt.[1] Thus, the State of Florida has the responsibility of proving all three elements of Driving under the Influence, as set forth in Florida State Statute 316.193(1). First, the prosecution must prove that the defendant was driving or in actual physical control of a vehicle. Secondly, it must prove that the driver was under the influence of alcoholic beverages, chemical substances set forth in F.S.S. 877.11, or any controlled substance listed under Florida Chapter 893. Lastly, the state must prove that the driver was affected by alcohol or controlled substances to the extent that his normal faculties were impaired.[2] Due to the sudden upswing in the use of non-controlled intoxicating substances, however, the state is no longer capable of proving the "controlled substances" prong in non-alcohol related D.U.I. cases.

Consider the plight of Mrs. Suzy Homeacre, who suffers from a mild nervous disorder. Yesterday afternoon, she took one Xanax, which is controlled. Tonight, suffering from insomnia, she takes an Ambien, which is neither controlled

nor a chemical substance listed in 877.11.[3] Immediately after taking the Ambien, she drives to the store to buy some milk. During the drive home, the Ambien starts to take effect. Suzy begins weaving across lanes of traffic and her reaction times are slow. When she is pulled over, her words are slurred and she has trouble locating her driver's license and registration. She fails field sobriety exercises and is placed under arrest for D.U.I..

At the jail, Suzy is given the opportunity to establish the alcohol level in her breath by means of Intoxilyzer testing. The test shows that she has no breath alcohol, so a drug recognition expert is brought in to evaluate the cause of her impairment. The drug recognition expert is only able to determine the category of drug involved, and he determines that Suzy is under the influence of a depressant. He cannot specify what depressant it is, nor whether it is controlled. Suzy is asked to provide a urine sample, which like most arrestees, she does. She is released the next morning.

At Suzy's trial, the police officer testifies to her control of the vehicle and her impairment. The drug recognition expert explains the evaluation he performed and the reasons he concluded that Suzy was under the influence of a depressant. The results from the urinalysis are also offered as evidence. Suzy's urine shows the presence of Alprazolam, a controlled substance and the active ingredient in Xanax. She tries to assert the defense that she was actually under the influence of Ambien. However, because the state only tests for controlled substances, and because Suzy did not think of obtaining her own urinalysis upon release from jail, she is unable to adequately show this alternate cause of impairment. Since there is a long-standing presumption that a positive test for a controlled substance shows causation of impairment, it is little trouble for the state to convict Suzy, though she was not under the influence of a controlled substance at the time of her arrest.

This hypothetical illustrates the issue that has arisen with the sudden increased use of non-controlled substances. Due to the above presumption, the state is wrongfully garnering convictions without being required to prove that the substances causing impairment were actually controlled. Metabolites – products that remain after a drug is broken down by the body – are present in urine after the impairment no longer exists.[4] Additionally, the State of Florida only tests urine for the presence of substances that the legislature has deemed to be "controlled." Therefore, it is possible for a driver to show signs of impairment, to provide a urine sample that tests positive for controlled substances only, but to be impaired by a substance that is not controlled. As an element of D.U.I., it is the task of the State of Florida to establish, beyond a reasonable doubt, that the substance causing impairment was controlled. The only way for the state to meet this burden is to test for and eliminate every possible non-controlled substance; a task that is impossible due to the unlimited number of intoxicating substances that are available. All the state can prove is that a metabolite of controlled substances was in the driver's system at the time of arrest. This is a far cry from proving that controlled substances were the actual cause of the impairment.

Historically, DUI defense has focused on the first and third elements, vehicle control and impairment. But with non-controlled substances now in common use, the innovative lawyer needs to shift his focus to the second element of the offense. In order to serve his clients effectively, he needs to have a working knowledge of the controlled substances that are tested, the duration of impairment they cause, and the varying lengths of time the metabolites remain in urine. Secondly, while it is impossible to remain current with every intoxicating substance, he needs to be aware that there are now many non-controlled substances that mimic the impairment of those that are controlled. Most importantly, today's defense attorney needs to insist that the State of Florida prove all elements of the offense of the crime. The long-time assumption that impairment is caused by alcohol or controlled substances is obsolete, and defense attorneys need to educate juries about the state's burden of proof in linking controlled substances and impairment.

This modern disconnect between the controlled substance and impairment elements of the D.U.I. statute also has implications for today's prosecutor. Prosecutors need to lobby for a more expansive D.U.I. statute, such as that adopted by the state of California. California Vehicle Code 23152(b) states that "it is unlawful for a person under the influence of *any* drug (emphasis added) to drive a vehicle."[5] "Drug" is defined in California Vehicle Code 312 as "any substance or combination of substances…which would so affect the nervous system, brain or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle…"[6] Adoption of a statute similar to this would eliminate the impossibility of proof currently created by the "controlled substance" verbiage, allowing prosecutors to properly prove every element of the offense. Additionally, this wording carries with it the added benefit of being proactive, as the state's ability to prosecute dangerous drivers would no longer rely on the ability of the Florida legislature to promptly designate newly developed intoxicating substances as "controlled." The time has come for the legislatures of "controlled substance" states to enact statutes that more adequately protect citizens from impaired drivers and are in compliance with the Supreme Court mandate.

1 In re Winship, 397 U.S. 58 (1970)
2 Fla. Stat. § 316.193(1) (2013)
3 Fla. Stat. § 877.011 (2013)
4 Fiona J. Couper & Barry K. Logan, *Drugs and Human Performance Fact Sheet* (2004)
5 Cal. Veh. Code § 23152(b) (2013)
6 Cal. Veh. Code § 312 (2013)

MOOT COURT COMPETITIONS

The Ave Maria School of Law Moot Court will be participating in the following external moot competitions in the 2014-2015 academic year:

- The New York City Bar Association's National Moot Court Competition
- The American Bar Association National Moot Court Competition
- Robert F. Wagner National Labor and Employment Law Moot Court Competition hosted by the New York Law School Moot Court Association
- The Florida Bar Chester Bedell Mock Trial Competition
- The National Baseball Arbitration Competition hosted by the Tulane Sports Law Society
- The Saul Lefkowitz Moot Court Competition hosted by the International Trademark Association
- Robert Orseck Memorial Moot Court Competition presented by The Florida Bar Young Lawyers Division

Brittany Harris, Moot Court Vice President of Externals, will be overseeing all the external teams. She may be contacted at **mc.vpexternals@avemarialaw.edu**

MAINTAINING CONFIDENTIALITY IN A HIGH-TECH WORLD

By Lisa DiFilippo (Alumna, Class of 2014)

It is generally recognized that there are inherent security risks associated with storing sensitive information electronically, yet this is how today's generation functions both personally and professionally. Everything from credit card information to social security numbers, medical records to tax returns are created, shared, and stored electronically. What many fail to appreciate, however, is the potential for breach of confidentiality and violation of privacy laws associated with the sharing and/or selling of digital devices.

For more than a decade, digital copiers have been capable of storing images of documents they scan or copy and such devices can be easily overlooked when it comes to security concerns.

Rule 1.6 of the ABA Model Rules of Professional Conduct requires attorneys to maintain the confidentiality of information relating to client representation with few exceptions. Because many law firms share office space with other lawyers and office personnel (and likewise share electronic devices to minimize costs), the potential for inadvertent disclosure by sharing devices such as copiers and multifunctioning devices that store client information is an issue that should be taken seriously. One way to minimize the risk of sharing of information is to set up copy codes and passwords amongst users.

Another concern when dealing with digital copiers comes with the distributing, returning (when rented) or selling of such devices to third parties. As most know, these digital copiers require hard disk drives to manage incoming jobs and workloads. From more advanced management information bases (MIBs) to network connection capabilities, print devices are becoming more like computers every day and are just as hackable.

In 2010, CBS broadcasted an investigation[1] in where reporters posed as customers at a New Jersey warehouse and purchased several multi-functioning copiers. After purchasing the copiers, the hard drives were removed using over-the-counter forensic equipment that assisted in extracting stored data and the information retrieved was almost unimaginable. One hard drive from a machine originally with a New York Sexual Crimes Unit provided lists of victims and targets in a major drug raid while another hard drive contained over $40,000 in copied checks and paystubs. But, the recovery from a machine originally used by an insurance company was the most shocking and almost immediately became a hallmark case in HIPAA history. Affinity Health Plan, Inc. failed to wipe its hard drive on a machine that contained hundreds of medical records of individuals containing everything from prescription information to cancer test results, all of which was downloaded in a matter of minutes by investigators.

It was discovered that Affinity Health Plan, Inc., impermissibly disclosed the protected health information of up to 344,579 individuals when it returned multiple photocopiers to leasing agents without erasing the photocopier hard drives.[2] Affinity settled violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules for $1,215,780. This event also prompted the state of New York to enact legislation that requires retailers of copy machines to give purchasers written notice that the machine's hard drive stores digital information and requires retailers to conspicuously post a warning poster on the premises to warm customers about hard drives and the risk of identity theft.[3]

In our profession, attorneys are bound to copy and store documents that contain highly sensitive client information. In doing so, it is important to remember the risks associated with sharing and distributing the machines to third parties. One way to take on the technology behemoth is to know how the specific system or device functions and to make certain that before distributing the machines, certain measures are taken to safeguard sensitive information and avoid inadvertent disclosure.

For more information on safeguarding sensitive data stored in the hard drives of digital copiers visit: http://business.ftc.gov/documents/bus43-copier-data-security.

The HHS Resolution Agreement and CAP can be found on the OCR website at: http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/affinity-agreement.html

1 Armen Keteyian, *Digital Photocopiers Loaded with Secrets*, CBS News Report

2 U.S. Dept. of Health and Human Services; *HHS settles with health plan in photocopier breach case*; August 14, 2013; http://www.hhs.gov/news

3 New York State Assembly Bill A11335 (June 3, 2010)

ROBO-SIGNING: A TECHNOLOGICAL MISNOMER IN THE FORECLOSURE CRISIS

By Jaime Hewitt (Alumnus, Class of 2014)

The term "Robo-Signing" may be an unfamiliar one to many outside of the real estate or debt collection industries, but it is one that has helped spawn a multi-million dollar legal nightmare for consumers and lenders alike, leaving debt-collection agencies free to take advantage of peoples plight. According to a U.S. Government Accountability Office report, the debt recovery industry reported annual revenues of $57.9 billion.[1]

"Robo-Signing" is not a technological term, as one might think – instead, it is the process of signing multiple documents, sometimes thousands of documents, by an individual in a short space of time, typically a standard workday.[2] "Robo-Signing" was instigated by mortgage lenders during the recent foreclosure crisis and is considered by many to be a catalyst for the housing meltdown generally.[3] One would think the process would be short-lived, but one industry saw an opportunity to seize upon the misfortune of others. The process has been adopted by debt collection agencies as a tool to increase collection activity to such an extent that it has become a standard practice resulting in judgments against consumers and claims of fraud against lenders on a regular basis.[4]

Numerous early claims by consumers against lenders focused on the inability of the "Robo-Signor" to accurately review and confirm the contents of affidavits filed by the lenders in foreclosure actions. One individual simply cannot be aware of the facts of thousands of cases to a sufficiently high standard to authenticate and execute an affidavit. As such, these claims were challenged as being grounded in fraud and were dismissed for failure to meet the specificity requirements of such allegations.[5]

The overwhelming number of these claims did not go unnoticed and a number of State Attorney Generals became involved, picking up the cause for disgruntled and now homeless consumers.[6] In total, forty-nine states initiated their own claims against the major financial institutions, and with such a large number of states with claims against the major banks, federal regulators quickly became involved and began their own investigations into the "Robo-Signing" procedures.[7]

In 2012, and again in 2013, multi-million dollar settlements were agreed upon between federal regulators, State Attorney Generals, and the major financial institutions, as well as many smaller local banks.[8] The aim of the settlements was two-fold – firstly, to stem the flow of claims against lenders and free up the court system from prolonged foreclosure actions,[9] but primarily, to provide compensation for the many homeowners dispossessed of their properties on the basis of an affidavit signed by someone with no knowledge of its contents.[10]

Despite the settlement agreements, "Robo-Signing" claims continue to be a thorn in the side of many banks, with Wells Fargo recently reaching their own settlement agreement in May of this year, in the amount of more than sixty-five million dollars.[11]

While these claims appear to be receding or being settled en-masse in the real estate context, the potential for a fresh wave of "Robo-Signing" claims continues to exist amongst many sub-prime debt-purchasing entities. One would think that the experiences of the major banks in utilizing a process such as "Robo-Signing" for the sake of speed would serve as a lesson for all in the potential dangers of using no-knowledge signatures. However, with the current ease and frequent acceptance of digital signatures for major purchases, such as houses and credit applications, it appears that lessons have not been learned and that major financial institutions have not been deterred from experimenting with the no-knowledge automation of what should be a human process.

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Professor Bonner has been not only instrumental in the development of the Ave Maria School of Law Moot Court Board, but his support of the board members individually and cumulatively is insurmountable. Any of the Board's accomplishments are a reflection of his hard work and support. We are thankful more than words could express.

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