

IT'S COMPLICATED: SOCIAL MEDIA LEGAL CONCERNS

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John Browning is a Partner at Lewis Brisbois Bisgaard & Smith in Dallas, Texas and a trial lawyer with more than 23 years of experience. As the author of numerous articles and the leading book on social media's impact on the law, Mr. Browning is frequently sought out by national and international media on the subject. He has appeared on television, radio, and podcasts discussing social networking and the law, and has been quoted in such publications as The New York Times, TIME magazine, Law360, the National Law Journal, Salon.com, and Law Times of Canada.

Mr. Browning received his Juris Doctor from the University of Texas School of Law and his Bachelor's from Rutgers University (Rutgers College), in History, and in Comparative Literature 1986 graduating with general honors and departmental honors in both majors.

SOCIAL MEDIA BY THE NUMBERS

- **Facebook: over 1.2 billion users worldwide**
- **Twitter: over 213 million active users**
- **72% of all adult Americans maintain at least 1 social networking profile**

FUN FACTS

- **Someone joins LinkedIn every second;**
- **In that same second, 24 hours of video are uploaded to YouTube.**
- **Twitter went from processing 5,000 tweets a day in 2007 to over 400 million tweets per day by 2013.**

SOCIAL MEDIA IN THE COURTS

- **Social media being used to establish jurisdiction.**
- **Social media used as a means of service of process (8 countries, 3 states in the U.S., including Texas, and at least one federal court have allowed it).**
- **New causes of action, like “twibel” (libel by Twitter) and “e-personation,” as well as new defenses.**

SOCIAL MEDIA CONTENT IS BECOMING INCREASINGLY IMPORTANT

- **Use by both sides in all types of cases (personal injury, family law, criminal law)**
- **Increasing use in cases that affect businesses:**

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- **Trademark infringement (Avepoint, Inc. v. Power Tools, Inc. d/b/a Axceler, W.D. Va. Nov. 2013)
(fake LinkedIn profile)**
 - **Misappropriation of trade secrets
(recent case involving HTC employees
who allegedly stole trade secrets)**
 - **Class actions**

– **Employment law cases**

- **Sumien v. Careflite, Inc. and Roberts v. Careflite, Inc. (Fort Worth Ct. of Appeals 2012)
Employees and privacy**
- **Rodriguez v. Wal-Mart (5th Cir. 2013) – the importance of having a good social media policy.**

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- **Regulatory and compliance issues**
 - **SEC disclosure enforcement**
 - **FDA warns pharma companies like IBSA about false & misleading Facebook posts.**

– E-discovery issues

- In a 2013 survey of in-house counsel, 20% indicated that they'd had to turn over content from employee social media profiles during internal investigations or during discovery in litigation.**

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- **BYOD policies in many businesses have made accessing and managing company data from personal devices a nightmare.**
 - **eDJ Survey – over 60% of in-house counsel reported being required to discover data from mobile devices as part of a legal proceeding.**

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- **Other e-discovery concerns include the difficulty of preserving texts, call logs, and other ESI on mobile devices for the typical 1-2 year legal hold period, and (for global companies) compliance with increasingly stringent EU data privacy laws when corporate ESI gets comingled with personal texts, chats, and other personal ESI.**

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- **Widely disparate approaches by courts in considering discovery of employee's social media content: EEOC v. Honeybaked Ham Co. (D. Colorado 2013) – hostile work environment class action lawsuit, where court orders each class member's social media content to be turned over and reviewed in camera.**

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- **Mail hoit v. Home Depot – Gender discrimination suit in which court held that employer’s discovery requests for employee social media postings were too broad.**

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- **Kennedy v. Contract Pharmacal Corp. (E.D. NY 2013) (gender discrimination suit where employer’s motion to compel “all documents . . . regarding Plaintiff’s utilization of social networking sites” was held to be too broad.**

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- **Croy v. Blue Ridge Bread, Inc. (W.D. Va. 2013) (Facebook message was proof that employee told employer about HIV-positive status in retaliation case.)**

OTHER WORKPLACE CONCERNS WITH SOCIAL MEDIA

- 1) Recruiting/hiring: According to 2013 study by Society for Human Resource Management, 77% of companies indicated they used social networking sites to recruit candidates (up from 56% in 2011). But what happens when you learn things on a social media profile that you can't ask about in an interview?

Example: Nieman v. Grange Mutual Casualty Co. (C.D. Illinois 2012)
Unsuccessful applicant's age discrimination claims allowed to go forward where employer was aware of date he graduated from college which was included on his LinkedIn profile.

2) Harassment – Co-worker’s posts or comments, even outside the workplace, can be work-related.

Example: Amira-Jabbar v. Travel Services, Inc. (D.P.R. 2010) (employee posted photos of company outing on her Facebook page, and another employee posts racially derogatory comments in return.)

3) Demanding employees' or applicants' facebook passwords – A number of states have made this illegal (California, Maryland, Illinois, New Jersey, Colorado, Michigan, Oregon, Washington, Arkansas, Utah, Vermont, New Mexico, and Nebraska).

4) Ownership of social media accounts
– Who “owns” the Facebook page and the Twitter followers when the employee who initiated the company’s social media presence leaves? Courts all over the country have wrestled with this – example, PhoneDog v. Kravitz (California), Eagle v. Morgan, (Michigan), etc.

5) Disciplining employees for activities/ statements on social media: In the last several years, the EEOC has been particularly aggressive in investigating “Facebook firings.”

THE BEST DEFENSE? A GOOD SOCIAL MEDIA POLICY

What should be in it?

- Set forth the goals.**
- Use clear, specific language (avoid “legalese” – use plain English)**
- Avoid vague or ambiguous terms like “appropriate” or “inappropriate.”**
- Provide specific examples if possible.**

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- **Define key concepts/terms.**
 - **Don't restrict more than what is necessary.**
 - **Tailor the policy to the specifics of the company's business (no "one size fits all" social media policy).**
 - **Caution employees about company monitoring.**

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- **Cross-reference other company policies, like internet usage policy.**
 - **Prohibit disclosure of proprietary information and trade secrets.**
 - **Prohibit harassing, discriminatory, and derogatory comments.**
 - **Advise employees of potential disciplinary action.**

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- **Finally, it's not enough to just have a social media policy. Enforce it, and be consistent in enforcing it.**