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By Marissa M. Henderson

INTRODUCTION

Social media is everywhere—Facebook, Twitter, LinkedIn, Instagram, Pinterest, Snapchat, Periscope,[1] the list is seemingly ever-growing. The Millennial generation, especially, post, text, and message on multiple platforms as their preferred means of communication. But social media's impact goes beyond personal lives. It impacts the practice and business of law and lawsuits. This article examines how social media can impact legal cases, especially maritime personal injury actions. This article will use one recent and particularly interesting case from New Orleans as a case study.

Two things that this article will touch upon and that should give readers food for thought in their practice are: (1) the nuts and bolts of how to use discovery to get at social media accounts, including overcoming common objections; and (2) ethical ramifications, such as whether there is an ethical duty to advise clients of social media in litigation.

[1] Periscope, owned by Twitter, Inc., is a "hot" new app designed to let you see the world through someone else's eyes. Users can post *live* video feed either to the public or to an invited group, replayable for 24 hours. *See* I-Tunes App store, Periscope app, available at https://itunes.apple.com/us/app/periscope/id972909677?mt=8 (last visited 1/20/16).

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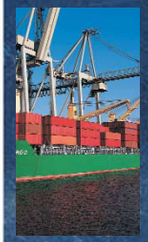


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Managing Editor's Introductory Note – January 2016

In this issue, we publish several articles that were initially presented at the 2015 Fall Meeting of The Maritime Law Association in Bermuda. The meeting provided the venue for a substantial number of CLE presentations and many and more are worth bringing to your attention if you were not fortunate enough to be present.

Our first article is a very informative and enjoyable presentation on e-discovery, a topic about which many of us need to know more. Marissa Henderson discusses what to do, and perhaps more importantly what not to do, when presented with discovery demands seeking social media information, and provides very useful tips on initiating your own e-discovery demands. It appears that privacy is a fiction in this brave new world. . .

We follow with a very useful discussion by Doug Stevens on the Maritime Labour Convention 2006 relating to seaman's rights and the duties owed by owners and operators to their crew, without whom maritime commerce would be impossible.

Keeping with the theme of seamen's rights, our next article by Aaron Greenbaum brings us up to date on recent decisions addressing maintenance and cure obligations owed to those seamen.

We follow with an article by Alberto Castaner on marine insurance and the doctrine of *uberrimae fidei* – does it still apply, if so, and what are the consequences of its application in a given case?

Bryant Gardner gives us a presentation on the new relations with Cuba and the opening of the door to our close Caribbean neighbor by the Obama Administration.

Next is our regular Recent Developments case reports, and we conclude with an extremely detailed and excellent review by Dr. Frank L. Wiswall of "*Churchill Goes to War, Winston's Wartime Journeys.*" The author, Brian Lavery, a British Naval historian, provides a full account of Winston's many wartime travels, necessitated by the exigencies of the war and post-war strategies. The book provides another insightful look into one of the most fascinating characters of the 20th Century.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

E-Discovery, Facebook Shenanigans, and Fraud:The Crowe v. Marquette Transportation Case

By Marissa M. Henderson

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THE *CROWE* CASE: WHAT NOT TO DO

Crowe v. Marquette Transportation[2] started out as a typical seaman's case for negligence under the Jones Act, with maintenance and cure and unseaworthiness claims also asserted. The plaintiff, Brannon Crowe, a Millennial-generation tug deckhand, claimed he injured his knee while moving a heavy pump off a tugboat, the LADY GUADALUPE, to the dock while standing on the vessel's bull rail. His liability theories essentially relied on his claim non-skid material was not adequately applied to the bull rail. He filed suit in May 2014 in the United States District Court for the Eastern District of Louisiana against his employer, Marquette Transportation Company Gulf-Inland, LLC ("Marquette").

Early in discovery, Marquette served a broad request for production on Crowe, seeking "an unredacted, unedited digital copy of your entire Facebook page" since he began work with Marquette. The discovery request even included instructions on how to get it, stating Facebook provides instructions and a simple way to "download a copy of your Facebook data." Crowe objected to this request as overly broad, unduly burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence—the usual objections to social media discovery requests. Crowe's answer to this request also stated: "[P]laintiff does not presently have a Facebook account."

Marquette did not initially push the written discovery request at that time, though it did ask Crowe about his Facebook use in deposition. Crowe testified he had recently "eliminated" his Facebook account. Marquette then moved to compel its Facebook page discovery request.[3] In support of its motion, Marquette submitted a mobile phone's screen shot of what appears to be a Facebook text message exchange between another deckhand on the LADY GUADALUPE, Robert Falsev, and someone with the user name "CroWe."[4] In this exchange, CroWe stated he "got hurt before [he] got on the boat" and asked Falsev to say the captain told them to put nonskid on the bulwarks. Crowe opposed the motion to compel, arguing Marquette was on a fishing expedition; alternatively, he sought an *in camera* review of his Facebook account. Crowe also claimed in briefing his Facebook account had been "hacked," and he did not have a capital "w" in his last name. In the same motion, Marquette also moved to compel a forensic exam of Crowe's phone. The court ordered Crowe to provide his entire Facebook history for an *in camera* inspection.

Crowe's lawyers submitted some 4,000 pages of Crowe's Facebook account history. After conducting just a cursory *in camera* review, Magistrate Judge Michael North issued an order to produce the entire 4,000 pages to the defense. Judge North's sternly-worded order noted it was "patently clear from even a cursory review that this information should have been produced as part of Crowe's original response."[5] The judge was not amused to learn Crowe's Facebook account was deactivated just *four days* after the written discovery request for his Facebook account was served. Clearly, one of the reasons the judge ordered production of the Facebook account was because Crowe had rather obviously (and clumsily) tried to hide it from the opposing side. Other facts—illustrating Crowe's deception and games with the lawsuit—seemed to trouble the court in its order. For example, Judge North noted Crowe's Facebook account was reactivated just a week before the account data was required to be produced to the court, and it was done from the same iPhone Crowe had regularly used to access Facebook previously. It certainly appeared that the plaintiff was playing games with the discovery process.

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[2] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130 (E.D. La. filed May 19, 2014) (Englehardt, C.J.).

[3] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 16 (E.D. La. filed December 18, 2014).

[4] The screenshot of the Facebook message exchange is in the court's record at Document Number 16-3.

[5] The order appears in the court's record at Document Number 32, filed on January 20, 2015.

Deactivation versus Deletion—A Critical Distinction on Facebook

In his order compelling production of the plaintiff's entire Facebook record, Judge North was further "troubled" by Crowe's discovery answer that he did not "presently have a Facebook account." The judge noted Crowe had only deactivated his account but had not deleted it. The order then quotes from Facebook's technical pages that explain the difference between deactivation and deletion of an account. As the order noted, deactivation makes a Facebook profile not visible to other users, but *all* the content is retrievable and can be reactivated *at any time*. Deactivation on Facebook is akin to going off-line for a time. Crowe went off-line as soon as his Facebook page became an issue in his lawsuit. Ironically, Crowe's attempt to keep his social media account out of discovery was thwarted by his own clumsy attempts to hide his account from the litigation.

Court Orders Jailbreak of Plaintiff's Mobile Phone–Text, Text, and More Texts

The court further punished Crowe for playing discovery games with his electronic communications. The same order giving the defense full access to his Facebook account allowed an intrusive forensic exam of Crowe's iPhone: a defense expert was allowed to conduct a "jailbreak" of the phone to pull out all deleted text messages. Typical for Millennials, when Marquette reviewed the jailbreak data, it found thousands of Crowe's texts and deleted texts. Crowe was a prolific texter. Notably, Marquette believed it found further evidence of Crowe's fraud on the court. On the Facebook text message app, Messenger,[6] Marquette found frequent texts between Crowe and fellow deckhand Falsev. However, before a certain date, there were no messages at all—causing Marquette to accuse Crowe of deleting all Falsev's texts before a certain date to hide the texts in which he says he got hurt away from work and asked Falsev to lie for him.

Interestingly, these facts reveal an interesting twist for lawyers seeking deleted text messages in discovery—deleting text messages on the Facebook Messenger app does appear to make them irretrievable, but deleted text messages sent through the mobile phone itself can be recovered in a "jailbreak" of the phone's internal software. However, for those litigants attempting fraud on the court, deleting Facebook Messenger texts just deletes them from one user's account; recall that Falsev could still retrieve Crowe's messages from *Falsev's* Facebook account. In other words, texts, like other forms of digital communications, have a life of their own and can survive—and be found in discovery—for much longer than the life of a lawsuit. Though this point is perhaps something we have all come to understand in the digital age, the *Crowe* case illustrates the nuances of different communications media and how they may play out in discovery battles.

Counterclaim for Fraud and Pretrial Motions for E-Discovery Evidence

After uncovering what it believed was significant evidence of the plaintiff's fraud on the court, Marquette moved to file a counterclaim asserting, among other things, fraud under the general maritime law and damages under state law not in conflict with maritime law. This was a highly unusual move by a Jones Act defendant. Though many Jones Act employers would like to claim fraud, there are rarely sufficient facts to support a claim, and the law is murky as to the viability of a fraud claim against a Jones Act seaman. An interesting battle ensued—the magistrate judge denied Marquette leave to file a counterclaim,[7] but the district judge set aside the order and granted leave to file the counterclaim.[8] Marquette's damage claims sought to recover the hefty amounts it had paid for Crowe's medical care, which included surgery, and also to recover payments directly to Crowe for seaman's maintenance, in addition to its litigation expenses. Crowe's lawyers then moved to dismiss the counterclaim, arguing Marquette failed to state a claim.[9] Marquette

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[6] Messenger is the popular mobile app that links to Facebook accounts, so that users can text message and even video call their Facebook friends. *See* I-Tunes App store, Messenger by Facebook, Inc, available at https://itunes.apple.com/us/app/messenger/id454638411?mt=8 (last visited 1/20/16).

[7] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 54 (E.D. La. Mar. 3, 2015) (North, M.J.).

[8] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 90 (E.D. La. May 8, 2015) (Engelhardt, C.J.).

[9] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 100 (E.D. La. filed July 31, 2015).

shot back with a concise statement of all the evidence uncovered during discovery that supported and established its fraud allegations.[10]

There were several interesting pretrial motions regarding the admissibility of many of Crowe's phone and Facebook text messages. Marquette wanted to present hundreds of Crowe's text messages as evidence at trial, and it attached these to their motions. Reading these text messages as attached to these motions as exhibits could make one frankly uncomfortable, as if one were peering into a stranger's deepest thoughts. Crowe texted about his hopes and dreams, business ventures he hoped to start in the Philippines, a friend's drug and criminal problems, often in a slang, vernacular style. No subject was off limits with his friends. Crowe is a typical Millennial who communicated electronically about everything. Had he been having an affair or had other private things to hide, lawyers on both sides, and anyone with a PACER account willing to take the time to pull court documents, would know all. In response, Crowe sought to present his texts about his suffering and economic woes.

Ultimately, the court ruled most of the texts and Facebook messages submitted by both sides were "truly hearsay and/or self-serving evidence" and were therefore not admissible unless properly used for impeachment. The court counseled the witnesses should testify and there be a "proper airing of evidence" through direct testimony.[11]

The parties went to trial entrenched in their positions: on the one hand, Crowe was an injured seaman deserving damages, on the other, he was a manipulating deckhand using an off-work injury as a basis for lying about getting hurt at work. The outcome turned on witness credibility. Ultimately, surmising from the verdict, it appears Crowe was credible enough to avoid being found a fraud but the jury was otherwise not sympathetic to his claims.

The jury trial took place October 5 through 7, 2015. The jury split the baby: it found Crowe was injured on the tug, but Marquette was not negligent nor was the vessel unseaworthy.[12] Since the jury answered the first question, that Crowe was hurt on the vessel, in the affirmative, the jury form did not require it to reach the last questions—whether Crowe acted fraudulently. In the end, both sides walked away with nothing.

Lessons from the Crowe Case

An important takeaway from the *Crowe* case is that we, as lawyers, must have a basic understanding of how social media works, and we should consider routine education of clients that their social media accounts and texts may be subject to discovery. Early counseling with Crowe might have changed this case altogether—Crowe may have avoided electronic communications to (allegedly) ask a witness to lie and there would have been no smoking gun text message. It would have come down to a standard credibility battle between plaintiff and a fact witness, with no Facebook message to lend credence to the witness' story.

Another lesson from the *Crowe* case for lawyers is to question clients more rigorously before answering in written discovery that he or she has no Facebook account. Deactivated is not "deleted" for Facebook accounts. Crowe thought he was clever by deactivating his account, because it meant no one searching for his account would find it. However, he did not delete it, and all 4,000 pages of his account were just lying in wait to be reactivated and retrieved. A final lesson from this case is that if a client does take down material on social media that may be relevant, the lawyer should advise the client to retain a copy or retain it in the lawyer's file. Had Crowe actually deleted his Facebook account, he probably would have faced sanctions for spoliation of evidence. Some of these attorney ethical issues will be discussed in more detail below.

NUTS AND BOLTS TO SOCIAL MEDIA DISCOVERY

Courts around the country have found social media data to be discoverable. Below are common objections raised to social media discovery—privacy and relevancy—and strategies to overcome such objections. Also discussed are practical tips to social media discovery.

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[10] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 101 (E.D. La. filed Aug. 10, 2015). This brief makes for good reading as a detailed account of Marquette's efforts to uncover fraud and the legal arguments supporting the employer's ability to claim fraud against a Jones Act seaman.

[11] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 129 at p. 2 (E.D. La. Sept. 25, 2015) (Engelhardt, C.J.).

[12] The jury's detailed verdict form is in the court's record at Document 152-6, filed on October 7, 2015.

Overcoming Common Objections

Privacy. The argument that social media information is subject to privacy protections can generally be overcome, and there is precedent sprinkled across jurisdictions.[13] Essentially, the response is that information shared through social networking sites such as Facebook or Twitter can be copied and disseminated by others, possibly strangers depending on the individual's privacy settings, so any concept of privacy is meaningless. As one New York state judge wrote, "If you post a tweet, just like you scream it out the window, there is no reasonable expectation of privacy."[14] In 2010, Facebook's Mark Zuckerberg discussed a new "social norm" of sharing information online, and the headlines ran, "Privacy is dead on Facebook."[15] Indeed, as early as 1999, Sun Microsystems' CEO Scott McNealy famously said to reporters, "You have zero privacy anyway. Get over it."[16]

Facebook's privacy settings, if utilized, do not generally provide much protection from disclosure in discovery. Facebook's settings allow you to limit some data to your "friends," but you still cannot control what your "friends" decide to share or post. Regardless of privacy settings, courts considering the issue generally (though not universally) recognize that information posted in social media is not truly private.[17]

Any privacy arguments will be balanced against the need for the discovery. Hence, counsel must have a factual predicate to obtain the discovery. For example, in a personal injury case where the plaintiff's quality of life post-accident is at issue, his photographs posted online prior to this accident and afterwards are arguably relevant to the issue. In *Nucci v. Target Corporation*,[18] a Florida court in 2015 ordered production of all photographs on the plaintiff's social networking sites from two years before the accident to date. The *Nucci* court stated:

> In a personal injury case where the plaintiff is seeking intangible damages, the fact-finder is required to examine the quality of the plaintiff's life before and after the accident to determine the extent of the loss. From testimony alone, it is often difficult for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a "day in the life" slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully

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[13] *See, e.g.*, *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Ca. 2012) ("Generally, [social media] content is neither privileged nor protected by any right of privacy.") (citation omitted); *Giacchetto v. Patchogue-Medford Union Free School Dist*., 293 F.R.D. 112 n.1 (E.D.N.Y. 2013) (rejecting arguments that a party's interest in privacy of their Facebook account requires a showing that the account actually contains information that would undermine the party's claims before the account data is discoverable because the Federal Rules do not require a party to prove the *existence* of relevant material before requesting it). Interestingly, in the criminal, Fourth Amendment context, the Supreme Court has assumed, but not held as such, that a municipal employee had a reasonable expectation of privacy in his text messages on a city-provided pager. *City of Ontario, California v. Quon*, 560 U.S. 746, 759 (2010).

[14] *People v. Harris*, 945 N.Y.S.2d 590, 595 (Crim. Ct. New York County 2012).

[15] Facebook did somewhat of an about-face in late 2014 when it added new and various privacy settings. However, speaking only as a casual user of Facebook, the privacy settings are confusing and require some digging to locate and activate.

[16] Wikipedia, Scott McNealy Article, https://en.wikipedia.org/wiki/Scott_McNealy (last visited Sept. 18, 2015).

[17] *See cf.*, *U.S. v. Meregildo*, 883 F. Supp. 2d 523, 525-26 (S.D.N.Y. 2012) (finding, in Fourth Amendment context, where defendant used privacy settings that allowed only his "friends" on Facebook to see postings, he "had no justifiable expectation that his 'friends' would keep his profile private"); *see also A.D. v. C.A.*, 16 N.Y.S.3d 126, 128 (N.Y. Sup. Ct. 2015) ("A person's use of privacy settings on social media, such as Facebook, restricting the general public's access to private postings does not, in and of itself, shield the information from disclosure if portions of the material are material and relevant to the issues of the action.").

[18] *Nucci v. Target Corp.*, 162 So. 3d 146, 152-53 (Fla. Dist. Ct. App. 2015).

> relevant to the damage issues in the lawsuit. The relevance of the photographs is enhanced, because the post-accident surveillance videos of Nucci suggest that her injury claims are suspect and that she may not be an accurate reporter of her pre-accident life or of the quality of her life since then. The production order is not overly broad under the circumstances, as it is limited to the two years prior to the incident up to the present; the photographs sought are easily accessed and exist in electronic form, so compliance with the order is not onerous.[19]

Relevance. As noted above, courts do require a threshold showing of relevance to allow social media discovery, especially if the discovery request is broad.[20] In the *Crowe* case, counsel could show the relevance of requested phone and Facebook data because a witness had given them a "smoking gun" Facebook message and claimed to have received other damaging texts from plaintiff. In other cases, personal injury claims alone provide some justification to get at social media content. For example, in a recent Florida case, *Tyer v. Southwest Airlines*,[21] the federal court ordered plaintiff to produce all post-injury photographs of herself posted on social media, because they were relevant to her physical condition, which she placed at issue by alleging personal injury damages.[22]

Counsel may have to lay a foundation for social media discovery, however, by establishing the party's use of social media, as noted below in the practitioner tip section. Ultimately, if the discovery request is adequately tailored to the relevance argument, a relevancy objection should be overruled.

Practice Tips for Social Media Discovery[23]

1. Take a "Snapshot" of the Party's Public Profile

Counsel—at least defense counsel in a personal injury matter—should conduct a search of the internet for plaintiff's social media presence early in case. Counsel should print or save the public information, which will help identify if the plaintiff later removes some content, such as photographs. Plaintiff's counsel, too, should consider counseling their clients on how social media may be discoverable and used in litigation (as discussed below in further detail) and should also find out early in the court of representation what his or her client has put out there in social media.

2. Ask a Simple Interrogatory to Identify Accounts and User Name

Early in discovery, ask a single interrogatory for identification of the party's social media accounts—but just their existence and the username. Early discovery requests are not the time to start a discovery battle by seeking full access to accounts or passwords; the goal is

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[19] *Nucci v. Target Corp.*, 162 So. 3d 146, 152 (Fla. Dist. Ct. App. 2015).

[20] *See, e.g., Mailhoit v. Home Depot U.S.A., Inc*., 285 F.R.D. 566, 570 (C.D. Cal. 2012) ("[S]everal courts have found that even though certain [social media] content may be available for public view, the Federal Rules do not grant a requesting party 'a generalized right to rummage at will through information that [the responding party] has limited from public view' but instead require 'a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.'") (citation omitted); *Melissa "G" v. North Babylon Union Free School Dist.*, 48 Misc. 3d 389, 391-92, 6 N.Y.S.3d 445 (N.Y. Sup. Ct. 2015) (finding Facebook photographs showing plaintiff engaging in recreational activities are probative and relevant to her claim for loss of enjoyment of life and requiring she preserve all Facebook data and plaintiff's counsel to review all Facebook account data and produce relevant material).

[21] *Tyer v. Southwest Airlines Co. f/k/a Airtran Airways, Inc.*, No. 14-cv-62899, 2015 U.S. Dist. LEXIS 97508, *5 (S.D. Fla. July 27, 2015).

[22] *See also Farley v. Callais & Sons LLC*, No. 14-2550, 2015 U.S. Dist. LEXIS 104533, *11-14 (E.D. La. Aug. 10, 2015) (denying carte blanche Facebook discovery of plaintiff's account but allowing certain relevant categories of Facebook discovery); *Giacchetto v. Patchogue-Medford Union Free School Dist*., 293 F.R.D. 112, 115-16 (E.D.N.Y. 2013) (denying full access to plaintiff's social networking postings but ordering production of any social networking postings referencing her emotional distress claims from the underlying incident and also postings that "refer to an alternative potential stressor" because she had "opened the door to discovery" on other sources or her emotional distress); *cf. Newill v. Campbell Transp. Co., Inc.*, 96 Fed. R. Evid. Serv. 527 (W.D. Pa. 2015) (finding plaintiff's Facebook posts indicating he had physical capabilities inconsistent with his claimed injuries to be relevant and admissible at trial, notwithstanding some embarrassment).

[23] These tips were drawn largely from the informative and detailed article by attorney Christopher B. Hopkins, *Ten Steps to Obtain Facebook Discovery in Florida*, Trial Advocate Quarterly (Spring 2015). The article contains detailed case discussions under Florida law and is highly recommended reading on this topic.

to learn early on which platforms a party uses and what information he or she has openly available. The user name is important, since an internet search may not locate accounts if a pseudonym is used. If any new accounts are identified, go back to step one and take a snapshot of publicly-available content on those social media accounts.

A sample interrogatory, unlikely to draw credible objection, is:

> Identify your accounts on Facebook, Twitter, Instagram, LinkedIn, and Periscope, and your username on each account.

3. Ask Basic Social Media Questions in Deposition

Consider adding to your standard deposition outline a series of questions to get basic information about whether and how the party uses social media. Counsel should be trying to build relevance arguments to obtain more intrusive social media discovery, or to eliminate the issue altogether if he or she does not use social media (and you believe him or her!). On the flip side, particularly on the plaintiff's side, counsel should prepare clients to answer such questions and to not appear defensive or hedge answers. In other words, counsel should advise plaintiffs not to do as Crowe did in the *Crowe v. Marquette Transportation* case.

Questions to ask to build a case for further social media discovery:

- Confirm accounts and user names identified in written discovery.
- How often and which platforms are used; number of friends or followers.
- What type of information is posted or shared: Kids pictures? Pictures of yourself doing activities? Physical/emotional state?
- Any discussion of the lawsuit on social media, including the facts, the underlying accident, damages, or the dispute.
- Any altered or deleted content since the accident or dispute.

4. Develop a Reason to Obtain Social Media Discovery

Social media discovery follows the same basic rules of any other type of discovery—it must be relevant and, under the revised Federal Civil Rule 26(b)(1), *"proportional to the needs of the case*." This proportionality requirement is new to Rule 26 as of December 1, 2015, so it remains to be seen how or if this clause will change the scope of discovery. Regardless, counsel wishing to obtain social media information in discovery should expect to be required to state some credible facts, made in good faith, that make it likely that relevant material will be found on the party's social media accounts. Counsel's early investigation efforts should gather such facts, if they exist. In the *Crowe* case, defense counsel could point to an apparent text message conversation in which the plaintiff told a fellow employee he had been injured while fishing on his own time and asked him to lie about facts to support the plaintiff's case.

If defense counsel asked plaintiff the deposition questions above, he or she should be well positioned to build on both the relevance argument and on identifying targeted information for more intrusive discovery requests. For example, if plaintiff claims she is unable to perform her normal housework activities, and she testified in deposition that she posts 3 or 4 times a day and often includes her activities, counsel has a reason to ask for her Facebook status posts from the underlying incident to the present. Arguably, counsel could request pre-incident Facebook status posts because they would reveal plaintiff's pre-incident activities and allow comparison to post-accident activities.

5. Make a Targeted Request for Production

Identify the narrowest scope for an initial production request that should generate useful results. Start with a request that you have an articulable, case-specific reason for seeking. For example, if counsel learned in deposition that the plaintiff posted pictures of herself both before and after the accident (and her physical condition is at issue), counsel can articulate a reason to request photographs of plaintiff posted on social media for some limited time before the incident and after, and possibly only those photographs that depict the area of the body at issue in the lawsuit. Remember, the more tailored the request, the more likely a court will allow it. As the *Crowe* case illustrates, it cannot hurt to include a brief explanation of how to retrieve such data. However, by all means, if counsel has an articulable reason for a broad, intrusive discovery request, make it. For example, in the *Crowe* case, defense counsel's request for production stated:

> An unredacted, unedited digital copy of your entire Facebook page from the onset of your employment with Marquette until the present. (This is a simple process specifically provide under the "General Settings" page on Facebook. Just click on "Download a copy of your Facebook data" and follow the instructions.[24]

Defense counsel in *Crowe* already had at least one witness informing them that the plaintiff had texted and sent Facebook messages regarding how he was really hurt and what to say for the lawsuit, so as to justify this broad request. However, for the typical case without the smoking gun Facebook message to justify full access to the account, it would be prudent to conduct social media requests in more justifiable, targeted "bites." At a minimum, the requested data should be limited in timeframe. Should the requested material reveal a justification for a more intrusive social media discovery request, then counsel can make another request: one bite at a time.

ETHICAL CONSIDERATIONS FOR PRACTICE AND OTHER TAKEAWAYS FROM THE *CROWE CASE*

The *Crowe* case gives us insight into how important social media discovery can be to litigation and raises lots of ethical questions for our practice. Some of these are addressed below.

Do Lawyers Have a Duty to Educate Themselves about Social Media: A Question of Lawyer Competence?

Due to the growing use of social media in discovery, a working knowledge of social media and technology is ethically required for attorney competence in practice areas in which social media discovery may play a role. State bar associations are increasingly including discussion about social media knowledge and use in their ethical guidelines, and some bar associations have drafted specific guidelines to address social media. In 2013, the ABA Ethics 20/20 Commission added Comment 8 to its Model Rule 1.1: Competence:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[25]

Many state bar associations have adopted this comment, since the ABA Model Rules of Professional Conduct serve as models for the ethics rules of most states.

Related to this question is whether there is a duty to investigate the social media presence of an opposing party. In particular, for defense counsel in a personal injury matter, I would argue the answer is yes. While I am not aware of any findings of attorney malpractice for failure to inspect a plaintiff's social media presence, it is certainly foreseeable. It is advisable to investigate what is publicly available about the plaintiff on-line, and, as noted above, to take a "snapshot" of any social media account data to use as a baseline for any further social media discovery.

Is there a Duty to Educate Your Clients about Social Media?

Yes, depending on the case and the client. It may be prudent to educate your clients, whether plaintiffs or defendants, about social media use and potential pitfalls in litigation. Some lawyers who are particularly sensitive to these e-discovery issues put educational warning language in their initial correspondence to clients, so their clients are aware of how social media may impact their case. In particular, when taking on a plaintiff's personal injury matter, counsel should warn their clients that information they post to social media, or text to friends, could wind up as evidence against them in a lawsuit.

The North Carolina State Bar recently responded to a question of a lawyer's duty to advise clients about social media, stating:

> If the client's postings could be relevant and material to the client's legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments.[26]

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[24] *Crowe*, Jan. 20, 2015 Order and Reasons (Document 32), at 2.

[25] American Bar Association, Comment on Rule 1.1, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html (last visited 1/20/16).

[26] North Carolina State Bar, 2014 Formal Ethics Opinion 5, Opinion #1, available at http://www.ncbar.com/ethics/ethics.asp?page=528 (last visited 1/20/16).

How Do Counsel Ethically Advise Clients about Using Social Media?

There are certainly ethical pitfalls. By simply telling your client that their communications on any electronic and social media platform may end up as evidence at trial, a lawyer may end up with a client who engages in spoliation and possibly even fraud.

1. Taking Down Posts

Generally, advising your client to delete negative social media data will run afoul of ethical rules when there is a duty to preserve such information. However, if the lawyer preserves information "taken down" from a client's social media or counsels his client to preserve the data, he may comply with his state's ethical rules. The North Carolina State Bar Ethics Committee has spoken on this point:

> If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media. The lawyer may take possession of printed or digital images of the client's posting made for purposes of preservation.[27]

Indeed, in 2013 a Virginia lawyer was suspended for 5 years and faced a trial court sanction of $542,000 for spoliation of Facebook evidence: the lawyer told his paralegal to advise his client to "clean up" his Facebook page by removing damaging photographs, denied in discovery that plaintiff even had a Facebook account, and later tried to hide his paralegal's emails with the plaintiff.[28] In the Virginia case, the lawyer admitted he had no familiarity with Facebook before the case. Apparently the picture that started the dispute portrayed plaintiff holding a beer, wearing a "I [Heart] Hot Moms" shirt, with two blond girls in the background. The plaintiff there, like Crowe, had deactivated his Facebook page and was forced to reactivate and produce the account data, which showed he deleted 16 photos after the "clean up" instruction.

2. Adding New Social Media Posts

The New York State Bar is on the cutting edge of addressing the thorny ethical issues surrounding social media. Last June their Commercial and Federal Litigation Section issued "Social Media Ethics Guidelines."[29] These Social Media Guidelines are well-drafted, and they address topics covered here and far beyond, such as furnishing legal advice through social media. One guideline of the Social Media Ethics Guidelines is particularly instructive here:

> Guideline No. 5.B: Adding New Social Media Content
>
> A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim." [Citations omitted.]
>
> *Comment*: A lawyer may review what a client plans to publish on a social media website in advance of publication and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person's perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct. A lawyer may advise a client to refrain from or limit social media postings during the course of a litigation or investigation.

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[27] North Carolina State Bar, 2014 Formal Ethics Opinion 5, Op. # 2.

[28] The state bar disciplinary disposition in *In the Matter of Matthew B. Murray*, Virginia State Bar Docket Nos. 11-070-088405 & 11-070-088422 is available at http://www.vsb.org/docs/Murray-092513.pdf (last visited 1/20/16). The final court order in the underlying case, which discusses the Facebook evidence spoliation, is *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 301-03 (Va. 2013). The lawyer paid the sanction, presumably from his fees earned from the large jury verdicts.

[29] The Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association are available at http://www.nysba.org/socialmediaguidelines/ (last visited 1/20/16).

This proposed New York ethical guideline provides a roadmap as to how to proactively advise your clients with respect to social media usage in litigation. Had Mr. Crowe been so advised (which he may have been), and had he taken that advice, he may not have used Facebook to allegedly tell a fellow deckhand how he "really" got hurt and the lies he wanted the deckhand to tell.

CONCLUSION

A final takeaway from this article: counsel should advise clients and conduct litigation as if nothing is truly ever irretrievable once it is posted in social media or sent electronically. It remains somewhere, waiting to be retrieved from your Facebook history, or found by the recipient on his phone or Facebook Messenger account. Internet pages even get archived randomly in something called "The Wayback Machine,"[30] which allows you to "time-travel" into the Internet's history. As lawyers, we need to be conscious that people, especially Millennials, share their lives extensively on social media and text voraciously,[31] and this information can almost always be retrieved; we need to understand the basic benefits and pitfalls of social media usage and advise our clients accordingly.

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[30] The Internet Archive's Wayback Machine, available at https://archive.org/web/ (last visited 1/20/16), is a digital archive of the Internet that regularly takes "snapshots" of websites, providing access to older versions of a webpage.

[31] Interestingly, the plaintiff's emails in the *Crowe* case were never at issue, likely because he did not use email much. Texting and posting offer more interactive platforms for Millennials, perfect for casual, non-professional communications. Of course, email communications still feature prominently in commercial litigation, in which the witnesses tend to communicate with professional colleagues by email. Hence, e-discovery of email accounts still keeps many litigators up late. However, in personal injury arena, social media and texts tend to feature more prominently than email—at least where discovery battles are concerned.