Tweeting & Snapping:

What You Need to Know About Preserving, Discovering, and Using Social Media

Presented by:
Lynne Bernabei
BERNABEI & KABAT, PLLC

Peter Sung Ohr
NATIONAL LABOR RELATIONS BOARD

Moderator:
Heather Newsom Leonard
HEATHER LEONARD, PC

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The Duty to Preserve Evidence

- When the Duty Arises:
  - During litigation and the time before litigation "when a party should have known that the evidence may be relevant to future litigation";
  - When a party learns of "pending or reasonably anticipated litigation";
  - When the "relevant individuals anticipate becoming parties in imminent litigation."

*Fed. R. Civ. P. 37(e) advisory committee's note (2006); *Green v. McClendon*, 262 F.R.D. 284, 289 (S.D.N.Y. 2009); *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

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- Reasonable Foreseeability:
  - Determined by an objective standard.
  - Whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.

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- Preservation Triggers:
  - Filing of administrative charge or complaint;
  - Pre-filing correspondence communicating an intent to initiate litigation rather than to avoid it.

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- Duty Triggered:
  - *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132 (N.D. Cal. 2012) (comprehensive summary of specific legal claims triggered duty).
  - *Major Tours, Inc. v. Colorel*, No. CIV 05-3091, 2009 WL 2413631 (D.N.J. Aug. 4, 2009) (letter specifying claims and damages, and demanding response within two weeks to avoid litigation, triggered duty).
  - *Washington Alder LLC v. Weyerhaeuser Co.*, No. CV 03 753, 2004 WL 4076674 (D. Or. July 27, 2004) (threat to sue for antitrust violations triggered duty).

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- Duty Not Triggered:
  - *Indiana Mills & Mfg., Inc. v. Dorel Indus., Inc.*, No. 1:04-cv-01102, 2006 WL 1749410 (S.D. Ind. Feb. 16, 2006) (demand letter did not threaten future lawsuit and discussed only the possibility of a negotiated resolution).
  - *Claude P. Bamberger Int'l, Inc. v. Rohm and Haas Co.*, No. 96-1041, 1997 WL 33768546 (D.N.J. Aug. 12, 1997) (demand letter did not threaten litigation but sought business remedy for business wrong).
  - *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007) (demand letter was too equivocal to trigger preservation duties).

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- Take Away:
  - Demand letters should expressly threaten litigation and provide a deadline for a response, after which the plaintiff will file suit.
  - They should also include a separate demand that the defendant preserve evidence.

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- What Evidence the Duty to Preserve Encompasses:
  - Relevant documents, including:
    - those reasonably calculated to lead to the discovery of admissible evidence;
    - those reasonably likely to be requested during discovery; and
    - those likely to be the subject of a discovery request.
  - Defendant must suspend its routine document retention policy and implement a litigation hold.

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- EECO Regulation – 29 C.F.R. §1602.14:

Employers must maintain records about:

- requests for reasonable accommodations;
- hiring, promotion, transfer, lay-off, and termination;
- rates of pay and terms of compensation;
- selection for training opportunities; and
- pending EEOC charges (including records of comparators).

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- To Whom the Duty Extends:
  - Counsel, who must advise client of the type of information potentially relevant to lawsuit and duty to preserve it;
  - Employees of a party likely to have relevant information;
  - Corporate managers who must inform employees of requirements for preserving evidence.

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Spoliation and Sanctions

- Background
  - Spoliation is "the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending on reasonably foreseeable litigation."
  - Spoliation subjects a party to a range of potential sanctions.
  - Governed by Federal Rule of Civil Procedure 37(e).

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- Rule 37:
  - Promulgated to ensure a uniform standard.
  - Applies when:
    - spoliation involves ESI;
    - ESI should have been preserved;
    - ESI was lost because party failed to take reasonable steps to preserve it; **and**
    - lost evidence cannot be restored or replaced through additional discovery.

  → **Proceed to subsection (e) for sanctions.**

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- Rule 37(e)(1): use upon finding of prejudice.
  - Permits minimal sanctions – those necessary to cure prejudice.
- Rule 37(e)(2): use upon finding of intent to deprive.
  - Permits most severe sanctions.
  - Allows adverse-inference instruction and entry of summary judgment/dismissal of case.

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- *Lester v. Allied Concrete Co.*, 285 Va. 295 (Va. 2013).
  - Defendant's document requests sought copies of all pages of Plaintiff's Facebook account.
  - Plaintiff's counsel instructed him, via a paralegal, to "clean up" his Facebook page, after which he deactivated his account.
  - Counsel omitted these communications with the Plaintiff from the privilege log.
  - Following a motion to compel, Plaintiff re-activated his account but deleted sixteen photographs.
  - Plaintiff testified at deposition that he never deactivated his account.

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- Sanctions awarded:
  - $542,000 against Plaintiff;
  - $180,000 against Plaintiff's counsel;
  - referred Plaintiff's counsel to the Virginia State Bar to investigate misconduct; and
  - referred Plaintiff to the prosecutor's office for investigation of perjury.

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- Independent Causes of Action:
  - Some states maintain independent causes of action for the tort of spoliation. For example, the following causes of action exist:
    - Alabama – negligent spoliation against a third party.
    - District of Columbia – negligent or reckless spoliation.
    - Montana – negligent or intentional spoliation against a third party.
  - Texas does not recognize a separate tort.

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Using Social Media Substantively

- Screening Job Applicants:
  - Social media platforms may reveal applicants' immutable, protected characteristics to those making hiring decisions.
  - Challenge: connecting the social media search to the adverse decision.
  - *Nieman v. Grange Mutual Ins. Co.*, No. 11-3404, 2013 WL 1332198 (C.D. Ill. Apr. 2, 2013) (Plaintiff failed to establish that hiring manager ever used Linked In).

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- Conduct Outside of the Workplace:
  - Circuit split about whether to consider outside conduct in hostile work environment claims.
    - Consider outside conduct if it occurred in a forum that is an extension of the workplace: First, Second, Seventh, and Eighth Circuits.
      - Social media evidence seems to follow the traditional analysis.
    - Do not consider conduct outside confines of workplace: Fifth and Tenth Circuits.
      - Murkier analysis – social media may still permeate the workplace walls.

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- Where an employer knows or should know that an employee posted harassing content about another employee on social media, the sufficiency of the employer's response is subject to judicial scrutiny. *Meng v. Aramark Corp.*, No. 12-CV-8232, 2015 WL 1396253 (N.D. Ill. Mar. 24, 2015).
- The EEOC has implied that it will consider co-workers' racially discriminatory Facebook comments in assessing a plaintiff's Title VII claim for racial harassment. *Knowlton v. LaHood, Sec'y, Dep't of Transp.*, EEOC Agency No. 2012-24254-FAA-05 (June 15, 2012).

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- Courts have also admitted evidence of co-workers' derogatory blog posts about a plaintiff's protected characteristics. *Espinoza v. County of Orange*, No. G043067, 2012 WL 420149 (Cal. Ct. App. Feb. 9, 2012) (affirming decision to admit co-workers' blog posts about Plaintiff's disability).
- In *Guardian Civic League v. Phila. Police Dep't.*, a class of African American police officers alleged that the Police Department created a racially hostile work environment by allowing white police officers to create, operate, and post racists comments on a website geared toward law enforcement, while at work, and to discuss the content in front of minority officers at work. No. 2:09-cv-03148-CMR (E.D. Pa. filed July 15, 2009).

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- *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000)
  - Hostile work environment case that addressed Employer's duty to monitor internet forums it provided for employees' use.
  - **Focus**: Whether the Forum "was such an integral part of the workplace that harassment on [it] should be regarded as a continuation or extension of the pattern of harassment that existed in the Continental workplace."
    - Whether the conduct at issue arose out of the employment relationship.
    - Whether Employer derived a substantial benefit from the Forum.

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- Employer's Remedial Action Sufficient:
  - When Employer blocked Employees' access to Facebook after learning of Facebook-based harassment against one employee, the court determined that Employer's response was prompt and appropriate, and therefore entered summary judgment for Employer. *Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010).

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- Employer's Remedial Action Unjustified:
  - The NLRB ordered Employer to reinstate employees it discharged for posting comments about the Plaintiff's work performance on Facebook, because the comments were not made during work hours and did not implicate protected bases. *Hispanics United of Buffalo, Inc. v. Ortiz*, No. 3-CA-27872 N.L.R.B. (Sept. 2, 2011).

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Social Media & Discriminatory Animus

- Social media evidence is generally admissible as "other evidence of discrimination."
  - Plaintiff claimed he was denied tenure on the basis of his race and subject to hostile work environment. Trial court denied Employer's motion for summary judgment, and held that jury could determine, from deciding officials' race-based Facebook comments, that tenure decision was based on race and that hostility remained prevalent within workplace. *Hannah v. Northeastern State Univ.*, No. CIV-14-074-RAW, 2015 WL 501933 (E.D. Okla. Feb. 5, 2015), *rev'd and remanded sub nom. on other grounds*, 628 F. App'x 629 (10th Cir. 2016).

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- However, the courts will exclude so-called stray remarks made on social media platforms. *Almoghrabi v. Gojet Airlines, LLC*, No. 4:14-CV-00507-AGF, 2016 WL 393580 (E.D. Mo. Feb. 2, 2016), *appeal dismissed* (Apr. 26, 2016) (excluding supervisor's social media comments as "stray political remarks").

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Social Media & Pre-Text

- Where employer cites Employee's violation of social media policy as basis for adverse action, Employee must show that proffered reason is pre-textual.
- In *Jones v. Gulf Coast Health Care of Del., LLC*, the Eleventh Circuit reversed the entry of summary judgment for Employer because a genuine issue of material fact existed about whether Plaintiff's alleged violation of workplace social media policy was pre-textual, and whether the real reason was retaliation for taking FMLA leave. No. 16-11142, 2017 WL 1396165 (11th Cir. Apr. 19, 2017).

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- Where Employer allegedly terminated Plaintiff for violating social media policy but did not terminate similarly situated employees, a genuine issue of material fact exists as to the basis for termination. *See Redford v. KTBS, LLC*, 135 F. Supp. 3d 549 (W.D. La. 2015).

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- Plaintiffs alleged Employer enforced social media policy in discriminatory manner against only females, and trial court permitted Plaintiffs to introduce evidence that Employer failed to discipline other employees for far worse conduct, as evidence of pre-text. *Bush v. Gulf Coast Elec. Coop., Inc.*, Case No. 5:13cv369-MW/GRJ, 2015 WL 5610852 (N.D. Fla. Sept. 23, 2015).

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- After Plaintiff reported sexual harassment to Employer, he threatened anyone who thought his report was a "joke" on Facebook. Employer made the harasser apologize to Plaintiff and then ordered Plaintiff to attend a violence training seminar because of his post. Plaintiff agreed to attend training, but Employer terminated him when he refused to sign a letter consenting to the training and acknowledging that Employer dealt with his sexual assault complaint appropriately. *Verga v. Emergency Ambulance Serv., Inc.*, No. 12-CV-1199 DRH ARL, 2014 WL 6473515 (E.D.N.Y. Nov. 18, 2014).
- Trial court denied Employer's motion for summary judgment; trier of fact could infer that Employer's proffered reason for termination was pre-textual.

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Discriminatory Enforcement

- At least one court has recognized a cause of action for Employer's allegedly discriminatory enforcement of its social media policies. *See Carney v. City of Dothan*, 158 F. Supp. 3d 1263 (M.D. Ala. 2016) (recognizing the cause of action but finding that Employee failed to present evidence that the policies were enforced disparately).

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Adverse Action

- Precluding Employee from accessing social media at work did not amount to an adverse action and did not materially alter job. *Freeman v. Fla. Pars. Juv. Det. Ctr.*, No. CV 14-2461, 2016 WL 4241905 (E.D. La. Aug. 11, 2016).

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Mobley v. Facebook, Inc., Case No. 5:16-cv-06440-EJD (N.D. Cal., Filed Nov. 3, 2016).

- Class action – Title VII and Fair Housing Act case.
- Alleges Facebook's ad platform publishes discriminatory and illegal housing and employment ads.
- Plaintiffs do not seek to end platform but to enjoin unlawful use of it.

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- Platform allows ad buyers to "exclude people," including those in the following categories, with the click of a button:
  - African Americans, Asian Americans, four categories of Hispanics, immigrants, and "people whose original country of residence is different from the current countries selected above";
  - Christians, Muslims, and Sunni Islamists; and
  - "Divorced," "Parents (All)," "Expectant Parents," and "Moms."

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- Defendants' motion to dismiss is pending before the district court.
  - Immunity under Section 230 of the Communications Decency Act;
  - Article III standing; and
  - Failure to allege Facebook engaged in wrongdoing.

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Third-Party Discovery Requests: Practice Tips

- AT&T Landline (Bellsouth)
  - Typically takes three months to receive.
- AT&T Wireless (Cingular, Cricket, GoPhone)
  - AT&T charges $40/hour to process subpoena.
- Century Link (cell service through Verizon)
  - May need to serve subpoena on both Century Link and Verizon.

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- Facebook
  - Must direct to "Facebook Inc." *not* "Facebook.com."
- Google (including Gmail)
  - Google will notify users before disclosing information.
- MetroPCS
  - Call records are kept for six months.
  - Text records are kept for sixty days.
- MySpace
  - "FriendID" must be included in subpoena.

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- Sprint
  - Consult Sprint Subpoena Manual.
- Time Warner Cable/Road Runner
  - Consult TWC Subpoena Compliance Manual.
- TracFone Wireless
  - Serve subpoena via facsimile.
  - Allow 7-10 days for processing.
- Twitter
  - Only accepts legal process from LEO delivered by mail or facsimile.

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- U.S. Cellular
  - Must provide very specific details about requested information.
- Verizon
  - Submit request via facsimile.

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NLRB Considerations

- Concerted Action
- Employer Use of Social Media Against an Employee
- Social Media Rules at Work
- Employer Monitoring of Employee Activity Online at Work

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- Advice Memorandum from Barry Kearney to Peter Sung Ohr re: "*Northwestern Univ.*, Case No. 13-CA-157467" (Sept. 22, 2016).
  - Whether rules in Northwestern University Football Handbook violated Section 8(a)(1) of the NLRA.
  - If so, whether Northwestern properly modified the rules.

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- *Tinley Park Hotel & Convention Ctr., LLC v. Santiago*, Case 13-CA-141609 (N.L.R.B.).
  - Addresses overly broad employee handbook provisions' chilling of protected speech.
  - Sections 7 and 8(a)(1) of the NLRA

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- Employer's no-recording policy violates the NLRA. *Whole Foods Market Group, Inc. v. NLRB*, No. 16-0002-ag, 2017 WL 2374843 (2d Cir. June 1, 2017).

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