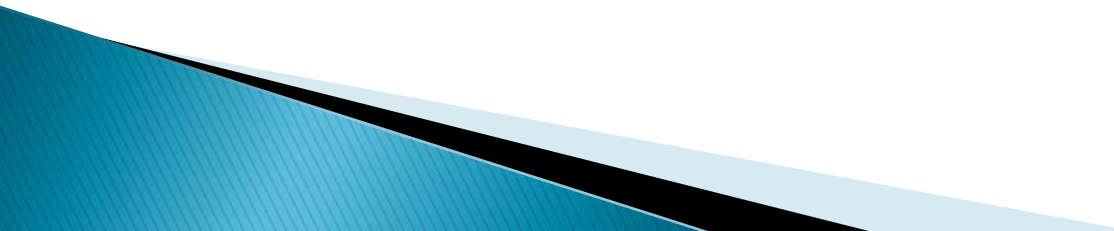


VI. Social Media Use and Other Complex Jury Issues



Sara Anne Hook
NBI: Voir Dire and Jury Selection
November 22, 2013

Introduction

- ▶ Social media is here to stay – and has become the communication venue of choice for a wide variety of people.
 - ▶ Whether it be through LinkedIn, Facebook, Twitter, Flickr, Pinterest or Instagram, today's citizen (who might be a potential jury member, lawyer, judge, witness or party in litigation) is generating an incredible amount of evidence in digital form that they may not even realize lacks any protection or privacy under court rules or recent case law.
 - ▶ Moreover, this electronically stored information (ESI) is nearly always searchable, discoverable and admissible, creating a rich repository that can be mined by those involved in a case and even by those who seek to unduly influence the process or outcome of a case.
 - ▶ Interestingly, the public is just beginning to realize the extent to which their information can be shared and used, typically without their knowledge or consent, and that this information should be considered nearly permanent.
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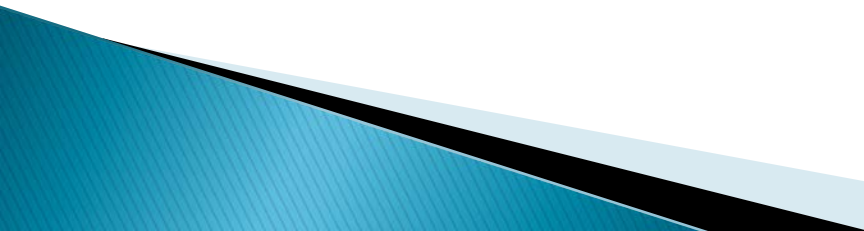
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- ▶ We now see statistics indicating what might be called “social media remorse” from those who have shared too much and are now trying to be more cautious.
- ▶ Consider the following statistics from the *ABA Journal* (October 2013, p. 12)
 - “29% of social media users between the ages of 18 and 34 say they have posted photos, comments or other information that could come back to haunt them during a job search.
 - 21% of those users say they have taken down a photo, post or comment over fears of the repercussions it could have with an employer.
 - 82% of those users pay attention to privacy settings.
 - 6% of those users do not pay attention to privacy settings.”

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- ▶ The government is also quite interested in what is posted on social media sites.
- ▶ For example, the Twitter Transparency Report, dated July 31, 2013, reported that “U.S. and foreign governments have made 1,157 requests for information about Twitter users in the first six months of this year, up from the 1,009 requests made in the preceding six months” – which represents a 14.7% increase. (*ABA Journal*, October 2013, p. 12).
- ▶ Also new phenomenon called “revenge porn”.

Change of Venue Requests: When and How They Are Used (Social Media)

- ▶ Changes in venue are being sought because of issues with social media, particularly publicity that is generated about these cases and the concern over whether this publicity will prejudice the pool of potential jurors, as well as threats against or intimidation of witnesses.
 - ▶ These cases range from local (Evansville) and typical (personal injury) to the most high-profile, sensational cases (Jodi Arias).
 - ▶ Depending on the type of case and jurisdiction, the appropriate rules should be consulted before requesting a change of venue.
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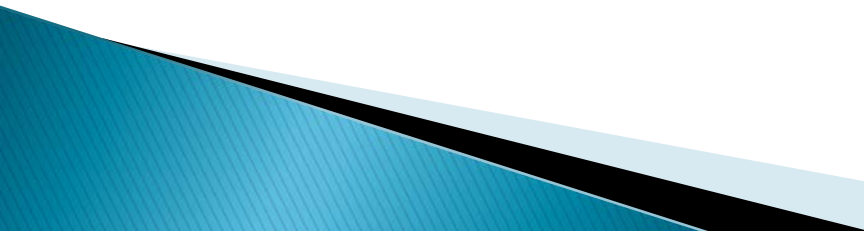
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- ▶ Indiana Rules of Court: Rules of Trial Procedure (Including Amendments made through January 1, 2013)
 - Rule 76. Change of venue
- ▶ Indiana Rules of Court: Rules of Criminal Procedure (Including Amendments Received Through May 29, 2013)
 - Rule 12. Change of venue in criminal cases
- ▶ 28 USC § 1404 – CHANGE OF VENUE, › Title 28 › Part IV › Chapter 87 › § 1404, (District Courts)

Mining Social Media for Information about Parties, Jurors and Witnesses

- ▶ Indiana Rules of Court: Rules of Professional Conduct (Including Amendments made through January 1, 2013)
 - Rule 3.3. Candor Toward the Tribunal
 - Rule 3.5. Impartiality and Decorum of the Tribunal
 - Rule 4.1. Truthfulness in Statements to Others
 - Rule 4.3. Dealing with Unrepresented Persons
 - Rule 4.4. Respect for Rights of Third Persons
 - ❖ For a case on Facebook friendship between a judge and the victim's father, see *Youkers v. State*, 2013 WL 2077196 (Tex. App.—Dallas May 15, 2013).

Researching Private vs. Public Social Media Accounts – What’s Ethical?

- ▶ Several ethics opinions have attempted to provide clarity on lawyer and attorney use of social media.
 - ▶ For example, the Association of the Bar of the City of New York’s Committee on Professional Ethics has promulgated Formal Opinion 2012–2 on jury research and social media. (Formal Opinion 2012–2).
 - ▶ This opinion relates to Rules 3.5(a)(4), 3.5(a)(5) and 3.5(d), which cover maintaining and preserving the impartiality of tribunals and jurors, as well as 8.4 on misconduct.
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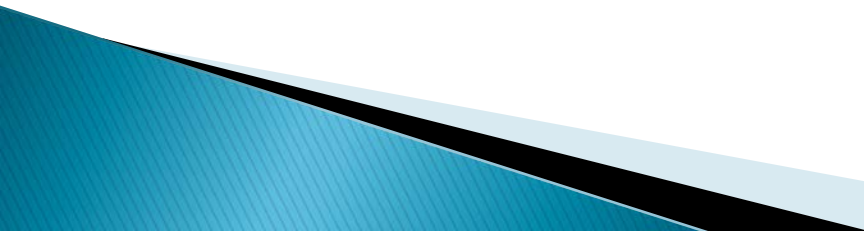
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- ▶ The American Bar Association recently issued a formal opinion about judges using social media. (ABA Formal Opinion 462, Judge's Use of Electronic Social Networking Media, February 21, 2013).
- ▶ For a case disallowing an insurance company to investigate non-public section of social networking accounts, see *Keller v. National Farmers Union Property & Cas. Co.*, 2013 WL 27731 (D. Mont. Jan. 2, 2013).
- ▶ A recent article in *Indiana Lawyer* also notes the importance of being able to authenticate information located on social media before it will be admissible in court. (D. Stafford. Digital Detectives: Social Media Sleuths Find Evidence, But Admissibility Requires Authentication. *Indiana Lawyer*, May 8–21, 2013, pp. 7–8).

Uncovering Juror Misconduct and What to Do About It

- ▶ According to an article by Pfeifer on About.com Law Practice Management, “[j]uror misconduct online has results in numerous new trials and overturned verdicts.”
- ▶ The article provides some suggestions for what to do if the attorney suspects juror misconduct through social media and provides examples of what the consequences of this misconduct might be.
- ▶ Raysman reports that while some activities did not rise to the level of juror misconduct, “*other* social media activities could potentially disrupt the integrity of the proceedings or end in a mistrial, and examples abound of instances where jurors have been removed from trials after attempting to friend the defendant on Facebook.”

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- ▶ In response to these concerns, a Judicial Conference Committee updated the set of model jury instructions that federal judges can use to deter jurors from using social media to research or communicate about cases on which they serve.
 - ▶ Among the other suggestions are repeated reminders by the judge, detailed explanations of the consequences of social media use during a trial and a poster to be displayed wherever jurors congregate.
 - ▶ Interestingly, the article notes that when juror use of social media was detected, it was most often because of a report by another juror.
 - ▶ The updated jury instructions cover this situation and the need to report violations to the judge.
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- ▶ **Indiana Rules of Court: Rules of Trial Procedure (Including Amendments made through January 1, 2013).**
 - **Rule 59. Motion to correct error**
 - **(A) Motion to correct error--When mandatory.** A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address:
 - (1) Newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial; or
- ▶ **Indiana Rules of Court: Rules of Criminal Procedure (Including Amendments Received Through May 29, 2013).**
 - **Rule 16. Motion to Correct Error**
 - **(A) When Mandatory.** A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days after the date of sentencing which, with reasonable diligence, could not have been discovered and produced at trial.

State Statutory Efforts to Control Jury Social Media Use

- ▶ Many jury members are using social media at trial, including in high-profile cases.
- ▶ For example, potential jurors were questioned about social media use as part of the George Zimmerman trial and this was also a problem in the Officer David Bisard case.
- ▶ According to Professor Johnston, “the legal system is incapable of silencing internet chatter before potential damage to a fair trial has been done.
- ▶ The most realistic approach to preserving the integrity of the court process is social media-specific jury directions, juror education and pre-trial training.”
- ▶ As indicated in Johnston’s article, “[t]he report includes a string of recommendations on how to drive the message home to jurors that certain social media use during a trial is prohibited.
 - These include ensuring jury directions, both written and oral, use plain language; specifically referring to social media in jury directions, and reminding jurors of the possible consequences of a failure to comply, such as criminal sanctions.
 - A pre-trial jury
 - A training module is also advised by the report.”

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- ▶ Johnston's article goes on to define juror misconduct as including "using social media to communicate with parties to the case, divulging details of an ongoing trial, seeking responses or advice about the case, or 'friending' fellow jurors on Facebook during the trial."
- ▶ The problem of juror misconduct is serious and poses a threat to the smooth functioning of the judicial process, with Mezani's article noting that this type of juror behavior led to 90 verdicts being challenged in the U.S. between 1999 and 2010, which was reported in *Reuters Legal*.

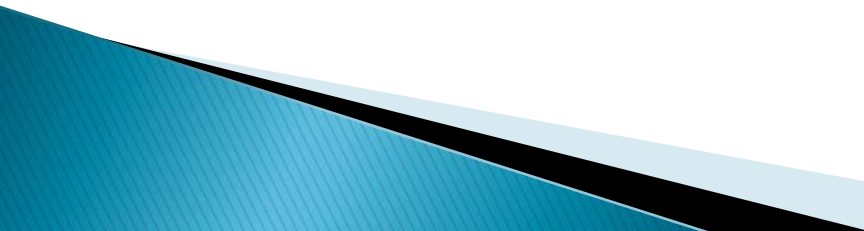
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- ▶ Other substantial reports have been published on juror use of social media which reveal the extent of the problem, the impact of the judicial process and the rights of parties and others and proposed solutions, including the formulation and use of model jury instructions and other measures taken by judges.
- ▶ In M. Dunn. *Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management*. Federal Judicial Center, November 22, 2011, see especially Appendices C through I for sample jury instructions from participating judges and pages 5–10 on strategies for preventing jurors' use of social media during trials and deliberations.

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- ▶ The Proposed Model Jury Instructions related to use of social media from The Judicial Conference Committee on Court Administration and Case Management (June 2012) are included as Appendix A.
- ▶ Many state courts are also struggling how to handle the issue of jury members accessing social media.
- ▶ For example, New Jersey state courts have adopted Charge 1.11C, titled Jurors Not to Visit Accident Scene or Do Investigations, or Conduct Any Independent Research of Any Nature, Including Use of the Internet or Other Media, as part of the instructions to be given after the jury is sworn in but before the opening statements. (See Appendix B).

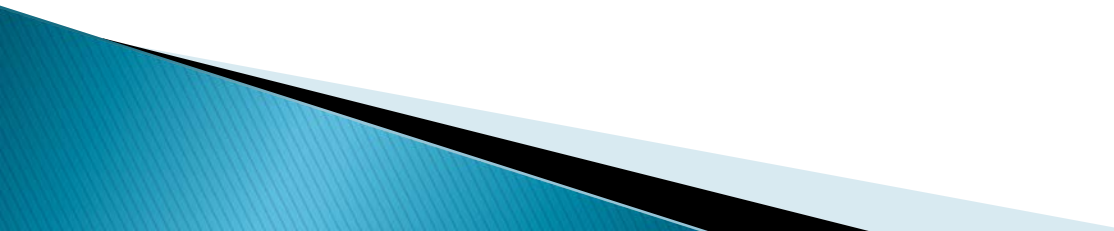
Attorney Use of Social Media at Trial

- ▶ Fortunately, there are a number of recent cases that illuminate some of the issues with handling social media as part of an electronic discovery process.
 - ▶ It is important to note that information from social media has nearly always been deemed discoverable and admissible, even in criminal cases.
 - ▶ Many social media users are shocked to learn that they can have little to no expectation of privacy for the material that they post on social media sites, irrespective of the settings they choose.
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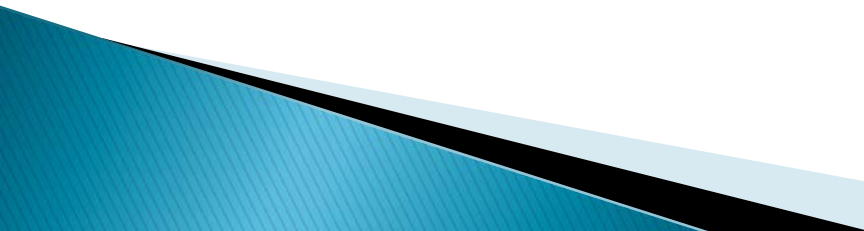
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- ▶ In fact, there are cases that suggest that someone who removes information from his or her social media site because of concerns about impending litigation may be liable for spoliation and faced with sanctions.
- ▶ Hence, the lawyer and legal team, the parties and any third-party vendors, contractors or consultants must be fully aware of the duties to collect, preserve, review and produce information from social media sites as electronically stored information (ESI) as outlined under the Federal Rules of Civil Procedures, the Federal Rules of Evidence and other state or specialized court rules.

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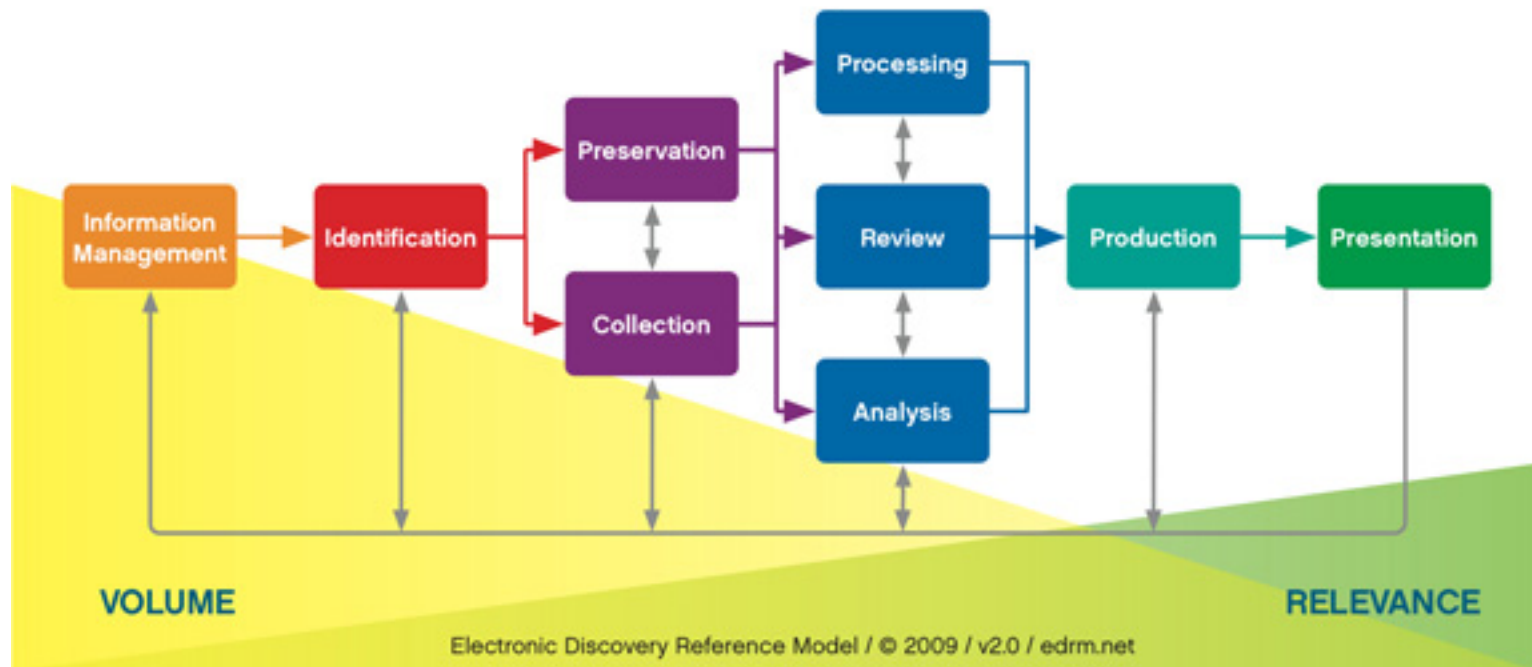
- ▶ In fact, there are cases that suggest that someone who removes information from his or her social media site because of concerns about impending litigation may be liable for spoliation and faced with sanctions.
 - ▶ A recent case also resulted in sanctions for the attorney who advised his client to remove unflattering photographs from the client's social media site.
 - ▶ Hence, the lawyer and legal team, the parties and any third-party vendors, contractors or consultants must be fully aware of the duties to collect, preserve, review and produce information from social media sites as electronically stored information (ESI) as outlined under the Federal Rules of Civil Procedures, the Federal Rules of Evidence and other state or specialized court rules.
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- ▶ It is helpful to review the Electronic Discovery Reference Model (EDRM) to trace the handling of information on social media from its creation to its presentation in court.
 - ▶ At each stage of the EDRM, there are many opportunities for mistakes and mishaps that may jeopardize a client's case as well as result in sanctions against the client and the lawyer and/or disciplinary action against the lawyer under the Rules of Professional Conduct in the state or states where the lawyer is licensed to practice law.
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Electronic Discovery Reference Model (EDRM)

Electronic Discovery Reference Model



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- ▶ A number of recent cases (2013) discussing issues related to the proper handling and production of information from social media sites were located from the K&L Gates and Kroll Ontrack case summary databases.
- ▶ Several of these cases illuminate a wide spectrum of issues with collecting, preserving and presenting this type of ESI as part of litigation.
- ▶ It is interesting to review the nature of these cases, which illustrate how social media has permeated every facet of our work and daily lives.
- ▶ For example, these cases include personal injury, wrongful death, trademark infringement, employment issues, harassment, assault and denial of insurance coverage.
- ▶ Among the disputes and mistakes outlined in these cases are relevance, scope of discovery requests, spoliation, admissibility, production, motions to compel, authentication, *ex parte* communication, bias and privacy.

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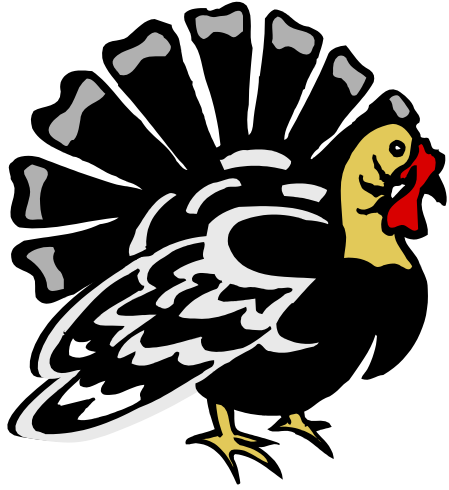
- ▶ *Fawcett v. Altieri*, ---N.Y.S.2d---, 2013 WL 150247 (N.Y. Sup. Ct. Jan. 11, 2013).
- ▶ *Gatto v. United Air Lines, Inc.*, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).
- ▶ *Giacchetto v. Patchogue-Medford Union Free School Dist.*, No. CV-11-6323(ADS)(AKT), 2013 WL 2897054 (E.D.N.Y. May 6, 2013).
- ▶ *Keller v. Nat'l Farmers Union Prop. & Cas. Co.*, No. CV 12-72-m-DLC-JCL, 2013 WL 27731 (D. Mont. Jan. 2, 2013).
- ▶ *Moore v. Miller*, 2013 WL 2456114 (D. Colo. June 6, 2013).
- ▶ *NOLA Spice Designs, LLC v. Haydel Enters., Inc.*, 2013 WL 3974535 (E.D. La. Aug. 2, 2013).

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- ▶ *People v. Kucharski*, 2013 WL 1281844 (Ill. App. 2nd Dist. Mar. 29, 2013).
- ▶ *Potts v. Dollar Tree Stores, Inc.*, 2013 WL 1176504 (M.D. Tenn. March 20, 2013).
- ▶ *Salvato v. Miley*, 2013 WL 2712206 (M.D. Fla. June 11, 2013).
- ▶ *Tapp v. New York State Urban Dev. Corp.*, No. 9131N, 2013 WL 3622969 (N.Y. App. Div. Jan. 31, 2013).
- ▶ *Youkers v. State*, 2013 WL 2077196 (Tex. App.—Dallas May 15, 2013).

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- ▶ Several articles provide guidance on best practices for collecting, preserving and producing electronically stored information (ESI) from social media sites as part of an electronic discovery process.
- ▶ Among these articles are Cloud Computing and Social Media: Electronic Discovery Considerations And Best Practices (A.S. Prasad, in *The Metropolitan Corporate Counsel*, February 2012, pp. 26–27), E-Discovery in the Age of Social Media (S. Strnad, ABA Section of Litigation, 2012 Section Annual Conference, April 18–20, 2012, pp. 1–11) and Social Media Data Collection Best Practices (Thought Leadership Team. *The Ediscovery Blog*, <http://www.theediscoveryblog.com/2010/12/30/social-media-data-collection-best-practices/>, December 30, 2010, accessed 10/8/13).
- ▶ New book published by the American Bar Association: *Social Media as Evidence: Cases, Practice Pointers, and Techniques*. Joshua Briones and Ana Taqvoryan, March 2013.



Any Questions?

Thank you for attending today's seminar –
and have a good Thanksgiving holiday!