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Institute of Continuing Legal Education

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FOREWORD

The Institute is especially grateful to our outstanding Seminar Chairperson(s) for providing the necessary leadership, organization, and supervision that has brought this program into a reality. Indeed a debt of gratitude is particularly due our articulate and knowledgeable faculty, without whose untiring dedication and efforts this seminar would not have been possible. Their names are listed on the brochure for this program and their contributions to the success of this seminar are immeasurable.

I would be remiss if I did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us hope your attendance will be most beneficial as well as enjoyable. Your comments and suggestions are always welcome.

March, 2017

Tangela S. King
Interim Director, ICLE

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EFFECTIVE VOIR DIRE

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I. KNOW YOUR GOALS

Before you begin anything, define your mission. Determine your major goals. Identify the major areas that need to be explored in order to accomplish your mission.

In every case involving a jury trial, the goal is to empanel a jury who will give your client a fair trial. There are five major goals for our voir dire:

1. Determine what kind of person is a bad juror for your case.
2. Helping jurors do most of the talking and actively listening to them.
3. Inspiring the jurors to care about your case.
4. Teaching fair jurors how to stay on the jury.
5. Getting bad jurors excused for cause.

When representing the brain damaged infant and his or her parents, there are three specific issues that must be explored and addressed:

1. Sympathy;
2. Experience with child birth and parenting; and
3. Causation and all other strengths for the defense.

GOAL #1: Determining What Kind of Person is a Bad Juror for Your Case

This is not always easy. Stereotypes do not always fit the individual. And a bad juror for one case is not necessarily a bad juror for another case.

This goal is about determining what sort of belief systems will prevent your client from receiving a fair trial. Your trial has two major issues – liability and damages. Some jurors will have biased belief systems as to liability and the same jurors can have objective belief systems as to damages or vice versa. Empaneling a mixture of both is often a disaster if you have the burden of proof.

Belief systems come from personal experience and peer opinion. Some of the belief systems which will prevent your client from starting the trial evenly with the other side usually include:

1. People who believe they would never file a personal injury lawsuit for themselves or a loved one;
2. People who believe companies should not be held responsible for the conduct of their employees when their employees violate company standards;
3. People who believe doctors and hospitals should not be sued for bad outcomes - ever;
4. People who believe the burden of proof is too low in civil cases where a lot of money is at stake;
5. People who believe trial by jury – especially with juries made up of regular people - are not appropriate for resolving medical or other complex or technical issue disputes; and
6. People who do not believe the injured should be compensated at all or should not be compensated for certain elements of harm.

Problematic belief systems can be discovered and explored by conducting focus groups and anticipating the belief systems your are likely to encounter, being the first to acknowledge that you know these beliefs exist, and forming your questions on these issues in a manner that gives jurors permission to have them and express them.

GOAL #2 – Helping Your Jurors do Most of the Talking and Listening to Them

Unlike a therapist who has multiple sessions to get a patient to open and talk, you have only one chance to reach a breakthrough with a potential juror. Talking is something you will have to condition the potential juror to do by making them feel safe. Start by requesting that the judge explain the selection process, the importance of jury service being among the highest of civic service second only to military service, the importance of honesty for a fair trial, and the importance of talking and responding to the questions during voir dire.

In encouraging jurors to talk, I have often said to the panel something like this in the very beginning:

> This is an extremely important process for all involved. Before we begin, let me start by answering three questions you may have: (1) What is this case about? (2) How long will it take? and (3) How do I get off this jury? The case is about allegations of negligence against a hospital and a profoundly brain injured baby and his lifelong needs. The parties expect the case will take approximately two and a half weeks to try. And the judge will have to answer the third question, but I can tell you from my experience, the jurors who do not respond to any of the questions and say very little usually somehow end up on the jury in greater numbers than those who actively participate and respond. I cannot tell you if by responding that you will be excused, but I can tell you from experience that if you don't talk to us, you may be increasing your chances of not being excused. Bottom line is we need you to talk to us. This process doesn't work very well if you don't.

Now that you have convinced them to talk, you must listen – you must actively listen to them. Someone smart once said, "Many a man would rather you hear his story

than grant his request." I believe this to be absolutely true. While we all want what we want when we want it, we can deal with not getting it much better when we know what we had to say was heard. Listen to the jurors. Honor them by showing them you are truly interested in their answers. Ask open-ended questions and seek to elicit agreement or opposing views from fellow panelists so that the juror feels dignified in giving the answer and so you can simultaneously explore views of others and observe how they interact with one another and observe where the "tribes" begin to develop.

I employ a technique for active listening that I define as M-O-V-E. M is mirror. O for "over and over" or tell me more or say more about that. V is for validate. And E is for empathize.

Mirroring. When you mirror a jurors answer, you are repeating back to the juror what you heard the juror say the way you understood it. For example, "What I hear you saying is . . . (and repeat back to them what you understood them to say). First, this let's them know you are listening. And if you get it wrong or not quite right, it let's them know you are trying to listen and understand. Second, if you get it wrong, it allows the juror to repeat or rephrase what they said to help you get it right. Remember, they want to be heard. Thirdly, the juror may hear what you say and realize they did say that but upon reflection, did not mean what they said at all and now have a chance to restate it in a way that is more correct for them. Many people, including lawyers, have trouble saying what they actually mean to say the very first time. Mirroring allows this to happen and the results are effective and build trust.

Over and over. Once you have correctly mirrored the juror's answer, say thank you and ask them to say more about that – to tell you more. It gives the juror the chance

to tell you why they feel the way they do without you asking "why." And it allows the juror to feel in control of his or her own answer and feel more confident and safe that by talking to you, you will hear what they have to say without judgment.

Validate. Now is when you get to say what the juror really wants to hear – I *understand* why you feel that way – It makes sense to me given your experience – I get it. This is all validation. And you are being the opposite of what they were probably expecting – a judgmental egoist with a superiority complex. You are being human – and I can tell you it is refreshing to them.

Empathize. Empathy means you see from their point of view and have connected it with some experience of your own where you felt like the juror has described he or she feels (not the same experience, but the same feeling) so that you can share with the juror how you are able to understand. Now you are connected. And the juror knows you sincerely care and actually listened to what he or she had to say. And the entre panel has just observed what it looks like to really listen to someone else. You just earned a few credibility points for yourself and your client and practiced being a better person all at once!

GOAL #3 – Inspiring the Jurors to Care about Your Case

If jurors don't care about your client or your case, you are not likely to win. This is true – If jurors care about your client and your case, they will give your client a fair trial – every time.

The first thing you do to inspire them to care is that you must make sure the jury sees that you feel strongly about your case, your cause, and that you care – truly care. If you truly care, it will show.

GOAL #4 – Teaching Fair Jurors How to Stay on the Jury

In all severe injury and death cases, and especially in cases involving a brain-damaged baby, people are sympathetic. The appearance overwhelming sympathy for a baby, is what every defense lawyer will attempt to paint to get your fair jurors excused for cause. Without teaching the jurors how to stay on the jury first, the defense lawyer will have a relatively easy time getting them excused since even if not overcome with sympathy, it is easy to make a person feel like they should be when asked to consider what it must be like for the parents and for this child.

You go first. You must find out how many of your jurors are parents themselves. Get them talk about their experiences good and bad, high and low. And find out from them how meaningful and important being a parent is even with the difficult aspects of it. Indeed, there is no greater value or purpose in life than nurturing a child.

Find out how many of them take care of special needs children or who knows someone close to them that does. You must get them to talk about it. You must find out if anyone filed a lawsuit and what the outcome was and what their feelings were about the whole process.

Opinions of others may influence some just like the witnesses who will be called at trial will influence your jurors. However, unlike trial where you cannot ask the jurors whether the witness influenced any opinion they have, you can ask in them in voir dire whether what another juror said has influenced them. Better to find out now than have the juror share their experience in the jury room for the first time and find out after you've lost that the key evidence for the defense was the experience of a juror that no one bothered to ask about – because of fear - before the trial began.

Now turn to your enemy, sympathy. Explain that the case cannot be decided on sympathy – that the law does not allow it. Also, explain that it is ok to feel sympathy – that they would not be human if they did not feel sympathy. However, it must be emphasized that their decision cannot be based on sympathy. Explain that you clients do not need to come to court for sympathy – that they have all of that they need at home, in church, with family, and with close friends. Point out that there will be evidence in the case of what the child's needs are – that none of this is being brought before the to engender sympathy which would be demeaning – but so that they may understand what the needs are and decide what must be done to ensure this child's needs are met. Now, teach the fair jurors how to stay on the jury with you next question:

Are there any of you who will be unwilling to follow the law and base your decision on sympathy rather than listen to the evidence in this case and base you decision solely on the evidence?

Emphasize again that they are not restricted or expected to not feel sympathy. Give them permission to feel lots of sympathy, but confirm that no one will base their verdict on it. Ask them if they can not only assure you of this, but also assure defense counsel, the defendant, and the judge.

Now, you must follow this with a discussion of sympathy for the defendant. Many people feel sorry for doctors who get sued. And it is understandable because doctors intend to help people. Doctors are good people, just like the doctors in this case. Stress this case is not about whether the doctor is a bad doctor, or a bad person, or careless all the time. Emphasize no one is losing a license as a result of this trial. Acknowledge that you suspect that, like your clients, the jurors will also like the

defendant doctor and his lawyers. What you need to know is whether they will be moved is how they view the evidence in the case, even a little, by any sympathy they might feel for the doctor. Sympathy cannot serve as the basis of a verdict for either side.

GOAL #5 – Getting Bad Jurors Excused for Cause

Peremptory strikes are precious and you will never have enough of them if you are representing regular people against doctors and hospitals. You must develop you skills to get biased and bad juror for your case excused for cause. When you identify a biased or bad juror, let him talk. Follow his lead. Nod with approval at the opinions he is sharing. Ask him if there is more. Allow the speeches. Be grateful you are hearing it and have a chance to follow up with him and that you will have a chance to ask the rest of the panel who else feels like he does. Often, no one will. However, if anyone does, you now have a chance you may have missed to get them off for cause, too.

So once the biased or prejudice has been shared, suggest to the potential juror that he doesn't seem like a man who changes his views like the wind. Confirm there is nothing you could say to get him to change his mind. Confirm that he has held his opinions for a very long time and that they are the result of a lifetime of his experience. Then confirm his opinions are not likely to change in the next few days. And confirms there is nothing the defense lawyer could say to get him to change his mind, or even the judge – that he has been forthright and completely honest which is what we asked him to do when we said there were no right or wrong answers only truthful ones. Confirm that even the judge could not say anything to get him to change his mind.

II. TIPS FOR JURY SELECTION

1. *Voir dire* starts the day your client walks in the door.
2. Keep a *voir dire* notebook throughout the case. Issues will arise and you will need to record your thoughts.
3. Know the law of *voir dire* in your jurisdiction. If there is not horn book on this subject in your state, write one. We did.
4. Use visual aids in *voir dire*. These are especially helpful for issues like the burden of proof, medical terms, medical equipment, the parties, witnesses, scaled questions, and changing subjects.
5. Visit the jury assembly room. Know what the jurors are told when they arrive and who is explaining the process to them and who is answering their questions. Know what literature is available in the jury assembly room. Know whether any orientation videos are shown to them and what is said on the videos. You would be surprised.
6. Donate numbered auction paddles to the Court to be used during *voir dire* to speed the general questioning faster.
7. Practice your *voir dire* and listening skills in everyday life. It will make you a better person and a better lawyer.
8. Conduct focus groups – frequently.
9. Have someone assist you with jury selection. You cannot give your complete attention to more than one thing or one person at a time.
10. Use supplemental jury questionnaires.
11. Make a seating chart.

12. Use a grading scale for each juror.
13. Use a mixture of open-ended, closed-ended, and scaled questions.
14. Approach the panel as if you are excited to meet them and learn about them – even if they scare you to death.
15. Tell them to respond even if they are not sure if the question applies but think it might.
16. Make your questions short and simple.
17. Listen actively – M-O-V-E.
18. You have two ears and one mouth. Use them in that proportion.
19. Thank jurors for their answers and invite them to tell you more.
20. Do not talk like a lawyer.

III. GEORGIA LAW OF JURY SELECTION

It is axiomatic that the cornerstone of a fair trial in our American system of civil justice is an impartial jury, untainted by even a suspicion of prejudgment on any issue, parties, counsel or the subject matter of the suit. Ellision v. National By-Products, Inc., 153 Ga. App. 475, 265 S.E.2d 829 (1980); Jones v. Cloud, 119 Ga. App. 697, 168 S.E.2d 598 (1969). This axiom defines the fundamental goal for all officers of the court, whether judge, counsel for the plaintiff or counsel for the defendant. If the law of jury selection is truly designed to achieve a fair trial for all parties, then counsel must be sure to at least master the legal fundamentals of the law of voir dire and jury selection.

Unfair jurors, all should agree, have no place on the jury or in "jury selection." In fact, "jury selection" begins only after voir dire reveals those prospective jurors which

should be excused as a matter of law or as a matter of fact.[1] Once those jurors have been excused, a full panel of either 12 or 24 impartial jurors should be left for "jury selection".[2] The regular panel of prospective jurors must ultimately consist of a "full panel of . . . **competent and impartial** jurors from which to select a jury." (Emphasis added.) O.C.G.A. §§ 15-12-122, 15 –12-133.

According to the plain meaning of the Code, "jury selection" can only begin when there is a "full panel" of "competent and impartial" jurors from which to select a jury. In fact, if so many prospective jurors are disqualified from the original panel for cause so that the remaining panel is not a full panel, "the judge, at the request of counsel for either party, shall cause the panel to be filled by additional **competent and impartial** jurors to [the number of either 12 or 24] **before requiring the parties or their counsel to strike a jury**." (Emphasis added.) O.C.G.A. § 15-12-122(b); see O.C.G.A. § 15-12-123(b). Once the regular panel is comprised of the appropriate number of competent and impartial jurors, then each party, with the plaintiff striking first, will alternately strike jurors from the panel to the number of 6 or 12 depending on the size of the jury sought. These strikes are exercised by the parties without stating any reason therefor, and for this reason they are known as peremptory strikes.[3] Based on the foregoing, it is abundantly clear that the

[1] This is accomplished through a "challenge for cause." Challenges based on principal grounds require the removal of a juror as a matter of law, while challenges based upon favor are factually based challenges, which are discretionary with the trial court. The distinction between the two and the legal authority for each is more thoroughly discussed below.
[2] A full panel for a 6 person jury is a panel of at least 12 competent and impartial jurors. A full panel for a 12 person jury is a panel of at least 24 competent and impartial jurors. O.C.G.A. §§ 15-12-122, 15-12-123
[3] This is true as long as the strike is not challenged under Batson v. Kentucky, 476 U.S. 79 (1986) for racial discrimination or J.E.B. v. Alabama, 511 U.S. 127 (1994) for gender discrimination.

parties are not required to exhaust their precious peremptory strikes on unqualified jurors. See Melson v. Dickson, 63 Ga. 682, 685-86(1) (1879).

In summary, when "jury selection" occurs it occurs only with a panel of competent and impartial jurors all of which would be qualified to serve on the ultimate jury impaneled for the trial of the case. The most important aspect of the quest for an impartial jury then does not take place during actual "jury selection", but in the voir dire during that critical period where challenges for cause are interposed. Now with an appreciation for the "office" of voir dire, the question becomes – what are the circumstances that cause a prospective juror to be disqualified and how are disqualified jurors excused from the trial of the case?

IV. THE FUNDAMENTALS OF VOIR DIRE: Challenges for Cause

As we have seen, an impartial jury is a jury untainted by even a suspicion of prejudgment on any issue, party, counsel or the subject matter of the suit. Therefore, whenever, during the course of voir dire, a suspicion regarding a prospective juror's ability to be impartial arises, a challenge for cause should be interposed. Unlike peremptory challenges, a challenge for cause must be based upon a specified reason. The stated reason will cause the challenge to fall into one of two categories: (1) those based upon principal grounds or (2) those based upon favor.

First, an understanding of the differences between a principal-based challenge and a favor-based challenge is imperative.

> Challenges for principal cause are based on facts which, if proved, automatically disqualify the juror from serving. Challenges for favor are based on admissions of the juror or facts and circumstances raising a suspicion that the juror is actually biased for or against one of the parties. Where challenges for favor are involved, the trial judge has discretion in determining whether a juror can decide the case in accordance with the

> evidence presented during the trial and without bias or partiality or outside influences.

Luke v. Suber, 217 Ga. App. 84, 87(2), 456 S.E.2d 598 (1995).

Based on Luke, *supra*, the important difference between principal-based challenges and favor-based challenges is the existence of judicial discretion. When the facts support a challenge based on principal grounds, the trial judge has no discretion to refuse to grant the challenge and must excuse the prospective juror as a matter of law. On the other hand, the trial judge retains discretion to grant or deny a favor-based challenge by considering the facts and will not be reversed on appeal absent abuse.[4]

A. Principal-Based Challenges

Principal challenges are based upon alleged facts from which, if proved to be true, the juror is conclusively presumed incapacitated to serve. See O.C.G.A. § 15-12-163(c); Mitchell v. State, 69 Ga. App. 771, 26 S.E.2d 663 (1943). The grounds for principal challenges may arise in three distinct situations: when the facts show a prospective juror (1) is **incompetent** to serve; or (2) has a **relationship** to a person or entity with an interest in the result of the case, O.C.G.A. §§ 15-12-135, 15-12-163; or (3) entertains a **fixed opinion** that will not yield to the law or evidence. Gragg v. Neurological Associates, 176 Ga. App. 516, 336 S.E.2d 608 (1985); Ellison v. National By-Products, Inc., 153 Ga. App. 475, 265 S.E.2d 829 (1980); Edwards v. Griner, 42 Ga. App. 282 (1930).

(a) Disqualification for Incompetence

[4] For additional decisions describing the differences between principal and favor-based challenges, see Whelan v. Moone, 242 Ga. App. 795, 531 S.E.2d 727 (2000); Smith v. Folger, 237 Ga. App. 888, 517 S.E.2d 360 (1999); and Sapp v. State, 222 Ga. App. 415, 474 S.E.2d 233 (1996).

Competency questions arise when the facts show that the prospective juror is (1) not a citizen or resident of the county, (2) under the age of 18, (3) mentally incapacitated, (4) a convicted felon, or (5) unable to communicate in the English language. O.C.G.A. § 15-12-163.

(b) Disqualifying Relationships

The question of a prospective juror's relationship arises when the facts show that he or she is related within the sixth degree by consanguinity or affinity to any person interested in the result of the case. O.C.G.A. § 15-12-135. Besides kinship, some examples of disqualifying relationships include:

(i) Employees of a corporation when the corporation is a party. Ferguson v. Bank of Dawson, 53 Ga. App. 309, 185 S.E.2d 602 (1936).

(ii) Employees of, stockholders in, or person related to stockholders in a defendant's insurance carrier. Rogers v. McKinley, 52 Ga. App. 161, 182 S.E.2d 805 (1935).

(iii) Policyholders in, employees of, or persons related to policyholders in a mutual insurance company having an interest in the outcome of the case. Weatherbee v. Hutcheson, 114 Ga. App. 761, 152 S.E.2d 715 (1966).

(c) Disqualification for Fixed Opinion

A juror that admits to a fixed opinion on any party, counsel, or issue respecting the subject matter of the suit that will not yield to the law or evidence must be excused since the juror's bias has been conclusively established. Gragg v. Neurological Associates, 176 Ga. App. 516, 336 S.E.2d 608 (1985). If a juror **must be excused** when

he or she admits to a "fixed opinion" that will not yield to the law or evidence, it necessarily follows that the trial court is without discretion to refuse to disqualify the juror. Since the hallmark of a principal challenge is the absence of judicial discretion, a challenge based on a fixed opinion which will not yield to the law or evidence is subject to a principal-based challenge.

Many cases considering the "fixed opinion" issue reach the ultimate holding without explicitly classifying whether the grounds for the challenge were principal or favor-based. These cases may have been the source of some confusion creating the false belief that jurors that are able to yield their fixed opinions to the law or evidence are somehow automatically qualified as competent and impartial jurors. This is not true! How many times has a valuable peremptory strike been used on a disqualified juror who was summarily found to be qualified simply because he or she said that the "fixed opinion" could yield to the law or evidence?

A juror claiming that his or her fixed opinion can yield to the law or evidence indeed may not be subject to a principal challenge for cause, but on the other hand, the juror may still be disqualified for favor.[5] Therefore, the juror is not automatically qualified to serve on the jury. Rather, the trial court must now exercise its discretion to determine whether this juror is disqualified for favor.

[5] For a thorough historical analysis of this issue, see Robinson v. State, 1 Ga. 563 (1846) which notes that "[i]t has been ruled in accordance with the common law right of challenge, that it is not necessary for the juror to have a fixed and definite opinion upon the matter in issue: it may be hypothetical; and this will constitute a ground of challenge, either principal or to the favor, according to the circumstances." Among the circumstances are whether the fixed opinion is one which will yield to the law or evidence.

The authority for the foregoing proposition can be found in Bowens v. State, 116 Ga. App. 577(5), 158 S.E.2d 420 (1967). There, the Court of Appeals, addressed the issue of a "fixed opinion" in both contexts, namely a "fixed opinion" that would yield and a "fixed opinion" that would not. In addressing the matter, the court stated:

> While whether in spite of the juror's testimony that he could try the case based upon the evidence rather than his opinion such opinion is so fixed that he would still be disqualified for favor is generally a matter for the trior to decide . . ., yet, where such juror states that he would retain his opinion through the trial unless the evidence should prove he was wrong as to his opinion, the trial court erred in failing to disqualify him for cause.

Id. at 579.

So considering the appellate decisions in context with the understanding that "fixed opinions" can be of two types (those that yield to the law and evidence and those that do not), counsel should be prepared to argue that his or her challenge is either a principal-based challenge where the trial court has no discretion or a favor-based challenge where the trial court must find that the juror is competent and impartial in spite of the "fixed opinion." Indeed, "[a] challenge for cause should be made as to show clearly whether it is a challenge for principal cause or a challenge to the favor." Sapp v. State, 222 Ga. App. 415, 474 S.E.2d 233 (1996).

B. Favor-Based Challenges

The 1933 Code of Georgia actually contained a code section entitled, "Challenge for Favor". Code 1933, § 59-705. For some reason, neither the title nor the body of former Code section 59-705 found its way into the Official Code of Georgia. However, O.C.G.A. §§ 15-12-133 and 15-12-134 read together contain the entirety of the body of Code 1933, § 59-705. The only thing missing is the title, "Challenge for Favor."

O.C.G.A. § 15-12-133 restates that portion of § 59-705 guaranteeing the parties the right to an individual examination of each juror as well as the portion defining the subject matter which may be inquired into for favor-based challenges:

> In the examination, the counsel for either party shall have the right to inquire of the individual jurors examined touching any matter or thing which would illustrate any interest of the juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the juror with the parties or counsel therefor, any fact or circumstance indicating any inclination, leaning, or bias which the juror might have respecting the subject matter of the action or the counsel or parties thereto, and the religious, social, and fraternal connections of the juror.

O.C.G.A. § 15-12-133 defines the statutory subject matter giving rise to a challenge for cause based upon favor and O.C.G.A. § 15-12-134 vests the trial court with discretion to determine whether good cause for favor has been established only in the limited circumstances where a juror has a desire or has expressed an opinion as to which party should prevail. The common law, however, fills the gap left by the Code and vests the trial court with discretion for the consideration of all other grounds for a favor-based challenge:

> A challenge to favor is based on circumstances raising a suspicion of the existence of actual bias in the mind of the juror for or against the party, as for undue influence, or prejudice, which essentially raises a question of fact . . . [to be decided by the trial court].

(Citations and punctuation omitted.) Bowens v. State, 116 Ga. App. 577, 578(3) (1967).

Since the trial court is vested with significant discretion as the sole trier of fact for favor-based challenges, what is the level of proof required by the movant in order to prevail? Just as every trier of fact in any investigation is provided a measuring stick for the proof, be it “preponderance,” “clear and convincing,” or “beyond a reasonable doubt”, there must be some legal standard to govern the inquiry.

The cases seem to establish an objective standard gauged by whether a "reasonable apprehension" exists regarding the partiality of the prospective juror. In fact, the cases hold that when the trial court considers a favor-based challenge, it abuses its discretion in failing to remove a prospective juror when the facts cause a **reasonable apprehension** to exist regarding the ability of the prospective juror to decide the case impartially. Temples v. Central of Ga. R.R. Co., 15 Ga. App. 115, 82 S.E. 777 (1914); Mitchell v. State, 69 Ga. App. 771, 26 S.E.2d 663 (1943). The word "reasonable" implies an objective standard which would seem to require the court to consider the facts, not on its subjective opinion of them, but upon what a reasonable person would find based on all of the facts and surrounding circumstances, including whether the factual answers supportive of the challenge were produced by open-ended as opposed to leading questions.

The caveat here to counsel advancing a favor-based challenge is that unlike principal-based challenges, the law does not require a conclusive showing of partiality. Rather than a conclusive showing, the only showing required is that which amounts to a **reasonable apprehension** of partiality. Therefore, where a prospective juror admits to facts giving rise to a favor-based challenge for cause, **"in the interest of fair trial, if error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors.**" (Emphasis added.) Temples at 119. Guided by the quest for absolute impartiality, when the objective facts amount to a reasonable apprehension regarding the ability of a prospective juror to be fair, the trial court should exercise its discretion and excuse that juror from the case.

V. THE REHABILITATION FICTION

In recent history, when a prospective juror admitted to facts giving rise to a favor-based challenge for cause, trial courts would undertake to "rehabilitate" such biased jurors by asking them some form of this loaded question:

> "Will you be able to put aside any preconceived thoughts or notions, listen to the evidence and the court's instructions, and decide this case fairly without favor to either party?"

This question, commonly referred to as the "magic question," did nothing to rehabilitate the partial mind of a juror whose opinions were shaped over a lifetime of experience. Only the cold and lifeless appellate record was arguably "rehabilitated" by an affirmative answer to the "magic question," and then only to the extent that it satisfied a very deferential "abuse of discretion" standard of appellate review.

Appellate courts had and still have the final say on whether a trial was fair, but confined to the record, when the appellate courts found that a record had been rehabilitated, the fact remained that the biased juror that decided the case was not. Therefore, the pronouncement from the appellate bench that the parties received a fair trial from the biased juror that answered the "magic question" affirmatively was, in the opinion of this author, merely a legal fiction.

Fictions aside, the reality is that partiality is a purely factual determination and the appellate courts recognized that the trial courts were in a better position to factually judge whether a juror should have been excused for favor. In these instances, it seems as if the appellate courts were merely deferring to the trial court's discretion whenever the "magic question" produced an affirmative response, often in spite of all the other evidence in the record. In truth, while under the great deference given to trial court discretion, the "magic

question" may have rehabilitated the record, but it fell far short of rehabilitating the partial mind of a prospective juror.

The truth of this statement can be easily confirmed by peering into common human experience outside of the courtroom. Outside of the courtroom, it is widely known that rehabilitation is a multi-million dollar industry and even with the skill of psychiatrists, psychologists, counselors, and other highly trained professionals rehabilitation of a person's natural inclinations, if accomplished, often takes years. Moreover, history shows us that preachers, priests, rabbis, and monks have for centuries engaged in efforts to rehabilitate the inclinations of the human mind. If the divinely inspired and professionally trained have great difficulty rehabilitating people, why would anyone interested in Justice believe that one question, a question phrased so that the answer is suggested, will "rehabilitate" an obviously biased juror?

VI. HOW TO DEAL WITH THE REHABILITATION FICTION

The Georgia Court of Appeals recently condemned the practice of juror rehabilitation by trial courts in the landmark case of Walls v. Kim, 250 Ga. App. 259 (2001), cert. granted. The solution, as the Walls court said, is not to rehabilitate, but to excuse the biased juror. However, without the assistance of the parties, this solution works better in theory than in practice.

As a practical matter, parties should gauge the "seriousness" of their case and assist the trial court by requesting an appropriate number of prospective jurors for voir dire so that they can be liberally excused whenever their answers or demeanor cause a reasonable apprehension regarding their impartiality. It is recommended that in "serious" cases a panel of at least 40 prospective jurors be requested when a jury of 12 is sought. In

other cases where the parties or their counsel believe that it will be enormously difficult or impossible to impanel an impartial jury, the parties should consider the only remedy reserved for these circumstances, the rarest of rare in a civil case, a change of venue. However, most cases can be handled by requesting a sufficient number of prospective jurors to be brought up for voir dire. Likewise, the parties will almost certainly be left with at least 24 competent and impartial jurors from which to peremptorily strike. Then the statute governing voir dire has been satisfied since no party was required to use a peremptory strike on a disqualified juror.

VII. HOW TO WIN YOUR FAVOR-BASED CHALLENGES

When a prospective juror causes counsel a reasonable apprehension regarding his or her impartiality, counsel should take steps to crystallize for the court the facts causing the apprehension through a series of further questioning. A great trial lawyer from Athens, Georgia recently published five points that will help counsel develop a stronger challenge when a prospective juror indicates favor. The attorney will want to ask the potential juror additional questions covering the following points:

(1) How long have you held this view?

(2) Is it the result of a dramatic or defining event?

(3) Have you maintained this view throughout voir dire?

(4) Even if you tried to be fair-minded and impartial to the parties, you would still hold this view, wouldn't you?

(5) Are you likely to change this view in the next three to five days?

When these points are covered after a prospective juror indicates favor, counsel is armed with a clear context showing the deep entrenchment of the prospective juror's

partiality. If the favor that caused the apprehension is developed properly, even those who still pretend that the "magic question" is useful must recognize that it serves no purpose in the face of partiality entrenched by the prospective juror's lifetime experience.

VIII. CONCLUSION

Only through a thorough understanding and full appreciation of the fundamentals of the law of voir dire and jury selection can you be sure that your client is receiving a fair trial. The liberal removal of prospective jurors, either on principal grounds or for favor, will ultimately cause all parties to know that there is no "better jury next time." If that is the prevailing sentiment among the parties and their counsel at the conclusion of the case, then the parties will be less likely to appeal. Ultimately, the integrity of our beloved jury system is preserved and faith is restored in our civil system of Justice.

Discovery Issues and Social Media©

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DISCOVERY ISSUES AND SOCIAL MEDIA©

I. INTRODUCTION

Discovery of social media accounts and social networking sites is almost universally requested now. If you have not had the experience that some post or photograph on a social media site significantly affects your case, you will.

Carefully crafted, narrow requests designed to seek material from SNSs that you can show have a good faith basis for obtaining relevant material or material reasonably calculated to lead to the discovery of relevant information likely will be enforced by the Georgia courts—both federal and state. Unfortunately, that is not usually the case. The overbroad, excessive, not targeted, fishing expeditions generally will not be enforced and should not be enforced.

Popular social media sites include:

- Ask.fm
- ClassMates
- Facebook
- Flicker
- Google+
- Instagram
- LinkedIn
- Live Journal
- MeetMe
- Meetup
- Messenger
- myLife
- Pinterest
- Snapchat
- Tagged
- Twitter
- Tumble
- Vine
- VK
- YouTube

One of my favorite overbroad discovery requests for social media is:

> Please produce color and exact screen-shot copies of all pages from any of your social media wall (such as Facebook, Myspace or Google+), personal, or business webpage(s), including, but not limited to, all pictures, profile, message board, status updates and all messages sent or received, existing at and *prior to* the date of this request. If you have deleted anything from this social media account/page, please provide a list of what and when the deletions occurred. Finally, please treat this as a continuing request such that, you should update this disclosure of your social

> media account/page, prior to any court hearing, with any changes after your initial response might be due.

"The Court … cannot ascertain why Defendant would need to read every 'e-mail, voicemail, text message [], multi-media message [], instant message [], on-line content from **social media** services…,posting [], blog [], or other documents or records of activity prepared by or for plaintiffs during their employment'". Rindfleisch v. Gentiva Health Servs., Inc., 2015 WL 12552052, at *3 (N.D. Ga. Feb. 10, 2015) (emphasis in original).

Frequently, the request indicates that in lieu of response, the provider can supply the access codes and passwords for their social media accounts because it is "easier" than trying to print everything out. An example of such a request is:

> Any and all communications, messages, photographs, videos, profiles, status updates, notes, wall postings, other postings, social media applications and any other content and information of any kind sent or received using, or posted to or on, any social networking account registered to and/or controlled by Plaintiff, including, but not limited to, any account(s) registered on Facebook.com, MySpace.com, LinkedIn.com and Twitter.com, from January 1, 20__ to the present. In the alternative, you may elect to identify each and every user name, log-in name, e-mail address and screen name used by Plaintiff to access any social networking site, including, but not limited to, Facebook.com, MySpace.com, Linkedln.com and Twitter.com, from January 1, 20__ to the present, and the corresponding password for each user name, log-in name, e-mail address or screen name identified by Plaintiff to allow full and unrestricted access to Plaintiff's personal information on the respective sites.

Requests such as these are, at a minimum, overbroad[1] and should not be enforced.

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[1] Most sites have some capability to download all postings. For example, Facebook has a tool under "Home", "Account Settings" to "Download a Copy of your Facebook Data", where you can download a copy of the posted Facebook data, including timeline, postings, activity log, messages (note may now be separate as Messenger has split off from Facebook) and photographs. See Jewell v. Aaron's, Inc., 2013 WL 3770837 (N.D. Ga. 2013) (note court did not find downloading burdensome). The tool will create an archive including any photos or videos you have shared on Facebook, your wall posts, messages and chat conversations, and your friends names and some of their email addresses (if allowed in friends' accounts settings). This creates on single document in chronological order. The archive does not include friends' photos and status

II. GENERAL DISCOVERY RULES APPLY

Discovery of social media accounts is an essential part of virtually all litigation today. The courts that have considered discovery of social media consider it under the same rules as any other discovery.

A. GEORGIA GENERAL RULES

The general rules of discovery in Georgia provide that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; …

O.C.G.A. § 9-11-26(b)(1).

Relevant evidence is generally admissible.[2] The Georgia Code defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence

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updates, other peoples' personal information, and comments the account holder has made on other's posts.

This tool will not restore deleted data or include it in the archive, thus, in response to this type of request, the client will have to recall what was deleted. However, the SNSs themselves can access this information. See Romano v. Steelcase, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) (where the court ordered the plaintiff to provide authorization for the defendant to access all her Facebook and MySpace pages including any deleted and archived items

[2] This paper presumes that access to all data has been obtained through legal means. If ESI of a party has already been obtained pre-litigation by the opposing party, counsel must determine

to the determination of the action more probable or less probable than it would be without the evidence." OCGA §§ 24–4–401, 24–4–402. The same rules apply to social media. See, e.g. Blackledge v. State, 299 Ga. 385, 391 (2016) (citing Cotton v. State, 297 Ga. 257, 260 (2015) for proposition that the rules for authentication of social media postings are unchanged from the "old Evidence Code")).

Georgia law does not currently have any express provisions in the Civil Practice Act with regard to discovery of electronically stored information ("ESI"), which would include social media. However, a few Georgia appellate cases have addressed ESI discovery issues. See, e.g., Georgia Emission Testing Co. v. Reheis, 268 Ga. App. 560 (2004) (affirming trial court orders allowing e-discovery and reversing splitting of costs); WGNX, Inc. v. Gorham, 185 Ga. App. 489 (1988) (holding computer records admissible as business records under O.C.G.A. 24-3-14); Cotton v. Eshelman & Sons, Inc., 137 Ga. App. 360 (1976) (ESI admissible).

No reported appellate civil cases in Georgia can be found addressing social media; however, trial courts have entered orders on social media.[3] In Goodman v. Otis Elevator Co., No. 15EV000001D (Fulton Cty State Ct., Order July 2, 2015), the Court ordered the parties to "meet face-to-face in a good faith attempt to agree on the parameters for Plaintiff's production of her social media posts." In a follow up order, the Court ordered production of certain electronic records, but did not further address social media (Order, Sept. 24, 2015). In denying a motion in limine in a medical malpractice case, the court ordered production of all photographs downloaded

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whether such methods were appropriate, and how to handle, if not, so as to avoid liability for her client (and the attorney). See, e.g., Georgia Computer Systems Protection Act, O.C.G.A. §§ 16-9-90, et. seq.; Georgia Electronic Invasion of Privacy Act, O.C.G.A. §§ 16-11-60, et.seq. See also Electronic Communications Privacy Act, 18 USC §§ 2510-2522; Stored Communications Act, 18 USC §§ 2701-2712; Wire Communications Act, 18 USC § 2511.

[3] I'm collecting these orders, so if you know of any Georgia trial court orders on social media, please email them to mprebula@prebulallc.com.

from MySpace and Facebook pages. Sandell v. Delaurier, No. SU 07—CV-2847-SW (Clarke County June 29, 2009).

In criminal appellate cases, Georgia have addressed the authentication and admission of social media. "Documents from electronic sources such as the printouts from a website like [Facebook] are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence." Burgess v. State, 292 Ga. 821, 823 (2013). See also Finley v. State, 298 Ga. 451, 453, 782 S.E.2d 651, 653 (2016) (admitting social media postings to show motive without discussion of the nature of the evidence); Hayes v. State, 298 Ga. 339, 342 (2016) (summarizing evidence including headband with initials defendant was wearing in photograph posted on defendant's social media webpage and in his and friend's user names); Cotton v. State, 297 Ga. 257 (2015) (upheld admission of social media messages on Facebook over prejudice and probative value objections; rejecting authentication as not raised but stating in dicta were authenticated); Hammontree v. State, 283 Ga. App. 739-740 (2007) (approved admitting instant messages from relative's Instant Messenger Account, which was not password protected where there was evidence the party defendant used the account).

B. FEDERAL GENERAL RULES

It is important to note that the federal standards are now different, but the results appear to be the same. Federal Rules of Civil Procedure now provide:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the

> parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FRCP 26(b)(1). It remains to be seen what effect the proportionality standard[4] will have on the discovery of social media accounts.

C. FEDERAL COMMUNICATIONS PROTECTION LAWS

Parties have argued and some courts have excluded social media discovery under the federal communications protections laws.[5] In particular, parties have relied on the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2701, 2702, 3121 & scattered in 18 U.S.C. ("ECPA"), and the Stored Communications Act, 18 U.S.C. §§ 2701-2703 ("SCA").[6] The ECPA was designed to primarily prevent government access to private electronic communications and provided that the government restrictions on wiretaps also applied to electronic communications, prohibited access to stored electronic communications in the form of the SCA, and limited tracing of telephone communications. It was primarily part of criminal law reform. The SCA was originally enacted as Title II of the ECPA.

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[4] See Jonathan E. Moore, Social Media Discovery: It's a Matter of Proportion, 31 W. Mich. U.T.M. Cooley L. Rev. 403 (2014).

[5] See Kristen L. Mix, "Discovery of Social Media", 5 Fed. Cts. Law Rev. 119, 130 (2011).

[6] The ECPA has been amended by the Communications Assistance for Law Enforcement Act of 1994, 47 U.S.C. §§ 1001-1010 ("CAELA"). Both the ECPA and the SCA have been amended by the USA PATRIOT Act, 18 U.S.C. §§ 1, *et seq.,* 18 U.S.C. §§ 2517, *et seq.,* 28 U.S.C. §§ 524, *et seq.,* & a zillion other places, and all of its amendments, extensions, and sunsets.

The SCA which prohibits the production of electronically stored communications, which would include the SMAs and SNSs, but has certain exceptions. Specifically the SCA § 2702 (a)(1) and (2) states:

> (1) A person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and
>
> (2) A person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service.

Some cases held that such laws provided protection from discovery. See Theofel v. Farey-Jones, 359 F.3d 1066, 1071 (9th Cir. 2004) (ECPA protects legitimate interests in confidentiality in electronic communications; and held subpoena for all emails sent or received by anyone at plaintiff's company was overbroad); Crispin v. Christian Audiger Inc., 717 F.Supp.2d 965, 971 (C.D. Cal. 2010) (quashing subpoena to MySpace and Facebook because some of the content was protected by the SCA). As shown below, courts have not generally excluded discovery on this basis in recent cases.

III. GUIDELINES RE DISCOVERY OF SOCIAL MEDIA

In Order to determine whether to allow discovery of social media, courts have provided guidance on a case by case basis by their analysis of certain issues that will control their decisions. These guidelines can help us determine whether we can obtain or defeat discovery requests for social media.

Courts generally follow this analysis:

- Does the party moving to compel have standing to challenge the discovery?
- Is the content requested privileged or protected by privacy or otherwise?

- Is the discovery request tailored so that it is reasonably calculated to lead to admissible evidence, including a factual predicate of relevance? **(Note split of authority below re predicate requirement).**
- Does relevance outweigh any privacy interest?
- Is the discovery request overbroad or a "fishing expedition"?
- If overbroad, should the court deny, narrow the request, or order the requestor to narrow the request?
- Is the discovery request burdensome, including but not limited to, cumulative or duplicative, accessibility, technologic feasibility, cost, time, court time, fees, etc.?
- If burdensome, does the relevancy outweigh the burden?

See Orr v. Macy's Retail Holdings, Inc., 2016 WL 6246798 (S.D. Ga. Oct. 24, 2016)[7]; Jewell v. Aaron's, Inc., 2013 WL 3770837 (N.D. Ga. 2013); Davenport v. State Farm Mut. Auto. Ins. Co., 2012 WL 555759 (M.D. Fla.); and cases cited therein.

A. STANDING

The person objecting to the discovery or moving to compel must have standing. Having a personal interest in the subject matter of the materials sought satisfies the standing requirement. Orr v. Macy's Retail Holdings, Inc., 2016 WL 6246798 (S.D. Ga. Oct. 24, 2016) (court found standing where plaintiff's SMA postings were sought); Crispin v. Christian Audiger Inc., 717 F.Supp.2d 965, 971 (C.D. Cal. 2010) (standing shown because person has personal interest in "his or her profile and inbox" on a SNS) (Note the limitation!).

[7] Note that Westlaw cites this case as **Jacquelyn** v. Macy's Retail Holdings, Inc.

B. NO INHERENT RIGHT TO PRIVACY IN SOCIAL MEDIA ACCOUNTS

While many litigants claim privacy rights in social media accounts ("SMAs"), courts that have addressed the issue have not found such a privacy right, particularly where the SMA is public, posts were voluntary, and the social networking sites ("SNSs") do not guarantee privacy.

1. Expectation of Privacy When Posting—Generally None.

Although as noted above, a few cases have found a privacy right in SNS postings, that does not appear to be the general rule. See Theofel v. Farey-Jones, 359 F.3d 1066, 1071 (9th Cir. 2004); Crispin v. Christian Audiger Inc., 717 F.Supp.2d 965, 971 (C.D. Cal. 2010). Instead, courts generally have found no reasonable expectation of privacy in social media postings.

--Romano v. Steelcase, 30 Misc 3d 426, 907 N.Y.S.2d 650, 2010 N.Y. Misc. LEXIS 4538 (N.Y. Sup. Ct. 2010). Where a litigant voluntarily puts information, documents, and pictures on an SNS, there can be no reasonable expectation of privacy. Court found Plaintiff had no reasonable expectation of privacy. In this personal injury case, where certain pictures were posted on the sites contradicting her contentions that she was confined to her bed due to injuries, the court found the SNSs may contain evidence related to her claims. The court ordered the plaintiff to provide whatever authorization was required for the SNS to provide the defendant with access to her records, including any deleted or archived records.

--People v. Harris, No. 2011-NY080152 (N.Y. Crim. Ct. 2012), the Court noted: "If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world."

2. Read the Disclosures and Policies: SNSs Do Not Guarantee Complete Privacy.

Courts have essentially said, read the service provider rules and policies. Virtually, every SNS advises the user that anything they post is not completely private and may be disclosed to the public.

--Romano v. Steelcase, 30 Misc 3d 426, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010). Facebook and MySpace terms of use for both sites did not guarantee privacy. Thus, one of the best ways to establish that you are entitled to the discovery is to show that the material sought is available to the public (and meet the factual predicate of relevancy, of course.)

--Zimmerman v. Weis Markets, Inc, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187, 2011 WL 2065410, No. CV-09-1535 (Northumberland C.P. May 19, 2011). Facebook and MySpace do not guarantee complete privacy. Facebook's policy states users post at their own risk and the information may become public.

3. Again, Read the Disclosures:
Password Protection or Privacy Settings May Not Be Enough.

--Tompkins v Detroit Metro. Airport, 278 FRD 377, 378 (E.D. Mich. 2012). "Defendant does not have a generalized right to rummage at will through information that the Plaintiff has limited from public view, … but such material is not protected by "common law or civil law notions of privacy."

--Patterson v Turner Const. Co., 88 AD3d 617, 931 NYS 2d 311, (1st Dept 2011). In a personal injury case, the Court reviewed SNS *in camera* and found some of the material relevant or reasonably calculated to lead to the discovery of admissible evidence. The Court held that "[t]he postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery because plaintiff used the service's privacy settings to restrict access, just as relevant

matter from a personal diary is discoverable". The Court required further specification of the material sought, its relevance, and how it contradicted Plaintiff's claims.

--Zimmerman v. Weis Markets, Inc, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187, 2011 WL 2065410, No. CV-09-1535 (Northumberland C.P. May 19, 2011). Public photos on SMAs cast down on Plaintiff's claimed injuries from a work injury. Even though sections were password protected and accessible only to "friends", the Court noted that Facebook and MySpace Defendants argued that the non-public portion of the sites might lead to further evidence. The court ordered plaintiff to provide defendant with all login and password information inferring it was reasonable that additional relevant information was contained within the password-protected portions.

4. The Law Does Not Protect Even Privileged Communications with Third Parties.

--Jewell v. Aaron's, Inc., 2013 WL 3770837 (N.D. Ga. 2013). SNS posts neither privileged nor protected by any right of privacy.

--Tompkins v Detroit Metro. Airport, 278 FRD 377, 378 (E.D. Mich. 2012). SNS posts not privileged nor protected by common law or civil law privacy.

--McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, 2010 WL 4403285, No. 113-2010 CD (Jefferson C.P. Sep. 9, 2010). Plaintiff claimed significant and possibly permanent injuries after he was rear-ended in a cool down lap of a stock car race. After the public portions of his Facebook and MySpace pages revealed comments about a fishing trip and attendance at the Daytona 500 after the alleged injuries, the court granted defendants' request for user names and passwords and read-only access reasoning that such communications were made to third parties and were not confidential.

C. RELEVANCE

In following the general rules for discovery, courts are applying the normal applicable relevancy standards.

1. Threshold Showing or Predicate of Relevance (Note split).

--Jewell v. Aaron's, Inc., No. 1:12–CV–0563–AT, 2013 WL 3770837 (N.D. Ga. July 19, 2013). In class action, requests for SNSs posts from any web site or web page, including Facebook, MySpace, LinkedIn, Twitter or a blog from 2009 to present during working hours for 87 opt-in class members were denied as burdensome. The Court discussed "fishing expedition, failure to make "sufficient predicate showing" that the material was reasonably calculated to lead to the discovery of admissible evidence. Defendant showed only "nothing more than its 'hope that there might be something of relevance'" in the social media posts. Id. (citation and quotation omitted). See also Palma v. Metro PCS Wireless, Inc., 18 F. Supp. 3d 1346, 1348 (M.D. Fla. 2014) (same even though requests narrowed to social media relating to the case and plaintiff's job citing Jewell).

--Martin v. Halifax Healthcare Sys., Inc., No. 612CV1268ORL37DAB, 2013 WL 12153535, at *2–3 (M.D. Fla. Dec. 31, 2013). "The mere possibility that a posting may turn out to be relevant does not establish that the broad nature of material sought is reasonably calculated to lead to the discovery of admissible evidence." The Court noted that postings of the incident had been produced and defendant "failed to establish the relevance of a wholesale production of social network activity by Plaintiffs."

--Keller v. National Farmers Union Prop. & Cas., Co., 2013 WL 27731 (D. Mont. Jan. 2, 2013). Finding that the defendant had not made a threshold showing that the material sought was reasonably calculated to lead to the discovery of admissible evidence, the court denied

the all access request. The court noted that it agreed with this "circumspect approach" to discovery of SNSs.

-- EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. 2010). In a sexual harassment case, defendant sought full access to claimant's Facebook and MySpace accounts asserting that such data would disprove plaintiffs' claims for emotional distress. The court found that the onset of emotional issues and whether other causes were shown on the SNS would be relevant to the case, but limited discovery to postings, profiles, and messages for a set time period and any photographs or videos relating to emotions, feelings, or mental state.

--Rozell v. Ross-Holst, 2006 U.S. Dist. LEXIS 2277, 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006). "The simple fact that a claimant has had social communications is not necessarily probative of the particular mental and emotional health matters at issue in the case. Rather, it must be the substance of the communication that determines relevance."

--Patterson v Turner Const. Co., 88 AD3d 617, 931 N.Y.S.2d 311, (1st Dept 2011). In a personal injury case, the trial court granted a motion to compel SNS. Although somewhat unclear, it appears that upon review, the First Department examined portions of SNS *in camera* and found some of the material relevant or reasonably calculated to lead to the discovery of admissible evidence and ordered production granting a motion to compel. The order was reversed and required further specification of the material sought, its relevance, and how it contradicted Plaintiff's claims.

--Romano v. Steelcase, 30 Misc 3d 426, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010), supra. Finding Facebook and MySpace postings "material and "necessary to the defense" as contradicting plaintiff's claims and deposition testimony.

-- Abrams v Pecile, 83 AD3d 527, 2011 NY Slip Op. 03108 (1st Dept 2011). Upon request to access to plaintiff's social networking accounts, the court denied the request because there was no showing that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims."

But there is a split of authority.

--Orr v. Macy's Retail Holdings, Inc., 2016 WL 6246798 (S.D. Ga. Oct. 24, 2016). The Court notes the split of authority and finds that the FRCP do not require a party to establish relevance or a "threshold showing" before requesting the discovery. Because the physical condition and quality of life of the plaintiff were at issue in the case, and the requestor had properly limited its request to specific categories relevant to these matters and damages, the court denied the motion to quash the subpoena and ordered production of those specific items from the SNS. No revelation as to what Facebook has done in response.

--Giacchetto v. Patchogue-Medford Union Free Sch. Dist, 293 F.R.D. 112, 114 (E.D.N.Y 2013). In this case, the defendant initially sought complete access to the plaintiff's SMA, but then only moved to compel certain categories limited to postings emotional and psychological health, physical damages, and accounts of events alleged. The court found that requiring a relevance predicate is not required by FRCP and "improperly shields from discovery the information of SMA users who do not share any information publicly."

2. Public Documents Indicate Relevant Evidence Might Exist on Other Portions

--McCann v. Harleysville Ins. Co., 78 A.D.3d 1524, 910 N.Y.S.2d 614 (2010). Court required threshold showing that public portions of SNS indicate that relevant information may be found on non-public portions. Defendants wanted complete access to SNS but court found no factual predicate for such access and Court denied. Court states it will conduct a "traditional

relevance analysis". Essentially, the court order production of postings relevant to the incident alleged, emotional and physical claims she made, and damages.

--Zimmerman v. Weis Markets, Inc, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187, 2011 WL 2065410, No. CV-09-1535 (Northumberland C.P. May 19, 2011). Public photos on SMAs cast down on Plaintiff's claimed injuries from a work injury. Defendants argued that the non-public portion of the sites might lead to further evidence. The court ordered plaintiff to provide defendant with all login and password information inferring it was reasonable that additional relevant information was contained within the password-protected portions.

3. "Fair Trial" Demands Justify Discovery of More.

--Romano v. Steelcase, 30 Misc 3d 426, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010). "[T]o permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial." 30 Misc 3d at 429. Court ordered access to current and historical SNS might contain further evidence and needed to ensure fair trial. Also noted that Plaintiff had prevented defense counsel from obtaining information by other means.

D. OVERBROAD AND BURDENSOME

Even if something may be relevant, or remotely possibly relevant, courts deny discovery where no predicate of relevancy is shown and request is overbroad and burdensome. While the analyses in the cases discuss both standards, courts seem to conflate them—can't show it's relevant because it's overbroad; it's overbroad so you cannot just go explore.

--Jewell v. Aaron's, Inc., 2013 WL 3770837 (N.D. Ga. 2013). In class action, requests for SNSs was a hope of finding something was overbroad. Discovery denied. See supra.

--Progressive Ins. Co. v. Herschberg, 2011 N.Y. Misc. LEXIS 2323 (N.Y. Sup. Mar. 30, 2011), a personal injury action, insurer sought discovery for "unlimited access" to the insured's Facebook account. The plaintiff had given testimony with regard to the effect of his injuries including impact on his lifestyle. Insurer showed that the plaintiff's postings of Facebook showed an active lifestyle contrary to his sworn testimony, but court held that the request was overbroad and denied the discovery finding that unlimited access was "unwarranted at this time." Id. at *4.

-- EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. 2010). The court balanced between defendant's request for unlimited access to SNS and EEOC attempt to limit the discovery to information that directly addressed allegations in the Complaint and regarding their individual plaintiff's emotional distress. The court found defendant's request overbroad and the EEOC's request too narrow. The court limited discovery to postings, profiles, and messages for a set time period and any photographs or videos relating to emotions, feelings, or mental state.

--Caraballo v. City of New York, 2011 N.Y. Misc. LEXIS 1038, at *6 (N.Y. Sup., Mar. 4, 2011). [D]igital 'fishing expeditions' are no less objectionable than their analog antecedents." Court denied defendant's motion to compel discovery of plaintiff's SNS data.

--McCann v. Harleysville Ins. Co., 78 A.D.3d 1524, 910 N.Y.S.2d 614 (2010). Court denied Defendants motion for complete access to SNS. First request was overbroad. Court specifically held "fishing expeditions" were not allowed. Defendants refiled seeking photographs and authorization for the Facebook account. Court denied because no found no "factual predicate of relevancy". However, the Court noted that its denial did not preclude the party trying again and laying a proper foundation for discovery of social media.

E. OTHER CONSIDERATIONS

1. Court Review or Not

--Jewell v. Aaron's, Inc., 2013 WL 3770837 (N.D. Ga. 2013). Court reviewed samples from 1 class representative when SNS discovery sought of 87 class members. Denied discovery.

--Fawcett v. Altieri, 2013 NY Slip Op 23010 (Supreme Court, Richmond Cty. 2013). Court basically said this is not the solution because its unmanageable to do so for all litigants or search for "tidbits" of relevant information. Courts don't have time for *in camera* reviews and should not do them absent some good faith basis to make the request for SNSs. He suggested taking a deposition, doing some investigation or surveillance first. The judge also explained that special masters are often used for such review but such costs should be paid by seeking such discovery in a tort case, but shared in commercial or cases.

-- Johnson v. Ingalls 2012 NY Slip Op 03492, — N.Y.S.2d —(3d Dep't 2012). Court reviewed photographs obtained from plaintiff's Facebook account in a personal injury case. Appellate court affirmed judge's decision to refuse to admit the majority, but admit approximately 20 photographs for cross examination, which were relevant to whether or not and the extent of her injuries when she either jumped or fell from a vehicle operated by the defendant.

--Patterson v Turner Const. Co., 88 AD3d 617, 931 NYS 2d 311, (1st Dept 2011). See supra. On review, the court analogized to a redacted diary and stated that the trial court should have conducted an *in camera* review just like in determining if portions of a personal diary should be disclosed in order to protect privacy interests.

2. Court Offers to Set up Facebook Account

--Barnes v. CUS Nashville, LLC, No. 3:09-CV-00764, 2010 WL 2265668 (M.D. Tenn. June 3, 2010). In dispute over Facebook subpoena and obtaining pictures from "friends" on Facebook, Magistrate Judge offered to open a Facebook account, "friend" all involved, and produce the relevant items to the parties. Don't know if the parties took him up on the offer.

3. Work It Out Among Counsel

--Goodman v. Otis Elevator Co., No. 15EV000001D (Fulton Cty State Ct. July 2, 2015) Court ordered the parties to "meet face-to-face" in a good faith attempt to agree on the parameters for Plaintiff's production of her social media posts." There are discovery orders, but no further order addresses social media so presume counsel did so.

IV. AUTHENTICATION.

Authentication of SNS generally follows the same rules as authentication of all other evidence. The same authentication rules apply to electronically stored information ("ESI") as to other evidence. Simon v. State, 279 Ga. App. 844, 847 (2006) (re authentication of emails). We have held that "[d]ocuments from electronic sources such as the printouts from a website like [Facebook] are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence." Cotton v. State, 297 Ga. 257, 259, 773 S.E.2d 242, 245 (2015) (quoting Burgess v. State, 292 Ga. 821, 823(4), 742 S.E.2d 464 (2013)).

The easiest way to avoid authentication issues is to obtain stipulations as to authenticity. Georgia Power Co. v. Jackson Elec. Membership Corp., 2006 WL 692496 (Ga.

P.S.C. slip copy) (stipulation as to authenticity of emails and who emails were transmitted to and from).

Circumstantial evidence may be sufficient. The Simon court held that emails were properly authenticated when the witness communicated with the defendant at his known email address, the witness testified the emails accurately reflected the exchange with the other party, the documents contained "indicia of reliability" including the use of the defendant's nickname and one reference to his email address, and the defendant acknowledged the authenticity of the documents. Simon v. State, 279 Ga. App. at 847.

Courts have given some guidance on authentication of SNS. Where a party can provide sufficient evidence to link the defendant/ alleged user to the SMA, that may be sufficient to authenticate the SMA. In the Interest of F.P., 878 A.2d 91, 94-95 (Pa. Super. Ct. 2005). The court found instant messages ("IMs") "self-authenticating" and admitted them into evidence after comparing them to letters because there was "sufficient evidence" linking the defendant to the messages, including his name and allegations that the victim stole from him.

The Court in Griffin v. Maryland, 19 A.3d at 420, 425 (Md. 2011), suggests three methods by which SNS data could be authenticated:

(1) Provide deposition testimony from the creator or author which attests to the authenticity of the SNS data.

(2) Provide ESI from computers and cell phones about the history of internet usage and which provides an "evidentiary trial" to establish the hardware was the device used to create the SNS profile and posting. Id. at 427-28. A qualified computer consultant can assist with establishing the electronic trail and evidence that will link the creator or user with specific hardware.

(3) Issue subpoenas to the SNS providers for information relative to the creators' or users' accounts and profiles. Id. at 428.

Other courts and administrative agencies have considered the following that may be sufficient to authenticate of social media content:

Social media may be authenticated the same as other documentary evidence through circumstantial means. In Cotton v. State, 297 Ga. 257, 259, 773 S.E.2d 242, 245 (2015), the victim's mother authenticated messages testifying she knew defendant by his nick name, saw videos he posted on YouTube using that name, and saw that his family and friends were Facebook "friends" with a person by that nickname and she could identify him due to posts on Facebook accounts she and her friends had. Id. at 259-260.

Show who has access to pages and whether a third party could have posted the material being offered into evidence. Commonwealth v. Williams, 456 Mass. 857, 926 N.E.2d 1162, 1172 (Mass. 2010) (MySpace pages not properly authenticated where no evidence offered showing who could access pages or whether third party could have written messages being offered). The ease with which a third party could access the social media account may raise issues as to the source of the information posted and as to authentication. Griffin v. Maryland, 19 A.3d at 420, 425 (Md. 2011).

Provide information as to the creator or user of the data being offered. Identifying the creator or user by identifying information such as age, hometown and birth date and a photo is not enough. Griffin v. Maryland, 19 A.3d at 420 (Md. 2011). The "identity of who generated the profile may be confound[ed], because 'a person observing the online profile of a user with whom the observer is unacquainted has no idea whether the profile is legitimate.'" Id. at 421. A picture

and personal information "were not sufficient 'distinctive characteristics'" to authenticate the pages. The Court held that a "greater degree of authentication" was required. Id. at 424.

Show the user account is not fictitious. Fictitious account profiles can be created for abuse. See United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (where woman created a fake MySpace page to flirt with and harass her daughter's former friend, and child committed suicide).

Avoid arguments that information has been manipulated. Where the trial court and counsel agreed that a photo "looked" like the defendant, the court noted that a third party easily could use Photoshop to manipulate photographs on SNS sites, undermining their authenticity as well, and ultimately held photo and MySpace page not properly authenticated. Griffin v. Maryland, 19 A.3d at 420, 425 (Md. 2011). See also People v. Lenihan, 911 N.Y.S.2d 588, 592 (N.Y. Sup. Queens Cty. 2010) (precluding photographs because of potential manipulation through Photoshop).

Offeror must show that the company maintaining the website was the source of the data. United States v. Jackson, 208 F.3d 633 (7th Cir. 2000) (where the defendant offering the evidence did not prove the company maintaining a website was the source of the information posted, the court held the website content was inadmissible hearsay) (note this was not a social media website).

Obtain agreement as to admissibility. Avoid any authentication issues by obtaining agreement. MySpace messages and emails between the defendant and a victim considered properly authenticated where defense counsel had expressly approved their admission. State v. Bell, 2009 Ohio App. LEXlS 2112, at **10-11 (Ohio Ct. App. May 18, 2009).

This paper presents only an overview on SNS discovery. There are now literally hundreds of cases in jurisdictions other than Georgia that will provide guidance on SNS issues as they arise.

Opening Statements

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OPENING STATEMENTS

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General Practice and Trial Institute
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GROUND RULES OF OPENING STATEMENTS

- They are not arguments
    a. Primary source of objections
- Demonstrative exhibits – always get approval beforehand
- Cannot use exhibits unless it is certain they will be admitted (or stipulated to)
- Stating facts which will not be admissible
- Stating personal belief
- Cannot be prejudicial or inflammatory

WHY ARE OPENING STATEMENTS IMPORTANT?

- First chance to tell your client's story
- First opportunity to fully present your theme for the case
- Continue to build rapport with the jury
- Make good first impression in your first chance to talk to the jury directly

LESSONS FROM THE FRONT LINES OF THE CRIMINAL JUSTICE SYSTEM: WHAT I LEARNED ABOUT EFFECTIVE OPENING STATEMENTS

- Use facts as your argument—can be just as persuasive as closing arguments
- Be organized and have a narrative
    - (contrast with voir dire, which is messy, non-narrative)
- Exhibits – to use or not to use? Pros and Cons
- Do not read your notes, do not over-rehearse
- Openings are a clarification tool on the law and the facts
- Tell your story in full—but keep it as short and sweet as possible!
- Preparation is key
- Find your style—be natural and personal, not a salesman
- Have a main theme, think about hidden theme