

**HOW TO PROPERLY REQUEST & OBTAIN
SOCIAL MEDIA THROUGH
ONLINE SEARCHES, DISCOVERY,
MOTIONS & COURT ORDERS**

PART II

2018 SC Bar Family Law Intensive
Asheville, NC
Saturday, November 2, 2018

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**PENDING SOUTH CAROLINA SUPREME COURT
CASE TO WATCH:**

Vanderwege v. Vanderwege

Oral arguments are scheduled before
the SC Supreme Court on

November 28, 2018.

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INTERROGATORY REQUEST... PROPER???

Identify all social media accounts to
which you have had access in the last
three years.

For each account, include the
user name & password
you used to access each account.

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Plaintiff's response:

Plaintiff objects to Interrogatory No. 24. The information sought is **not relevant** to the subject matter of the pending action, or if so, does not outweigh the prejudice to Plaintiff's constitutional **right to privacy**. Further, the information sought does not appear calculated to lead to the discovery of admissible evidence.



TRIAL COURT'S RULING:

This Court finds that this Interrogatory is appropriate,
& that the [Husband] should serve a response within thirty (30) days of this order.



Husband petitioned the SC Supreme Court for a common law *writ of certiorari* & an order staying the proceedings pending resolution.

SC Supreme Court granted Husband's Stay on June 1, 2018.



South Carolina Chapter of the American Academy of Matrimonial Lawyers (SCAAML) accepted the Supreme Court's invitation to file an *Amicus Curiae* brief.

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AUDIENCE PARTICIPATION:

**You are the trial judge.
How would you rule
on the Motion to Compel?**

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You represent H & as part of your Objection to the Interrogatory Request, you file a Motion for a Protective Order. What is the basis for your motion?


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***You are the trial judge.
How would you rule on H's Objection
& Motion for a Protective Order?***

**Sample PROTECTIVE ORDER
(Exhibit 5)**

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You represent Husband.
A certified forensic technology expert
has downloaded all H's social media
posts for the past 3 years.
As his attorney what are you looking
for to include in a ***Privilege Log***?

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Sample PRIVILEGE LOG (EXHIBIT 6)

X v. Y
2018-DR-10-0001

X v. Y
Privilege Log Example

EXHIBIT

6

Bates No.	Description	Privilege
Def. Responses to Plaintiff's First RTP #0001	Email from Y to Minister 1/1/18 10:00 AM and Minister to Y 3/1/18 7:00 AM	Information redacted because it is protected under Priest Penitent Privilege.
Def. Responses to Plaintiff's First RTP #000349-#000422	Private Facebook messages between client and attorney	Information redacted is protected under the Attorney-Client & Work Product privileges.
Defendant's Supplemental Response to Plaintiff's First RFP Six #000466-#000662	Y's Facebook prior to date of marriage	Information is redacted as irrelevant and not reasonably calculated to lead to the discovery of relevant and/or admissible evidence.

WHAT IS A WISE SYSTEM FOR EVERY FAMILY LAWYER TO DO ROUTINELY IN EVERY FAMILY COURT CASE ABOUT SOCIAL MEDIA & ESI?

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As Ashby advised yesterday.....
SET UP A SYSTEM

Have staff member conduct an in-house, online, Internet social media search for all public information available about every single potential client & opposing party

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Check all of the following:

- Facebook
- LinkedIn
- Instagram
- Twitter
- CharlestonCounty.org
- Wayback Machine
- Google
- Basic online search
- Google reverse image search, images.google.com
- UserName search
- Check Tax Records for assets
- See Tim Conlon's book

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How many of you search for arrests & convictions before you meet with a potential client?

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Other website searches

See suggestions in *Electronic Evidence for Family Law Attorneys*, Conlon, Timothy J. and Hughes, Aaron (2017).

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- Bing.com
- Yippy.com
- ZabaSearch.com
- PeekYou.com
- Manta.com
- Archive.org

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TRADITIONAL DISCOVERY REQUESTS

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Interrogatories

Name and platform address of **every social networking platform** used by Plaintiff during **[list specific period of time, such as from the date of marriage/separation/filing to date]**.

Email addresses, usernames, screen names, IM names, user IDs, handles, login name, for every website, social media and blog on which Plaintiff has an account and include any aliases used by Plaintiff on any of these accounts.

- **Do not ask for the opposing party's password.**
- Should you suggest material be subject to an Order of Protection?
- Should Counsel have the opportunity to review the material?
- What if material is subject to a privilege?
- Who should review? 3rd party or *in camera* review by a Judge?

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Requests for Production

Request the materials in their **original, native format.**

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CURRENT SCRPC 26

In General Language states:

Relevant to the *claims and defenses of the parties...*

Note to Rule 26: 2011 Amendments states:

Discovery of electronic evidence must relate to the claims & defenses *asserted in the pleadings*

WHO THINKS THIS NARROWS THE NATURE OF A DISCOVERY REQUEST FOR ESI OR SOCIAL MEDIA?

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**CHANGE THE DEFINITION
OF
“DOCUMENTS”
IN ALL YOUR RFP’s**

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Requests to Admit

- Defendant maintains a Twitter, Facebook, etc account.
- Defendant's Twitter user name is @XXX.
- On July 1, 2014, Defendant posted a tweet stating "can't wait to quit my job tomorrow so I can head to the beach early for July 4th!! #Partynonstop."
- *Other suggestions from the Audience:*

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Allowing the Opposing Party *Unchecked Access* to the Other Party's Social Media Passwords is a

BAD IDEA!

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Social Media Posts

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**If an opposing party can access
other party's social media account,
the opposing party can literally
assume the identity of owner ...**

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Such unauthorized entry could
allow the opposing party to change
the account owner's privacy &
other settings, whether on a
platform or on a smart device itself.

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Protecting passwords *can actually resolve potential
authentication issues* further downstream.

People v. Valdez, 201 Cal. App. 4th 1429 (2011),

Defendant's MySpace account

*Only the person with the password to the account can
upload and edit content on the account pages.*

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If the password remains in the possession of the *original owner*, the argument that data was *corrupted* or *compromised* goes away.

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Protecting Confidential, Privileged Material from Discovery

There are several ways to protect Confidential, Privileged Material from Discovery.

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Traditional:

- Party goes through material,
 - Party creates a privilege log,
 - Party turns over non-privileged material, &
- Litigants then fight over allegedly privileged material.*

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For more involved cases:


EXHIBIT 6, ENTER INTO A CONSENT ORDER OF PROTECTION

Each party has a forensic technology expert;
Each expert has their client's passwords & encryption codes.

1st Responding party has his expert preserve the data;
fishing expeditions are restricted, &
privileged material is protected;

Then, materials are turned over to other expert
to review & examine.


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Or


One independent gatekeeper

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Depositions

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Cellebrite Touch

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**Exhibit 7:
Form Confidentiality Order**

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**SPELL OUT THE EXPERT'S DUTIES'
CLEARLY whether in the Order of
Protection or Confidentiality Order**

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Relevant Federal Laws affecting ESI

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1. Federal Wiretap Act

“[E]lectronic communication’ means any transfer of signs, signals, writing, images, sounds, data...transmitted in whole or in part by a wire, radio...system that affects interstate or foreign commerce, but does not include...any communication from a tracking device...” See 18 U.S.C. 2510(12)(C)(emphasis added).

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2. Stored Communications Act (18 U.S.C. 2701)

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided...” See 18 U.S.C. 2701(a)(1)

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Jennings v. Jennings, 401 S.C. 1, 736 S.E.2d 242 (2012)




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3. The Computer Fraud Act (18 U.S.C. 1030)

“(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains –

(A) Information contained in a financial record of a financial institution, or a card issuer as defined in section 1602(n)(1) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1601 et. Seq.);




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4. Electronic Communications Privacy Act

“Wire communication”

“Oral communication”



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AUDIENCE DISCUSSION & PARTICIPATION

***TYPICAL SITUATIONS THAT
MIGHT ARISE IN YOUR LAW
PRACTICE & HOW TO HANDLE
THEM...***

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Potential client brings a pile of emails she downloaded from her husband's account.

She wants you read them & she starts telling you what is in them.

WHAT DO YOU DO?

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Potential client brings a number of his spouse's texts between his spouse and another male.

He starts telling you what is in the texts.
He wants you to read the text messages.

HOW DO YOU RESPOND?

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REAL CASE SCENARIO

**IDENTIFY THE ISSUES.
WHAT ADVICE WOULD YOU
GIVE?**

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