INSIDE: Are Officeholders' Social-Media Accounts Public Forums? • Libel by Twitter • Preserving Online Evidence

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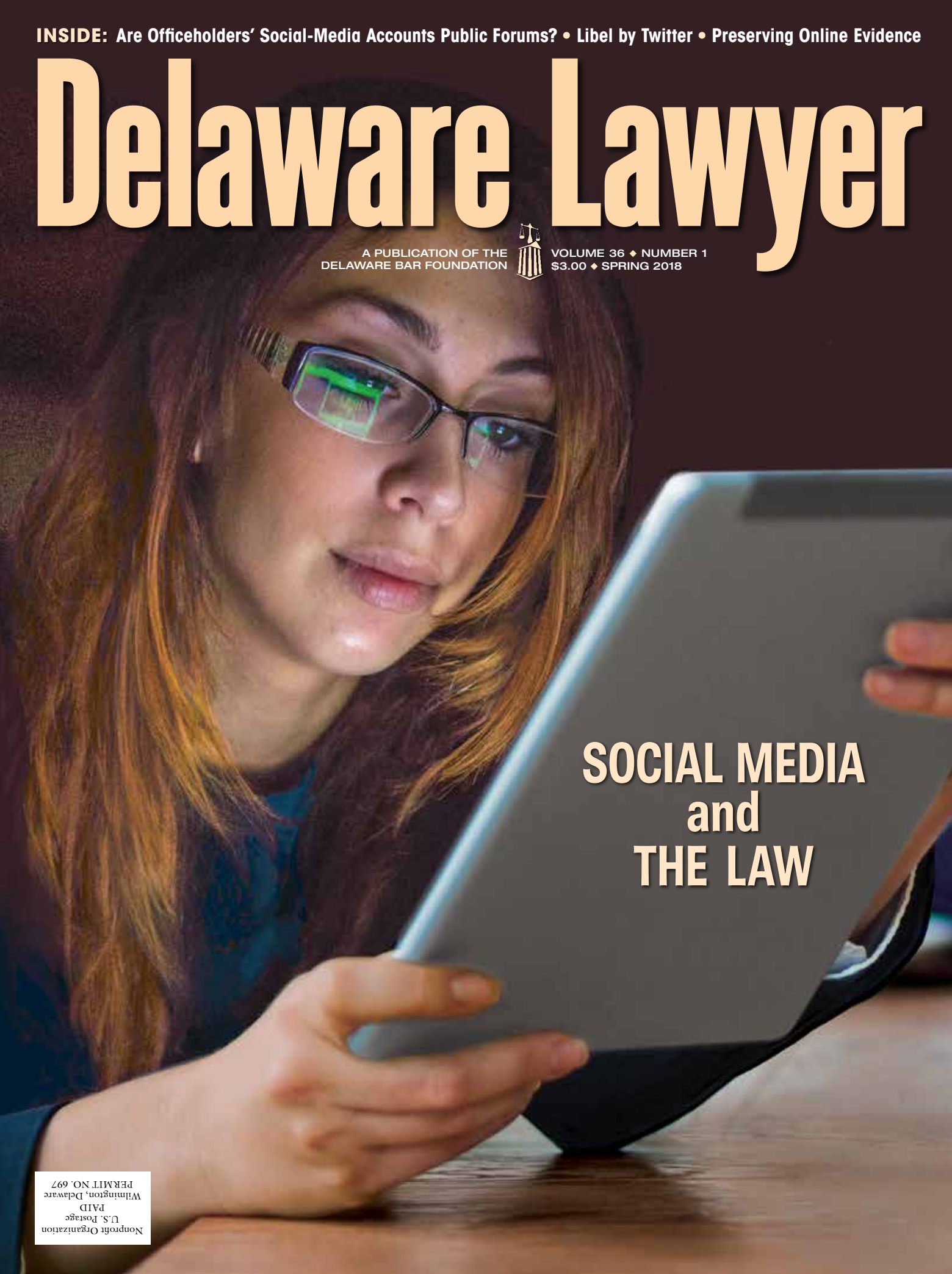

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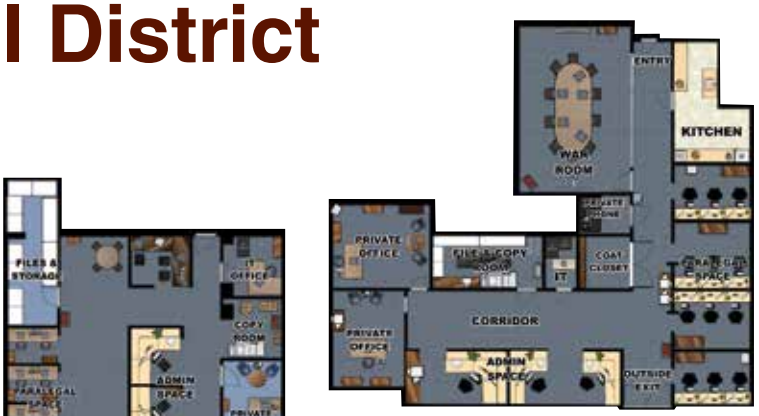

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EDITOR'S NOTE

Rodney A. Smolla

In the early 1960s, before there was an Internet and when most Americans understood television as a choice between ABC, NBC and CBS, the philosopher Marshall McLuhan famously pronounced, "The medium is the message." This issue of the *Delaware Lawyer*, focusing on the law and social media, invites us to reflect on whether McLuhan had it right. What actually matters most, the *medium* or the *message*?

The four principal articles focus on social media in litigation, social media and "the right of publicity" (also known as "appropriation of name or likeness"), social media and libel, and whether the social-media platforms of public officers should be treated as public forums for First Amendment purposes.

These four topics are all intrinsically interesting cuts on the intersection of law and social media, but they are in no sense comprehensive. We might easily come up with another 40 topics illustrating the intersection on issues no less compelling.

Molly DiBianca's article opens with the statement, "Social-media evidence is everywhere and in every court." We might expand Molly's point. Our commerce, our culture, our discourse, our democracy now reside as much in cyberspace as in physical space. As law touches all aspects of human endeavor, it touches all aspects of the cyber world, where so much of human endeavor now resides.

If the Internet generally, and social media particularly, have profoundly transformed our world, the law has struggled to keep up. We labor to apply principles and doctrines developed in the relationships and realities of the physical world to the relationships and realities of the virtual world.

Molly's article is a superb primer on anything and everything a lawyer must consider regarding social media as the lawyer counsels and advocates on behalf of clients contemplating or commencing litigation.

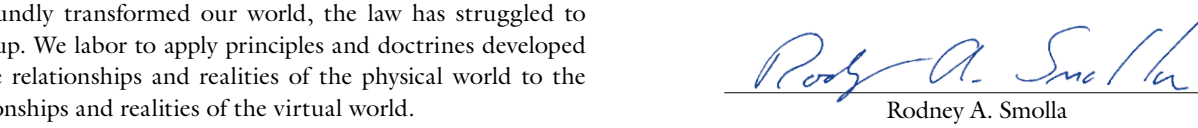
Ashley Messenger, Clay Calvert, and I each focus on how substantive legal doctrines developed in a simpler time get morphed and stressed when placed in the context of modern social media.

Ashley engages in a fascinating exploration of what may happen when common-law doctrines governing the right of publicity meet Twitter.

Clay engages in a similar exploration, examining how the centuries-old law of libel and decades-old First Amendment doctrines that now constrain libel law apply in the context of the Internet, including the impact of the broad immunity Congress created with section 230 of the Communications Decency Act.

My own contribution explores how First Amendment doctrines governing public forums are stressed when applied to the social-media posts of public officials, taking as a principal example (well, who *else*?) President Donald Trump's ubiquitous use of Twitter.

Also, don't miss Bruce M. Stargatt Legal Ethics Writing Competition winner Michelle Streifthau-Livizos' take on whether judges and lawyers can be "friends" on social media.



Rodney A. Smolla

Clay Calvert

is the Brechner Eminent Scholar in Mass Communication in the College of Journalism and Communications at the University of Florida in Gainesville. He also directs the Marion B. Brechner First Amendment Project, which has filed multiple friend-of-the-court briefs with the U.S. Supreme Court in cases involving the rights of free speech, free press and petition. He is the author or co-author of more than 140 law journal articles and is co-author of the market-leading undergraduate textbook *Mass Media Law* (20th ed. 2018, McGraw-Hill Education). He is a member of the State Bar of California and the Bar of the Supreme Court of the United States.

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is Senior Associate General Counsel at National Public Radio, specializing in First Amendment and media law issues. She previously served as Editorial Counsel to *U.S. News & World Report*, a Fellow at the Reporters Committee for Freedom of the Press, and litigation counsel in private practice. She has taught First Amendment law at the University of Michigan Law School and media law at American University. She is the author of a textbook, *A Practical Guide to Media Law*, and is a former radio talk show host.

Rodney A. Smolla

is Dean of the Delaware Law School of Widener University. He was previously President of Furman University, and the Dean of the Washington and Lee and the University of Richmond Law Schools. He was Director of the Institute of Bill of Rights Law at William & Mary, and Senior Fellow of the Annenberg Washington Program of Northwestern University. He is the author of many legal treatises, books and articles on constitutional law, media law and civil rights law. He remains an active litigator and has presented oral argument in state and federal courts throughout the country, including the United States Supreme Court. He became a member of the Delaware bar in 2016.

Ashley Messenger

The Right of Publicity in Social Media

When does corporate communication cross the line from protected expressive "speech" to commercial promotion?

This article was inspired by a tweet:[1] The image above was tweeted by Chevrolet, a corporation that makes the iconic Chevy Corvette, in reference to the death of singer Prince, famous for a song entitled "Little Red Corvette," whose chorus contains the line "Baby, you're much too fast." The tweet clearly features one of the company's premier products and also clearly references a famous person.

Most American jurisdictions recognize a cause of action for infringing "the right of publicity" or for "appropriation of name or likeness."[2] The tort, typically classified as a form of invasion of privacy, arises from the unauthorized appropriation of a person's name or likeness for the defendant's own benefit.

Most jurisdictions require that the appropriation be for a "commercial purpose."[3] Some states apply the tort in a manner that extends beyond a literal appropriation of the person's name or likeness, applying it more broadly to an appropriation of a plaintiff's "identity" or "image" for commercial purposes.[4]

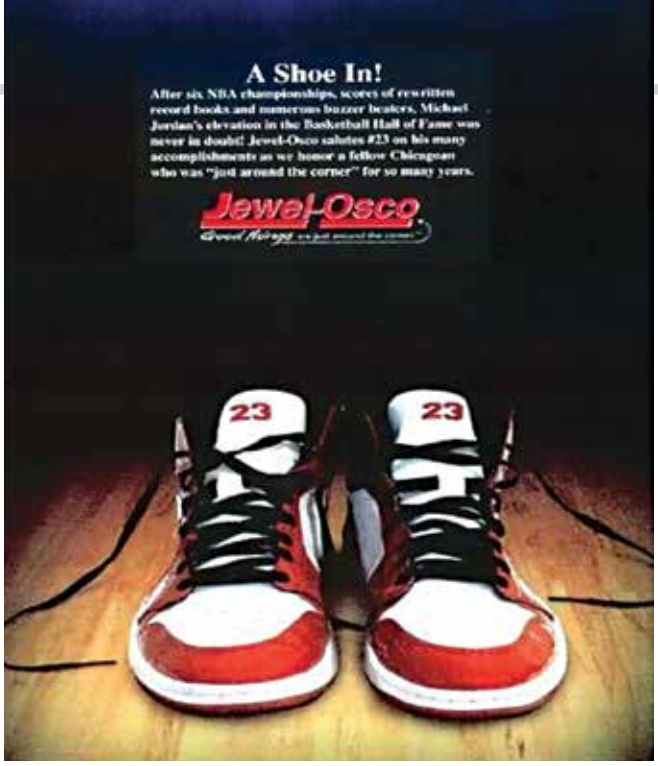
There are some jurisdictions in which the case law might support a claim for violating Prince's right of publicity because the tweet invokes his image,[5] and yet the speech at issue is clearly commentary of a matter of public concern, which would ordinarily be protected by the First Amendment. The question is whether such social-media commentary is "commercial."

What is Commercial?

Courts are clear on the principle that only "commercial" uses are actionable for the purpose of right of publicity claims.[6] "Expressive" works, on the other hand, like books, films, newspapers and art, are protected by the First Amendment, even when they are sold for profit.[7] Yet as simple as that distinction seems, numerous cases wrestle with the question of what is a "commercial" versus "expressive" use of a name or likeness.[8]

In many cases, the use at issue has some expressive elements and some commercial elements. It has proven to be difficult to draw a clear line to distinguish commercial from protected uses. States have created various tests to make that determination.[9] Because these tests give different weight to different factors, the outcome of a case could easily be very different depending on the jurisdiction in which the case is filed.

This is one complaint that many national companies have — that there is no clear, consistent standard to which they



will be held to guide their decision-making. Or, more accurately, the Supreme Court has failed to establish a clear guideline for what kind of use would be protected by the First Amendment.

The only publicity case to reach the Supreme Court contained a highly unusual set of facts, involving the filming and broadcast of an entire human cannonball act, and the decision provides little guidance as to how the First Amendment relates to commentary about celebrities.[10] Thus, speakers lack the ability to gauge whether their speech will have constitutional protection if the context could remotely be considered commercial.

Commercial Speech and the First Amendment

Even if speech is determined to be "commercial" rather than "expressive," the Supreme Court has ruled that commercial speech is entitled to some degree of First Amendment protection.[11] The Court affirmed in *First National Bank of Boston v. Bellotti* [12] that corporations have a First Amendment right to comment on issues of public concern.

In striking down a state campaign finance provision, the Court ruled that "the question must be whether [the law] abridges expression that the First Amendment was meant to protect." [13] The Court stated that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source . . ., " noting that no one would suggest that the speech at issue should be restricted if the speakers were not corporations.[14]

The Court in *Bellotti* also noted that media companies have broad First Amendment rights,[15] yet "the press does not have a monopoly on either the First Amendment or the ability to enlighten."[16] The First Amendment prohibits the government from "limiting the stock of information from which members of the public may draw." [17]

> In *Jordan v. Jewel Food Stores, Inc.*, the court found that the speech constituted "image advertising," which might help the brand, and therefore is commercial.

But the Court later carved back its expansive view of corporate expression in *Bolger v. Youngs Drug Products Corp.*[18] The Court had to determine whether informational pamphlets distributed by a condom manufacturer were "commercial." The pamphlets discussed "important public issues such as venereal disease and family planning." [19] However, they also mentioned Trojan-brand condoms, the product sold by the company.

In an unfortunately brief analysis, the Court concluded that the pamphlets were commercial. The Court said that "the reference to a specific product does not by itself render the pamphlets commercial speech," and the fact that the company had "an economic motivation for mailing the pamphlets" was insufficient to turn the materials into commercial speech, but the combination of factors supported the conclusion that the speech was commercial.[20]

The impact of *Bolger* and its relatively light analysis is most evident in the Seventh Circuit's decision in *Jordan v. Jewel Food Stores, Inc.* [21] The facts of the case are relatively straightforward: Michael Jordan, a famous basketball player, was inducted into the Basketball Hall of Fame. *Sports Illustrated* published a commemorative issue focusing on Jordan's career. Jewel was offered a page of advertising space in exchange for carrying the issue in its stores.[22]

Jewel's "ad," which consisted of a congratulatory message, ran on the inside back cover and said:

> After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.[23]

The ad also featured a large photo of a pair of basketball sneakers with #23 on them and the Jewel-Osco logo was centered on the page.[24]

The content of the speech — a congratulatory message and praiseful commentary — is something that we would typically recognize as expressive speech. In fact, the message could easily have been part of any of the articles in the magazine. The photo of the sneakers could also have illustrated any of the stories. The only thing that identified the message as an "advertisement" was the Jewel-Osco logo and the reference to the store's tagline, "just around the corner." No product was advertised, there was no

call to action and the focus of the message was entirely on Jordan's accomplishments.

The *Jordan* court specifically relied on *Bolger*. Even though the ad didn't propose a commercial transaction or refer to any specific product, and the literal import of the words was clearly noncommercial,[25] the court found that the speech constituted "image advertising," which might help the brand, and therefore is commercial. The opinion indicates that anything that is not "product advertising" is "image advertising," and merely by existing, it is inherently commercial.

Ironically, the entire *Sports Illustrated* issue, while sold for profit, is entirely protected. The court said that Jewel-Osco's speech was clearly noncommercial, but it distinguished the ad from the other editorial content because "[i]t isn't an article, a column, or a news photograph or illustration."[26] In essence, even though the ad delivered the same congratulatory message, the fact that it wasn't in the form of an article was problematic in the court's view.

The court failed to recognize that there are other models for corporate speech that reference a brand without being an "advertisement" or "commercial." For example, noncommercial public broadcasters have relied on corporate sponsorships for decades and the FCC has established very clear guidelines for determining what counts as a "noncommercial" corporate sponsorship.[27]

Sponsorship messages — which the FCC distinguishes from "commercial advertising" — may contain brand names and/or refer to products or services, but may not include qualitative or comparative language. They may also include logos or slogans as long as they are there to identify the sponsor rather than promote it.[28] Price or savings information, calls to action (*e.g.* "stop by our showroom"), or inducements (*e.g.* "special gift for the first 50 customers") are "commercial," but neutral references to the brand itself are not.[29]

Sponsorship messages — which the FCC distinguishes from "commercial advertising" — may contain brand names and/or refer to products or services, but may not include qualitative or comparative language.

Thus, a court need not determine that every corporate statement that might generate goodwill is "commercial."

In fact, other courts have found that businesses are entitled to First Amendment protection when right of publicity issues arise. For example, in *New York Magazine, Inc. v. Metropolitan Transportation Authority*,[30] the Second Circuit protected an advertisement for *New York Magazine*, poking fun at Mayor Rudy Giuliani, which featured the magazine's logo and the line, "Possibly the only good thing in New York Rudy hasn't taken credit for."

Similarly, in *Joe Dickerson & Assoc., LLC v. Dittmar*,[31] the Supreme Court of Colorado protected a company's newsletter, even though it was for marketing purposes, noting that "the content of the speech, not the motivation of the speaker," determines whether the speech is commercial or not.[32]

Corporate Speech in Social Media

The question, then, is whether corporate speech in social media is always "commercial" speech. On one hand, the speech has the potential to create an economic benefit to the company. Speech in social media would seem to always count as "image advertising" as the court in Jewel described.

On the other hand, corporate speech in social media can be expressive. The Corvette ad shown at the top of this article is a perfect example. I don't know what Corvette executives thought about Prince's song, "Little Red Corvette," but I would guess that Corvette has gained incalculable benefit from the reference over the years insofar as the song associated the Corvette brand with being very fast and very sexy. The company's post feels like a direct response to Prince's speech about them, a thank you of sorts, from one "person" to another.[33]

Many corporate social-media posts are consistent with media uses but are accused of violating publicity rights only because the poster is the "brand." For example, an actress sued over the tweet above.

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Tabloid magazines that feature celebrities performing ordinary tasks like shopping or eating food would not be liable for associating the celebrity with the product they are using because the use is editorial.[34] And if any person — whether an ordinary citizen or a paparazzo — tweeted a photo of the actress, commenting on her visit to Duane Reade, the use would likely be protected.

The basis for liability seems to be only that the tweet was posted from the official Duane Reade Twitter account.[35] In essence, everyone in the world *except Duane Reade* could tweet exactly the same thing with impunity. And that raises some interesting questions.

Could the CEO of Duane Reade tweet the image from his personal account? Could an intern? Could Duane Reade retweet someone else's tweet of the image? Are all such tweets "commercial" just because there may be some benefit to the company? Should we consider the expressive context of the tweet or only take into account the source?

Social media shows that the line between promotion and expression is very thin. But social media also has an important quality that distinguishes it from traditional advertising: notably, the ability to respond.

When a company refers to a person on social media, they run the risk of the person using the platform to object. Imagine tweeting about Katherine Heigl shopping in your store and, instead of suing, she simply replies something to the effect that the store was a mess, staff was rude, and she has no intention of returning.

And the public can respond too. When Carrie Fisher died, Cinnabon tweeted an image that looked like Princess Leia with Cinnabon rolls in lieu of her iconic hair twists, and the public backlash was so strong that Cinnabon deleted the tweet and apologized.[36]

In many cases, a brand's effort to portray itself positively will backfire, and that possibility alone will certainly provide a chilling effect on abusive, exploitative references to celebrities without the need for the law to infringe First Amendment rights. At least in the case of social media, there is a self-corrective mechanism that can be employed that should alleviate any "harm" to the extent the interests being protected are related to protecting privacy or truth (*i.e.* not falsely associating a person with a brand).

The question of how corporations may speak in the realm of social media takes on greater importance as the Supreme Court has acknowledged the role of social media as the new town square.

Moreover, the question of how corporations may speak in the realm of social media takes on greater importance as the Supreme Court has acknowledged the role of social media as the new town square.[37]

To the extent the law seeks to protect an economic interest — to ensure that people make money from the use of their name or likeness — that interest should always yield to legitimate First Amendment rights.[38] The law should provide breathing room for the expressive aspects of corporate speech, especially in social media, rather than dismiss all commentary as marketing or "image advertising" and therefore commercial. ◆

NOTES

1. This article is adapted from a law review article that appeared in *Widener Law Review*. Special thanks to Meenakshi Krishnan for research assistance.

2. *See* Rodney Smolla, *Law of Defamation*, § 10.4 (2017 Update).

3. *Id.* § 10.4.

4. *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (applying the right of publicity to an "avatar" resembling Rutgers University college football quarterback Ryan Hart in a videogame).

5. To be clear, no lawsuit has been filed to my knowledge. Prince died in Minnesota, which is one of the states that does not recognize the descendibility of publicity rights.

6. *See, e.g., Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (advertisement for cars); *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (advertisement for electronics); *Henley v. Dillard's Dept. Stores*, 46 F. Supp. 2d 587 (N.D. Tex. 1999) (advertisement for shirts).

7. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (holding that a magazine spread featuring an actor in an evening gown does not violate publicity rights); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (finding that a book mentioning the plaintiff does not violate publicity rights); *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003) (holding that a comic book does not violate publicity rights); *Stewart v. Rolling Stone, LLC*, 105 Cal. Rptr. 3d 98 (Cal. Ct. App. 2010) (holding that a magazine feature surrounded by advertisements does not violate publicity rights of the bands spotlighted in the feature); *Polydoros v. Twentieth Century Fox Film Corp.*, 79 Cal.Rptr.2d 207 (Cal. Ct. App. 1997) (holding that the film "The Sandlot" does not violate publicity rights); *Montana v. San Jose Mercury News*, 40 Cal.Rptr.2d 639 (Cal. Ct. App. 1995) (holding that a poster of quarterback as part of newspaper's football coverage was not a violation of his publicity rights); *Tyne v. Time Warner Enter. Co.*, 901 So. 2d 802 (Fla. 2005) (ruling that the film "The Perfect Storm" does not violate publicity rights). But *see Parks v. LaFace Records*, 328 F.3d 437 (6th Cir. 2003); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

8. *See Toffoloni v. LFP Publ'g Grp., LLC* (*d.b.a. Hustler Magazine*), 572 F.3d 1201 (11th Cir. 2009); *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003); *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001); *Benavidez v. Anheuser-Busch, Inc.*, 873 F.2d 102 (5th Cir. 1989); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (Cal. App. 2010); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003)

9. *See, e.g., Comedy III Productions v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (applying the "transformative use" test); *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (works should be protected unless the use of the likeness is "wholly unrelated" to the work or is "simply a disguised commercial advertisement for the sale of goods or services."); and *Doe v.*

TCI Cablevision, 110 S.W.3d 363 (Mo. 2003) (finding that a comic book with a character inspired by a real-life hockey player was not protected by the First Amendment, using the "predominant use" test).

10. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

11. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

12. 435 U.S. 765 (1978)

13. *Id.* at 775-76.

14. *Id.*

15. *Id.* at 777 n. 14 and 781.

16. Id. at 782.

17. *Id.* at 783.

18. 463 U.S. 60 (1983).

19. *Id.* at 68.

20. *Id.* at 67.

21. 743 F.3d 509 (7th Cir. 2014).

22. *Id.*

23. *Id.* at 512.

24. *Id.*

25. "It's clear that the textual focus of the ad is a congratulatory salute to Jordan on his induction into the Hall of Fame. If the literal import of the words were all that mattered, this celebratory tribute would be noncommercial." *Id.* at 517.

26. *Id.* at 519.

27. *See Commission Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, 97 F.C.C. 2d 255 (1984); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 7 F.C.C. 3d 827 (1992) (FCC 86-161).

28. *Id.* at 262-63.

29. *Id.*

30. 136 F.3d 123 (2d Cir. 1998).

31. 34 P.3d 995 (Colo. 2001).

32. *Id.* at 1004 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (criticizing the use of speaker motivation to determine whether a use is commercial); *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989).

33. *Cf. Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

34. *See, e.g., Hoffman v. ABC/Capital Cities*, 255 F.3d 1180 (9th Cir. 2001).

35. The case eventually settled and no court opinion was issued to provide guidance on whether truthful statements about celebrities using a product would be protected. Eriq Gardner, *Katherine Heigl Ends Lawsuit Over Duane Reade Tweet*, Hollywood Rep. (Aug. 27, 2014, 12:20 PM PT), http://www.hollywoodreporter.com/thr-esq/katherine-heigl-ends-lawsuit-duane-728552.

36. Carly Mallenbaum, *Cinnabon Deletes, Apologizes for Carrie Fisher Tweet After Backlash*, USA TODAY (Dec. 27, 2016, 9:47 AM ET), http://www.usatoday.com/story/life/people/2016/12/27/cinnabon-tweets-deletes-carrie-fisher-tweet-after-backlash/95893594.

37. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (U.S. 2017) ("With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events [social networking sites like Facebook, LinkedIn, and Twitter], checking ads for employment, speaking and listening in the *modern public square*, and otherwise exploring the vast realms of human thought and knowledge.") (emphasis added).

38. *See, e.g., Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016).

Clay Calvert

Libel by Online Social Media

Section 230 immunity gives interactive computer services wide protection from defamation actions.

Can a tweet — a message of 280 or fewer characters posted on a medium known for righteous rants and instant outrage — land you in a libel suit? Yes — just ask Oscar-nominated and Emmy Award-winning actor James Woods.

In January 2018, a federal judge in *Boulger v. Woods*[1] tossed out a libel case against *The Onion Field* actor stemming from a Twitter-posted message. Woods' tweet falsely suggested plaintiff Portia Boulger gave a Nazi salute during a March 2016 campaign rally in Chicago for then-presidential candidate Donald J. Trump. Boulger, in fact, was a Democrat and a pledged convention delegate for Bernie Sanders.

Replete with the hashtags Twitter users adore, Woods' tweet read: "So-called #Trump 'Nazi' is a #BernieSanders agitator/operative?" The actor supplemented those words by reposting from another Twitter user a photo of a woman giving a "Heil Hitler" gesture, accompanied by a caption incorrectly identifying her as Boulger.

Woods was fortunate to escape liability. His use — strategic or otherwise — of a question mark at the end of his tweet spared him from a lengthy legal battle.

That's because U.S. District Judge George C. Smith held that "the question mark leaves open the real possibility that reasonable readers would interpret the tweet as a mere inquiry signaling Woods's lack of certainty and inviting his followers to reach their own conclusions"[2] rather than as a factual assertion.

And because the case was tried under Ohio law, which recognizes the innocent construction rule (if a statement is susceptible of two meanings, one defamatory and one not, the court adopts the innocent one), Smith dismissed the case. In brief, Woods' question-mark tweet constituted an innocent, non-defamatory construction. Lest one think that tacking on a question mark is a sure-fire formula for dodging a libel case, Judge Smith cautioned that the case's outcome was "not to say that questions are automatically insulated from liability for defamation as a

matter of law. Many courts . . . have recognized the possibility that questions may function as factual assertions depending on the circumstances." [3]

Interestingly, *Boulger* was not the first libel suit over a tweet involving James Woods. In 2015, the actor was on the other end of a dispute, suing an anonymous Twitter user who accused him of being a "cocaine addict." [4] Such a factual allegation is defamatory because it imputes criminal conduct to Woods and attacks his personal habits and character. A California judge refused to dismiss Woods lawsuit[5] and the anonymous poster later died, cutting off the appeals process.[6] Woods wound up with a letter from the deceased defendant's attorney stating that his client and his client's family "are not aware of any facts to suggest that Mr. Woods has ever been a cocaine addict or used any other drugs." [7]

Regardless of the somewhat unusual endings in the James Woods lawsuits, they — along with other recent high-profile libel suits filed against the likes of Courtney Love[8] and Donald Trump[9] based on their tweets — evidence the perils and pitfalls of spouting off on social-media platforms like Twitter and Facebook.

For the record, the president — the man who says he wants to open up libel laws — wiggled off the legal hook in January 2017 in *Jacobus v. Trump* because a judge determined his tweets, perhaps unsurprisingly, were protected as "loose, figurative, and hyperbolic" expressions of opinion akin to a "political dispute cum schoolyard squabble." [10]

Indeed, Trump had tweeted the plaintiff was a "major loser" and "a real dummy" who had "zero credibility." [11] Such name calling — albeit sad, as the president might say — has long been protected.

Libel by Twitter — twibel, in portmanteau parlance — is real. And while some courts find that the rough-and-tumble rhetoric often found on Twitter affects the determination of whether a tweet is a factual assertion (actionable) or an opinion (non-actionable),[12] the same traditional elements of defamation generally apply to lawsuits based on tweets just as they do to cases involving printed newspapers and books.

Recently, Section 230 has shielded Twitter and Facebook from lawsuits claiming they provide material support to terrorist organizations by permitting their content.

The five basic elements of a defamation lawsuit, as the Supreme Court of Delaware recently reaffirmed, "are: (i) a defamatory communication; (ii) publication; (iii) the communication refers to the plaintiff; (iv) a third party's understanding of the communication's defamatory character; and (v) injury." [13] The central injury of, course, is harm to one's reputation stemming from a false statement of fact, with redress for reputation being recognized under the Delaware Constitution.[14]

But there is one very important difference between old-school defamation lawsuits and those involving statements posted on Internet-based platforms such as Twitter, Facebook, newspaper websites and online review platforms like Yelp. That distinction is the civil immunity granted by federal statute to websites that merely host content created and generated by third parties.

Specifically, Section 230 of the Communications Decency Act of 1996 states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." [15] This so-called Good Samaritan provision typically means that Twitter, Facebook, Yelp and other sites are immune from liability for defamatory remarks posted by third parties.

Social-media websites thus are treated more like distributors — akin to newsstands and bookstores — rather than publishers. In practical terms, this means Portia Boulger could sue James Woods for his tweet, but she could not sue Twitter for hosting that tweet.

In one high-profile defamation case, the U.S. Court of Appeals for the Sixth Circuit in 2014 held that Section 230 shielded a website — aptly called The Dirty — and its operator, Nik Richie, from liability for defamatory comments posted by an anonymous user about a high school teacher and Cincinnati Bengals cheerleader named Sarah Jones.[16] The website instructed users to "[t]ell us what's happening. Remember to tell us who, what, when, where, why."

In brief, Jones contended the website solicited defamatory content. But the Sixth Circuit held that "[b]ecause (1) the defendants are interactive service providers, (2) the statements at issue were provided by another information content provider, and (3) Jones's claim seeks to treat the defendants as a publisher or speaker of those statements, the [Section 230] bars Jones's claims." [17]

Section 230 is broadly construed by courts to protect Internet service providers and interactive computer services in a wide variety of civil liability situations, including ones stretching far beyond the confines of libel law. For instance, the U.S. Court of Appeals for the Fifth Circuit held in 2008 that Section 230 shielded MySpace from civil liability based on negligence and gross negligence claims in a case involving a 14-year-old girl who was sexually assaulted by a man who initiated contact with her through that social network.[18] More recently, Section 230 has shielded Twitter and Facebook from lawsuits claiming they provide material support to terrorist organizations by permitting their content.[19]

Are such results correct? Section 230 was intended "to promote the continued development of the Internet and other interactive computer services and other interactive media" [20] and "to preserve the vibrant and competitive free market that

presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[21] But that was 22 years ago — akin to a century or so online, given how swiftly change occurs on the Internet.

Recent decisions in which the website Backpage.com* has been shielded by Section 230 from liability for hosting user-generated ads allegedly for prostitution, including underage women who are trafficked for sex, are promoting reconsideration of the statute's broad scope.[22] In ruling in one such case in 2016, the U.S. Court of Appeal for the First Circuit suggested that while its hands were tied, Congress needed to step in to amend Section 230. As the First Circuit put it:

> The appellants' core argument is that Backpage has tailored its website to make sex trafficking easier . . . [and] the appellants have made a persuasive case for that proposition. But Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to Internet publishers. Showing that a website operates through a meretricious business model is not enough to strip away those protections. If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.[23]

SESTA would amend Section 230 to eliminate immunity for the operators of websites that knowingly assist, support or facilitate advertising for the sale of unlawful sex acts with sex trafficking victims.

In 2017, Congress took action with Senate Bill 1693, better known as the Stop Enabling Sex Traffickers Act of 2017 (SESTA). Introduced by Ohio Senator Rob Portman, SESTA would amend Section 230 to eliminate immunity for the operators of websites that knowingly assist, support or facilitate advertising for the sale of unlawful sex acts with sex trafficking victims. It would also allow state attorneys general to file civil actions against such website operators on behalf of residents who are sex trafficking victims. The measure initially faced immense pushback from Silicon Valley giants like Google and Facebook, but that has changed.[24] The bill was still pending in March 2018.

Another pending federal measure that would also affect Section 230 is House Bill 1865, known as the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA). Both bills have been blasted by the Electronic Frontier Foundation (EFF), which describes itself as "the leading nonprofit organization defending civil liberties in the digital world."[25] As a December 2017 EFF posting stated, "[o]ne of the most egregious problems with FOSTA and SESTA is the difficulty of determining whether a given posting online was created in aid of sex trafficking."[26]

Ultimately, while Section 230 provides critical immunity to the likes of Twitter and Facebook in defamation cases, the Backpage.com and terrorist cases are testing its limits and giving it growing pains. One can reasonably expect further efforts to rollback its sweep. Whether those bills ultimately are successful or effective remains to be seen. ◆

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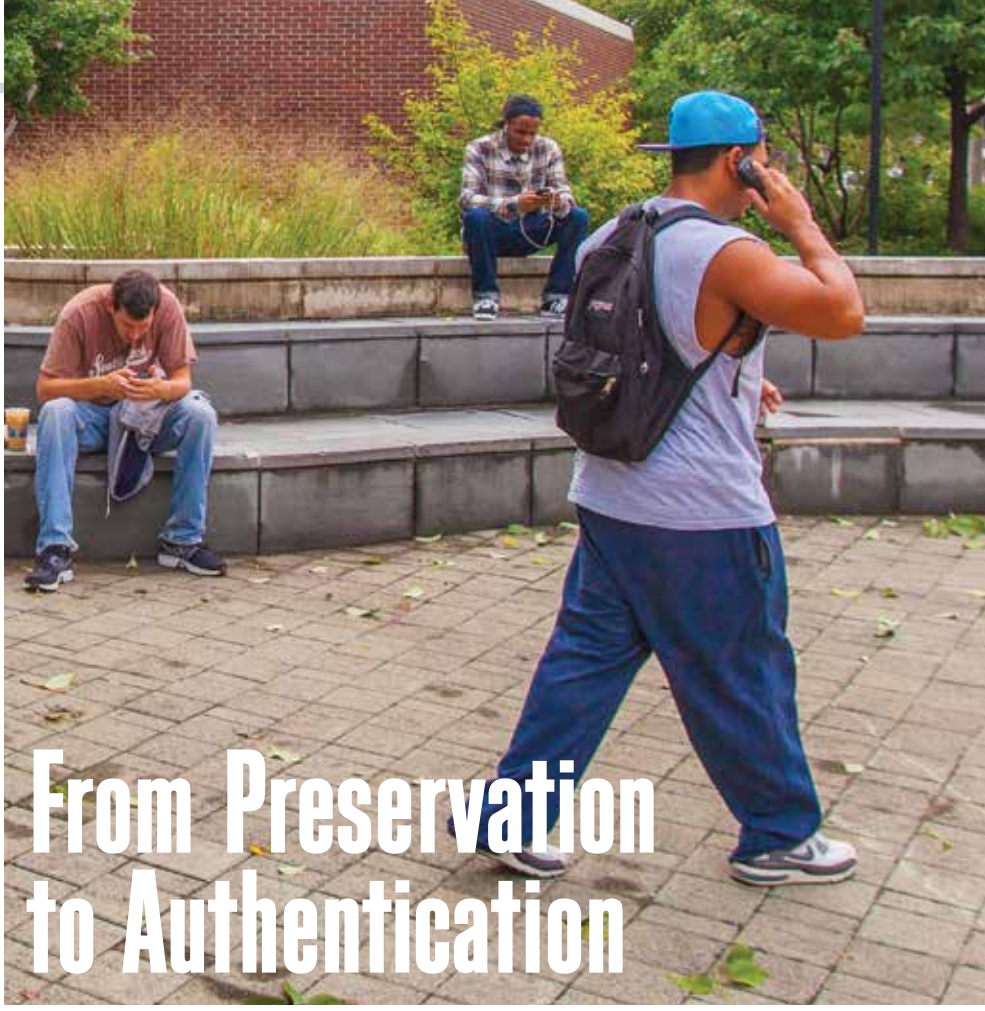
**Editor's Note: As this article went to press, it was announced that Backpage.com's servers had been seized following a raid by federal and state agencies.*

NOTES

1. 2018 U.S. Dist. LEXIS 11156 (S.D. Ohio. Jan. 24, 2018).
2. *Id.* at *29.
3. *Id.* at *27.
4. Complaint, *Woods v. Doe*, No. BC589746 (Cal. Super. Ct. Los Angeles Cnty. July 29, 2015), http://www.thebloomfirm.com/wp-content/uploads/2016/02/2015.07.29-COMPLAINT-Woods-FILED-Complaint.pdf.
5. Order, *Woods v. Doe*, No. BC589746 (Cal. Super. Ct. Los Angeles Cnty. Feb. 8, 2016), http://www.thebloomfirm.com/wp-content/uploads/2016/02/WOODS_Ruling-020816.pdf.
6. Eriq Gardner, *James Woods Drops Lawsuit Over "Cocaine Addict" Tweet After Getting Trophy Letter*, Hollywood Rep., July 19, 2017, https://www.hollywoodreporter.com/thr-esq/james-woods-drops-lawsuit-cocaine-addict-tweet-getting-trophy-letter-1022660.
7. *Id.*
8. *Gordon & Holmes v. Love*, 2016 Cal. App. Unpub. LEXIS 755 (Cal. Ct. App. Feb. 1, 2016 unpublished).

See **Libel** *continued on page 30*

Molly DiBianca



Social-Media Evidence: From Preservation to Authentication

A primer on attorneys' obligations to collect, retain and produce evidence from social-media channels.

Social-media evidence is everywhere and in every court. From the divorce case in which one spouse's changed Facebook status from "Single" to "In a relationship" was a factor in the reduction of alimony payments, to the intellectual-property case in which the plaintiff asserted claims for trademark infringement based on the defendant's allegedly infringing logo, which could be found on the defendant's Facebook page — social-media evidence is ubiquitous and unavoidable.

Although lawyers may be inclined to shy away from social media out of fear of the unknown, our ethical obligations require us to deal with social-media evidence head on. This article lays out the basics for the preservation, collection, production, authentication and introduction of social-media evidence.

Step One: Warn

First things first. At the outset of a new engagement, consider a warning to your new client. Lawyers who represent individuals, for example, commonly include a provision in engagement letters specifically warning clients of the risks of social-media use while their case is ongoing.

But, while the engagement-letter option may protect you against malpractice, it does not do much to help assist the client from harming his case with misdirected social-media posts. So help your client help himself.

Consider whether you should request that your client cease all social-media activity until the case is complete. If that request seems too drastic (or your client seems unlikely to comply), consider whether you should advise your client to change his social-media profiles to "private" so they are not accessible by the public.

At a minimum, consider advising your client to avoid posting anything that could affect the case and to *never* post anything that would waive the attorney-client privilege.

Step Two: Preserve

While warning your client about the multitude of problems to avoid, it may occur to you that some problems may already exist. In other words — what exactly has your client *already* posted online that may be damaging to his case? Now is the time to ask.

Better to know now than when opposing counsel asks your client on the witness stand and puts "unflattering" photos of your client on the Elmo for the jury to see. So, wisely, you sit down with your client to review his Facebook profile and see for yourself what potential issues may exist.

But then you find those issues. Maybe you find lots of them. Now what?

Can you tell your client to delete the profile entirely? Or the pictures and posts that you worry may hurt the case?

This thought should trigger all sorts of alarm bells. The duty to preserve arises when a party reasonably foresees that evidence may be relevant to issues in litigation. All evidence in a party's "possession, custody, or control" is subject to the duty to preserve. Evidence is considered to be within a party's "control" when the party has the legal authority or practical ability to access it. Thus, a client has "control" of the contents of his social-media account and, consequently, the duty to preserve applies.

Rule 3.4 of the Delaware Rules of Professional Conduct (the "Rules") provides that a lawyer (and anyone acting on her behalf) shall not obstruct another party's access to evidence or alter, destroy or conceal potential evidence. It also expressly provides that a lawyer "shall not counsel or assist another person to do any such act."[1] On its face, Rule 3.4 seems to clearly prohibit a lawyer from advising or assisting her client from deleting content from his Facebook page.

But the answer may not be that obvious. The Florida Bar Association's Professional Ethics Committee issued an advisory opinion on the subject and the opinion makes clear that the issue is more nuanced.[2] If the lawyer first ensures that the evidence is preserved, the Committee concluded, the attorney may instruct the client to destroy the online content.

The Pennsylvania Bar Association's Professional Guidance Committee agrees.

Deletion may prove to be of limited value. If you advise a client to delete his Facebook account after you've downloaded it to a flash drive, you will still have to produce any content that is relevant to the case.

In an earlier advisory opinion, the Pennsylvania Committee concluded both that an attorney may advise her client to change the privacy settings on the client's social-media page and, also, may instruct the client to delete the content — *provided*, however, that the content has already been preserved.

For good reason, the lawyer may not be very comfortable with instructing a client to destroy evidence of any kind. A Virginia court imposed sanctions of $542,000 against a senior trial lawyer and $180,000 against his client when the client, at the instruction of the lawyer's paralegal, deleted photographs from the client's social-media page.[3] But, in that case, the photographs had not been preserved prior to deletion.

So, if you are considering whether it would be a good idea to tell your client to delete online posts, photos and comments, think carefully. Preserve the content, regardless of whether you decide in favor of deletion.

A final word of warning. Relevant evidence is discoverable, regardless of whether it is online, on a flash drive or in a filing cabinet. So deletion may prove to be of limited value in any event. If you advise a client to delete his Facebook account after you've downloaded it to a flash drive, you will still have to produce any content that is relevant to the case. Consequently, think hard before you take any steps to delete social-media evidence.

Step Three: Discover

Discovery is the next hurdle. Many lawyers know that they should consider requesting relevant evidence from a party's social-media pages but are unsure how exactly to go about doing it. The key is to keep your requests narrowly tailored.

Unless there is a specific reason, do not ask for the entire account. You wouldn't ask a party to produce the entire filing cabinet — only the documents within that filing cabinet that are relevant to the case. The same applies to discovery of social media — ask only for the posts, comments, photos and other content that is relevant.

Worse than requesting the entire account is a request for the password to that account. One court explained that a party is not entitled to access a party's account merely because there is a pending action. The court explained that, "[t]o enable a party to roam around in an adversary's Facebook account would result in the party to gain access to a great deal of information that has nothing to do with the litigation and [] cause embarrassment if viewed by persons who are not 'Friends.'"[4] A federal court in Michigan went further, sanctioning a defendant who moved to compel production of the plaintiff's Facebook password.[5]

If you are on the receiving end of such a request, do not acquiesce. There are significant risks to accessing another person's online accounts. For example, if the account owner later alleged that you altered or removed content while logged in, it could be extremely difficult to disprove.

In one case, the parties agreed that the plaintiff would provide his password to the defense lawyer, who, the parties had agreed, would then log in and review the account for relevant content. However, when the lawyer did get around to logging in, Facebook sent an automated message to the account holder-plaintiff alerting him of a log in from an unrecognized device.

The plaintiff, believing his account

had been hacked, accidentally deleted the entire account.[6] The defendant moved for sanctions as a result of the spoliation. The court concluded that the plaintiff had failed to preserve evidence as required and granted the defendant's request for an adverse-inference instruction.

Step Four: Collect

If you are on the receiving end of a request for "relevant" social-media content, how do you go about collecting and producing that content? Many lawyers are overwhelmed by the task. But putting the burden on the client is problematic. The Court of Chancery has reiterated that "self-collection" whereby the client, and not the lawyer, manages the discovery of electronic evidence, is insufficient.[7]

So the ball is back in the lawyers' court — we are responsible to manage the collection. With Facebook content, this can be accomplished with the click of a button. The Facebook tool, "Download My Info" (found in the Settings of every Facebook account) enables users to download all content and a fairly significant amount of metadata from their account. It is free, takes just minutes, and delivers the entire account as a .zip file, which can be saved easily on a flash drive and maintained in the lawyer's office.

The Facebook tool, "Download My Info" enables users to download all content and a fairly significant amount of metadata from their account.

This serves not only to ensure that the content has been preserved but also enables the lawyer to review the contents for possible production without having to be logged into her client's account.

Step Five: Produce

Admittedly, the thought of poring through a client's entire social-media account in an effort to find the relevant posts can be daunting. If the project is *too* daunting, there are options.

For example, you could produce the entire account on an attorney's-eyes-only basis and allow the other side to identify what it contends should be produced.[8] An appropriate protective order should be in place first, though, to ensure that the attorney may not use the information for any other purpose and to set the parameters for the attorney's review.

Step Six: Use

You have collected the evidence and are ready to use it in court. In Delaware, the standard is clear. In *Parker v. State of*

Delaware, the Delaware Supreme Court ruled that the standard for authentication of social-media evidence is no different than any other kind of evidence.[9]

In other words, a party seeking to introduce an Instagram post may do so using "any form of verification" available under the Rules of Evidence, which could include live testimony, corroborative evidence or distinctive characteristics.

A Cautionary Tale

A Texas judge told me a story that truly encapsulates what not to do when it comes to social-media evidence. I share it here as a cautionary tale.

The plaintiff, a young woman, alleged to have suffered significant physical injuries as a result of an automobile accident. At trial, things were going smashingly well for the plaintiff, who was represented by a prominent, highly regarded and very successful senior lawyer.

During cross-examination of the plaintiff, the defendant's lawyer put up a photograph of the plaintiff ably zip-lining over a plush jungle in Costa Rica. This, of course, could be devastating to the plaintiff's potential recovery.

A party seeking to introduce an Instagram post may do so using "any form of verification" available under the Rules of Evidence.

Shocked, the plaintiff's lawyer jumped to his feet to object. But he did more than just object. He accused the defense counsel of *hacking* the plaintiff's computer because "How else could he have gotten this photograph?!?" The defense lawyer, of course, had obtained the photo from the plaintiff's *publicly available* Facebook page.

As the judge told it, at that moment the jury's sympathies for the plaintiff disappeared. The judge was right — the jury deliberated briefly and promptly returned a verdict for the defendant.

What troubled the judge the most, though, was the plaintiff's lawyer's accusations in open court that defense counsel had intentionally gained unlawful access to the plaintiff's computers — in other words, committed a crime. The judge felt that such an accusation warranted a referral to the state's disciplinary counsel.

The lawyer could have avoided the entire disaster. He could have warned his client against leaving her profile public. He could have reviewed her posts and

See **Evidence** *continued on page 30*

Rodney A. Smolla

The First Amendment and Public Officials' Social-Media Accounts

The courts continue to grapple with defining public and private spaces on the Internet.

Should the private social-media accounts of public officials be deemed public forums when the public official uses the social-media account to make statements regarding public policy and governmental initiatives germane to the official's office? The claim that the private Facebook or Twitter accounts of public officials should be treated as public forums has strong surface appeal. Federal, state and local officials pervasively use social media to articulate policy views and communicate with constituents. All 100 members of the United States Senate, for example, use social media — one of the few practices all 100 Senators have in common! [1]

In *Knight First Amendment Institute v. Trump*,[2] users of Twitter who were blocked by President Donald Trump's personal twitter account, #realDonaldTrump, brought suit in 2017 in the United States District Court for the Southern District of New York, claiming that the President's private Twitter account should be treated as a "public forum," and that the President's blocking of their access to that forum violated the First Amendment.

Around the same time, two opinions from two different Federal District Judges in the United States District Court for the Eastern District of Virginia reached opposite conclusions on this question within days of one another. Both decisions have been appealed to the United States Court of Appeals for the Fourth Circuit.[3]

In *Davison v. Rose*,[4] District Judge Anthony J. Trenga held that school board officials who blocked Brian Davison from their social-media accounts did not violate the First Amendment. In contrast, in *Davison v. Loudoun County Board of Supervisors*,[5] District Judge James C. Cacheris reached the opposite conclusion in another decision from the Eastern District of Virginia in which Brian Davison was also

a party, holding that a county commissioner had created a public forum through her use of her Facebook page to discuss positions and solicit comments from constituents on public affairs, and had violated the First Amendment when she briefly blocked Davison from access to her page.

Suits have been filed against the Governors of Maryland and Kentucky for blocking access to their social-media accounts, and similar cases are percolating across the country.

We think of the Internet generally, and social media particularly, as our modern digital "public square." The "marketplace of ideas" is now largely online. It is where our discourse and democracy happen. A 2017 Supreme Court decision, *Packingham v. North Carolina*,[6] contained some sweeping language that seemed to support the possibility that private social-media sites, like President Trump's Twitter account, might properly be treated as public forums. In the words of the Court:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. . . . Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.
>
> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace — the "vast democratic forums of the Internet" in general, . . . and social media in particular. Seven in ten American adults use at least one Internet social networking service. . . . One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. . .. This is about three times the population of North America.[7]

Government agencies and offices have websites, or accounts on the likes of Facebook or Twitter, which may very well become designated public forums if there are places on the sites for comments posted by citizens.

For all this, however, I am not convinced.

We often speak loosely of the Internet as our modern "public square." Our law, however, should not be as loose as our speech. For legal purposes, the Internet should be treated as a virtual world, which, like the physical world, has both public and private spaces, with different First Amendment principles applicable to each.

In *physical* space, the First Amendment "public forum law" has always recognized a divide between government spaces and private spaces. All decisions of the Supreme Court articulating the contours of public forum law *presuppose* that a public forum is either government property or a government program. Public forum law contains additional divides, separating those government spaces and programs that are deemed public forums from those that are not.

The matrix of public forum law treats places such as parks, streets and sidewalks as historically dedicated to free expression, labelling them "traditional" public forums. The First Amendment provides that such spaces be open to free expression.

Other government spaces and places may become public forums (in First Amendment parlance, "designated" or "limited" public forums) when the government intentionally opens them to expression. A municipal auditorium or state university conference room would be classic examples of designated or limited forums.

Finally, many government facilities are not open to expression at all. These are "nonforums," where there is no right to assemble, picket, leaflet or speak. The open space outside the State Supreme Court building would be a public forum, the inside of a Justice's chambers a nonforum.

In addition, a concept known as the "government speech" doctrine treats the government's *own* messages as outside any First Amendment restriction. Citizens generally have a right to be free from viewpoint discrimination for their own expression in a public forum, but they have no right to control what the government chooses to say or not say in its own voice.[8]

In physical space, these distinctions work tolerably well.

There is no cogent reason for treating cyberspace any differently. There are tens of thousands of government spaces on the internet. Government agencies and offices have websites, or accounts on the likes of Facebook or Twitter, which may very well become designated public forums if there are places on the sites for comments posted by citizens. Such sites might also at times be classified as organs for the government's own expression, and treated as government speech.

Running parallel to these digital government spaces, however, are the millions of private digital spaces that are not government forums, but rather the platforms from which individuals, corporations and organizations engage in their own speech. The operators of these private platforms have a First Amendment right to operate them as they like. The essence of free speech on these private platforms is that operators may include the messages they want and exclude those they do not.

How, then, ought we treat the private social-media platform of a public office-

holder? Granted that the web page of the White House or a local school board may be a public forum, does it follow that the web page of the occupant of the White House or an individual school board member is a public forum as well?

There is an argument that the answer should turn on how the official uses the private account. The argument invites courts to ask whether the account is used to make pronouncements on public policy or solicit the views of constituents. This analysis borrows from constitutional and civil rights law principles developed to determine whether an ostensibly private activity is "state action" or activity "under color of law." Seen through this prism, courts are asked to determine whether there is a "nexus" between the private activity and the public's business.

This is not a sound way to frame or analyze the issue. The question of whether an official is acting under "color of law" or engaged in "state action" should not be conflated with the separate First Amendment question of how and when a public forum comes into existence.

All decisions of the Supreme Court articulating the contours of public forum law presuppose that a public forum is either government property or a government program.[9] The "Court has recognized that members of the public have free speech rights on other types of government property and in certain other government programs that share essential attributes of a traditional public forum."[10]

To be sure, public forum analysis also extends to government property outside the physical realm, including government programs and virtual or "metaphysical" property. The Court has held public forum principles are applicable when "government creates such a forum, in either a literal or 'metaphysical' sense."[11]

Yet a public forum does not come into existence through adverse possession. Unless the forum is a traditional public forum, such as a street, sidewalk or park, the government itself must act intentionally to turn its property or program into a public forum. "A government 'does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'"[12]

A clean and simple rule, aligned with classic First Amendment doctrine and principle, ... is that government social media platforms may be public forums, but the personal social media platforms of officeholders may not.

Social-media platforms such as Facebook or Twitter are not themselves government property or programs and cannot be public forums. Nor are the personal social-media accounts of users, even users who are public officeholders, public forums. The Internet and social media are vast venues for the exchange of expression. But they are private venues, not government-owned-and-operated public forums.

Politicians *of course* use social media such as Facebook or Twitter to express views on government and public policy. There is virtually always a "nexus" between the private expressive activity of the politician and the official activity of government. Courts, however, should distinguish between the office and the officeholder.

Elected officials have a dual character, official and political. At times, they act in furtherance of the duties of their office. At other times, they act as private political actors who hold office, but are engaged in expression and association in their *political* capacities.

Courts should establish a bright-line division between the First Amendment principles that govern public forums on government property and within government programs, and the very different First Amendment principles that govern the private choices of political officeholders on their personal social-media platforms. A clean and simple rule, aligned with classic First Amendment doctrine and principle, and far better calculated to enhance the vibrancy of our political discourse, is that government social-media platforms may be public forums, but the personal social-media platforms of officeholders may not.

If a public officeholder is forced to treat his or her social-media page as a public forum, the page will lose its character as the officeholder's own unique, individual, candid and authentic expression, and instead become a bowdlerized platform collecting the random messages of any and all, stripped of any distinctive personality or direction. The point of a public forum is that the forum *itself* is to be neutral. The forum is an empty vessel. The forum is the space where others come to express their views.

The point of an officeholder's personal social-media platform is exactly the opposite. It cannot be forced neutral. It cannot be forced to be an empty vessel. It exists to be partisan, and in that existence the marketplace of ideas is enriched, not impoverished.

It is important to bear in mind what the argument I am advancing here is not asserting. I do not claim that a government official's statements on social media are invisible to constitutional, statutory or common law. A government official's statements on a private account may be a "smoking gun" establishing discriminatory intent, or even state action itself, if the statements evidence illicit action perpetrated under color of law. An official is not immunized from an otherwise unconstitutional command because the official issues the command through a private account. An official using his or her private account to order a subordinate to block a citizen from speaking in a public park would surely be violating the First Amendment.

The argument advanced here also does not assert that statements made on a public employee's social-media page cannot have legal consequences. Public employees may in some circumstances face discipline for social-media statements,

under the principles governing public employee speech.[13] Public employees remain fully subject to all the myriad rules of civil and criminal liability that may attach to unprotected expression, such as libel or prosecution of obscenity or engaging in true threats. The argument here simply is that the social-media platforms of public employees should not be deemed public forums.

To illustrate, consider President Trump's use of Twitter. I use this example not to pick on the President, but because his use of Twitter may be the single most notorious use of social media by a public officeholder in American society today. President Trump's tweets certainly may have legal consequences. As Clay Calvert's article in this issue notes, the President was sued for "libel by tweet" in *Jacobus v. Trump*.[14] The plaintiff, Cheryl Jacobus, was a political strategist, public relations advisor and news media commentator. Jacobus' suit against Mr. Trump was not based on his use of colorful pejoratives to attack her, but on her claim that his tweets contained factual falsehoods about her that damaged her reputation.

Mr. Trump's tweets were also cited by courts in assessing the underlying intent behind his controversial immigration bans.[15] The reality that Mr. Trump's statements on Twitter may carry profound legal consequences was further underscored by the Senate Testimony of former F.B.I. Director James Comey on June 8, 2017, in which Director Comey bluntly testified that it was a tweet by Mr. Trump that led directly to the appointment of a Special Counsel to lead the investigation into Russian interference with the 2016 presidential election.[16]

Yet to acknowledge that President Trump's tweets may have legal consequences does not, in my judgment, warrant the additional step of treating his private Twitter account as a government forum. To take that additional step will cause great mischief to the architecture of modern First Amendment doctrine, rendering incoherent the First Amendment's longstanding division between public and private spaces.

And what, one might ask, are we then to make of the Supreme Court's sweeping pronouncements in *Packinham*? To unpack *Packingham*, consider first the meaning of the passage quoted above in light of the Court's actual holding. The Court in *Packingham* held unconstitutional a North Carolina law enacted in 2008, making it a felony for a registered sex offender to gain access to many websites, including social-media platforms such as Facebook and Twitter. The Court in *Packingham* did not hold that Facebook and Twitter, both private companies, were governmentally owned and operated traditional public forums. Nor did it hold that the millions of Americans who have Facebook and Twitter accounts and open them generally to the public for postings are thereby operating public forums. Nor did the Court in *Packingham* hold that the millions of Facebook and Twitter users who are government employees are operating public forums.

Those who wish to critique a President, governor, or school board chair have almost infinite channels and platforms in both virtual and physical space to speak their minds.

The marketplace of ideas will not collapse if President Trump, or a governor, or a local school board member is allowed to run their own social-media pages as they please. Those who wish to critique a President, governor, or school board chair have almost infinite channels and platforms in both virtual and physical space to speak their minds.

But the marketplace of ideas will collapse, or at least be rendered conceptually incoherent as a legal construct, if we conflate government spaces and private spaces, confusing the office with the officeholder. ◆

NOTES

1. Congressional Research Service, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, R44509 (May 26, 2016), https://fas.org/spg/crs/misc/.pdf.

2. 1:17-cv-05205, filed July 11, 2017 (S.D.N.Y. 2017).

3. Disclosure: The author of this article, Rodney A. Smolla, was the counsel-of-record in two amicus briefs filed in the two cases in the Fourth Circuit, arguing that the Facebook sites of the public officials ought not to be treated as public forums.

4. *Davison v. Rose*, No. 1:16CV0540 (AJT/IDD), 2017 WL 3251293 (E.D. Va. July 28, 2017).

5. *Davison v. Loudoun County Board of Supervisors*, No. 1:16CV932 (JCC/IDD), 2017 WL 3158389 (E.D. Va. July 25, 2017).

6. *Packingham v. North Carolina*, 137 S. Ct. 1730, (2017).

7. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, (2017).

8. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

9. *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 791 (1996) (We have recognized two kinds of public fora. The first and most familiar are traditional public fora, like streets, sidewalks, and parks, which by custom have long been open for public assembly and discourse. . . . 'The second category of public property is the designated public forum, whether of a limited or unlimited character — property that the State has opened for expressive activity by part or all of the public'") (internal citations omitted). *See also Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 1992) ("property that the State has opened for expressive activity by part or all of the public"); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (same).

10. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (emphasis added).

11. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

12. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. at 2251).

13. *See Connick v. Myers*, 461 U.S. 138, 149 (1983); *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 568 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) .

See **First Amendment** *continued on page 30*

The Bruce M. Stargatt
Legal Ethics Writing Competition

Michelle Streifthau-Livizos is the first winner of the Bruce M. Stargatt Legal Ethics Writing Competition award. A third-year student at Drexel University Thomas R. Klein School of Law, Michelle is Lead Editor of the *Drexel Law Review* and Member of the Drexel Moot Court Board. Following graduation, she will clerk for Magistrate Judge Christopher J. Burke in the U.S. District Court for the District of Delaware, and in the fall of 2019 join Morris Nichols Arsht & Tunnell, where she clerked last summer. Her winning essay explores the extent to which a judge and a lawyer can be "friends" on social media.

The Bruce M. Stargatt Legal Ethics Writing Competition invites original, unpublished scholarly papers concerning ethical issues in the practice of law. The competition is open to students and recent graduates of any ABA-credited law school, persons taking the most recent Delaware Bar examination, law clerks currently employed by a member of the Delaware judiciary, and Delaware attorneys admitted for no more than five years. The precise essay topic is in the author's discretion.

In conformity with competition guidelines, this year's panel of judges consisted of former Delaware Supreme Court Justice E. Norman Veasey, former Vice-Chancellor and former Delaware Supreme Court Justice Jack B. Jacobs, and David C. McBride, a member of the Board of Editors of *Delaware Lawyer* since its inception in 1983.

The competition is funded by the Stargatt family through the Delaware State Bar Foundation in memory of the late Bruce M. Stargatt, founding member and partner of Young Conaway Stargatt & Taylor, LLP. Bruce's accomplishments include President of the Delaware State Bar Association, member of the American College of Trial Lawyers, and winner of the Herbert Healy Award of the American Judicature Society for his "outstanding contributions to substantially improve the administration of justice in the state of Delaware."

The award reflects his high regard for legal ethics and clear writing throughout his long career as advocate, law firm leader and contributor to *Delaware Lawyer* magazine.

Michelle Streifthau-Livizos

Can a Judge and a Lawyer be 'Friends'?

Social-media connections have created new concerns about rules governing impartiality and recusal.

The Florida judge probably did not foresee any problems when she "friended" the lawyer on Facebook but when that lawyer appeared before her, the opposing party moved for her disqualification. The movant claimed to have "a well-grounded fear of not receiving a fair and impartial trial" and believed, based on the Facebook connection, that the lawyer influenced the judge.[2]

On appeal, the court explained that there are "countless factors" that could lead someone to believe a judge is "biased in favor of a litigant" and that merely being friends with someone is not grounds for disqualification.[1] "If friendship alone with a lawyer or member of a firm is a basis for disqualification,[3] then most judges in rural and semi-rural areas and many in metropolitan areas would be subject to disqualification in a large number of cases."[4]

Moreover, Facebook "friends" are not based on true friendship, considering that people can have thousands of "friends" and commonly cannot recall all of their "friends," and Facebook uses technology to suggest "friends."[5]

Not everyone agrees, though, that judges should use social media, much less "friend" lawyers.[6] One ethics law professor commented, "I don't see any upside in a judge having a social-media presence" as it can only cause trouble.[7]

Although the use of Facebook, LinkedIn, and other social-media websites to connect with professional contacts, friends and family is commonplace,[8] judges are forced to question whether: (1) they should use social media and (2) their social-media use should be more restricted than the typical user.[9] Judges are held to a higher ethical standard than the public in their personal and professional lives, thus they strive to avoid actions that give a negative impression of the judicial office.[10]

Unlike the relative privacy of in-person interactions, social-media content is likely to be viewed by people outside their social circle and can easily be misinterpreted and passed along to others, which may be embarrassing and potentially career-ending.[11]

A judge recently was suspended after he called Charlottesville protesters "snowflakes" on Facebook, despite the fact that that he saw nothing controversial about his comments.[12] A newsperson saw the posts and brought it to the chief judge's attention.[13] If the judge had said the same comment to an individual instead, he would probably not have been caught and suspended.

The issue is further complicated when judges and lawyers connect through social media, as in the case of the Florida judge who faced disqualification. For example, should judges be "friends" with lawyers if both parties share personal information and comment on each other's posts? Does this inner knowledge of the judge's life mean that the lawyer will have an advantage or that the judge cannot be impartial? Is the act of a judge "recommending" or "endorsing a skill" on a lawyer's LinkedIn page the same as a judge offering to write a recommendation on the lawyer's behalf? Is it wrong for judges to connect with someone who belongs to a controversial organization?

These are the types of questions that many jurisdictions, including Delaware, have yet to answer.

> Judges must "avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety."

In 2013, the American Bar Association issued a formal opinion addressing some of the growing concerns.[14] The ABA encourages judges to engage in social media as it may "prevent them from being thought of as isolated or out of touch" as long as they "comply with relevant provisions of the Code of Judicial Conduct."[15] Thus, judges must "avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety."[16] Some connections may give the impression of improper influence on the judge.[17] Moreover, judges must be careful to avoid *ex parte* communications.[18]

Unlike how people discuss their work on their pages, judges cannot comment on pending matters.[19] A judge in North Carolina was publicly reprimanded for regularly posting Facebook updates, like "[i]n a Felony trial now State prosecuting pimp."[20] His defense — he thought only his friends and family could view it[21] — raises questions regarding the requisite knowledge that judges should have of privacy and security features.

States decide the appropriate course of action for judges to take when a lawyer who is connected to them via social media appears in their court.[22] The ABA opinion comments that context is key and simply having a social-media connection should not alone "indicate the degree or intensity of a judge's relationship with a person."[23]

Judges should rarely have the affirmative duty to disclose the connection "because of the open and casual nature" of communications on social-media websites but judges must carefully use their discretion when making the decision to disclose the connection in the same manner as they would for any personal or professional relationship.[24]

The approaches taken by New York, Arizona, California, Kentucky, Maryland, Florida, Ohio and the few other states that established guidelines on this topic, range from strict to liberal.[25] Because states commonly rely on other states' established guidelines when creating their own, future state guidelines will likely resemble the existing approaches, although which approach remains unknown.[26]

There are similarities among the states though. Most guidelines establish that (1) judges may use social media and, (2) if permitted to connect with lawyers, judges should exercise care to comply with the judicial conduct rules.[27] Lawyers also should know the guidelines to avoid an ethical violation for misconduct.[28]

Several jurisdictions and the ABA find that merely being connected through social media tends to be an insufficient reason to justify recusal.[29] Other jurisdictions have specifically included when judges must disclose and/or recuse themselves based on such social-media connections.[30]

New York offers thorough guidance via several advisory opinions. Judges are permitted to socialize with lawyers in person and may have a variety of reasons for wanting to engage in social media, similar to the average person; therefore, New York "cannot discern anything inherently inappropriate about a judge joining and making use of a social network."[31]

The guiding rule is that "a judge must avoid impropriety and the appearance of impropriety in all of the judge's activities . . . and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," especially since content and connections are publicly accessible.[32] Furthermore, judges cannot provide legal advice, discuss cases through private messages or posts, or engage in any other communications that violate the judicial conduct rules.[33]

When judges post personal information, social media can create "the appearance of a stronger bond" despite that it was not intended to target and form a closer relationship with anyone particular.[34] In this respect, judges should be mindful of the public's potential interpretation. New York's three relationship categories — an acquaintance, a close social relationship, and a close personal relationship — define how judges should respond if they have a social-media connection with the lawyer before them.[35]

First, an acquaintance relationship occurs when "a judge is acquainted with an attorney [and] their interactions outside court result from happenstance or some coincidental circumstance such as being members of the same profession, religion, civic or professional organization, etc." but neither party initiates outside social contact.[36] There is no reason to question a judge's impartiality.[37] This is similar to a judge merely being connected to a lawyer on social media without much further interaction.

Second, a close social relationship is where the parties and their families may enjoy dinners together, one family member may care for the other's children, or the parties may attend each other's weddings.[38] Minimally, judges should disclose the relationship on the record.[39] It is at the judge's discretion whether he can be impartial or if he should recuse himself.[40]

Third, if there is a close personal relationship between the judge and the lawyer, the judge must disqualify or recuse himself.[41] Ultimately, it is up to the judge to determine which category the relationship falls under and the right course of action based on whether his "impartiality might reasonably be questioned."[42]

Florida takes a stricter approach than New York by focusing on whether someone could *potentially* believe that the "friended" lawyer is in a special position to influence the judge instead of the actual relationship. Judges are prohibited from connecting with lawyers who *may* appear before them.[43] Judges are otherwise allowed to participate in social media provided it does not violate the Code of Judicial Conduct.[44]

Several jurisdictions and the ABA find that merely being connected through social media tends to be an insufficient reason to justify recusal.

In addition to lawyers, Oklahoma judges cannot connect with "law enforcement officers, social workers, attorneys and others who may appear" before them.[45] Massachusetts adopted guidelines similar to Florida but included a bright-line test requiring recusal when a judge is connected through social media to the lawyer before her.[46] Furthermore, judges cannot disclose on social media their status as a judge and must prevent others from doing so.[47]

Arizona leaves the issue to the judge's discretion to recuse herself if her impartiality could be reasonably questioned.[48] While they may connect on LinkedIn, judges should not provide LinkedIn "recommendations" or "skill endorsements" for lawyers who appear in their court as it may give the appearance of partiality.[49] Arizona further cautioned that, as technology changes and other issues arise, judges should contact the Judicial Ethics Advisory Committee.[50]

In 2015, North Carolina adopted an opinion similar to Arizona's.[51] Utah tends to follow this overall approach as well.[52]

Other states lie in the middle of these approaches. Maryland does not disqualify judges for having friendships and "sees no reason to view or treat 'Facebook friends' differently" but agrees with Kentucky and Oklahoma that judges should be aware of the many risks to using social media.[53]

California's detailed opinion includes the potential pitfalls that judges might encounter, including the consequences of not monitoring content.[54] Imagine how negatively the public would view a judge if someone posted insensitive comments to the judge's Facebook page and he failed to promptly remove it. California also sets forth multiple factors to guide a judge when determining whether there is potential for someone to

question his impartiality, such as looking to the nature of the relationship.[55]

What is the right approach for Delaware to adopt? This is a complex question. Delaware has unique challenges due to its close-knit nature and small size. It is not unusual for lawyers to be adversaries in the courtroom and friends outside the courthouse. Similarly, lawyers and judges interact outside of the courtroom. Attend a bench and bar event to experience the camaraderie of the Delaware Bar. It is the Delaware Way.

Like Maryland and other states, Delaware allows judges to use their discretion to disqualify themselves when their impartiality could be reasonably questioned. They are not specifically required to disqualify themselves for socializing with lawyers who appear before them.[56] Otherwise, judges would frequently be disqualified based on their interactions with lawyers who belong to the same clubs, their children playing sports together, and other common activities that are bound to happen due to the state's size. Therefore, the "no connections with those who *may* appear before the judge in court" approach is unrealistic.

The best approach is a liberal approach, where it is left to the judge's discretion to abide by the Delaware Judges' Code of Judicial Conduct. Under this approach, judges may use social media and connect with lawyers, same as they do face-to-face. Doing so would continue to promote the congeniality of the Delaware Bar. After all, it is what makes Delaware a unique place to practice. ◆

NOTES

1. *Law Offices of Herssein v. United Servs. Auto. Ass'n*, 42 Fla. App. LEXIS 12035, at *2 (Dist. Ct. App. 2017).

2. *Id.*

3. *Id.* at *3.

4. *Id.* (citing *Hayes v. Rogers*, 378 So. 2d 1212, 1220 (Fla. 1979)).

5. *Id.* at *8.

6. David Ovalle, *Legal Ruling in: Facebook 'friends' aren't necessarily real friends*, Miami Herald, (Aug. 23, 2017) http://www.miamiherald.com/news/local/community/miami-dade/article168865087.html.

7. *Id.*

8. *See* Shaziah Singh, *Friend Request Denied: Judicial Ethics and Social Media*, 7 J.L. Tech. & Internet 153, 15455 (2016).

9. *See generally* Brooke Boucek, *Judges Seek Stability in the World of Social Media and Evolving Expectations Surrounding Today's Preferred Medium*, American Journal of Trial Advocacy, http://www.cumberlandtrialjournal.com/judges-seek-stability-in-the-world-of-social-media-and-evolving-expectations-surrounding-todays-preferred-medium.

10. *See generally id.*

11. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 (2013).

12. Tyler Estep, *Gwinnett judge suspended after posts about Confederate monuments*, AJR.COM, (Aug. 15, 2017), http://www.ajc.com/news/local-govt--politics/gwinnett-judge-suspended-after-posts-about-confederate-monuments/0BhU3WXwawztILcn95ipqJ.

13. *Id.*

14. ABA, *supra* note 13.

15. *Id.*

16. *Id.*

17. *Id.* (stating that forming relationships in such a manner would violate Rule 2.4(C) and is not permissible use of social media). Examples include questionable organization and political figures.

18. *Id.*

19. *Id.* ("[A] judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.").

20. Minn. Board on Jud. Standards, Amended Pub. Reprimand 15-17 (2015).

21. *Id.*

22. *See* ABA, *supra* note 13 (stating that the various state drafting committees have issued opinions ranging "from outright prohibitions to permission with appropriate cautions").

23. *Id.*

24. *Id.*

25. *Social Media and the Courts*, National Center for State Courts, http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Judicial%20Ethics%20Advisory%20Opinions%20on%20Social%20Media; *see* Singh, *supra* note 1, at 158 (stating eleven states provided guidance regarding the use of social media by judges).

26. *See* Okla. Judicial Ethics Advisory Panel Op. 2011-3 (2011) (stating Oklahoma looked to various jurisdictions before writing its opinion); Md. Judicial Ethics Advisory Op. 2012-07 (2012) (discussing other jurisdictions).

27. *Id.*

28. Model Rules of Prof'l Conduct r. 8.4 (AM. BAR ASS'N 2017) (Misconduct includes "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct").

29. N.Y. Advisory Op. 13-39 (2013) (stating "the mere status of being a "Facebook friend," without more, is an insufficient basis to require recusal" and it is insufficient "that a judge's impartiality may reasonably be questioned . . . or that there is an appearance of impropriety . . . based solely on having previously "friended" certain individuals who are now involved in some manner in a pending action").

30. *See* Singh, *supra* note 1, at 159-67.

31. N.Y. Advisory Op. 08-176 (2009).

32. *Id.*

33. *Id.*

34. *Id.*

35. N.Y. Advisory Op. 11-125 (2011).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* (defining a close personal relationship as one "where the judge, the attorney, and/or members of their immediate families share confidences, socialize regularly, vacation together, celebrate significant events in each other's lives and/or share interests that are important to them personally").

42. *Id.*

43. Fla. Sup. Ct., Ethics Advisory Comm., Op. 2009-20 (2009) ("The Committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge.").

44. *Id.*

45. Okla. Judicial Ethics Advisory Panel Op. 2011-3 (2011).

46. Mass. Comm. on Judicial Ethics, Op. 2011-6 (2011) ("[I]terms of a bright-line test, judges may only "friend" attorneys as to whom they would recuse themselves when those attorneys appeared before them.").

47. *Id.*

48. Ariz. Advisory Op. 14-01 (2014).

49. *Id.*

50. *Id.*

51. N.C. Formal Ethics Op. 8 (2015).

52. Utah Ethics Advisory Comm. Informal Op. 12-01 (2012).

53. Md. Judicial Ethics Advisory Op. 2012-07 (2012).

54. Cal. Judicial Ethics Comm. Op. 66 (2010).

55. *Id.*

56. Del. Judges' Code of Judicial Conduct Rule 2.11.

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14. 55 Misc. 3d 470, 51 N.Y.S.3d 330, 334 (N.Y. Sup. Ct. 2017).), *aff'd*, 64 N.Y.S.3d 889 (N.Y. App. Div. 2017).

15. *See International l Refugee Assistance Project v. Trump*, No. 17-1351, 2017 WL 2273306, at *3 (4th Cir. May 25, 2017), as amended (May 31, 2017) ("That same day, he highlighted the statement on Twitter, 'Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!'"). The United States Supreme Court granted the government's petition for certiorari in the various cases challenging the Executive Orders dealing with the immigration ban, and ultimately vacated and remanded because the order had expired by its terms and been replaced by a new order. *Trump v. International Refugee Assistance Project*, 138 S.Ct. 353 (2017).

16. Matt Apuzzo and Enmarie Huetteman, Comey Bluntly Raises Possibility of Trump Obstruction and Condemns His 'Lies', *The New York Times* [digital ed.], June 8, 2017. ("Mr. Comey placed the origins of the special counsel investigation squarely on Mr. Trump's Twitter account, a frequent source of conflict for the president."), available at: https://www.nytimes.com/2017/06/08/us/politics/comey-hearing-trump-russia.html?emc=edit_th_20170609&nl=todaysheadlines&nlid=45567585&_r=0.

Evidence

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discovered that his client's injuries were not, in fact, what she purported them to be. And he could have avoided the open-court outburst (and the disciplinary referral that followed). ◆

NOTES

1. Del. Prof. Cond. R. 3.4(a).

2. Fla. Prof'l Ethics, Op. 14-1 (June 25, 2015).

3. *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).

4.*Trail v. Lesko*, No. GD-10-017249 (Pa. C.C.P. July 3, 2012).

5. *Chauvin v. State Farm Mut. Auto. Ins. Co.*, 0-cv-11735 (S.D. Mich. June 21, 2011) (affirming magistrate's ruling).

6. *Gatto v. U. Airlines, Inc.*, No. 10-1090-ES-SCM (D.N.J. Mar. 25, 2013).

7. *Roffe v. Eagle Rock Energy GP*, No. 5258-VCL (Del. Ch. Apr. 8, 2010).

8. *See Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375 (D. Nev. June 20, 2012).

9. 85 A.3d 682 (Del. 2014). *See also Moss v. Delaware*, 166 A.3d 937 (Del. 2017) (table) (extending and applying *Parker* to text messages).

Libel

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9. *Jacobus v. Trump*, 51 N.Y.S.3d 330 (N.Y. Sup. Ct. 2017), *aff'd*, 64 N.Y.S.3d 889 (N.Y. App. Div. 2017).

10. *Id.* at *343.

11. *Id.* at *334.

12. *See Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC*, 151 F. Supp. 3d 287, 295 (E.D.N.Y. 2015) ("New York courts have consistently protected statements made in online forums as statements of opinion rather than fact."); *see generally* Lyrissa Barnett Lidsky & RonNell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 Va. J. Soc. Pol'y & L. 155 (2016).

13. *Clouser v. Doherty*, 2017 Del. LEXIS 363 (Del. Sept. 7, 2017).

14. *See* Del. Const. art I, § 9 (2018) (providing, in relevant part, that "every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law") (emphasis added); *see also Kanaga v. Gannett, Co.*, 687 A.2d 173, 177 (Del. 1996) (finding that Article I, Section 9 of the Delaware Constitution "establishes a strong state constitutional basis for remedies to recompense damage to one's reputation").

15. 47 U.S.C. § 230 (2018).

16. *Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014).

17. *Id.* at 417.

18. *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008).

19. *See, e.g., Force v. Facebook, Inc.*, 2018 U.S. Dist. LEXIS 8478 (E.D.N.Y. Jan. 18, 2018) (using Section 230 to dismiss claims that Facebook supported Hamas by allowing it, its members and its supporters to use Facebook's platform to further their aims); *Pennie v. Twitter, Inc.*, 2017 U.S. Dist. LEXIS 199250, *34 (N.D. Cal. Dec. 4, 2017) (finding that Section 230 "immunizes Defendants from most if not all of Plaintiffs' claims, because Plaintiffs' theory of liability rests largely on the premise that Defendants should be held responsible for content created and posted by users (here, Hamas and its affiliates) of Defendants' interactive computer services").

20. 47 U.S.C. § 230 (b) (1) (2018).

21. 47 U.S.C. § 230 (b) (2) (2018).

22. *See Doe v. Backpage.com*, 817 F.3d 12 (1st Cir. 2016).

23. *Id.* at 29.

24. Nitasha Tiku, *Under Pressure, Tech Companies Back Anti-Sex-Trafficking Bill*, Wired, Nov. 3, 2017, https://www.wired.com/story/under-pressure-tech-companies-back-anti-sex-trafficking-bill/.

25. About EFF, Electronic Frontier Foundation, https://www.eff.org/about.

26. Elliot Harmon, *Amended Version of FOSTA Would Still Silence Legitimate Speech Online*, Electronic Frontier Foundation, Dec. 11, 2017, https://www.eff.org/deeplinks/2017/12/amended-version-fosta-would-still-silence-legitimate-speech-online.

Of Counsel *continued from page 32*

of the Alumni Board of the University of Virginia Endowment Fund.

Phillips' parents both had deep family roots in Sussex County. His mother was a school teacher during the week and taught Sunday school as well. His father concurred in the importance of education, but regarded most Sundays as days to be afield. One Sunday morning his beagles followed the scent trail of a rabbit right by the church, allowing the congregation inside to hear the hounds in full cry.

Phillips spent much of his youth outdoors, especially wing shooting in the marshes. Today he says that his recreational interests are fishing, wing shooting (for ducks and doves), retrievers, trees and Chesapeake Bay boating, in that order. The acorn does not fall far from the oak.

Phillips has two daughters and a son, all married with their own children. Susan Simmons Phillips, his wife and best friend, is a companion on many adventures, including salmon fishing in Russia, trout fishing in Patagonia, and repeated expeditions to watch the wildlife of east and southern Africa.

In the long tradition of sportsman-conservationists, Phillips has sought to ensure the future of the wildlife and places he loves in Delaware, Maryland, Pennsylvania and farther afield. In addition to continuing with Mt. Cuba's extensive regional land conservation activities, he serves or has served on the boards of Red Clay Reservation, Delaware Wild Lands, Chesapeake Bay Foundation, the Coldwater Conservation Fund of Trout Unlimited, the National Fish and Wildlife Foundation Council, Fauna and Flora International and Wild Earth Allies.

While Phillips has not sought the attention of the general public, his efforts have not gone unrecognized. For years the renowned zoologist Cynthia Moss has studied wild elephants in the Amboseli area on the Kenya/Tanzania border. She keeps permanent records of each one. In honor of her friend, Blaine T. Phillips, she gave the name "Blaine" to a "boisterous" male elephant born in 1995 at the foot of Mount Kilimanjaro.

In 1999 the University of Virginia School of Law established a permanent chair in Phillips' honor called "The Blaine T. Phillips Distinguished Professorship in Environmental Law." In 2013, Phillips' lifetime achievements as a conservationist were honored by his election as an officer of Fauna & Flora International at a London event celebrating its 110th anniversary as the world's oldest conservation organization.

The words that Blaine Phillips has lived by through 26 years of "retirement" (so far) are simple and worth remembering: "Stay active and continue to make a contribution as your means allow." ◆

Gregory A. Inskip

OF COUNSEL: Blaine T. Phillips

"After weeks of bickering and name-calling Tanzania abruptly closed its border with Kenya today, stranding hundreds of American and European tourists," reported Roger Mann in *The Washington Post* on February 5, 1977. For Blaine Phillips and a few traveling companions, "abruptly" was an understatement.

They had watched elephants, buffaloes and tree-climbing lions in nearby Manyara National Park and waited on a grassy field for a small plane to take them to their next destination. The plane landed, taxied to a stop and was immediately surrounded by men with submachine guns. Uniformed soldiers with guns in hand took Phillips and party into custody.

Phillips wangled permission to place one telephone call, which went through and found his partner, Richard F. Corroon, already at the office in Wilmington early Saturday morning. Corroon called an acquaintance in Washington, with the result that a commercial passenger jet arrived to fly Phillips' party and 200 other Americans across the border to Nairobi, Kenya.

The story is offered not just for entertainment but because it illustrates some things about Blaine Phillips. He was a partner of Potter Anderson & Corroon LLP and remains counsel to the firm. He loves nature and wildlife and will go off the beaten path to find it. He has a cool head in a crisis, but he also was lucky that Corroon was his partner, that the satellite phone worked, and that Corroon was in the office to get the call.

Another important fact about Phillips is that he attended the University of Virginia and flourished there, both as an undergraduate (Honors Degree 1952; President, Raven Society; Phi Beta Kappa) and at the School of Law (L.L.B. 1955; Board of Editors, *Virginia Law Review* 1953-55; Phi Delta Phi; Raven Award).

He came to the attention of William S. Potter, another Virginia dual graduate, who extended an invitation for Phillips to join Berl Potter and Anderson as an associate in 1955. Phillips also was recruited by firms in New York but did not like the big-city crowds and lifestyle and accepted Potter's offer instead. Phillips was elected to partnership in 1963.

Phillips was Managing Partner of Potter Anderson & Corroon LLP from 1978 until 1988 and performed many firm management tasks even earlier. Hiring was one of his duties. He looked for ability and character in recruits, and demonstrated a human touch characteristic of good leaders.

Jim Burnett, a retired partner, recalls how Phillips informally acted as a mentor for new associates, making sure that they received the right guidance to proceed with varied and sometimes demanding tasks assigned by other partners.

Phillips already had earned the confidence of private clients and public officials, who entrusted important responsibilities to him. For many years, he was a board member of and counsel to Delaware Trust Company, and a board member and President of Delaware Park Inc. He served for years on the Board of Bar Examiners (member 1973-1985, Chairman 1984-1985) and the Governor's Judicial Nominating Commission (member 1988-1992, Chairman 1991-1992).

Phillips retired from the partnership and accepted Of Counsel status in January 1992. He moved on to a second career in the nonprofit sector (which actually had begun well before he retired from law practice), holding leadership positions in major culture- and nature-related institutions for decades: Winterthur Museum & Gardens (on the Board for more than 30 years and was its Secretary and Vice-Chairman), Hagley Museum & Library (President 2002-2003), Mt. Cuba Center (President for more than 28 years), and Fair Play Foundation (President for 29 years, continues as Trustee).

He also was appointed by the Governor to serve on the Board of Visitors of Delaware State University. He is a Trustee

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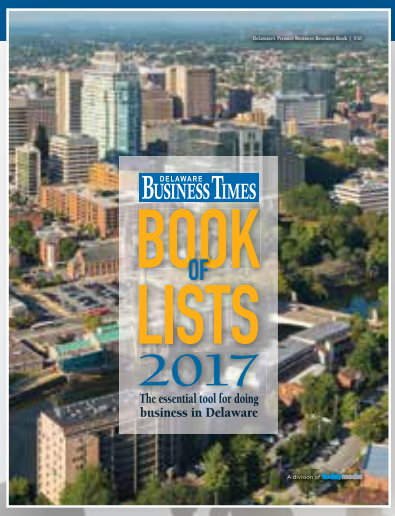

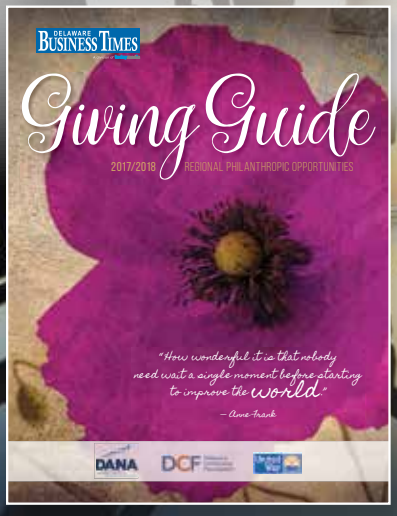

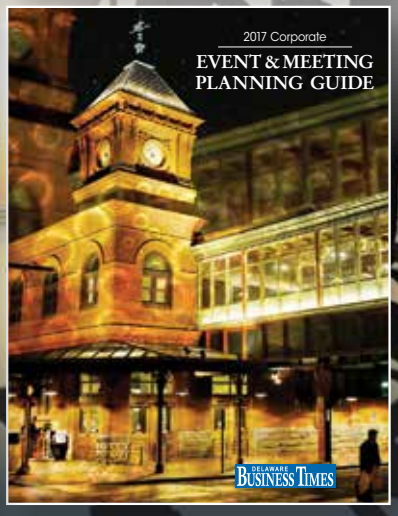

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