Social Media and the Law
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This second supplement to *Social Media and the Law* updates the treatise’s straightforward and accessible coverage of the rapidly evolving landscape of social media with the latest developments in the field, including:

**Ownership of a Decedent’s Social Media Account.** In February 2015, Facebook updated its policy regarding what happens to a user’s account when that user dies. *See new § 3:4.3 and § 6:4.1[F] for more.*

**Cyberharassment/Threats.** In December 2014, the U.S. Supreme Court heard oral argument in *Elonis v. United States*, in which a man who had made *violent posts on Facebook* was convicted of threatening to murder his wife. The Court’s much-anticipated ruling is expected to address whether an individual’s Facebook posts that would otherwise be *protected free speech* (ranting, sarcasm, art, etc.) can rise to the level of *threats that constitute a crime*. *See §§ 1:4.9, 5:4.1, and 9:2.3.*

**Password Protection Statutes.** Section 6:3.4 has been updated to reflect the current status of state legislation that would require job applicants and employees to provide employers with their personal social media information.

**Social Media in Employment/Workplace Actions.** This supplement offers coverage of numerous recent actions involving social media and the workplace, including: *“sex-plus” discrimination* claims by an employee based on content of emails between corporate executives referring to her as a “prima donna” and “hellava bitch” (§ 6:4.1[A]); *retaliation*, where an employee was discharged after posting disparaging comments about her supervisor on Facebook (§ 6:4.1[E]); *ownership of social media accounts*, where an employee who used her personal social media to promote her employer’s business had her account accessed by co-workers, who posted on her behalf without her permission (§ 6:4.1[F]); whether a school teacher’s blog posts referring to her students as “jerks,” “whiny, simpering grade grubbers,” “frightfully dim,” and the like are free speech granted *First Amendment protection* (§ 6:4.2[A][1]); alleged violations of the *Stored Communications Act*, where a former employee’s personal Apple account—which he

*(continued on reverse)*
had synched, while employed, with his work-issued devices—was later accessed by the former employer (§ 6:4.2[B][1][b]); and NLRB actions involving a wide variety of labor law issues (§ 6:4.2[B][2][b][i]). New § 6:4.1[C] addresses disability discrimination claims involving social media, where one employee shares on social media information about another employee’s confidential health or medical information.

**Copyrights: The “Fair Use” Doctrine.** In determining whether one’s use of another’s copyrighted work is fair, courts consider (among other factors) whether the use of the work is transformative and the amount of the work used. In June 2014, the Second Circuit held that the systematic digitization of copyrighted books by several research universities’ libraries was fair use, primarily because the creation of a full-text searchable database is a quintessentially transformative use. Similarly, in October 2014, in a case in which university professors posted portions of copyrighted books online as course materials for use by students, the Second Circuit reversed and remanded the trial court’s blanket use of a 10%-or-one-chapter benchmark, which it called improper, noting that it allowed the district court to abdicate its responsibility of looking at instances of infringement on a case-by-case basis. See § 3:2.3[C].

**Social Media As a Hiring and Recruitment Tool.** The latest data from 2014 studies by CareerBuilder and Jobvite report an increasing use of social media by employers, with specific details on how employers rely on it in making hiring decisions. See § 6:3.1 for more, including some potentially troubling results regarding job candidates who post content that indicates political and religious affiliations.

**Data Scraping.** See § 3:3.6 for coverage of several recent cases involving data scraping—the use of various tools and techniques to extract user data from websites—including a 2014 settlement involving claims by LinkedIn that a recruiting company was harvesting user profile information from its site.

**Defamation.** In an effort to protect individuals’ rights to express themselves in matters of public concern, twenty-eight states currently have passed acts that limit strategic lawsuits against public participation—so called anti-SLAPP laws—while some websites are including “anti-disparagement clauses” in their terms of use as a way to prevent users from posting negative statements about their products, services, and employees. See new § 5:2.2[C]–[D] for details. See also § 5:2.2[E][1]–[2] for recent social media defamation cases.

**Regulation of Broker-Dealers and Financial Institutions: Crowdfunding.** The SEC recently issued a preliminary interpretation addressing crowdfunding—the practice of funding a venture, typically via the Internet, by collecting many small donations from very large numbers of individuals. §§ 1:4.7, 7:3.2[F].

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