

PRESENTED AT**38th Annual Jay L. Westbrook Bankruptcy Conference**

November 14-15, 2019

Austin, Texas

**Navigating the Discovery Minefield:
Contemporary Discovery Techniques to Keep Pace With
Constantly Changing Communications in Modern Society**

Deirdre Carey Brown
Hoover Slovacek LLP
Galleria Office Tower 2
5051 Westheimer Rd., Suite 1200
Houston, Texas 77056
713.977.8686
brown@hooverslovacek.com

Ashley L. Harper
Hunton Andrews Kurth LLP
600 Travis Street
Suite 4200
Houston, Texas 77002
713.220.4013
ashleyharper@HuntonAK.com

Jay H. Ong
Munsch Hardt Kopf & Harr, P.C.
Frost Bank Tower
401 Congress Avenue, Suite 3050
Austin, Texas 78701-4071
512.391.6100
jong@munsch.com

I. INTRODUCTION

Why should we allow people who lived long ago, in a different world, to decide fundamental questions about our government and society today?

I am not an advocate for frequent changes in laws and Constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.”

— Thomas Jefferson¹

The notion that a system of laws must evolve over time in order to adapt to the changing demands of civilization is a longstanding one, but its relevance is perhaps more acute today than ever before. We live in a technological world in which the ease of access to information is unrivaled. By the turn of the century, nearly 5 exabytes (1 exabyte is roughly equivalent to the volume of the Library of Congress, multiplied 500,000 times) of information were generated – more information has been generated and stored in the first four years of the 21st Century than all of the information generated in the history of humankind – and most such information now never makes contact with a sheet of paper.²

Considering only e-mail traffic alone, in 2019 the total number of business and consumer emails sent and received per day are projected to approximate over 293 billion, and with an estimated average annual rate of 4% over the next four years, are projected to exceed 347.6 billion e-mails **per day**, by the end of 2021.³ But, e-mails are “so 20th Century” when it comes to modern digital communication, which is now dominated by instant messaging and social media platforms, including, but not limited to: (i) social networking sites (Facebook, Twitter, LinkedIn); (ii) image and video sharing and hosting sites (Instagram, Snapchat, Youtube, Vimeo); (iii) Blogs, sharing and review sites (Medium, Tumblr, Pinterest, AirBnB, Yelp); and (iv) community and discussion forums (Reddit, Quora).⁴

Indeed, on Instagram, one of the fastest growing social media sites today, active daily content increased over 330% from 2017 to 2019.⁵ Current statistical analyses place social media

¹ Strauss, David A., *The Living Constitution* (September 27, 2010), <https://www.law.uchicago.edu/news/living-constitution> (last visited October 20, 2019); *Thomas Jefferson > Quotes > Quotable Quote*, Goodreads, Inc., <https://www.goodreads.com/quotes/94629-i-am-not-an-advocate-for-frequent-changes-in-laws> (last visited October 22, 2019).

² Phillips, Sarah, *How Effective are Proposed Protections for “Not Reasonably Accessible” Data?*, 83 N.C.L. Rev. 984, 991 (May 2005); *Back to the Future: FRCP and Electronic Discovery in Bankruptcy*, 24-1 A.B.I.J. 24, 24 (Seward, Jack ed., February 2005).

³ *Email Market, 2019-2023*, The Radicati Group, Inc. (April 2019). <https://www.radicati.com/?p=16037> (last visited October 1, 2019).

⁴ See, e.g., *The 7 different types of social media*, Biteable, <https://biteable.com/blog/tips/the-7-different-types-of-social-media/> (last visited September 1, 2019).

⁵ Mohsin, Maryam, *10 Social Media Statistics You Need to Know in 2019 [Infographic]* (March 7, 2019), Oberlo, <https://www.oberlo.com/blog/social-media-marketing-statistics> (last visited September 1, 2019).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Navigating the Discovery Minefield: Contemporary Discovery Techniques to Keep Pace With Constantly Changing Communications in Modern Society

Also available as part of the eCourse

[2019 Jay L. Westbrook Bankruptcy eConference](#)

First appeared as part of the conference materials for the 38th Annual Jay L. Westbrook Bankruptcy Conference session "Navigating the Discovery Minefield"