

## Cyber Ethics: Part 1

### Geo-Fencing: Free Speech or Tainting the Jury Pool?

By John G. Browning\*

In April of this year, Monsanto Company was facing the latest in a series of high-stakes, high-profile trials over the allegedly toxic traits of its herbicide, Roundup.<sup>1</sup> Facing more than 11,000 such lawsuits nationally, and having already been rocked by large verdicts (\$289 million<sup>2</sup> and \$80 million<sup>3</sup>, respectively) in the first two cases to go to trial, the chemical giant decided to think outside of the box—by creating a digital box of sorts.<sup>4</sup> Leading up to the trial in California, Monsanto ran a series of targeted pop-up ads highlighting Roundup’s safety and relevant product studies using a digital marketing tool called geo-fencing.<sup>5</sup> Geo-fencing is a tool which allows companies to send pop-up advertisements to cellphone apps within a designated geographical area.<sup>6</sup> Plaintiffs’ attorneys cried foul, claiming that Monsanto’s targeted cell phone advertising included the courthouse in Alameda County, California, in which proceedings were held, which meant that the ads might target jurors.<sup>7</sup> For example, Google ads touting headlines like “Weed

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\*John Browning is a partner at Spencer Fane, a national law firm. Browning earned his juris doctorate at the University of Texas School of Law, and his undergraduate degree from Rutgers. Browning serves as an adjunct law professor at SMU, Texas A&M, and Texas Tech law schools, teaching a course on social media’s impact on the law. Moreover, Browning has published 4 books and over thirty law review articles on how technology and the law intersect. His work has garnered numerous journalism awards, including the Clarion Award for Outstanding Newspaper Column; the Texas Press Association’s Outstanding Column Award; and Print Journalist of the Year (2009); 6 Philbin Awards for Excellence in Legal Reporting; and in 2007 he was nominated for a Pulitzer Prize in Journalism. Browning is the current Chair-elect of the SBOT Computer and Technology Section. Check out [JOLTT’s technology lawyer highlight on John Browning](#).

<sup>1</sup> See Patricia Cohen, *\$2 Billion Verdict Against Monsanto Is Third to Find Roundup Caused Cancer*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/business/monsanto-roundup-cancer-verdict.html> (discussing the April trial’s ultimate disposition).

<sup>2</sup> Michael James & Jorge L. Ortiz, *Jury Orders Monsanto to Pay \$289 Million to Cancer Patient in Roundup Lawsuit*, USA TODAY (Aug. 10, 2018, 6:36 PM), <https://www.usatoday.com/story/news/2018/08/10/jury-orders-monsanto-pay-289-million-cancer-patient-roundup-lawsuit/962297002/>.

<sup>3</sup> Sara Randazzo, *Judge Cuts \$55 Million From \$80 Million Roundup Verdict*, W.S.J. (July 15, 2019, 6:03 PM), <https://www.wsj.com/articles/judge-cuts-55-million-from-80-million-roundup-verdict-11563226266>.

<sup>4</sup> The \$289 million verdict was later reduced to \$20 million. *Id.*

<sup>5</sup> Amanda Bronstad, *Did Defendants in Latest Roundup Trial ‘Geo-Fence’ Jurors?*, THE RECORDER (Apr. 12, 2019, 2:03 PM), <https://www.law.com/therecorder/2019/04/12/did-defendants-in-latest-roundup-trial-geo-fence-jurors/?sreturn=20190826190011>.

<sup>6</sup> Sarah K. White, *What is Geofencing? Putting Location to Work*, CIO (Nov. 1, 2017, 12:43 PM), <https://www.cio.com/article/2383123/geofencing-explained.html>.

<sup>7</sup> Mem. of Points & Authorities in Support of Mot. for Temporary Inj. Precluding Advertisements by Def. Relating to Safety, Testing, and Studies on its Products Until After Entry of J. in this Action, Pilliod et al. v. Monsanto Co., Ca. Super. Ct. Alameda, No. RG17862702 (Mar. 18, 2019), <https://www.courthousenews.com/wp-content/uploads/2019/04/RoundupGeofencing-TRO.pdf>; Transcript

Killer Hype Lack Scientific Support,” and “Fear of ‘Chemicals’ Results from Misunderstanding” were popping up on smartphones throughout the San Francisco area.<sup>8</sup> The plaintiffs’ lawyers asked Judge Winifred Smith to ban Monsanto’s geo-fencing activities within a quarter-mile of the courthouse, urging that an injunction was necessary to protect the jury pool from being tainted.<sup>9</sup>

Monsanto’s lawyers fired back, pointing out that the plaintiffs’ law firms themselves had already engaged in an “onslaught of disparaging Roundup advertisements across multiple media platforms.”<sup>10</sup> The defense team pointed out that the jury pool had already been bombarded with 2,187 anti-Roundup television and radio ads from December 1, 2018 to March 21, 2019 in the local area alone.<sup>11</sup> In fact, Monsanto had actually moved for a mistrial just before opening statements, due to the “misinformation” campaign led by the plaintiffs’ attorneys.<sup>12</sup> Monsanto’s lawyers also argued that the company had both a valid First Amendment right to engage in such speech and a right to communicate accurate product information.<sup>13</sup>

Judge Smith ultimately agreed with the defense attorneys and denied plaintiffs’ motion for a gag order. She stated, “The court is not persuaded that the alleged geomarketing is materially different from carrying signs outside the courthouse or carrying placards or wearing buttons inside a courtroom, or that it requires a different judicial response.”<sup>14</sup> Judge Smith added, “Plaintiffs have not met their burden to show that Monsanto’s speech presents an actual threat of imminent prejudice to plaintiffs’ right to a fair trial nor shown that there are no viable alternatives to a prior restraint on Monsanto’s speech.”<sup>15</sup> However, Judge Smith did acknowledge that geo-fencing “raises a number of issues,” observing that “technology has taken us places probably we never thought it would go.”<sup>16</sup>

These “number of issues” regarding geo-fencing and related technologies seem to have received the majority of media attention about the case, and raises the question—how far can

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at 1826-28, *Pilliod et al. v. Monsanto Co.*, Ca. Super. Ct. Alameda, No. RG17862702 (Apr. 2, 2019), <https://usrtk.org/wp-content/uploads/2019/04/Trial-Transcript-Pilliod-April-2-2019.pdf>; *see also* Bronstad, *supra* note 5.

<sup>8</sup> Gary Ruskin, *Google Ads Raise Concerns About Geofencing*, USRTK.ORG (Mar. 15, 2019), <https://usrtk.org/monsanto-roundup-trial-tacker/google-ads-raise-concerns-about-geofencing/>.

<sup>9</sup> Transcript at 1826-28, *supra* note 7.

<sup>10</sup> *See* Def. Monsanto Company’s Opp’n to Plaintiff’s Mot. for Temporary Inj. Precluding Advertisements by Monsanto Relating to Safety, Testing, and Studies on its Products Until After Entry of Judgment in this Action, *Pilliod v. Monsanto, Co.*, Ca. Super. Ct., Alameda Cty., No. RG17862702 at 2 (April 3, 2019), <https://www.courthousenews.com/wp-content/uploads/2019/04/RoundupGeofencing-OPP.pdf> (hereinafter Monsanto Opp’n to Inj.).

<sup>11</sup> *See id.*

<sup>12</sup> *See id.* (referencing Transcript at 1295-1532, 1306-1308, *Pilliod et al. v. Monsanto Co.*, Ca. Super. Ct. Alameda, No. RG17862702 (Mar. 28, 2019), <https://usrtk.org/wp-content/uploads/bsk-pdf-manager/2019/04/Trial-Transcript-Pilliod-March-28-2019.pdf>).

<sup>13</sup> *See* Monsanto Opp’n to Inj., *supra* note 10.

<sup>14</sup> Bronstad, *supra* note 5.

<sup>15</sup> *See* Debra Cassens Weiss, *Judge Refuses to Block Maker of Roundup Weed Killer From Geofencing Around Courthouse*, ABA J. (Apr. 15, 2019, 3:03 PM), <http://www.abajournal.com/news/article/judge-refused-to-block-maker-of-roundup-weed-killer-from-geo-fencing-around-courthouse>.

<sup>16</sup> *See* Transcript at 2074-2350, 2083, *Pilliod et al. v. Monsanto Co.*, Ca. Super. Ct. Alameda, No. RG17862702 (Apr. 4, 2019), <https://usrtk.org/wp-content/uploads/bsk-pdf-manager/2019/04/Pilliod-Trial-Transcript-April-4-2019.pdf>.

lawyers and their clients go when digitally communicating about a case? Given geo-fencing's broad capabilities, using GPS, wi-fi, or cellular data to draw virtual boundaries around a specific location and trigger targeted messages and ads via social media—does the technology violate the digital privacy of the venire panel and bring lawyers closer to jury tampering? Geo-fencing is clearly a new technology causing issues with due process and fair representation. But how problematic is this technology in other contexts? For example, how are lawyers using geo-fencing technology and social media for personal use? This begs an examination of how courts and disciplinary committees balance between the attorney's right to free speech and the attorney's multitude of responsibilities owed to the client.

Lawyers who use geo-fencing for firm advertising have already been widely criticized. Personal injury law firms in a number of states have used geo-fencing to target cellphone users in hospital emergency rooms, chiropractic clinics, and pain management centers.<sup>17</sup> For example, firms in the Philadelphia area hired a digital advertising firm to market its services to patients waiting in hospitals using geo-fencing.<sup>18</sup> Massachusetts Attorney General Maura Healey has shared her concerns about this “digital ambulance chasing,” noting that “private medical information should not be exploited in this way . . . [e]specially when it's gathered secretly without a consumer's knowledge, without knowledge or consent.”<sup>19</sup> Healey has targeted this digital ambulance chasing in the past.<sup>20</sup> In 2018, Healey settled a suit with a digital marketing company who worked with a pro-life counseling organization to send targeted “pregnancy help” ads to women entering Planned Parenthood clinics in Massachusetts.<sup>21</sup>

Although few courts have considered the issue of geo-fencing, courts have disciplined lawyers for their technology use, particularly in cases in which lawyers' communications have jeopardized the integrity of a jury trial.<sup>22</sup> In 2018, the Amarillo Court of Appeals in Texas upheld the sanctions imposed against attorney William A. Brewer, III for using a “push poll,” or telephone survey, of Lubbock County residents just weeks before a jury trial in a wrongful death case.<sup>23</sup> The trial judge imposed sanctions of over \$177,000 after finding that a number of the poll questions

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<sup>17</sup> Debra Cassens Weiss, *Law Firms Hire Company to Send Ads to ER Patients' Cellphones; Is it a HIPAA Violation?*, ABA J. (May 30, 2018, 1:37 PM), [http://www.abajournal.com/news/article/law\\_firms\\_hire\\_company\\_to\\_send\\_ads\\_to\\_er\\_patients\\_cellphones\\_is\\_it\\_a\\_hipaa](http://www.abajournal.com/news/article/law_firms_hire_company_to_send_ads_to_er_patients_cellphones_is_it_a_hipaa).

<sup>18</sup> Bobby Allyn, *Digital Ambulance Chasers? Law Firms Send Ads to Patients' Phones Inside ERs*, NPR.ORG (May 25, 2018, 2:38 PM), <https://www.npr.org/sections/health-shots/2018/05/25/613127311/digital-ambulance-chasers-law-firms-send-ads-to-patients-phones-inside-ers>.

<sup>19</sup> *Id.*

<sup>20</sup> See Press Release, Office of Mass. Attorney General, AG Reaches Settlement with Advertising Company Prohibiting ‘Geofencing’ Around Massachusetts Healthcare Facilities (Apr. 4, 2017), <https://www.mass.gov/news/ag-reaches-settlement-with-advertising-company-prohibiting-geofencing-around-massachusetts>.

<sup>21</sup> *Id.*; see also Assurance of Discontinuance Pursuant to G. L. 93A, § 5, In the Matter of Copley Advertising, et al., Mass. Super. Ct (Apr. 4, 2017), <https://www.huntonprivacyblog.com/wp-content/uploads/sites/28/2017/04/nDP.pdf>.

<sup>22</sup> Ken Teel v. Titeflex, No. 2012-504-105 (72nd Dist. Ct., Lubbock County, Tex. Jan. 2016).

<sup>23</sup> Alex Wolf, *Dallas Litigator Sanctioned for Attempts to Taint Jury Pool*, LAW360 (Jan. 22, 2016, 11:01 PM), <https://www.law360.com/articles/750016/dallas-litigator-sanctioned-for-attempts-to-taint-jury-pool>.

were “designed to influence or alter the opinion or attitude of the person being polled,” and that the attorney’s conduct was “designed to improperly influence a jury pool” via the dissemination of information “without regard to its truthfulness or accuracy.”<sup>24</sup> Agreeing that such practices “negatively affected the rights of the parties to a fair and impartial jury” and “negatively reflected upon the integrity of the judicial system,” the Court of Appeals affirmed.<sup>25</sup> The Supreme Court of Texas has granted review, with proceedings currently ongoing.<sup>26</sup>

With technology advancing faster than courts and disciplinary committees can handle, the issue of lawyers’ creative use of technology to represent their clients (or advertise their own services), will continue to toe the line between First Amendment rights and concerns with due process and fair representation.

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<sup>24</sup> See Alison Frankel, *Texas Sanctions Appeal Confronts Limits on Pre-Trial Jury Research*, REUTERS BLOG (Sept. 30, 2016), <http://blogs.reuters.com/alison-frankel/2016/09/30/texas-sanctions-appeal-confronts-limits-on-pre-trial-jury-research/>.

<sup>25</sup> *Brewer v. Lennox Hearth Products, LLC*, 546 S.W.3d 866 (Tex. App. —Amarillo Mar. 26, 2018, pet. granted); Dorothy Atkins, *Atty Rightly Sanctioned for Push Poll, Texas High Court Told*, LAW360 (Nov. 1, 2018, 5:03 PM), <https://www.law360.com/articles/1097781/atty-rightly-sanctioned-for-push-poll-texas-high-court-told>.

<sup>26</sup> See generally Cara Salvatore, *Texas Justices to Review Atty’s Push Poll Sanction*, LAW360 (June 28, 2019, 7:16 PM), <https://www.law360.com/articles/1173946/texas-justices-to-review-atty-s-push-poll-sanction>.