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## **SOCIAL NETWORKING WEBSITES: IMPACT ON LITIGATION AND THE LEGAL PROFESSION IN ETHICS, DISCOVERY, AND EVIDENCE**

*Sandra Hornberger\**

### **I. INTRODUCTION**

The continuous and rapid evolution of technology and the increasing use of social networking websites have left the courts questioning how to deal with discovery and professional responsibility matters in the twenty-first century. Courts are gradually being forced to adapt to changes in social communication and the resulting impact on attorney conduct, discovery methods, and the admission of new categories of evidence.<sup>1</sup> However, keeping up with these changes has become progressively more difficult for the courts.<sup>2</sup>

There are numerous rules and regulations that attorneys are expected to abide by throughout the course of litigation and court proceedings. Although these rules and regulations are amended to adapt to frequent and constant changes in technology,<sup>3</sup> problems often arise because the progression of the law cannot keep up with the

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<sup>1</sup> See Ethan J. Wall, *Facebook, Other Networking Sites Look Like Plunder to Attorneys*, BROWARD DAILY BUS. REV., Feb. 12, 2009, at 16.

<sup>2</sup> See *id.* (noting that as technology rapidly advances and professionals become more dependent on technology, courts will have to address the uncertainty surrounding discovery and admissibility of evidence discovered on social networking websites).

<sup>3</sup> Therese Craparo & Anthony J. Diana, *The Next Generation of E-Discovery: Social Networking and Other Emerging Web 2.0 Technologies (Tip of the Month)*, MONDAQ, Aug. 4, 2009, available at 2009 WLNR 15069036 (indicating that the Federal Rules of Civil Procedure were amended in 2006 and broader language was used in the construction of the electronic discovery rule to account for constant changes in technology and communication).

pace of technological evolution.<sup>4</sup> Notwithstanding such problems, current rules are sufficiently adequate in guiding the judiciary through upcoming cases involving social networking websites.

Attorneys should be aware and acknowledge the protracted process of amending rules and regulations and, therefore, should have a vast knowledge of current rules. Simultaneously, as evidenced by recent decisions, attorneys should be aware and weary of the traps and dangers social networking sites and electronic communication techniques pose to ethics and discovery.<sup>5</sup> However, with growing frequency, it appears that judges are not burdened with finding novel solutions. For example, advisory ethics opinions have established that attorneys using “social networks” to discover information are bound by the rules of professional responsibility.<sup>6</sup> The judges who make these decisions seem to apply already existing rules to matters concerning evolved technology where no new and definitive bright line rule exists; thus, it appears that a definitive bright line rule is unnecessary.

The vast amount of information an attorney may find on a social networking website can be a “virtual gold mine of discoverable information[,]”<sup>7</sup> and any issues arising as a result of the discovery of such information, particularly regarding what is and is not discoverable, can be resolved, perhaps even avoided, if attorneys familiarize themselves with existing rules. Take, for example, an attorney seeking to contact a witness through a third party. If Facebook was not involved and the attorney attempted to contact the witness through other means, such as by telephone, or face to face conversation via a third party, a court applying current rules would likely reach the same result. Judges have consistently applied current ethical rules when determining whether attorneys have abided by ethical obligations inherent to the legal profession while obtaining information from social

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<sup>4</sup> Dan Regard & Tom Matzen, *Web 2.0 Collides With E-Discovery*, LAW.COM (May 30, 2008), <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202421780523> (stating that “technology develops and the law catches up”).

<sup>5</sup> Tiffany M. Williams, *Social Networking Sites Carry Ethics Traps and Reminders*, ABA LITIGATION NEWS (Aug. 27, 2009), [http://www.abanet.org/litigation/litigationnews/top\\_stories/social-networking-ethics.html](http://www.abanet.org/litigation/litigationnews/top_stories/social-networking-ethics.html).

<sup>6</sup> *Id.*

<sup>7</sup> Wall, *supra* note 1.

networking websites.<sup>8</sup>

The steady and growing use of social networking websites<sup>9</sup> enables the sites to become an important source of information gathering, especially because information obtainable online “ ‘should not enjoy the same privacy protection as information maintained in someone’s private home.’ ”<sup>10</sup> In order to acclimate to this new source of information and discovery tool, and to effectively utilize it, attorneys must become more comfortable with existing rules. There is no need for new bright line rules that will serve to prevent attorneys from finding themselves entangled in new-aged ethical problems and discovery battles. Knowledge of existing rules provides attorneys sufficient protection from ethical traps and discovery battles.

Attorneys should utilize this incredible source of information without fear of it being undiscoverable, inadmissible, or unethical. In traditional practice, an attorney would not second-guess his or her desire to introduce certain evidence. The same should apply to information obtained from social networking sites, so long as attorneys master current regulations and rules addressing the means of obtaining such information. Properly obtaining the information will not only avoid conflict between opposing sides in the courtroom when debating what type of information is and is not discoverable, but it will make access to information more efficient, and thereby also more cost effective.

The following sections will describe the vast quantity of information available on social networking websites and the advantage attorneys stand to gain by becoming more familiar with the information and utilizing it appropriately. Section II will address the composition of social networking websites, information made available by such sites, and accessibility to the sites. Section III will address ethical concerns associated with obtaining information from social networking websites and issues relating to the contacting of witnesses, clients, and others via these sites. Section IV will address procedural issues surrounding discovery. Finally, Section V will address the relevance of information obtained through social networking websites

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<sup>8</sup> See Philadelphia Bar Ass’n Prof’l Guidance Comm., Op. 2009-02 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf) [hereinafter Opinion 2009-02].

<sup>9</sup> See Wall, *supra* note 1 (indicating that the question of whether social networking “sites will have an impact on electronic discovery” really should be a question of when).

<sup>10</sup> See Williams, *supra* note 5.

and the relation between this information and the Federal Rules of Evidence dealing with admissibility of this information.

## II. SOCIAL NETWORKING WEBSITES

Social networking websites include websites such as MySpace, Facebook, Twitter, and LinkedIn.<sup>11</sup> However, there are hundreds of other social networking sites servicing a wide variety of interests.<sup>12</sup> The sites are typically used by individuals whose primary goals are to indicate to other users of the same sites the other networks they belong to, and who other individuals in their networks are.<sup>13</sup> Attorneys should be aware of the dangers surrounding the web, but they should not be discouraged from using the web as a valuable resource. Despite social networking websites being a new forum that provides discoverable information, attorneys, through the use and application of existing rules governing legal issues, can utilize this information. The rules may not be favorable under all circumstances, but the lack of privacy restrictions and the public nature of these sites will likely lead to wide admissibility of the sites' contents.

To join a social networking site, a person sets up a profile which usually contains a picture of the person along with various information "such as age, location, interests, and an 'about me' section."<sup>14</sup> Usually, social networking sites allow their users to select who may view their profiles, whether it is friends only, friends of friends, or the entire network.<sup>15</sup> Additionally, there are privacy settings that are capable of being adjusted by an account user.<sup>16</sup> For example, users can decide whether they would like their profile to appear and be viewed by the public or by friends only.<sup>17</sup> Once a profile is set up, if it is available to the public, a subscriber may invite others to become his or her direct "friend," "contact," or "fan," the term de-

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<sup>11</sup> *Id.*

<sup>12</sup> Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM., no. 1 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.* (noting that users may deny permission to view their networking profile to other users in their network).

<sup>17</sup> Boyd & Ellison, *supra* note 12.

depends on which site is used.<sup>18</sup> For example, Facebook, a well-known networking website, allows individuals to contact each other via “friend request.”<sup>19</sup> Anyone who becomes a friend can view the profile holder’s entire profile as well as the profile holder’s other friends.<sup>20</sup> Friends are also able to send private messages and instant messages, and they can post comments on an individual’s wall.<sup>21</sup> Many sites also enable their users to share photos and videos.<sup>22</sup> The information users include in their profiles is valuable to attorneys, judges, and others in the legal profession because it is likely to be true and accurate since use of the sites mainly involves “communicating with people who are already a part of their extended social network . . . as opposed to meeting new people.”<sup>23</sup> It is likely that a network composed of friends an individual already knows will prevent him or her from posting untrue or inaccurate information—there is no purpose in providing false information others searching your profile are likely to know.

Some commentators consider social networking sites to be “‘unregimented environments for young people’ ” thus they most likely provide relevant and reliable information when explored by attorneys for litigation purposes because many users share various details of their personal lives.<sup>24</sup> It is believed that “those [people] between [sixteen] and [twenty-four] years of age” use social networking sites as a way to communicate instead of by “telephone . . . [or] coffee shops.”<sup>25</sup> Use of these sites has led to sensitive private information being publicized; information such as pictures, journal entries, and other private details are shared to portray oneself “as [they would] like to be seen—pretty, witty, brave, sexy, or tough.”<sup>26</sup>

People have been spending increasingly more time on social networking websites, using the sites “to manage both personal and

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<sup>18</sup> *Id.*

<sup>19</sup> See Williams, *supra* note 5.

<sup>20</sup> See Boyd & Ellison, *supra* note 12.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> LaJean Humphries, *The Impact of Social Networking Tools and Guidelines to Use Them*, LLRX.COM (Jan. 15, 2007), <http://www.llrx.com/features/goodgoogle.htm>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

professional relationships.”<sup>27</sup> The information available on these sites is so abundant that it is not only utilized by attorneys to explore and gather information about witnesses and other viable sources for their case, but is also used by colleges and employers to discover personal information about potential students and/or employees.<sup>28</sup> Also, although some social networking sites allow users to create a user name, other sites, such as Facebook, use the real names of the account holder.<sup>29</sup>

Attorneys should also be aware that judges, not simply clients, friends, and colleagues, are using Facebook and other social networking websites.<sup>30</sup> A Texas state judge, the Honorable Susan Criss, caught an attorney appearing before her in a lie because of the attorney’s postings on Facebook.<sup>31</sup> The attorney alleged that she had a death in the family and as a result needed a continuance, yet her Facebook postings indicated that she was partying throughout the week.<sup>32</sup> Attorneys should be aware of the dangers surrounding the web but nevertheless should not be discouraged from using the web as a valuable resource. Judge Criss indicated that the American Bar Association should address this new forum of media and information because “ ‘[t]he medium is always going to change . . . [w]e need to always adapt.’ ”<sup>33</sup>

Courts and legislatures may, in the future, establish guidelines and rules defining the scope of investigating within social networking sites once the law has caught up with technology. Therefore, attor-

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<sup>27</sup> H. Christopher Boehning & Daniel J. Toal, *Social Networking Data Presents Challenges*, N.Y. L.J., July 1, 2009, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202431893552>.

<sup>28</sup> *Id.*; Karen L. Stevenson, *What’s on Your Witness’s MySpace Page?*, ABA LITIG. NEWS ONLINE (Mar. 2008), [http://www.abanet.org/litigation/litigationnews/2008/march/0308\\_article\\_myspace.html](http://www.abanet.org/litigation/litigationnews/2008/march/0308_article_myspace.html).

<sup>29</sup> See Stevenson, *supra* note 28.

<sup>30</sup> See Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, ABA J. (July 31, 2009, 2:16 PM), [http://www.abajournal.com/news/facebooking\\_judge\\_catches\\_lawyers\\_in\\_lies\\_crossing\\_ethical\\_lines\\_abachicago/](http://www.abajournal.com/news/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Judge Criss discussed that the Model Rules do not have to address social networking websites, but attorneys should be aware that there are still ethical lines that cannot be crossed. *Id.* For example, the judge indicated that attorneys made postings on Facebook complaining about their cases and clients. McDonough, *supra* note 30. While Model Rules do not have to reflect social networking websites, attorneys should keep in mind that the rules of ethics do not become irrelevant because they are not directly addressed by the Model Rules. *Id.*

neys, despite the wide use of “social networking sites to discover information about their adversaries, witnesses, and even potential jurors[,]” must understand that the current discovery process of obtaining private information through these sites is governed by the existing rules of procedure, evidence, and ethics.<sup>34</sup> Although the difficulty of applying litigation rules to these new methods of discoverable information may be said to lie within the inability of the rules to keep up with technological advancements, it seems more reasonable that the lack of familiarity and understanding of the existing rules results in the difficulty of utilizing new forms of discovery. The variety and amount of social networking sites is quickly growing.<sup>35</sup> According to Bill Eager, co-founder of a company “that helps social-networking users market to each other,” the number of social networking sites would increase from approximately 850 in 2008 to 250,000 by 2009.<sup>36</sup> It is estimated that “[t]hirty-five percent of adult Internet users in the United States have a profile on a social networking site, and more than 500,000 new users join these sites every day.”<sup>37</sup>

With the rapidly growing number of social networking website users, it is inevitable that attorneys will increasingly seek to use this information in the courtroom. Attorneys have had to battle several issues that have arisen, including potential ethical violations and problems the use of networking websites could pose.

### III. ETHICAL CONCERNS

The Philadelphia Bar Association Professional Guidance Committee recently issued an advisory opinion regarding professional responsibilities and accessing personal information on social networking sites for discovery purposes.<sup>38</sup> The advisory committee found that an attorney seeking to discover information about a witness from the witness’ social networking website, such as MySpace or Facebook, must adhere to ethical obligations placed on an attorney

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<sup>34</sup> Daniel L. Brown and Aimee R. Kahn, *Savvy Use of Social Networking Sites*, N.Y. L.J., Sept. 8, 2009, available at [http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202433578539&font\\_colororredFree\\_With\\_Registrationfont\\_Savvy\\_Use\\_of\\_Social\\_Networking\\_Sites](http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202433578539&font_colororredFree_With_Registrationfont_Savvy_Use_of_Social_Networking_Sites).

<sup>35</sup> See Jon Swartz, *Social-Networking Sites Work to Turn Users Into Profits*, USA TODAY, May 12, 2008, available at [http://www.usatoday.com/tech/techinvestor/industry/2008-05-11-social-networking\\_N.htm](http://www.usatoday.com/tech/techinvestor/industry/2008-05-11-social-networking_N.htm).

<sup>36</sup> *Id.*

<sup>37</sup> Wall, *supra* note 1.

<sup>38</sup> See Opinion 2009-02, *supra* note 8.



by the rules of professional responsibility and conduct.<sup>39</sup> Such a requirement eliminates the need for a bright line rule. The legal profession is sufficiently regulated by the American Bar Association's Model Rules as well as each state's individual ethical and professional rules. The effective rules are flexible and can be adapted to various situations. This, for example, means that rules governing regular communication, conflicts, or fees attributable to attorneys and clients, witnesses, or judges, can easily be applied to communication using innovative technology.

In the matter before the Professional Guidance Committee, an attorney sought advice on discovery methods after determining at a deposition that the witness, an eighteen-year-old woman, not a party to the litigation, had Facebook and MySpace accounts.<sup>40</sup> The attorney sought to utilize a third party to "friend" the witness on Facebook and obtain personal information about the witness that the attorney alleged was relevant and could be used to impeach the witness.<sup>41</sup> The third party would not disclose that he or she is affiliated with the attorney, but otherwise would be truthful, then the third party would provide the posted information to the attorney "who would evaluate it for possible use in the litigation."<sup>42</sup>

The advisory committee decided that the attorney's efforts would violate rules of professional conduct established under Philadelphia law, illustrating the need for attorney awareness when attempting to discover information through social networking sites.<sup>43</sup> Pursuant to the opinion, the attorney was ethically prevented from using a third party to "friend" the witness because it would violate the professional conduct rule requiring an attorney to avoid "dishonesty, fraud, deceit, [or] misrepresentation."<sup>44</sup> The attorney's main purpose was to obtain the information that was to be used for impeachment purposes; however, the witness was not to be told by the third party that he or she was working for the attorney on the opposing side and attempting to obtain access to information that would likely impeach the witness.<sup>45</sup> The committee indicated that the attorney's behavior

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<sup>39</sup> *See id.* at 1-2.

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Opinion 2009-02, *supra* note 8, at 2-4.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Id.* at 1.

was dishonest and fraudulent and therefore barred by the rules of professional conduct.<sup>46</sup>

In this case, the rules achieved the intended and proper result. An attorney owes his or her client a fiduciary duty of the utmost good faith and loyalty; thus, an attorney may not be dishonest or fraudulent.<sup>47</sup> A bright line rule addressing social networking sites is unnecessary to demonstrate the importance of an attorney's duties to his or her client or witness.

The committee noted that the attorney himself could have requested the witness to be his "friend"—by sending a request to the witness which, if accepted, would allow the attorney to view the witness's profile—"by simply asking the witness forthrightly for access[,]” thereby avoiding the deception he risked in asking a third party to investigate the witness on his behalf.<sup>48</sup> A new bright line rule regulating contact with witnesses would not likely require more than the current rules already do, "asking the witness forthrightly for access,"<sup>49</sup> and therefore, it is superfluous. A clear understanding of existing ethical obligations when attempting to discover information via social networking sites eliminates potential risks, such as, sanctions, that attorneys may be subject to. It would be prudent for attorneys to have detailed knowledge of already existing rules. This would enable attorneys to have a better idea as to how information available on these sites can be used to, for example, determine the credibility of witnesses since there seem to be no clear rules or guidelines.<sup>50</sup>

It is evident that an attorney, even when dealing with public profiles on social networking sites, must consider and abide by the rules of professional conduct despite the fact that the information would be available if the individual is "friended." As discussed in the advisory opinion, had the attorney himself contacted the witness directly via "friend request" he would not have broken any ethical or

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<sup>46</sup> *Id.* at 3.

<sup>47</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

<sup>48</sup> Opinion 2009-02, *supra* note 8, at 3.

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 6. It is noted at the end of the advisory opinion that it is just an opinion and it "is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other [c]ourt. It carries only such weight as an appropriate reviewing authority may choose to give it." *Id.* It is not a clearly established rule giving attorneys the necessary guidance or rules to follow in order to avoid ethical conflicts and consequences.

professional rules, and therefore, he would have been able to obtain the information.<sup>51</sup>

When attorneys abide by rules governing conduct, they are opening the door to a wealth of information easily obtainable and readily available from social networking websites.<sup>52</sup> Not only can attorneys find an abundance of information about potential witnesses, but they can also discover information about potential jurors, their own clients, and opposing counsel.<sup>53</sup> Although profiles will not always be available to be viewed publicly and witnesses may not be willing to allow attorneys to probe, there are potential ways to circumvent privacy claims.<sup>54</sup> As a result, attorneys must be aware of the information available and the means of legally accessing it.

Privacy regulations also govern the use of information posted on networking sites.<sup>55</sup> However, even under such circumstances, new regulations would not be greatly advantageous. Privacy rights have developed over decades; existing rules governing such rights are more beneficial to both attorneys seeking to obtain information and to users of networking sites, especially if they may have been the focus of litigation previously and there is a clear understanding of how they are applicable. A new and unfamiliar rule could subject attorneys to lengthier and more costly litigation because of the uncertainty surrounding its application and use.

A great variety of information about witnesses and clients can be obtained from networking sites. Investigation into social networking sites has led to “insight into a person’s values, activities, biases[,] and self-image” among many others.<sup>56</sup> It has also made available information such as “past education and employers . . . other people in

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<sup>51</sup> See *id.* at 3.

<sup>52</sup> See Jack Zemlicka, *Attorneys Underutilize Social Networking Web Pages*, WIS. L.J., (Oct. 6 2008), <http://www.wislajournal.com/article.cfm/2008/10/06/Sites-Unseen-Attorneys-underutilize-social-networking-Web-pages> (claiming that if attorneys are not using these sites to obtain information, they should be).

<sup>53</sup> *Id.*; Humphries, *supra* note 24.

<sup>54</sup> See, e.g., Opinion 2009-02, *supra* note 8, at 3 (stating that had the attorney himself contacted the witness directly via “friend request” he would not have broken any ethical or professional rules, and therefore, he would have been able to obtain the information).

<sup>55</sup> See e.g., *id.* at 2-3 (illustrating how the rules governing attorney misconduct apply to the unauthorized use of an attorney using social media websites to gather information in a wrongful way).

<sup>56</sup> Tamara Thompson, *Due Diligence with Social Networks*, L. TECH. NEWS, Dec. 12, 2008, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202426678705&hbxlogin=1>.

their network, interest organizations . . . leisure activities . . . [and] marital status[;]" the list goes on and on.<sup>57</sup> These social networking sites create a new dynamic and a new realm of discoverable information that provide personal information to attorneys—if obtained properly—to use when examining potential witnesses, clients, or even opposing counsel.<sup>58</sup>

Whether information listed on social networking websites can be discovered, is relevant, admissible, or reliable will be determined by courts; either way, judges have almost begun to expect searches of these sites.<sup>59</sup> Thus, attorneys must follow evidentiary and civil procedure rules, even if no specific rules dealing with social networking sites exist.<sup>60</sup> Attorneys can accomplish this by considering their methods of obtaining information from a social networking site in relation to obtaining the information otherwise.<sup>61</sup> For example, the attorney in the Philadelphia Bar Association Advisory Committee opinion should have known that “trick[ing] a witness into befriending a third party” in a situation not involving a social networking site would have been against ethical rules, thus the same would apply to using Facebook for example.<sup>62</sup>

Although there are ethical concerns with respect to communicating with witnesses on social networking sites, there are also ethical concerns about the information attorneys post on these websites.<sup>63</sup> Attorneys should acknowledge that the ethical rules, which apply to public conversations they engage in, also apply to postings or communication on social networking websites.<sup>64</sup> It is crucial for attorneys to avoid ex parte communication or posting “case specifics and the outcome of litigation” on these sites.<sup>65</sup> These mishaps could be considered ethical violations and the Model Rules would apply, even

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<sup>57</sup> *Id.*

<sup>58</sup> See Zemlicka, *supra* note 52.

<sup>59</sup> Thompson, *supra* note 56.

<sup>60</sup> See Stevenson, *supra* note 28.

<sup>61</sup> *Ethical Concerns Regarding Social Networking Sites*, YOUNGTexasLawyer.COM (May 20, 2009), <http://www.youngtexaslawyer.com/?p=1345>.

<sup>62</sup> *Id.*; Opinion 2009-02, *supra* note 8, at 2.

<sup>63</sup> See Miriam Rozen, *Social Networks Help Judges Do Their Duty*, TEX. LAW., Aug. 25, 2009, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202433293771>.

<sup>64</sup> See *id.*

<sup>65</sup> *Id.*

though the communication is electronic as opposed to in person.<sup>66</sup>

However, newly established bright line rules advising attorneys that conduct such as this is prohibited would be redundant. Current rules specifying that attorneys may not communicate ex parte are sufficient; a simple and common sense approach to the rules illustrates to an attorney that he or she cannot have communications with a judge when the opposing party is not present.<sup>67</sup> Communication via networking sites is logically considered communication nonetheless; therefore, it is irrelevant whether or not a new bright line rule or existing rules govern the conduct.

Judges can also fall victim to social networking website misuse.<sup>68</sup> The lack of specific direction and knowledge about this new media phenomenon is causing confusion in the legal profession.<sup>69</sup> Attorneys are searching for bright line rules without realizing that existing rules are sufficient. During a child custody and support proceeding, a North Carolina judge and defense counsel discussed Facebook and became friends on the social networking site.<sup>70</sup> In the midst of the proceedings, the judge and defense counsel posted several messages on each other's Facebook sites regarding the trial.<sup>71</sup> The judge also looked up the defendant's information on the online search engine Google.<sup>72</sup> Although the communication occurred online between "friends," it is clear that Model Rules of ethical conduct applying to traditional communication also would apply to social networking websites.<sup>73</sup> The North Carolina judge, as a result of his actions, faced a public reprimand.<sup>74</sup> In addition to the reprimand, he

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<sup>66</sup> *Id.*

<sup>67</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.9 (2010).

<sup>68</sup> See Public Reprimand, <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimand/s/jsc08-234.pdf> (last visited Nov. 4, 2010) [hereinafter Public Reprimand] (indicating that it is inappropriate for a judge and attorney to become friends on a social networking website and discuss pending litigation on such a site).

<sup>69</sup> See *Judge Reprimanded For Facebook Chats*, WXII12.COM (June 1, 2009), <http://www.wxii12.com/news/19625311/detail.html> (stating that although the judge most likely knew that ex parte communication was prohibited by ethical rules, he conversed with the attorney via Facebook, thus violating ethical rules, most likely unknowingly).

<sup>70</sup> Public Reprimand, *supra* note 68, at 1-2.

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.*

<sup>73</sup> See *id.* at 3-4 (stating that The Judicial Standards Committee concluded that although communications occurred on Facebook, it was ex parte communication with defense counsel, which was prohibited, and the judge's online research of defendant prejudiced him; thus the judge was forced to recuse himself from the case).

<sup>74</sup> *Id.* at 4.

had to agree not to repeat his conduct, as it would hurt not only the integrity of the judiciary, but also the faith the public has in the judiciary, and that he would “familiarize himself with the Code of Judicial Conduct.”<sup>75</sup>

The New York Judicial Ethics Committee has attempted to determine the appropriate scope of social networking website usage by judges, indicating that judges may use such websites as long as they comply with the “Rules Governing Judicial Conduct.”<sup>76</sup> This would seem to indicate that even the members of the judicial ethics committee consider existing rules sufficient. The opinion provides a list of non-exhaustive considerations judges should keep in mind when using social networking websites.<sup>77</sup> The opinion also indicates that technology changes rapidly and that the rules cannot always keep up.<sup>78</sup> Therefore, judges should consider these changes and how they “present further ethics issues.”<sup>79</sup> The committee encourages judges to consider the rules and potential violations of the rules when posting material on their websites.<sup>80</sup>

Judges are also required to avoid impropriety on their sites, to be “mindful” when making connections with others in the legal profession, and not to communicate about their cases and pending litigation.<sup>81</sup> Thus, the judicial committee on ethics is simply establishing that the rules governing judicial conduct apply to social networking websites. Judges, despite the inability of the law and rules to keep up with rapidly changing technology, should consider the rules and interpret how the rules would apply to their situation.<sup>82</sup>

Along with judges and attorneys, jurors can also succumb to problems involving social networking websites.<sup>83</sup> In *United States v. Fumo*,<sup>84</sup> the defendant sought a new trial on the basis that a juror had

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<sup>75</sup> Public Reprimand, *supra* note 68, at 4.

<sup>76</sup> Opinion 08-176 (Jan. 29, 2009), available at <http://www.courts.state.ny.us/ip/judicial/ethics/Opinions/08-176.htm>.

<sup>77</sup> *Id.* (taking into consideration that there are several reasons why judges may want to participate and establish an online social networking website account).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See Opinion 08-176, *supra* note 76.

<sup>82</sup> See *id.*

<sup>83</sup> See, e.g., *United States v. Fumo*, No. 06-319, 2009 WL 1688482, at \*61 (E.D. Pa. June 17, 2009) (noting that during the trial, a juror posted updates of the proceeding on his Twitter and Facebook accounts).

<sup>84</sup> *Id.*

used Facebook to post messages about the ongoing trial's progress while proceedings were being held.<sup>85</sup> The court determined that the juror's postings on Facebook were harmless because the postings in "no way suggest[ed] any outside influence, much less prejudice, bias, or impartiality."<sup>86</sup> Thus, *Fumo* illustrates a judge's ability to consider rules which have already been established when attempting new challenges dealing with technology, particularly social networking websites.

The unavailability of bright line rules or precedent governing social networking websites should not discourage attorneys from taking advantage of what information the sites have to offer. While remaining careful and observing existing rules, attorneys should learn how to use networking sites to their advantage in litigation.<sup>87</sup> The phenomenon of social networking websites continues to expand, and it is not only evident in the legal world and in the gathering of information about witnesses, but it has also made itself evident in education and the job market among many others.<sup>88</sup>

While new rules directly addressing social networking websites could help courts and judges analyze problems and resolve issues more quickly, existing rules have been sufficient. Judges have been able to apply the existing Model Rules to inappropriate conduct of attorneys and the Code of Judicial Conduct to inappropriate conduct of judges. As a result, it appears that in the realm of ethics, currently existing rules are adequate. Other cases involving discoverability of information posted on social networking websites have also surfaced. From already decided cases, it appears that the courts are, again, applying existing case law to new fact situations involving social networking websites, thereby eliminating the need for a bright line rule.<sup>89</sup>

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<sup>85</sup> *Id.* at \*58.

<sup>86</sup> *Id.* at \*64.

<sup>87</sup> See Wall, *supra* note 1 (claiming that lawyers "have barely begun to scratch the surface on how to" deal with discovery of information available on social networking websites).

<sup>88</sup> Humphries, *supra* note 24.

<sup>89</sup> See, e.g., Wolfe v. Fayetteville, Arkansas Sch. Dist., 600 F. Supp. 2d 1011, 1017 (W.D. Ark. 2009) (explaining that evidence from Facebook was used when a school administrator was sued for discrimination); Cromer v. Lexington-Fayette Urban Cnty. Gov't, No. 07-256-JBC, 2008 WL 4000180, at \*1 (E.D. Ky. Aug. 26, 2008) (discussing the arrest of a police officer who was accused of misconduct after he posted information on his MySpace profile); Doe v. California Lutheran High Sch. Ass'n, 88 Cal. Rptr. 3d 475, 478 (Cal. Ct. App. 2009)

#### IV. DISCOVERY OF INFORMATION ON SOCIAL NETWORKING WEBSITES

According to recent decisions, it appears that courts are open to and accepting of admitting information found on social networking websites.<sup>90</sup> Courts have often held information obtained from such sites to be discoverable under the Federal Rules of Civil Procedure, despite the lack of court precedent.<sup>91</sup> The Federal Rules of Civil Procedure dealing with electronic discovery were last amended in 2006.<sup>92</sup> The Advisory Committee decided to apply the “broad language permitting discovery of information ‘stored in any medium’ ” to electronic discovery in an attempt to take on the rapid and constant changes in technology and communications.<sup>93</sup> “This has allowed the Federal Rules to remain flexible in the evolving world of electronic communications.”<sup>94</sup> The broad language of these rules enables their adaption to new conditions without creating a need for a set of laws specifically addressing networking sites. A rule created to address networking sites may generate confusion and disagreements over other mediums containing useful information.

Courts and legislatures have not had the opportunity to deal with social networking websites at great lengths; however, some courts are taking the initiative by allowing information from such sites to be discovered if it “relate[s] to subjects at issue in a litigation.”<sup>95</sup> As long as the “subject matter [of the content of a profile] is relevant to pending litigation,” it is likely that a court will allow the information obtained on a social networking site to be discoverable.<sup>96</sup>

The Federal Rules of Civil Procedure, Rule 26 provides the general rules governing discovery and the duty to disclose informa-

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(discussing the suspension of students from a private school after they posted information on their MySpace pages).

<sup>90</sup> See *Wolfe*, 600 F. Supp. 2d at 1017; *Cromer*, 2008 WL 4000180, at \*1; *Doe*, 88 Cal. Rptr. 3d at 478.

<sup>91</sup> Dave Rhea, *Two Oklahoma City Attorneys Warn Companies of Pitfalls of Social Media Sites*, J. REC. (Aug. 19, 2009), available at 2009 WLNR 16184526. See also *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D. Nev. Jan. 9, 2007).

<sup>92</sup> *Craparo & Diana*, *supra* note 3.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Wall*, *supra* note 1.



tion.<sup>97</sup> Rule 26(b)(1) defines the scope of discovery that may be obtainable by parties:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).<sup>98</sup>

Courts that have been faced with making a determination about the discoverability of information obtained from social networking websites have considered Rule 26<sup>99</sup> because of a lack of direct precedent or legislation.<sup>100</sup> Notwithstanding this fact, the established Rule 26(c) has been a sufficient guide to courts in determining whether information found on social networking sites will be discoverable.

However, parties have also used Rule 26(c) as a means of precluding information contained on social networking websites.<sup>101</sup> The practical use of Rule 26(c), for both permitting and precluding discovery, demonstrates the sufficiency of existing rules, not only to

<sup>97</sup> FED. R. CIV. P. 26.

<sup>98</sup> FED. R. CIV. P. 26 (b)(1).

<sup>99</sup> See e.g., *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D. Nev. Jan. 9, 2007). The court dealt with a motion to compel plaintiff to provide private e-mail messages from her MySpace account to the defendants. *Id.* at \*2. The matter was at a pre-trial stage, thus the rules of evidence technically did not apply. *Id.* at \*4. Therefore, the court considered Rule 26(c) of the Federal Rules of Civil Procedures in conjunction with Rule 412 of the Federal Rules of Evidence as per the Advisory Committee's Notes which indicated that Rule 26(c) "protect[s] [a] victim against unwarranted inquiries and . . . ensure[s] confidentiality." *Id.*

<sup>100</sup> Rhea, *supra* note 91.

<sup>101</sup> *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-cv-01958-WYD-MJW, 2009 WL 1067018, at \*1-2 (D. Colo. Apr. 21, 2009).

benefit those seeking to benefit from use of networking sites, but also to benefit those who are disadvantaged by such information.

Pursuant to Rule 26(c), information is discoverable so long as it is relevant to the litigation, whether it be relevant to the claim or defense.<sup>102</sup> Courts have allowed discovery of information from social networking websites in various circumstances, despite the lack of strict guidelines and rules.<sup>103</sup> Attorneys should take advantage of existing rules, particularly the federal rules of procedure that cover and admit a broad scope of information and data obtained through electronic discovery. For example, *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*<sup>104</sup> illustrates the readiness of courts to consider allowing discovery of information obtained on MySpace.<sup>105</sup>

In *Mackelprang*, the plaintiff sued her former employer, Fidelity, alleging sexual harassment.<sup>106</sup> The defendant, Fidelity, obtained public information from two MySpace accounts that allegedly belonged to plaintiff; one account indicated she was single with no intention of having children, while the other indicated she had six children.<sup>107</sup> Thereafter, the defendant compelled discovery of private messages sent via the MySpace account.<sup>108</sup> The defendant argued that the messages “may contain statements . . . about the subject matter of this case . . . [and] admissions . . . which could potentially be used to impeach the witnesses’ testimony . . . that Plaintiff’s alleged severe emotional distress was caused by factors other than Defendant’s . . . misconduct.”<sup>109</sup> The defense clearly relied on the Federal Rules of Civil Procedure in its attempt to admit the information obtained through MySpace.<sup>110</sup>

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<sup>102</sup> FED. R. CIV. P. 26(b)(1).

<sup>103</sup> See, e.g., *Wolfe*, 600 F. Supp. 2d at 1017; *Cromer*, 2008 WL 4000180, at \*1; *Doe*, 88 Cal. Rptr. 3d at 478.

<sup>104</sup> *Mackelprang*, 2007 WL 119149, at \*1.

<sup>105</sup> *Id.* at \*8 (noting that the statements made on plaintiff’s MySpace wall can be relevant if they relate to issues regarding her emotional distress claim).

<sup>106</sup> *Id.* at \*1.

<sup>107</sup> *Id.* at \*2.

<sup>108</sup> *Id.*

<sup>109</sup> *Mackelprang*, 2007 WL 119149, at \*6.

<sup>110</sup> See FED. R. CIV. P. 26(b)(1). Although this rule does not directly address social networking websites, electronic discovery is interpreted broadly; thus, it includes social networking websites. In this case, the defense based its argument for compelling the plaintiff to provide the private messages on the relevance of the information to the current litigation. *Mackelprang*, 2007 WL 119149, at \*3. If the messages contained any statements about the

However, in *Mackelprang*, the court determined that the plaintiff could not be compelled to produce all of the private messages on her MySpace page because it would result in the defendant obtaining irrelevant information.<sup>111</sup> Nevertheless, the court indicated that a limited request for production of the messages would suffice to compel plaintiff to supply the messages.<sup>112</sup> This further advances the argument that attorneys should be aware of the wealth of information available on these websites, and that the information could potentially be beneficial to their case.<sup>113</sup> In this instance, the existing rules performed the same function a new rule could have performed. It is widely understood that irrelevant information will not be admissible and this should not be dependent on whether the information is written on a regular piece of paper or a networking website. Attorneys should not be discouraged from obtaining as much information as possible from public profiles of clients, witnesses, and others posted on social networking profiles in this era of technological advancements when the courts, despite the lack of bright line rules, employ the Federal Rules of Civil Procedure in determining the scope of discovery.<sup>114</sup>

In 2009, a court, using existing rules, logically determined the admissibility of information posted on a Facebook site by simply inquiring whether the information was relevant to the matter before the court.<sup>115</sup> In *Bass ex rel. Bass v. Miss Porter's School*,<sup>116</sup> the District Court of Connecticut decided a matter in which relevant evidence contained on a Facebook page was deemed discoverable.<sup>117</sup> The de-

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subject matter of this case, they could be relevant to the claim or defense of the plaintiff or defendant as per the requirement of Rule 26. *See id.*

<sup>111</sup> *Mackelprang*, 2007 WL 119149, at \*7 (reasoning that the defendant obtaining all of the message in plaintiff's MySpace account would reveal information regarding sexually explicit or promiscuous conduct, which was not relevant to her employment with the defendant).

<sup>112</sup> *Id.* at \*8. The court indicated that obtaining all of the messages in plaintiff's MySpace account would reveal information regarding sexually explicit or promiscuous conduct which was not relevant to her employment with defendant. *Id.* at \*7. However, defendant would be able to conduct further discovery into whether the accounts in fact belonged to the plaintiff and plaintiff could be compelled to "produce relevant and discoverable email communications." *Id.* at \*8.

<sup>113</sup> *See* Wall, *supra* note 1.

<sup>114</sup> *See Mackelprang*, 2007 WL 119149, at \*8.

<sup>115</sup> *Bass ex rel. Bass v. Miss Porter's Sch.*, No. 3:08cv1807(JBA), 2009 WL 3724968, at \*1 (D. Conn. Oct. 27, 2009).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

fendants requested relevant information from plaintiff's Facebook site, which plaintiff considered irrelevant.<sup>118</sup> The court determined that the entire Facebook record, "750 pages of wall postings, messages, and pictures," contained communications that were relevant to the subject matter of the litigation; thus, the defendants were entitled to the complete social networking site activity record.<sup>119</sup>

Comparing the decisions in *Mackelprang* and *Bass*, it appears that a court has discretion in determining whether discovery of information from social networking websites can or cannot be compelled. Despite relying on the rules of civil procedure, decisions judges will make in the future are not predictable. Decisions regarding "discoverability of online personal information have not kept pace with new opportunities for online expression, which are being developed faster than regulations can be revised or promulgated."<sup>120</sup> However, several cases before the courts are indicative of existing rules sufficiently regulating the admissibility and discoverability of information posted on networking sites.<sup>121</sup> A determination of whether evidence is relevant to the matter before the court, just as it would be made in a case concerning information presented on tangible documents, can be made as effectively and logically if the information was posted on a networking site.

Courts also take into account the expectation of privacy when determining whether to allow discovery of information available on social networking sites.<sup>122</sup> The courts consider the subjective expectation of privacy a profile user may have when creating and using the website.<sup>123</sup> If the user intends the information to be available for public use or publication, there can be no reasonable expectation of privacy.<sup>124</sup> An argument parties can make to prevent having to hand

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Ronald J. Levine & Susan L. Swatski-Lebson, *Are Social Networking Sites Discoverable?*, PRODUCT LIABILITY L. & STRATEGY, Nov. 13, 2008, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202425974937>.

<sup>121</sup> See, e.g., *Bass*, 2009 WL 3724968, at \*1; *Mackelprang*, 2007 WL 119149, at \*9; *Ledbetter*, 2009 WL 1067018, at \*1-2.

<sup>122</sup> See Levine & Swatski-Lebson, *supra* note 120.

<sup>123</sup> *Id.*

<sup>124</sup> See *id.*; *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (holding that "[u]sers would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting[;]" thus, for example, an e-mail that was received by the recipient is no longer subject to privacy because it has been delivered and, therefore, any expectation of privacy is extinguished).

information over at the discovery stage involves the privacy settings the party sets on his or her site.<sup>125</sup> However, arguing that profiles are set up with a restriction to all but individuals who have been accepted as friends may not be sufficient to keep the information out.<sup>126</sup> In making their determinations, courts seems to rely on “the idea of individual responsibility when using social networking sites and a lowered expectation of privacy where the person asserting a right to privacy is the same person who made the information public in the first place.”<sup>127</sup>

Attorneys should be aware that the chances of admitting the information found on social networking websites depends on the strength of the argument they can present with regard to relevance under Rule 26(b)(1). Attorneys who often litigate and practice before the court should be able to make strong and effective arguments for admitting information whether it was obtained through traditional means or more modern and technologically advanced means. Courts that have allowed discovery of information obtained from networking sites have mainly been concerned with the relevance of the subject matter to the litigation as required by Rule 26.<sup>128</sup>

Allowing social networking website information to be discovered using Rule 26 allows the party opposing the discovery request to employ Rule 26(c) and seek a protective order to protect the party and “prevent [the] disclosure of [the] information.”<sup>129</sup> Pursuant to Rule 26(c), information should only be discoverable if “the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case and cannot be obtained except through discovery.”<sup>130</sup>

Increasingly, it has become common practice for attorneys to compel discovery of information posted on social networking sites in

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<sup>125</sup> Levine & Swatski-Lebson, *supra* note 120.

<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

<sup>128</sup> *See Mackelprang*, 2007 WL 119149, at \*8. The court indicated that the discovery is “based on a good faith response to demands for production . . . constrained by the Federal Rules and by ethical obligations” and that a party can be compelled to provide such information if they are wrongfully withholding it. *Id.* The *Mackelprang* court’s rationale is based on the requirements of Fed. R. Civ. P. 26(b)(1); however, the court does not address or distinguish the information here, which was obtained from a social networking website, from information obtained in a more traditional fashion. *See id.* at \*4.

<sup>129</sup> Levine & Swatski-Lebson, *supra* note 120.

<sup>130</sup> *Mackelprang*, 2007 WL 119149, at \*4. *See also* FED. R. CIV. P. 26(c)(1).

criminal and civil trials.<sup>131</sup> Attorneys can choose from photographs, videos, and many other personal facts of the profile owner.<sup>132</sup> It has become more important than ever for attorneys to consider whether their client or adversary has a networking site and whether information on such a site could potentially be either “useful or harmful to their case.”<sup>133</sup> Aside from looking into their clients, attorneys can also investigate the credibility of opponents and expert witnesses by checking social networking websites.<sup>134</sup> For example, in a personal injury action, a defendant was permitted to introduce video evidence from a Facebook page of the plaintiff slam-dunking a basketball only a few days after the accident.<sup>135</sup>

It remains questionable when and whether a court will allow personal information obtained from social networking sites to be discoverable since the “specific rules governing . . . discoverability” in these circumstances have not been able to keep up with the rapid changes in technology.<sup>136</sup> However, as the above cases reveal, courts have successfully applied the Federal Rules of Civil Procedure to cases involving social networking websites. The current rules adequately address the issues brought before the court. Can the same be said for the Federal Rules of Evidence? It appears so. From these cases, it is reasonable to conclude that existing rules are sufficiently adequate to address legal issues, particularly the discovery of information from social networking websites.

## V. FEDERAL RULES OF EVIDENCE AND ADMISSIBILITY OF SOCIAL NETWORKING WEBSITES’ INFORMATION

Whether information obtained from social networking websites is discoverable in litigation is not the only question surrounding this new media. Although attorneys must remember to utilize the Federal Rules of Civil Procedure, attorneys must also have a thorough knowledge of the Federal Rules of Evidence. With the growing use of such websites, attorneys are increasingly using personal information obtained online. Consequently, the rules of evidence come

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<sup>131</sup> Stevenson, *supra* note 28.

<sup>132</sup> *Id.*

<sup>133</sup> Wall, *supra* note 1.

<sup>134</sup> *See id.*

<sup>135</sup> *Id.*

<sup>136</sup> Levine & Swatski-Lebson, *supra* note 120.

into play. In an attempt to admit evidence such as photographs, conversations, postings, comments, or any other information available on a person's website, attorneys must still "satisfy the rules of evidence."<sup>137</sup> Gathering evidence from social networking websites has become an effective way to obtain personal information of clients or opponents.<sup>138</sup>

Issues that arise in admissibility of evidence gathered from social networking sites include problems of relevance,<sup>139</sup> authentication,<sup>140</sup> and hearsay.<sup>141</sup> Attorneys, through practice and prolonged use of current rules, are able to learn how to manipulate existing rules to overcome such problems. Therefore, if attorneys continue to commit and strive to thoroughly understand the Federal Rules of Evidence, as many do, a bright line rule addressing social networking websites will be unnecessary.

Judges are the "gatekeepers" in determining what evidence from social networking websites will be admissible.<sup>142</sup> The rules of evidence apply to information gathered from social networking websites just as they would apply to traditional evidence such as letters or journals.<sup>143</sup> Providing judges with discretion to make evidentiary determinations may lead to greater consistency and uniformity among decisions under the current laws since the determinations are based on precedent and evaluation of current rules. Novel rules governing social networking sites would create less uniform and consistent decisions, as the rules would provide judges with much greater discretion to interpret new rules for which no guiding precedent exists.

Evidence must be relevant to be admissible.<sup>144</sup> In order to be relevant, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action

<sup>137</sup> Brown & Khan, *supra* note 34.

<sup>138</sup> See John S. Wilson, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1224 (2007) (indicating that law enforcement officers have been obtaining personal information from social networking sites as evidence in criminal cases).

<sup>139</sup> See Brown & Khan, *supra* note 34.

<sup>140</sup> Wilson, *supra* note 138, at 1229.

<sup>141</sup> *Id.*

<sup>142</sup> Jack Zemlicka, *Attorneys Using Social Networking Web Sites as Research Tools*, WIS. L.J., Oct. 6, 2008, available at 2008 WLNR 25789701.

<sup>143</sup> Bitá Ashtari & Jan Thompson, *Rape Shield Laws and Social Networking Websites: Is There Any Privacy Left to Protect?*, 2 FED. CRIM. DEF. J. 72, 86 (2009).

<sup>144</sup> FED. R. EVID. 402.

more probable or less probable than it would be without the evidence.”<sup>145</sup> However, even relevant evidence may not be admissible if the probative value is substantially outweighed by unfair prejudicial effect or, if it is hearsay.<sup>146</sup> Pursuant to Rule 801 of the Federal Rules of Evidence, evidence, particularly an out of court statement, offered for the substantive “truth of the matter asserted” is hearsay.<sup>147</sup>

Courts have applied the rules of evidence in cases involving social networking websites because of the lack of evidentiary rules directly addressing this new media phenomenon, yet the outcomes have been fair and appropriate. In cases where “evidentiary admissibility is satisfied, information discovered on a member’s profile page can be extremely useful.”<sup>148</sup> For example, in *Mackelprang*, a defendant who was accused of sexual harassment argued that evidence obtained from the plaintiff’s MySpace page would indicate “that [the] [p]laintiff was a willing participant . . . and actively encouraged the alleged sexual communication” with defendant; and it would be relevant as to whether the plaintiff actually suffered emotional distress.<sup>149</sup> The defense’s argument that plaintiff welcomed defendant’s conduct was indeed relevant.<sup>150</sup>

The court applied the Federal Rules of Evidence, and despite the relevance of the information sought to be compelled, it had to consider the prejudicial effect of the evidence.<sup>151</sup> As a result, the court indicated that at trial the evidence may be inadmissible because it violates evidentiary rule 412(a), which precludes “evidence offered to prove that any alleged victim engaged in other sexual behavior or to prove the alleged victim’s sexual predisposition.”<sup>152</sup> The court held that the probative value of the information did “not substantially outweigh its unfair prejudicial effect to [p]laintiff” and that there was no “relevant connection between a plaintiff’s non-work related sexual activity and the allegation that he or she was subjected to unwelcome and offensive sexual advancements in the workplace.”<sup>153</sup> According-

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<sup>145</sup> FED. R. EVID. 401.

<sup>146</sup> FED. R. EVID. 403.

<sup>147</sup> FED. R. EVID. 801; Ashtari & Thompson, *supra* note 143, at 86.

<sup>148</sup> Brown & Khan, *supra* note 34.

<sup>149</sup> *Mackelprang*, 2007 WL 119149, at \*3.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* See also FED. R. EVID. 403.

<sup>152</sup> *Mackelprang*, 2007 WL 119149, at \*3; FED. R. EVID. 412.

<sup>153</sup> *Mackelprang*, 2007 WL 119149, at \*6.



ly, the court applied the Federal Rules of Evidence to information obtained from Plaintiff's MySpace page, as they would be applied to traditional sources of information and ruled that the information was inadmissible.<sup>154</sup> The application of the rules was appropriate and the court did not abuse its discretion. It was not burdensome or difficult for the court to apply the current rules, thus alleviating a need for new bright line rules. The court correctly and appropriately considered relevancy, probative evidence, and prejudicial effect and, as a result, was able to reach a conclusion. The origin of the evidence—electronic via social networking sites as opposed to tangible documentation—is irrelevant.

In *People v. Fernino*,<sup>155</sup> a New York City criminal court held that information from a MySpace account was admissible non-hearsay evidence.<sup>156</sup> In this case, the court admitted evidence of messages sent by defendant on MySpace in the form of friend requests when there was an outstanding order of protection prohibiting communication between defendant and those she requested.<sup>157</sup>

Evidence from social networking sites is also admissible to impeach a witness.<sup>158</sup> In *In re K.W.*,<sup>159</sup> a minor accused her father of sexually assaulting her.<sup>160</sup> However, K.W. maintained a MySpace website on which she made several postings alluding to the fact that she was not a virgin.<sup>161</sup> But, when she filed the report against her father with the police, she indicated to the officers that she was a virgin before her father started raping her.<sup>162</sup> The court found that the MySpace statements could be used as impeachment evidence because they contained statements that were inconsistent with prior statements made by K.W. which directly went to the issue pending in the litigation.<sup>163</sup> However, the court did indicate that the social networking website information would not be admissible "as substantive evidence that someone else caused the trauma."<sup>164</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> 851 N.Y.S.2d 339 (N.Y. Crim. Ct. 2008).

<sup>156</sup> *See id.* at 342.

<sup>157</sup> *Id.* at 340, 342.

<sup>158</sup> *See In re K.W.*, 666 S.E.2d 490, 494 (N.C. Ct. App. 2008).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 492.

<sup>161</sup> *Id.* at 494.

<sup>162</sup> *Id.*

<sup>163</sup> *K.W.*, 666 S.E.2d at 494 (citing *State v. Younger*, 295 S.E.2d 453, 456 (N.C. 1982)).

<sup>164</sup> *Id.* at 494.

Although there are no bright line rules governing the admissibility of evidence found on social networking websites, there appears to be a pattern indicating what decisions the judge will make when determining whether or not the information is relevant and thereby admissible. However, the decision to admit the evidence is in the judge's discretion and in many cases it can be quite damaging. Such was the case for Joshua Lipton who seriously injured a woman in a drunk driving incident.<sup>165</sup> In Lipton's case, the prosecution presented a photograph that was posted on a Facebook profile showing Lipton at a Halloween party shortly after the accident wearing a jail suit.<sup>166</sup> The judge admitted the photographs based on the prosecution's argument that they establish and/or cast doubt upon Lipton's character.<sup>167</sup>

Other courts deciding cases regarding admissibility of evidence obtained from social networking sites are also inclined to allow statements made on such sites by their owners to be used against them.<sup>168</sup> In *Clark v. State*,<sup>169</sup> the defendant was convicted of the intentional murder of a two-year old girl.<sup>170</sup> Clark appealed the decision on grounds that evidence from his MySpace website was inadmissible at trial.<sup>171</sup> The posting on his MySpace page read: "Society labels me as an outlaw and criminal . . . if I can do it and get away. B . . . sh . . . And with all my obstacles, why the f . . . can't you."<sup>172</sup> Clark argued that the statement was inadmissible because it was character evidence used for the " 'forbidden inference' of . . . propensity[.]" however, the court disagreed.<sup>173</sup> The court held that the information posted on Clark's MySpace page was properly admitted into evidence because the statements were his own rather than statements of prior bad acts, and Clark's testimony, which attempted to convey

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<sup>165</sup> See *Social Networking Sites Facebook, MySpace Yield Evidence*, HERALDNET (July 20, 2008), <http://www.heraldnet.com/article/20080720/BIZ/281626175/1005>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* The prosecution successfully introduced the evidence to portray Lipton "as an unrepentant partier who lived it up while his victim recovered in the hospital." *Id.* Admissibility such as this allows prosecutors to cast doubt on a defendant's character and can result in harsher sentences for criminals.

<sup>168</sup> See, e.g., *Clark v. State*, 915 N.E.2d 126, 129-30 (Ind. 2009).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 129, 132.

<sup>171</sup> *Id.* at 129.

<sup>172</sup> *Id.*

<sup>173</sup> *Clark*, 915 N.E.2d at 129-30 (citing *Camm v. State*, 908 N.E.2d 215, 231 (Ind. 2009)). See also FED. R. EVID. 404(b).

he acted recklessly, gave the prosecution the opportunity to rebut that claim with his statements from the MySpace page.<sup>174</sup>

The cases thus far illustrate that the relevancy requirement surrounding admissibility of evidence does not appear to be a great barrier to introducing information obtained from social networking websites. A more daunting obstacle attorneys will have to face is authentication of the evidence.<sup>175</sup> However, it is not overly difficult to authenticate evidence. An attorney must simply prove “through the existence of direct or circumstantial evidence, that the content from the profile is attributable to, connected to, or even authored by the defendant.”<sup>176</sup>

The Tennessee Court of Appeals has deemed statements between a husband and wife sufficiently authenticated by the wife.<sup>177</sup> The court, in *Dockery v. Dockery*,<sup>178</sup> did not accept the husband’s argument that only a representative from MySpace could authenticate the statements on the sites.<sup>179</sup> The court reasoned that the wife’s testimony about the statements listed on the MySpace website evidences “ ‘that the matter in question is what its proponent claims’ ” it is and thus, it was sufficient to authenticate the information posted on the site.<sup>180</sup>

When faced with information that is beneficial to an attorney’s case, the attorney should take advantage of the information readily available on social networking websites and use arguments founded on the traditional Rules of Evidence to admit such statements against an opponent. These social networking sites are “unregimented environments for young people,” but also for adults, which enable persons to share “journals, photographs, and intimate details,” creating a treasure of information for attorneys to use in litigation.<sup>181</sup> So long as attorneys find detours to circumvent privacy and authenticity issues, information obtained from social networking websites will likely be admissible.<sup>182</sup> In any case, the existing evidentiary

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<sup>174</sup> *Id.* at 130-31.

<sup>175</sup> See Wilson, *supra* note 138, at 1129.

<sup>176</sup> Ashtari & Thompson, *supra* note 143, at 87.

<sup>177</sup> *Dockery v. Dockery*, No. E2009-01059-COA-R3-CV, 2009 WL 3486662, at \*6 (Tenn. Ct. App. Sept. 21, 2009).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (quoting TENN. R. EVID. 901(a)).

<sup>181</sup> Humphries, *supra* note 24.

<sup>182</sup> See Wall, *supra* note 1.

rules sufficiently address any legal issues surrounding the admission of information obtained from social networking websites.

## VI. CONCLUSION

The improvement in technology and rapid expansion of the Internet and its use warrant courts and legislatures to address issues and problems created by such developments. The growth of social networking websites, with Facebook and MySpace alone having more than one hundred million users each, is already affecting the legal community.<sup>183</sup> Attorneys, immediately upon retaining a client, should investigate whether or not that client maintains a social networking site profile and what information is available to the public via the site.<sup>184</sup>

Federal Rules of Evidence, like Federal Rules of Civil Procedure and the Model Code for attorneys or Code of Judicial Conduct for judges, in the present form, sufficiently deal with issues brought before the courts involving introduction and admittance into evidence information found on social networking websites. While technology develops quicker than legal developments can, existing law adequately addresses issues arising from new forms of information-providing technologies.

When utilizing tools such as social networking websites and other Internet based information sources, it is necessary to remember that potential traps must be avoided. Jurors, attorneys, judges, and clients must be aware of the consequences communication with other parties can have on not solely legal matters, but also in other areas

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<sup>183</sup> Ken Strutin, *Evidence is an Age of Self-Surveillance*, N.Y. L.J., Mar. 11, 2009, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428950936>.

<sup>184</sup> See Don P. Palermo, *The Danger of Self-Inflicted Damage on the Web: How the Opposition Can Use Your Own Clients' Web Sites Against Them*, 30 PA. LAW. 34, 36 (2008). During a mediation attempt involving a personal injury suit, the attorneys representing the plaintiff were surprised with information presented by opposing counsel regarding the plaintiff. *Id.* Plaintiff's attorneys did not seek out or investigate plaintiff's social networking websites she had set up, however, defendant's attorneys had. *Id.* While plaintiff's counsel expected a seven-figure offer, they received a much lower offer. *Id.* After plaintiff's accident in which she claimed to have been severely injured, defense counsel was able to find personal information on her MySpace page. *Id.* The evidence, photographs in this matter, indicated that plaintiff was "tanned and toned and was in the process of consuming an alcoholic beverage with her girlfriends" and not suffering from injuries worth seven figures, thus, the low settlement offer. Palermo, *supra* note 184.

such as employment consideration.<sup>185</sup> Judges and attorneys must be conscientious of applicable rules of conduct governing their professions when creating or maintaining their profiles on social networking websites.

Individuals must be careful when making statements that may contradict or be inconsistent with postings, photographs, or other information available on social networking sites that are obtainable by opposing counsel as such information can be used to impeach witnesses.<sup>186</sup> Attorneys must also be careful when using social networking sites and should avoid posting comments about their clients or the status of a case being litigated. As long as evidence is deemed relevant and is not substantially prejudicial or hearsay, courts will most likely admit it. It does not matter whether the evidence is traditional evidence or new media type of evidence such as information from profiles on social networking sites.

Despite the lack of definitive rules and precedent governing discoverability and admissibility of social networking sites, courts will likely admit personal information posted on social networking websites as long as introduction of the information satisfies the traditional rules of ethics, procedure, and evidence. In the case of the attorney who attempted to contact a third party witness, the existing rules governing attorney conduct applied. Although the facts behind the issue involved new technological developments, the judge's resolution of the case illustrates the ability to apply currently governing rules. Also, the Federal Rules of Civil Procedure, such as Rule 26, apply to social networking websites. The issue before the court may not involve regular facts such as plaintiffs requesting discovery of physical documents, but rather information from a Facebook or MySpace page. However, it appears that the existing Rules of Procedure enable judges to adequately resolve the issue. Finally, Federal Rules of Evidence, just like the Rules of Procedure, can be applied to cases involving new technological developments such as social networking sites. Cases before the court such as *Clark* and *Dockery* demonstrate the court's satisfactory use of currently existing rules

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<sup>185</sup> See Humphries, *supra* note 24. Employers often search social networking websites to evaluate potential job candidates. *Id.* Some firms believe that before hiring any employee it is only rational to conduct a search of all Internet profiles. *Id.* Many candidates are not aware that postings on social networking websites could be damaging their job prospects. *Id.*

<sup>186</sup> See, e.g., *K.W.*, 666 S.E.2d at 494.

governing evidence.

However, implications of these new forums for information, which will only continue to steadily advance, must be addressed by rules governing the legal profession. This must be done not only to define how this evidence can be used, but also to make attorneys more aware of the availability of such evidence and reduce fear of wasting time with what may potentially be inadmissible or undiscoverable evidence. Since social networking sites “are being developed faster than regulations on the discoverability of electronic information, courts may need to broaden the scope of evidentiary principles applicable to technology like e-mail and text messages sooner than later”; however, it appears that current rules are an adequate starting point.<sup>187</sup>

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<sup>187</sup> Wall, *supra* note 1.

