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The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession

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THE ADVENT OF DIGITAL DIARIES: IMPLICATIONS OF SOCIAL NETWORKING WEB SITES FOR THE LEGAL PROFESSION

I. INTRODUCTION

The days of simple discovery requests are over. In a world run by technology, even the most loyal pen and paper users find themselves assimilating to the computer culture. Managers no longer keep their business records in books, but store these records in computer databases. People spend more time communicating over the Internet than over the phone or in person. The combination of increased electronic recordkeeping and communication translates into complicated discovery requests and unique admissibility hurdles. Attorneys must remain abreast of the latest Internet developments because they present creative opportunities for electronic evidence gathering.

Federal and state courts are beginning to issue published and unpublished opinions regarding social networking web sites and related communication devices, such as email and instant messaging.[1] An examination of these federal and state cases, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure provides insight into the way courts should handle social networking web sites in the future.

This Comment addresses the emerging trends in communication through social networking web sites and the implications for both criminal and civil litigation. Part II provides an overview of the use of social networking web sites as evidence. Part III addresses how federal and state courts apply the Federal Rules of Civil Procedure and Evidence, and the corresponding state rules, to

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1. *See, e.g.*, United States v. Tank, 200 F.3d 627, 630–31 (9th Cir. 2000) (finding that the government properly authenticated chat room logs); United States v. Jackson, 208 F.3d 633, 637–38 (7th Cir. 2000) (upholding the exclusion of web site postings because the postings were hearsay and not properly authenticated); Rudolph v. Clifton Heights Police Dep't, No. 07-cv-01570, 2008 WL 2669290, at *7 (E.D. Pa. July 7, 2008) (finding a printout from a MySpace page was insufficient evidence to sustain a claim); Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 537–85 (D. Md. 2007) (determining that the existing rules of evidence adequately govern electronically stored information); Mackelprang v. Fidelity Nat'l Title Agency of Nev., Inc., No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *2–9 (D. Nev. Jan. 9, 2007) (denying a party's motion to compel content from a MySpace page); *In re* K.W., 666 S.E.2d 490, 492–95 (N.C. Ct. App. 2008) (finding that content from a MySpace page was admissible as impeachment evidence, but not as substantive evidence); State v. Carroll, No. 07CA14, 2007 WL 2696883, at *2–3 (Ohio Ct. App. Sept. 11, 2007) (admitting information from and testimony about a MySpace page); State v. Gaskins, No. 06CA0086-M, 2007 WL 2296454, at *7–8, (Ohio Ct. App. Aug. 13, 2007) (finding the trial court did not abuse its discretion by permitting the introduction of photographs from MySpace but disallowing questioning about the web site); Dexter v. Dexter, No. 2006-P-0051, 2007 WL 1532084, at *6–7 & n.4 (Ohio Ct. App. May 25, 2007) (finding that a party had no expectation of privacy when her MySpace page was available to the public and upholding the admission of evidence from the web site); State v. Bell, 882 N.E.2d 502, 511–12 (Ohio Ct. Com. Pl. 2008) (finding that MySpace chats were relevant and could be authenticated); *In re* F.P., 878 A.2d 91, 95 (Pa. Super. Ct. 2005) (reasoning that the court was not going to create unique rules for email messages and other electronic communications); *In re* T.T., 228 S.W.3d 312, 322–23 (Tex. App. 2007) (allowing the introduction of content from a party's MySpace page).

information contained on these web sites. Part IV concludes that state legislatures and state and federal courts should accommodate this emerging trend of social networking web site evidence. Specifically, states should adopt amendments to their rules of civil procedure regarding electronically stored information (ESI). Moreover, federal and state courts should recognize social networking web sites as a potentially discoverable type of ESI and should apply ordinary admissibility requirements to social networking web sites.

II. INTRODUCTION TO SOCIAL NETWORKING WEB SITES AS EVIDENCE

A. Overview of Social Networking Web Sites

One of the latest Internet trends is social networking web sites. These web sites are effective for facilitating communication, conveying autobiographical information, and consequently, collecting evidence.[2] Facebook is a social networking website with over 200 million active users.[3] MySpace boasts over 260 million users.[4] These web sites provide users the opportunity to express themselves and to connect with other users.[5] Users get a free "space" or "profile" to which they may upload photographs, contact information, personal information, and almost anything else they desire.[6] Users can also send both private and public messages to other users.[7]

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2. *See, e.g.*, Karen Barth Menzies, *Perils and Possibilities of Online Social Networks*, TRIAL, July 2008, at 58, 58 (comparing an attorney's access to information on an individual's social networking web site to an attorney's access to an individual's personal diary).

3. Facebook Press Room, http://www.facebook.com/press/info.php?factsheet (last visited June 11, 2009) (reporting the most recent statistics). Facebook's usage rate has grown quickly. *See, e.g.*, John S. Wilson, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1222 (2007) (reporting 70 million Facebook users in April 2008 (citing Facebook Press Room, http://www.facebook.com/press/info.php?statistics.php)).

4. *See* Tom Anderson's MySpace Profile, http://www.myspace.com/tom (last visited June 11, 2009). Tom Anderson is the president of MySpace. Tom Anderson's profile provides an up-to-date estimate of the number of registered MySpace users. MySpace automatically makes Tom a "friend" of any new user. Therefore, his friends reflects the number of registered users who have not removed him from their "friend list." *See id.*

5. The "Quick Tour" link on MySpace.com advertises the benefits of using the network, including the ability to "[e]xpress who you are," and "[s]hare what you're up to." MySpace Quick Tour, http://www.myspace.com/index.cfm?fuseaction=userTour.home (last visited June 11, 2009). Facebook similarly announces in its web site overview: "Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet." Facebook Fan Page, http://www.facebook.com/facebook#/facebook?v=info&viewas=2016869 (last visited June 12, 2009).

6. Wilson, *supra* note 3, at 1220.

7. *See id.*

B. Social Networking Web Sites as Evidence

The growing use of social networking web sites[8] presents opportunities for lawyers to gather evidence from these web sites in both criminal and civil cases.[9] MySpace and Facebook have proven especially useful to attorneys who seek incriminating evidence in family law matters,[10] personal injury claims,[11] and criminal law cases.[12] Prosecutors and criminal defense attorneys are adapting to the increasing use of social networking web sites.[13] Prosecutors are gathering information from social networking web sites for evidence, especially to prove a defendant's subsequent questionable conduct or lack of remorse.[14] For example, in one recent and controversial case, a young woman driver killed her passenger after losing control of her vehicle in a drunk driving accident.[15] The California prosecutor found photographs of the defendant on her MySpace page, smiling while drinking a glass of wine.[16] The defendant also posted information on her profile about drinking and partying.[17] Although it was initially expected that she would receive a long probation, she eventually was sentenced to two years in prison.[18] The prosecutor submitted the MySpace page in the sentencing hearing

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8. Facebook currently receives an average of 250,000 new registrations per day, and MySpace receives 300,000 new registrations per day. Menzies, *supra* note 2, at 58 ("One in four Americans has a MySpace page . . . . and in the United Kingdom, it is as common to have a MySpace page as it is to own a dog.").

9. Vesna Jaksic, *Litigation Clues Are Found on Facebook: Lawyers Use Social Networks as a Tool*, NAT'L L.J., Oct. 2007, at 1, 1; Justin Rebello, *Using Social Networks to Investigate Your Case*, LAW. USA, Aug. 2008, at 1, 1.

10. *See, e.g.*, Dexter v. Dexter, No. 2006-P-0051, 2007 WL 1532084, at *6–7 (Ohio Ct. App. May 25, 2007) (using a MySpace page in a child custody case); *In re* T.T., 228 S.W.3d 312, 322–23 (Tex. App. 2007) (allowing information from a MySpace page in a case involving termination of parental rights).

11. *See, e.g.*, Rebello, *supra* note 9 (stating that the investigation of social networking web sites is not limited to criminal trials); Benjamin Rolf et al., *The Usefulness of Social Networking Websites to a Resourceful Defense Team*, STRICTLY SPEAKING, Jan. 30, 2008, at 1, 2–3, *available at* http://www.dri.org (follow "Newsletter" hyperlink under "Membership Services"; then follow "2008 Product Liability Committee Strictly Speaking Winter.pdf" hyperlink under "Product Liability (Strictly Speaking)") (discussing the advantages a social networking website provided the defense in a personal injury claim).

12. *See* Wilson, *supra* note 3, at 1202; Stephanie Francis Ward, *MySpace Discovery: Lawyers Are Mining Social Networks for Nuggets of Evidence*, A.B.A. J., Jan. 2007, at 34, 34.

13. Wilson, *supra* note 3, at 1202; Ward, *supra* note 12, at 34.

14. Rebello, *supra* note 9. Rebello also discusses a similar situation where a college student, on trial in connection with a drunk driving incident, was sentenced to two years in prison after the prosecutors found an incriminating photograph on the defendant's Facebook page of him at a Halloween party wearing a costume that labeled him "Jail Bird." *Id.*; *see also* Ward, *supra* note 12 (reporting that prosecutors do not use social networking web sites as frequently as defense attorneys because prosecutors rely on search warrants for better evidence).

15. Rebello, *supra* note 9.

16. *Id.* The prosecutor posited that these photographs proved that the defendant lacked remorse for her actions. *Id.*

17. *Id.*

18. *Id.*

and the defendant's "sentence ballooned."[19] Additionally, prosecutors have found evidence from social networking web sites helpful in prosecuting gang-related crimes.[20] Defense attorneys are also using social networking web sites as valuable evidence, especially to impeach victim witnesses.[21] These attorneys are not only monitoring the victim's web site behavior,[22] but are searching family members' and friends' pages for evidence as well.[23]

This form of evidence gathering is not isolated to criminal cases, as attorneys are beginning to utilize these web sites in the civil context.[24] The Products Liability Division of the Defense Research Institute (DRI)[25] recognized that these web sites provide similar opportunities for attorneys in products liability actions.[26] Careless plaintiffs may post information on their personal profiles that provides ammunition for the defense's case.[27] For example, it is difficult to convince a jury that the plaintiff suffers from a severe personal injury if the defense finds pictures of the plaintiff dancing at a party after the alleged injury-causing accident.[28] In a recent case, a student died of alcohol poisoning at a University of Texas fraternity initiation, and the jury awarded $4.2 million in damages to the student's family.[29] Although the fraternity attempted to destroy photographs taken that evening, the attorney for the student's family found photographs and videos of the initiation on MySpace and Facebook pages.[30]

Despite the increasing number of attorneys perusing these web sites for evidence, the use of social networking web sites as evidence also has its critics. As one author remarked, "The problem with these networking sites is that it is really a domain of fiction, and is therefore an unreliable source of information."[31] Furthermore, critics argue that these web sites are not as helpful

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19. *Id.*

20. *See* Jaksic, *supra* note 9 (commenting that these websites are useful because gang members "talk about some of the[ir] [gang] behavior and antics").

21. *See, e.g.*, Laurie Mason, *Defense Attorneys Trolling the Net, Too*, BUCKS COUNTY COURIER TIMES (Levittown, Pa.), Aug. 23, 2008, *available at* http://www1.phillyburbs.com/pb-dyn/news/111-08232008-1580556.html ("In more and more cases, defense attorneys are the ones trolling the Internet, looking for photos and postings that might help them poke holes in prosecution witnesses' stories."); Ward, *supra* note 12, at 34 (claiming that criminal defense attorneys are the ones who use these websites the most for evidence gathering).

22. Mason, *supra* note 21.

23. *Id.*

24. Rebello, *supra* note 9; Rolf et al., *supra* note 11.

25. The DRI web site describes DRI as "[an] international organization of attorneys defending the interests of business and individuals in civil litigation." Defense Research Institute: About DRI, http://www.dri.org/open/About.aspx (last visited June 11, 2009).

26. *See* Rolf et al., *supra* note 11.

27. *See id.*

28. *See id.*

29. Rebello, *supra* note 9.

30. *Id.* Rebello's article also highlights a case where an attorney found photographs of a defendant's collection of classic cars on his MySpace page, when the defendant had claimed he had no assets to pay the plaintiff's damages. *Id.*

31. Mason, *supra* note 21 (internal quotation marks omitted).

as they seem at first blush because users have the option of making their profiles private. However, although the web sites provide users this privacy option, many fail to recognize this option exists, and some even choose to display their profiles to the world.[32] Despite these concerns, this form of evidence gathering is becoming more commonplace,[33] and more courts are beginning to recognize the reliability of information derived from them.[34]

III. HOW THE RULES ADDRESS THESE WEB SITES AND HOW COURTS HAVE APPLIED THE RULES

The Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the applicable state rules (including South Carolina's rules) do not specifically address social networking web sites as a unique form of evidence. This leaves federal and state courts to apply the existing rules of evidence and civil procedure to the discovery and admissibility of evidence derived from social networking web sites. A handful of recent cases have addressed social networking web sites,[35] but there is no consensus among the decisions as to the admissibility or discoverability of such web sites.[36] However, even without express rules governing this evidence, the courts decided these cases through individual fact analysis, using the existing rules governing the admissibility of evidence and the discovery of other forms of ESI.[37] Furthermore, cases that did not address social networking web sites specifically but addressed Internet communication devices similar to social networking web sites, such as instant messaging and email,[38] are helpful because of the arguments presented for the

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32. *See* Rolf et al., *supra* note 11, at 1; *see also* Menzies, *supra* note 2, at 60 (noting that the surprising thing about MySpace "is the enormous number of people who are willing to let their personal information remain public").

33. *See* Jaksic, *supra* note 9; Menzies, *supra* note 2.

34. *See, e.g.*, State v. Bell, 882 N.E.2d 502, 511–12 (Ohio Ct. Com. Pl. 2008) (finding that certain MySpace chats were relevant and could be authenticated).

35. *See* cases cited *supra* note 1.

36. The Conference of Chief Justices recognized the inconsistency of court rulings on ESI. *See* CONF. OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION vi–vii (2006), *available at* http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf ("Uncertainty about how to address the differences between electronic and traditional discovery under current discovery rules and standards 'exacerbates the problems. Case law is emerging, but it is not consistent and discovery disputes are rarely the subject of appellate review.'" (quoting COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONF. OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 3 (2004))).

37. *See, e.g.*, Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 541–62 (D. Md. 2007) (using the existing rules for authenticity and citing several cases for support of the proposition that electronic evidence does not require the court to apply a different body of law).

38. See *United States v. Jackson*, 208 F.3d 633, 637–38 (7th Cir. 2000), and *United States v. Tank*, 200 F.3d 627, 630–31 (9th Cir. 2000), for examples of courts addressing electronic evidence similar to social networking web sites.

denial of admissibility and discoverability, such as an individual's right to privacy and problems with authentication, hearsay, and relevance.[39]

A. *The Federal Rules of Civil Procedure*

The Federal Rules of Civil Procedure address ESI.[40] In December 2006, the Federal Rules were amended to better accommodate ESI.[41] Rule 34(a) formally recognizes ESI as a "proper category of information to be produced."[42] Rule 34(a) provides:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or *electronically stored information*—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form . . . .[43]

Although the Federal Rules Advisory Committee may not have had social networking web sites in mind when drafting the rules on ESI,[44] courts should apply the Federal Rules to social networking web sites just as other types of ESI.[45] Three reasons justify the similar treatment: (1) the Advisory committee intended the rule on ESI to be flexible,[46] (2) social networking web site components are similar in structure and function to traditional forms of ESI, and

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39. *See, e.g.*, *Jackson*, 208 F.3d at 637–38 (finding that web postings were hearsay and irrelevant).

40. *See, e.g.*, FED. R. CIV. P. 45(d)(1)(D) (discussing the duties a party has when responding to a subpoena for ESI).

41. *See* John F. Emerson, *Less Paper, More Danger? New Federal Rules on Electronic Discovery Are Now in Effect*, S.C. LAW., Mar. 2007, at 24, 24.

42. *Id.* at 26.

43. FED. R. CIV. P. 34(a) (emphasis added).

44. One explanation for the Federal Rules Advisory Committee's failure to acknowledge social networking web sites is that these web sites rapidly increased in popularity, a trend that the Advisory Committee did not recognize when they drafted the ESI amendments to the Federal Rules.

45. *See* Jaksic, *supra* note 9. John Palfrey, executive director of the Berkman Center for Internet & Society at Harvard Law School, suggests that despite the lack of decisions regarding social networking web sites, judges "have indicated that they will treat this information like other electronic evidence." *Id.*

46. *See* CONF. OF CHIEF JUSTICES, *supra* note 36, at 1; NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION 3 (2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.pdf.

(3) case law on traditional forms of evidence provides guidance for any differences between social networking web sites and other forms of ESI.[47]

The first reason courts should treat social networking web sites similarly to other types of ESI is because the Advisory Committee of the Federal Rules of Civil Procedure intended ESI to be a fluid concept. For example, *Federal Practice and Procedure* states that the 2006 amendment to Rule 34 "adopts a very broad definition of electronically stored information. The term was selected to encompass many different sorts of information-storage technologies presently in use or to be developed in the future."[48] The National Conference of Commissioners on Uniform State Laws, which drafted uniform rules for ESI in 2007 with the "spirit and direction of the recently adopted amendments to the Federal Rules of Civil Procedure," also indicated that the phrase "electronically stored information" encompasses future technological developments.[49] Likewise, the Conference of Chief Justices acknowledged that the list of ESI in the proposed state guidelines "should be considered as illustrative rather than limiting, given the rapid changes in formats, media, devices, and systems."[50]

Courts have recognized the flexibility of the Federal Rules of Civil Procedure regarding ESI.[51] Although case law discussing the applicability of the Federal Rules to social networking web sites specifically is scarce, probably because the parties resolve these discovery issues prior to trial, courts have acknowledged that "ESI comes in multiple evidentiary 'flavors,' including e-mail, website ESI, internet postings, digital photographs, and computer-generated documents and data files."[52] Many of these types of ESI, such as Internet postings and digital photographs, are features available on social networking web sites.[53]

A second reason for treating social networking web sites in the same manner as other forms of ESI is that aspects of social networking web sites, especially messaging features, are structured and function in the same way as other types of traditional ESI. For example, email is delivered to an inbox in the same way that messages are delivered to an inbox on Facebook and MySpace.[54] Both email and

47. *See, e.g.*, Mattie T. v. Johnston, 74 F.R.D. 498, 502 (N.D. Miss. 1976) (reasoning that a subpoena to request access to records need not be served on the person who owns the information).

48. 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2218 (2d ed. Supp. 2008) (indicating that this same definition applies to the other rules on ESI).

49. NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, *supra* note 46, at 2–3.

50. CONF. OF CHIEF JUSTICES, *supra* note 36, at 1.

51. *See, e.g.*, Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 (D. Md. 2007) (acknowledging the many types of ESI).

52. *Id.*

53. *See id.* at 538 & n.4.

54. *See* Wilson, *supra* note 3, at 1220 ("Social-networking sites also facilitate interpersonal communications through email systems that allow users to exchange messages.").

social networking web site messages are password protected by the user,[55] but a third party facilitates the communication.

Finally, case law provides guidance for any differences between social networking web sites and traditional forms of ESI.[56] For example, social networking web sites present discovery problems that many types of ESI do not because information is not physically stored on the user's computer and the user does not own the web site. If the web site is actually owned by a company that allows a user to upload information, how may a litigant request an individual user to produce information from the web site? Although a court is likely to find that the web site company actually owns and possesses the information on a social networking web site, ownership and actual possession are not necessary for discovery purposes.[57] For example, in *Mattie T. v. Johnston*,[58] the court found that ownership is not required to compel production: "A person seeking access to records through the issuance of a subpoena often has the subpoena served on the individual who has possession of the documents and the court has found no requirement that the subpoena be served on the person who owns the documents."[59] Additionally, the materials sought do not need to be in the physical possession of the person from whom discovery is sought: "'Control' has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand."[60]

Information gathered from social networking web sites also presents spoliation concerns. A party has the duty to preserve evidence during the litigation and the time leading up to litigation if the "party reasonably should know that the evidence may be relevant to anticipated litigation."[61] If a party intentionally destroys the evidence, the judge or jury generally may infer that the evidence is unfavorable to the party.[62] The party claiming spoliation must prove: "(1) the spoliation was intentional, in the sense that it was purposeful, and not inadvertent; (2) the destroyed evidence was relevant to the issue or matter for which the party seeks the inference; and (3) he or she acted with due diligence with respect to the spoliated evidence."[63] However, attorneys can attempt to counteract this problem by sending a "preservation letter," which attorneys use

55. *See* Facebook, http://www.facebook.com/ (last visited June 12, 2009); MySpace, http://www.myspace.com/ (last visited June 12, 2009).

56. *See* SEC v. Credit Bancorp, Ltd., 194 F.R.D. 469, 471 (S.D.N.Y. 2000); Mattie T. v. Johnston, 74 F.R.D. 498, 502 (N.D. Miss. 1976).

57. *See Credit Bancorp*, 194 F.R.D. at 471; *Mattie T.*, 74 F.R.D. at 502.

58. *Mattie T.*, 74 F.R.D. at 498.

59. *Id.* at 502.

60. *Credit Bancorp*, 194 F.R.D. at 471.

61. 32B AM. JUR. 2D *Federal Courts* § 2111 (2007) (citing Renda Marine, Inc. v. United States, 58 Fed. Cl. 57, 60 (2003)).

62. 29 AM. JUR. 2D *Evidence* § 256 (2008) (citations omitted).

63. *Id.* (citing Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1174 (2006)).

for other forms of ESI.[64] This is a common practice, and "attorneys increasingly are sending 'preservation letters' to the potential adversaries requesting that they preserve certain information from destruction."[65] The letter does not impose a legal obligation, but it may be sufficient to place the party on notice and to suggest that any destruction after receipt is intentional spoliation of the evidence.[66]

Federal courts have rarely addressed social networking web sites and the Federal Rules of Civil Procedure. In *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*,[67] the court denied the defendant's motion to compel private MySpace communications to rebut a sexual harassment charge because the defendant did not prove that the email messages contained sexually-related communications.[68] Although the court denied the motion, dicta suggested that had the defendant produced stronger evidence, the court may have granted the motion.[69] The court concluded, "If Defendants develop[] some basis, beyond mere speculation, to support a reasonable belief that Plaintiff engaged in sexually [explicit] email communications on her Myspace.com accounts with former co-employees at Fidelity, the Court might have reason to reconsider Defendant's motion to compel on that ground."[70]

The United States District Court in Pennsylvania also considered the sufficiency of evidence from a MySpace page in a constitutional rights case. In *Rudolph v. Clifton Heights Police Department*,[71] the plaintiff filed a civil action against the police department, alleging a violation of her constitutional rights due to the officers' rough contact.[72] The plaintiff also claimed that the department's unlawful "computer policy" fostered aggression in the police department,[73] and as proof of the computer policy, she introduced a printout of a police officer's MySpace page.[74] The court found the printout insufficient evidence of an unlawful computer policy, and thus dismissed the plaintiff's claim.[75] The court did not thoroughly discuss its reasoning but stated that besides the "many, many reasons this is insufficient evidence for this claim," the plaintiff did not produce proof that the defendant police officer used the police station's computers for

64. Jackson Lewis LLP, Anticipating and Preempting the "Endless" Search for Electronic Documents in Discovery Requests (Feb. 9, 2006), https://www.jacksonlewis.com/legalupdates/articleprint.cfm?aid=900.

65. *Id.*

66. *Id.* (citing Wiginton v. CB Richard Ellis, No. 02C6832, 2003 WL 22439865, at *4 (N.D. Ill. Oct. 27, 2003).

67. No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D. Nev. Jan. 9, 2007).

68. *Id.* at *6 n.1.

69. *Id.*

70. *Id.*

71. No. 07-cv-01570, 2008 WL 2669290 (E.D. Pa. July 7, 2008).

72. *Id.* at *7.

73. *Id.*

74. *Id.*

75. *Id.*

management of his MySpace page.[76] Although *Rudolph* does not provide guidance as to the discoverability of MySpace pages, the court's holding focused on the failure of the plaintiff to connect the MySpace page to her claim against the police station.[77] Therefore, by inference, if a party can provide the requisite connection, information from a MySpace page may be sufficient evidence to avoid summary judgment.

B. The Federal Rules of Evidence

Although the Federal Rules of Evidence do not address electronic data as a distinct category of evidence, and federal case law regarding the admissibility of social networking web sites is limited,[78] federal courts have found that the Federal Rules of Evidence "apply to computerized data as they do to other types of evidence."[79] Despite the absence of a clear holding regarding the use of social networking web sites as electronic evidence, in the federal cases that do mention this type of evidence skepticism uniformly stems from the fact that the evidence is hearsay, or from the party's inability to authenticate the evidence properly.[80]

In *Lorraine v. Markel American Insurance Co.*,[81] a Maryland district court held that web site ESI, email, web postings, digital photographs, and computer-generated documents are subject to the standard rules of admissibility, exceptions to hearsay, and exclusion despite relevance.[82] In terms of admissibility, courts treat ESI in the same way as conventional types of evidence.[83] The *Lorraine* court reasoned that the test of admissibility for ESI

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76. *Id.*

77. *Id.*

78. *See, e.g.*, Mackelprang v. Fid. Nat'l Title Agency of Nev., Inc., No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *6 (D. Nev. Jan. 9, 2007) (finding that the probative value of the party's MySpace page did not outweigh the unfair prejudice of its admission).

79. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 n.5 (D. Md. 2007) (quoting MANUAL FOR COMPLEX LITIGATION FOURTH § 11.446 (Federal Judicial Center 2004)); *see also Mackelprang*, 2007 WL 119149, at *6 (analyzing the content of a party's MySpace page under Rule 412); United States v. Ferber, 966 F. Supp. 90, 99 (D. Mass. 1997) (applying the Federal Rules of Evidence to an email message and finding the email qualified as a present sense impression hearsay exception). *But see* St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999) (finding Internet evidence so inherently unreliable that the hearsay exceptions in the Federal Rules of Evidence almost never apply). The Federal Rules of Evidence, like the Federal Rules of Civil Procedure, were designed to be flexible. *See, e.g.*, *Lorraine*, 241 F.R.D. at 538 n.5 ("[T]he rules of evidence are flexible enough to accommodate future 'growth and development' to address technical changes not in existence as of the codification of the rules themselves.").

80. *See, e.g.*, United States v. Jackson, 208 F.3d 633, 637–38 (7th Cir. 2000) (finding that the Internet postings in question were hearsay and not properly authenticated).

81. 241 F.R.D. 534 (D. Md. 2007).

82. *See id.* at 538.

83. *Id.*; *see also In re* F.P., 878 A.2d 91, 95 (Pa. Super. Ct. 2005) (reasoning that unique rules for email messages and other electronic communications were unnecessary, and that such communication should be evaluated as any other document with regards to relevance and authenticity); J. Shane Givens, Comment, *The Admissibility of Electronic Evidence at Trial:*

mirrors the test for other types of evidence: (1) relevance; (2) authenticity; (3) exceptions to hearsay; (4) the original writing rule; and (5) the probative value substantially outweighing the danger of unfair prejudice.[84]

The admissibility of ESI presents additional hurdles that conventional forms of evidence do not.[85] For example, authentication may be difficult for ESI.[86] The *Lorraine* court noted that while some courts "may require greater scrutiny than that required for the authentication of 'hard copy' documents, they have been quick to reject calls to abandon the existing rules of evidence when doing so."[87]

One federal court has also addressed—in a criminal case—the authenticity of evidence gathered from sources similar to the components of social networking web sites. In *United States v. Tank*,[88] the defendant was convicted of conspiring in the exploitation, receipt, and distribution of sexually explicit images of children.[89] The government collected the evidence at issue from Internet chat rooms,[90] similar to Facebook's instant messaging system. The court found that the "government made a prima facie showing of the authenticity" of chat room log printouts.[91] The court quoted *United States v. Catabran* for the proposition that "[a]ny question as to the accuracy of the printouts . . . would have affected only the weight of the printouts, not their admissibility."[92] The court also found that the government had adequately connected the defendant to the chat room conversations.[93] The court determined that there was no question that the conversations were relevant to the defendant's charges.[94]

Authentication of Internet postings is unique.[95] Courts examine many factors when deciding whether an Internet posting is properly authenticated, including:

Courtroom Admissibility Standards, 34 CUMB. L. REV. 95, 107 (2003) ("[I]t seems that courts are becoming increasingly reliant on the trustworthiness of electronic evidence. Original concerns about the authenticity of computer printouts of electronic evidence seem to be waning as courts repeatedly rely solely on the applicable hearsay exception as the foundational requirement to test the admission of electronic evidence.").

84. *Lorraine*, 241 F.R.D. at 538.

85. *In re* Vinhnee, 336 B.R. 437, 445 (B.A.P. 9th Cir. 2005) (recognizing that an electronic record may present "more complicated variations on the authentication problem than for paper records"); *see also* Menzies, *supra* note 2, at 62 ("As helpful and as powerful as information from cyberspace can be, it presents significant admissibility hurdles . . . .").

86. *See Lorraine*, 241 F.R.D. at 542–43.

87. *Id.* (citations omitted); *see also* Menzies, *supra* note 2, at 62 ("Judges can be skeptical of this new kind of evidence, so if you want to present it to a jury, you will need to authenticate it carefully.").

88. 200 F.3d 627 (9th Cir. 2000).

89. *Id.* at 629.

90. *Id.* at 630–31.

91. *Id.* at 630.

92. *Id.* (quoting United States v. Catabran, 836 F.2d 453, 458 (9th Cir. 1988)).

93. *Id.*

94. *Id.*

95. Although some Internet postings include the author's stamp, a person may post anonymously. Furthermore, a person may post under another's name. Menzies, *supra* note 2, at 62. This may make it difficult for a party to be able to trace the posting to the actual author.

> The length of time the data was posted on the site; whether others report having seen it; whether it remains on the website for the court to verify; whether the data is of a type ordinarily posted on that website or websites of similar entities . . . whether the owner of the site has elsewhere published the same data, in whole or in part; whether others have published the same data, in whole or in part; whether the data has been republished by others who identify the source of the data as the website in question[.][96]

The fact-intensive inquiry has led some courts to find that a party properly authenticated an Internet posting,[97] and others to find a party failed to do so.[98]

For example, in *United States v. Jackson*,[99] the court upheld the exclusion of web site postings by members of white supremacy groups as evidence of racism because the court found the postings were hearsay and not properly authenticated.[100] The court reasoned that Jackson could not prove that these white supremacy groups actually posted the racist remarks, [101] and although the finding that the danger of unfair prejudice substantially outweighed the probative value of the postings was a "close call" for the court of appeals, it did not indicate abuse of the trial court's discretion.[102] However, these postings differ from postings on social networking web sites. When posting on MySpace or Facebook, the individual user must have an account that identifies the posting, the person making the posting will be identifiable based on their own profile and account. However, there is still the question of whether the person who owns the account is the person who made the posting under the account.[103]

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96. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 555–56 (D. Md. 2007) (quoting Gregory P. Joseph, *Internet and Email Evidence*, 13 PRAC. LITIGATOR 22 (2002)) (internal quotation marks omitted).

97. *See, e.g.*, Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1154 (C.D. Ca. 2002) (finding that Internet posting printouts were properly authenticated).

98. *See, e.g.*, St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774–75 (S.D. Tex. 1999) (rejecting authenticity and referring to information from the Internet as "voodoo information"). *St. Clair* was decided in 1999, which may provide significant insight into the court's skepticism of Internet postings. The court may not be so skeptical now, given the significant rise of social networking web site users in the past ten years. *See* Menzies, *supra* note 2.

99. 208 F.3d 633 (7th Cir. 2000).

100. *Id.* at 637–38.

101. *Id.* at 638.

102. *Id.* at 637.

103. For a discussion of how courts have handled this authenticity question, see *infra* text accompanying notes 142–46.

C. *State Rules of Civil Procedure*

In approximately half of the states, the rules of civil procedure do not address ESI.[104] Although the number of states with ESI amendments continues to grow each year, currently only twenty-eight states have enacted amendments addressing ESI.[105] The states that have enacted such amendments include Alaska, Arizona, Arkansas, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Texas, Utah, Virginia, and Wyoming.[106]

The push for states to adopt rules for electronic data has been led in part by the Conference of Chief Justices.[107] The Conference drafted *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, acknowledging the near-universal use of electronic records, addressing the frequent questions ESI raises for parties and courts, and clarifying the proper way to treat the differences between ESI and traditional forms of information.[108] This push stems from the confusion caused by courts applying the rules for conventional discovery to electronic discovery.[109] This is the same push that initiated the recent ESI amendments to the Federal Rules of Civil Procedure.[110] Proponents argue that states must adopt rules for ESI: because of the increasing use of these web sites[111] and because state courts hear most of the nation's litigation,[112] the likelihood is great that social networking web sites will present state courts with evidentiary questions,[113] and states can avoid the uncertainty of electronic discovery if they follow the federal rules' lead.

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104. *See* K&L Gates LLP, Current Listing of States That Have Enacted E-Discovery Rules, http://www.ediscoverylaw.com/2008/10/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules/ (last visited June 12, 2009).

105. *See id.*

106. *Id.* Texas led the way by formally recognizing ESI under its rules of civil procedure in 1996. *See* Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 334 (2008). However, the majority of the states that have enacted amendments have done so in the last few years. *See* K&L Gates LLP, *supra* note 104. Although South Carolina has yet to amend its rules, the South Carolina Bar Practice and Procedure Committee is "looking into possible amendments." LexisNexis Electronic Discovery Services, State Court Rules, http://www.lexisnexis.com/applieddiscovery/LawLibrary/StateCourt.asp#SC (last visited June 12, 2009).

107. *See* CONF. OF CHIEF JUSTICES, *supra* note 36 (quoting COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONF. OF THE U.S., *supra* note 36).

108. *Id.*

109. *See id.* at vii (quoting COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONF. OF THE U.S., *supra* note 36).

110. *See, e.g.*, Wilson, *supra* note 3, at 1215 (outlining the history of the ESI amendments and noting that the application of the traditional rules to ESI produced "disparate results").

111. *See* Menzies, *supra* note 2.

112. Marcus, *supra* note 106, at 333.

113. *Id.*

Like federal case law, there is limited state case law on social networking web sites,[114] especially regarding the discoverability of information found on individual user's pages. However, state courts have addressed the discoverability of social networking web sites in relation to an individual's right to privacy.[115]

In an Ohio child custody case, the defendant, who lost custody in the trial court, objected to the admission of information regarding her lifestyle.[116] The trial court allowed evidence of the defendant's lifestyle gathered from testimony and online blogs.[117] Her MySpace page referenced her drug use and explained that although she was taking a break from using drugs because of the child custody litigation, she planned to continue using drugs sometime in the future.[118] The court of appeals reasoned that the defendant had no reasonable expectation of privacy when she admitted to writing the blogs, which were open to the public.[119]

The Supreme Court of Indiana examined the different components of MySpace and recognized that certain aspects, such as a profile, may be private, while aspects like a social group may be open to the public.[120] However, the evidence from the defendant's MySpace page was insufficient for the court to find the defendant guilty because of the "lack of knowledgeable testimony regarding the nature and operation of MySpace and the extent to which its 'profiles' and 'groups' are publicly accessible."[121] This ruling suggests that courts are beginning to recognize the possibility of discoverable evidence from social networking web sites, but as with any evidence, the party providing the evidence must lay the requisite foundation for its admission.

Thus, privacy may be a concern for discoverability of social networking web site information. Only the Ohio court came to a conclusion on this issue, noting that posting something on the Internet for the world to see estops a party from claiming privacy as a defense.[122]

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114. *See, e.g.*, A.B. v. State, 885 N.E.2d 1223, 1224–28 (Ind. 2008) (permitting the introduction of evidence from a MySpace page); *In re* K.W., 666 S.E.2d 490, 494 (N.C. Ct. App. 2008) (finding the evidence gathered from a MySpace page was proper impeachment evidence but not substantive evidence); Dexter v. Dexter, No. 2006-P-0051, 2007 WL 1532084, at *6–7 (Ohio Ct. App. May 25, 2007) (upholding the admission of evidence from a party's MySpace page); *In re* T.T., 228 S.W.3d 312, 322–23 (Tex. App. 2007) (permitting the introduction of evidence from a party's MySpace page).

115. *See, e.g.*, *Dexter*, 2007 WL 1532084, at *6 n.4 (finding that a party had no right to privacy when she admitted her MySpace page was available to the public).

116. *Id.*

117. *Id.* at *6.

118. *Id.*

119. *Id.* at *6 n.4.

120. A.B. v. State, 885 N.E.2d 1223, 1227 (Ind. 2008).

121. *Id.*

122. *See Dexter*, 2007 WL 1532084, at *6 n.4. The court noted, "[defendant] admitted in open court that she wrote [the] on-line blogs and that these writings were open to the public to view. Thus, she can hardly claim an expectation of privacy regarding these writings." *Id.*

D. The State Rules of Evidence

States' rules of evidence also do not address social networking web sites or any other form of ESI. However, just as the Federal Rules of Evidence adequately govern ESI without specifically mentioning it, the standard state rules governing admissibility also govern social networking web sites. The North Carolina and Ohio state courts have handled evidentiary issues related to social networking web sites by applying their traditional rules of evidence.[123]

The North Carolina Court of Appeals applied its state rules of evidence to determine the relevance of photographs and language from a minor's MySpace page.[124] In *In re K.W.*, the victim–minor reported to her school counselor that her father had raped her.[125] The claim was supported by a physician's physical examination of the minor which verified the abuse.[126] The defendant–father sought to introduce suggestive photographs and language from the victim's MySpace page—both to impeach the victim and to prove that someone else committed the sexual acts with the victim.[127] The court found that the information from the MySpace page was proper impeachment evidence, but that the defendant could not admit the evidence from the victim's MySpace page as substantive evidence that someone else committed the sexual acts.[128] The court reasoned that there was no evidence of specific sexual acts involving someone other than the defendant as required by Rule 412 of the North Carolina Rules of Evidence.[129]

Ohio courts are especially progressive in their recognition and treatment of social networking web sites as evidence. In one criminal case, the defendant tried to exclude evidence of sexual battery and imposition from emails and MySpace chats.[130] The defendant argued that the MySpace chats lacked relevance.[131] He challenged the admissibility of the chats based on their incomplete nature, claiming they were unfairly prejudicial.[132] The defendant also challenged the authenticity of the chats, arguing that anyone could have altered them.[133]

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123. *See, e.g.*, State v. Bell, 882 N.E.2d 502, 511–12 (Ohio Ct. Com. Pl. 2008) (finding that certain MySpace chats were relevant and could be authenticated); *In re* K.W., 666 S.E.2d 490, 494–95 (N.C. Ct. App. 2008) (denying the admission of information from a MySpace page); State v. Gaskins, No. 06CA0086-M, 2007 WL 2296454, at *7–8 (Ohio Ct. App. Aug. 13, 2007) (finding the trial court did not abuse its discretion by permitting the introduction of photographs from MySpace); State v. Carroll, No. 07CA14, 2007 WL 2696883, at *2–3 (Ohio Ct. App. Sept. 11, 2007) (allowing the admission of information from and testimony about a MySpace page).

124. *In re K.W.*, 666 S.E.2d at 492–95.

125. *Id.* at 492.

126. *Id.*

127. *Id.* at 492, 494.

128. *Id.* at 494.

129. *Id.* South Carolina has a similar rule. *See* S.C. CODE ANN. § 16-3-659.1 (2003).

130. State v. Bell, 882 N.E.2d 502, 511 (Ohio Ct. Com. Pl. 2008).

131. *Id.*

132. *Id.*

133. *Id.* at 511–12.

Applying the state rules of evidence, the court admitted the electronic communications[134] finding that the MySpace chats were relevant and could be authenticated.[135] The court also provided a rule for the admissibility of "electronic communications" such as the MySpace page:

> [A party] may sufficiently authenticate the electronic communications through testimony that (1) he has knowledge of defendant's e-mail address and MySpace user name, (2) the printouts appear to be accurate records of his electronic conversations with defendant, and (3) the communications contain code words known only to defendant and his alleged victims.[136]

Just as the federal court in *Tank*,[137] the Ohio Court of Common Pleas reasoned that the possibility that the chats were incomplete and alterable was an issue that went to the weight of the evidence, not to the authenticity.[138]

In an Ohio criminal case involving unlawful sexual conduct with a minor, the court allowed evidence that the defendant knew the victim was a minor—not only did the victim tell the defendant her age, but the victim also posted her age on her MySpace page, where the defendant first contacted her.[139] Furthermore, the court found that Internet chats corroborated the defendant's knowledge of the minor's age.[140] Although the court mentioned AIM Instant Messenger chats in the opinion,[141] it is unclear whether these chats were exclusively AIM conversations or if they also included communication through MySpace. The court seemed to handle these electronic evidentiary concerns as they would traditional evidentiary issues.

One Pennsylvania state court opinion, although addressing emails and text messages, provides an example of how courts might handle the authenticity of social networking web site evidence under their traditional rules of evidence. In *In re F.P.*,[142] the court criticized the defendant's argument that electronic messages are "inherently unreliable" because they are anonymous and cannot be conclusively traced back to a particular person.[143] The court acknowledged the difficulty of authenticating emails because a person can pose as the account owner by signing on to someone else's account and sending a message from the

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134. *Id.* at 512.

135. *Id.*

136. *Id.*

137. United States v. Tank, 200 F.3d 627, 631 (9th Cir. 2000) (quoting United States v. Catabran, 836 F.2d 453, 458 (9th Cir. 1988)).

138. *Bell*, 882 N.E.2d at 512 (quoting Hall v. Johnson, 629 N.E.2d 1066, 1069 (Ohio Ct. App. 1993)).

139. State v. Carroll, No. 07CA14, 2007 WL 2696883, at *2–3 (Ohio Ct. App. Sept. 11, 2007).

140. *Id.* at *2.

141. *Id.* at *1.

142. 878 A.2d 91 (Pa. Super. Ct. 2005).

143. *Id.* at 95.

account. However, the court found this problem is not unique to electronic messages,[144] as paper documents present the same problem.[145] A person can forge a signature or steal letterhead to pose as the owner.[146] The court further reasoned that differences between electronic messages and traditional written documents do not warrant automatic exclusion of the evidence or the creation of special court-made rules: "We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity."[147] This reasoning illustrates the court's flexibility and its willingness to apply its traditional state evidence rules to new technologies.

IV. CONCLUSION

The Federal Rules of Evidence and Civil Procedure do not address social networking web sites specifically, and the states' rules are also silent as to their discoverability and admissibility. Furthermore, many states have not adopted amendments to their rules of civil procedure regarding ESI.[148] The ability to collect evidence from social networking web sites is a positive innovation that demands similar treatment under all of the states' rules of civil procedure as it is beginning to receive under the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and twenty-eight states' rules.

The state legislatures that have not amended their rules of civil procedure to include a rule for ESI[149] should first incorporate these amendments into their standing rules. State and federal courts should recognize social networking web sites as a type of ESI under their amended rules of civil procedure. Regarding admissibility, courts should treat evidence from social networking web sites the same way they treat conventional forms of evidence.

State legislatures cannot isolate themselves from the "near universal reliance on electronic records both by businesses and individuals."[150] Similarly, state legislatures cannot ignore the confusion courts have had when applying rules of civil procedure that do not provide for ESI, something which the Federal Rules

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 96.
148. *See* K&L Gates LLP, *supra* note 104.
149. Alabama, California, Colorado, Delaware, Florida, Georgia, Hawaii, Kentucky, Massachusetts, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wisconsin have yet to enact ESI amendments. *See id.*
150. CONF. OF CHIEF JUSTICES, *supra* note 36, at vi.

Committee recognized when drafting amendments to the Federal Rules of Civil Procedure.[151]

Courts should consider policy arguments such as those in *Lorraine v. Market American Insurance Co.* when facing evidentiary issues regarding social networking web sites—the current federal rules are adequate for this type of evidence.[152] Courts should not be suspicious of information gathered from social networking web sites because the rules governing admissibility provide the same safeguards for these web sites that they provide traditional forms of evidence. Courts can also apply the *Lorraine* reasoning to the discoverability of information from social networking web sites as well. A unique body of law for these web sites is unnecessary. Furthermore, a flexible approach enables courts to handle any future technological advances. Although caution can be a responsible reaction to new technologies, automatic skepticism is prejudicial to potentially valuable evidence.

In a world where hundreds of millions of people are actively using social networking web sites,[153] ignoring this evidence places an impediment on the search for truth. States should learn from the difficulties that prompted the Advisory Committee to adopt amendments to the Federal Rules of Civil Procedure[154] and be proactive in accommodating this innovative evidence outlet. Additionally, courts should be flexible in recognizing this evidence under the existing rules.

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151. *See supra* text accompanying note 109.

152. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 n.5 (D. Md. 2007) (quoting MANUAL FOR COMPLEX LITIGATION, *supra* note 79).

153. *See supra* text accompanying notes 3–5.

154. *See* Wilson, *supra* note 3, at 1215.