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Litigation and Social Media: Using Social Media To Your Advantage at Every Step of the Trial

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Litigation and Social Media: Using Social Media To Your Advantage at Every Step of the Trial

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I. INTRODUCTION

"There's a whole generation of people for whom tw[eeting] is as [second nature] as breathing,"[1] *for whom the word "friend" has become a verb, and for whom Web 2.0 is the only media platform that they know.*

On the flip side, you have heard the horror stories that involve social networking: a mom charged with cyberbulling a teenage girl over MySpace;[2] a man convicted of conspiracy for discussing cannibalism in an online message forum;[3] a vengeful boyfriend posting an explicit tape of his ex-girlfriend online;[4] a debt agency using Facebook to harass a woman regarding an unpaid loan;[5] and a well-known, but unsuspecting football player using Facebook, only to get catfished.[6]

Social networking has exploded in recent years, and our craving for real-time information has similarly increased. The abuses of social media, in terms of lack of transparency, oversharing, and claims of defamation, are on the rise, which in turn implicates our legal system and our courts. This brave new world is posing many a challenge for our judges and litigants.

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[1] Nora Lockwood Tooher, *Tackling Juror Internet Use*, LAWS. USA, (Mar. 24, 2009), http://lawyersusaonline.com/blog/2009/03/24/tackling-juror-Internet-use/ (quoting litigation consultant Ken Broda-Bahm).

[2] Jennifer Steinhauer, *Woman Indicted in MySpace Suicide Case*, N.Y. TIMES (May 16, 2008), http://www.nytimes.com/2008/05/16/us/16myspace.html?ref=meganmeier.

[3] Benjamin Weiser, *'Ugly Thoughts' Defense Fails as Officer Is Convicted in Cannibal Plot*, N.Y. TIMES, Mar. 13, 2013, at A1, *available at* http://www.nytimes.com/2013/03/13/nyregion/gilberto-valle-is-found-guilty-in-cannibal-case.html?pagewanted=all.

[4] Todd Quinones, *'Heart Broken' Boyfriend Charged After Posting Sex Tape Online*, CBS PHILLY (Nov. 16, 2011, 10:43 PM), http://philadelphia.cbslocal.com/2011/11/16/heart-broken-boyfriend-charged-after-posting-sex-tape-online/.

[5] Tamara Lush, *Court Rules Debt Agency Can't Contact Woman on Facebook*, LAW TECHNOLOGY NEWS, Mar. 22, 2011, http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202485594771.

[6] Catfishing refers to someone falling in love with a fake Internet persona. A person is thus "catfished" when they fall in love with someone who is not who they claim to be online. Steve Eder, *Hoax Is Revealed as Irish Star Says He Was Duped*, N.Y. TIMES, Jan. 17, 2013, at B15, *available at* http://www.nytimes.com/2013/01/17/sports/ncaafootball/story-of-manti-teos-girlfriend-is-said-to-be-a-hoax.html. *See also* Rachel Dodes, *Nev Schulman on Texting, 'Catfishing' and Manti Te'o*, WALL ST. J. (Apr. 5, 2013, 11:07 AM), http://blogs.wsj.com/speakeasy/2013/04/05/nev-schulman-on-texting-catfishing-and-manti-teo/ (for discussion of the term "catfishing" and the Manti Te'o hoax).

Today, Facebook has over one billion users—or over one-seventh of the world's population.[7] Facebook and YouTube rank as the two (2) most visited sites on the Internet.[8] Indeed, social networking pervades the Internet: sixty-seven percent (67%) of all Internet users engage in some sort of social networking.[9] According to the Pew Research Center, as of late 2012, out of all Internet users, sixty-seven percent (67%) use Facebook, sixteen percent (16%) use Twitter, fifteen percent (15%) use Pinterest, thirteen percent (13%) use Instagram, and six percent (6%) use Tumblr.[10] For Internet users under fifty (50), social networking use increases to eighty-three percent (83%) of all Internet users.[11] Based on just how deeply social networking has penetrated society, social networking, it appears, is here to stay.

Most jurists and attorneys have caught onto the trend of social networking, and are now dealing head-on with issues and/or cases that in some way involve or implicate social media. Though some have refused to recognize social media as a real issue,[12] judges and attorneys must embrace the fact that social media exists, and learn how it is best used in discovery and at trial.

This article dissects some of the more frequent challenges that can occur during litigation and provides guidance for how judges and attorneys can use (or not use) social media throughout the process. Section I discusses the difficulties in bringing a lawsuit when social media is involved, including issues with personal jurisdiction and service. This article then examines 47 U.S.C. § 230 as a bar to suing interactive Internet service providers for social media misuse-related tort lawsuits in Section II. Section III details discovery of electronically stored information, issuing subpoenas to unmask anonymous users, and highlights privacy concerns. Section IV explains issues that occur at trial when social media is in play, including an analysis of issues surrounding voir dire, evidence authentication, and juror misconduct. Section V focuses on post-trial concerns of individuals who have been banned from the Internet. Finally, Section VI contains a discussion of ethical considerations for both judges and attorneys when it comes to using social media. We hope this article serves as a resource on key legal decisions with respect to social media vis-à-vis the courtroom. The law is evolving in this arena, and the States do not yet have consistent rulings in many areas. Overall the more restrictive states are Florida and Maryland. The more liberal states, i.e., those permitting social media use for service, investigation, and at trial, are California and New York.

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[7] Ashley Vance, *Facebook: The Making of 1 Billion Users*, BLOOMBERG BUSINESSWEEK (Oct. 4, 2012), http://www.businessweek.com/articles/2012-10-04/facebook-the-making-of-1-billion-users.

[8] Graeme McMillan, *Facebook Tops One Trillion Hits Per Month, Wins Internet*, TIME (Aug. 25, 2011), http://techland.time.com/2011/08/25/facebook-tops-one-trillion-hits-per-month-wins-Internet/.

[9] MAEVE DUGGAN & JOANNA BRENNER, THE DEMOGRAPHICS OF SOCIAL MEDIA USERS — 2012 2 (2013), *available at* http://pewInternet.org/Reports/2013/Social-media-users/The-State-of-Social-Media-Users.aspx.

[10] *Id.*

[11] *Id.*

[12] *See* E.C. v. C.B.T., Sr., Docket No. FV-03-282-13, 2013 WL 1858859, at *3 (N.J. Super. Ct. App. Div. May 6, 2013) (where a lower court judge stated, "I don't give a lot of credence to e-mails and Facebook and all that nonsense because that's not a face to face exchange.").

II.
BRINGING A LAWSUIT

a. Personal Jurisdiction

Finding personal jurisdiction over defendants in the context of social media interactions can be difficult, especially when the defendant could be miles away from where the injury is suffered (if the defendant can be located at all). Due process requires that a non-resident defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notices of fair play and substantial justice."[13] Courts have grappled with how to protect defendants' due process rights, yet still give plaintiffs a forum for redress for their injuries. As these cases show, courts continue to have difficulty in molding old jurisdictional principles to fit third-party website use through social media.

One of the earliest tests to arise for online jurisdiction came from *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*[14] *Zippo* determined that personal jurisdiction can be exercised over operators of interactive websites by using a sliding scale analysis, where the likelihood of personal jurisdiction is proportionate to the nature and quality of commercial activity conducted over the Internet.[15] Some courts have attempted to use the *Zippo* sliding scale test in cases involving social media, but the *Zippo* analysis is essentially useless when it comes to determining whether personal jurisdiction can be exercised over a third-party user of a website.[16]

Because *Zippo* is inapplicable to individual users of interactive websites, courts have attempted to apply the traditional notion of purposeful availment to cases involving social media. For example, in *Wilkerson v. RSL Funding, LLC*,[17] the Court of Appeals of Texas applied the purposeful availment standard to a person who made negative posts on Yelp about a company.[18] The Court noted that without evidence that the defendant knew his activities on a website would target a specific location, asserting personal jurisdiction would deny him of due process.[19] Instead, the evidence revealed that the defendant did a search for the company, then posted reviews and comments about the company with only one (1) reference to the company's presence in Texas.[20] Courts in other jurisdictions have similarly found that without some

[13] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
[14] 952 F. Supp. 1119 (W.D. Pa. 1997).
[15] *Id.* at 1124.
[16] Wilkerson v. RSL Funding, LLC, 388 S.W.3d 668, 676 (Tex. App. 2011).
[17] 388 S.W.3d 668 (Tex. App. 2011).
[18] *Id.* at 677–82.
[19] *Id.* at 678–79.
[20] *Id.* at 680.

indication of specific targeting of an area, purposeful availment (and thus personal jurisdiction) cannot be found simply by using a social networking site.[21]

But where a defendant has somehow engaged in specific targeting, personal jurisdiction can be exerted. In *Rios v. Ferguson*,[22] a resident of North Carolina threatened an individual in Connecticut over YouTube.[23] In a case of first impression, the Superior Court of Connecticut considered whether it could extend jurisdiction over the North Carolina resident based on the threatening video.[24] The Court noted that when other jurisdictions were confronted with questions of jurisdiction in the context of posting messages in social media, they concluded that the mere posting of a message by a resident of one (1) state that could be read in another state was not enough to confer jurisdiction upon the latter.[25] Still, based on the specific targeting of a Connecticut resident through threats, the Court held that the posting of a YouTube video created grounds for personal jurisdiction in Connecticut over the North Carolina resident.[26] Thus, specific targeting of some nature is required to find personal jurisdiction over a defendant.[27]

b. Service via Social Media

When plaintiffs struggle to serve process on defendants, they have begun to turn to the Internet as a way to effect service. Now, attorneys commonly seek permission from courts to serve defendants via social networking when other methods fail. In *Fortunato v. Case Bank USA, N.A.*, [28] attorneys sought to serve a defendant via a Facebook message.[29] Chase Bank wanted to implead a third party into the case, but was unable to serve her at the address they had.[30] Chase Bank hired an investigator, who located what was believed to be the third party's Facebook profile, which included her location.[31]

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[21] *See* Woodhurst v. Manny's Inc., No. 12-0317, 2013 WL 1452929 at *2–*3 (Iowa Ct. App. Apr. 10, 2013) (holding that mere advertisements Facebook and MySpace pages that were for a separate location outside of the forum state did not show purposeful direction of activities toward the forum state). *See also* Lyons v. Rienzi & Sons, Inc., No. 09-CV-4253, 2012 WL 1393020 at *1 (E.D.N.Y. Apr. 23, 2012) (holding that an Italian company operating a Facebook page accessible to U.S. users did not suffice for personal jurisdiction over the company); M & M Technologies, Inc. v. Gurtler Chemicals, Inc., No. Civ. A. 03-994 GMS, 2005 WL 293509 (D. Del. Feb. 8, 2005) ("while [defendant] does maintain an Internet website that it can use to solicit business from Delaware, the mere existence of its website does not rise to the level of regularly soliciting business in Delaware") (citations omitted).
[22] 978 A.2d 592 (Conn. Super. Ct. 2008).
[23] *Id.* at 593–94.
[24] *Id.* at 594.
[25] *Goldhaber v. Kohlenberg*, 928 A.2d 948, 952 (N.J. Super. Ct. 2007) (citations omitted). However, in *Goldhaber*, the Superior Court of New Jersey did find personal jurisdiction over the defendant based on evidence that the postboard messages targeted New Jersey, as the author knew the plaintiff lived in New Jersey and made references to the town where the plaintiff lived. *Id.* at 953. Additionally, the defendant referred to the plaintiff's neighbors and even posted the plaintiff's address. *Id.*
[26] *Rios*, 978 A.2d at 600.
[27] *Compare* text accompanying notes 17–21 *with* text accompanying notes 22–26.
[28] No. 11 Civ 6608(JFK), 2012 WL 2086950 (S.D.N.Y. June 7, 2012).
[29] *Id.* at *1.
[30] *Id.* at *2
[31] *Id.*

In 2012, United States District Court for the Southern District of New York noted that service by Facebook is unorthodox and not yet broadly approved by any reported court.[32] The Court noted that authorization of service by email had only been approved when there was a degree of certainty that the email would likely reach the defendant.[33] As facts that would establish such were not put forth, the Court denied the plaintiff the right to service the defendant by Facebook.[34]

On the other hand, the same jurisdiction approved service by Facebook less than one (1) year later in *F.T.C. v. PCCare247, Inc.*[35] There, the Court noted that service by Facebook only raised questions about due process, as there was no way to confirm that the Facebook profile really belonged to the person whose profile claimed to be the owner.[36] Plaintiffs were able to show that even though service via Facebook is novel, there was reason to be confident that the Facebook accounts were operated by the defendants based on the accounts' registration email addresses and that both defendants listed their job titles as the defendant companies.[37] The Court was cautious about starting service by Facebook alone: in this case, it was not the sole method of service.[38]

As the court noted in *PCCare247*, technological advances require that courts be open to "considering requests to authorize service via technological means of then-recent vintage rather than dismissing them out of hand as novel."[39] The Court, thus, followed the lead of the Ninth Circuit who had stated that the "due process reasonableness inquiry unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance."[40] Indeed, since *Fortunato*, service via social media has even been approved in foreign jurisdictions, such as Canada.[41]

From these cases, it appears that service by social media should be coupled with service of another method, like email or perhaps a traditional method.[42] Further, plaintiffs must substantiate the claim that service by social media would likely reach the defendant.[43] This can be shown through facts, e.g., that the social media account is registered to the same email as the defendant; that the social media account lists the same job information that the defendant holds; and/or the account lists the same address as the last known address of the defendant.[44]

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] No. 12 Civ. 7189(PAE), 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013).
[36] *Id.* at *5. Determining who the owner of a social media profile is is a recurring question/theme among cases involving social media.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* (citing Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002)) (internal quotation marks omitted).
[41] *See Brian Burke can serve legal notices online in defamation lawsuit*, CANADIAN PRESS (May 29, 2013, 4:21 PM), http://www.ctvnews.ca/canada/brian-burke-can-serve-legal-notices-online-in-defamation-lawsuit-1.1302491 (noting that service via email or private message on social media has been approved in a defamation case about online message board comments).
[42] *See PCCARE247*, 2013 WL 841037 at *6 (ordering service by both email and Facebook).
[43] *Fortunato*, 2012 WL 2086950 at *2.
[44] *See PCCARE247*, 2013 WL 841037 at *5 (listing facts that establish that the defendant is likely the same person that owns the social media account in question).

Obviously, this assumes the recipient's social media profile is public otherwise these issues cannot be readily verified. If the profile is not public, secondary service via social media will face a hurdle.

III.
BARRIER TO SUITS — SECTION 230 IMMUNITY[45]

47 U.S.C. § 230 provides that

> No provider or user of an interactive computer service[46] shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers[47] or others the technical means to restrict access to material described in paragraph (1).[48]

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[45] While this article does not endeavor to provide comprehensive information on cyberbullying, it is difficult to ignore in the context of Section 230 immunity as plaintiffs often have nowhere to turn for redress if a court grants a website immunity under the statute. Instead, injured parties often must rely on federal misuse statutes, like 18 U.S.C. §§ 875 and 2261A(2), which criminalize threatening interstate communication and interstate stalking through an interactive computer service, respectively. Applications of these statutes have been largely unsuccessful. *See* United States v. Baker, 890 F. Supp. 1375, 1388–90 (E.D. Mich. 1995) (holding that emails detailing plans to harm a woman fell short of the constitutional standard of a true threat and denying prosecution of defendant under 18 U.S.C. § 875 when analyzed under the lens of the First Amendment); United States v. Cassidy, 814 F. Supp. 2d 574, 587 (D. Md. 2011) (holding that 18 U.S.C. § 2261A(2)(A) invalid as applied at blog and Twitter posts, which are constitutionally protected expressions of speech). Notably, no court analyzing 18 U.S.C. § 2261(A)(2)(A) has upheld its constitutionality. *Cassidy*, 814 F. Supp. 2d at 586 n.13. Recently, Congress re-enacted the Violence Against Women Act ("VAWA"), 18 U.S.C. § 2261, which may provide women with a recourse against cyberstalking. Under the VAWA, it is a federal crime to use an interactive computer service to cause substantial emotional distress or place a person in reasonable fear of death or serious bodily injury in certain classes of people. 18 U.S.C. § 2261A (2013). This is a new law and has yet to undergo any constitutional challenges. Scholars have noted that Section 230 immunity actually affords social networking sites the unique opportunity to foster online citizenship given that no matter what action the site takes (to leave a post alone or delete it), they will be immune from suit. *See, e.g.*, Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011). Despite this chance to shape the Internet community, some sites (while adopting terms that prohibit abusive speech) have adopted terms where users are largely responsible for policing the posts on their websites. *See, e.g.*, *Facebook Community Standards*, Facebook, https://www.facebook.com/communitystandards (last visited June 26, 2013).

[46] "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Communications Decency Act of 1996, 47 U.S.C. § 230 (f)(1)(2) (1998).

[47] "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* at (f)(1)(3).

[48] *Id.* at (c)(2).

In essence, Section 230 bars suits against intermediary interactive computer service providers, like Facebook, MySpace, and Twitter, when it comes to censoring (or not censoring) content on its website.[49]

Zeran v. America Online, Inc.[50] discussed the effects of Section 230. In *Zeran*, Kenneth Zeran brought a suit against America Online for defamation ("AOL") after posts were made on AOL featuring t-shirts with offensive slogans related to the Oklahoma City bombings.[51] The posts listed Zeran's phone number as the contact to purchase the shirts.[52] Zeran contacted AOL and requested the posting be removed after the first post.[53] AOL removed the post, but the next day, another message advertising more t-shirts for sale was posted with Zeran's contact information.[54] More posts then ensued, advertising additional items for sale with more offensive slogans.[55] Zeran again contacted AOL and was told by the company that the account where the posts originated would be closed.[56] Eventually, Zeran received an abusive phone call about every two (2) minutes as a result of the posts.[57]

In his suit, Zeran sought to hold AOL liable for defamatory speech under a theory of distributor liability.[58] The Court of Appeals for the Fourth Circuit held that Section 230 applied to the case regardless of whether Zeran attempted to label AOL a distributor.[59] As the Court noted, Congress enacted Section 230 to "maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."[60] Interactive computer service providers have so many users that imposing tort liability upon providers would have a chilling effect on free speech as intermediates would have to screen each post for

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[49] Other suits outside of this context could still arise, and Congress may still attempt to shape ways to find intermediary liability. For example, the Stop Online Piracy Act ("SOPA") and the Protect IP Act ("PIPA"), as introduced in U.S. Congress, attempted to make it difficult for sites to sell or distribute pirated copyrighted material. Larry Magrid, *What Are SOPA and PIPA And Why All the Fuss?*, FORBES, Jan. 18, 2012, http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/. Under SOPA, the U.S. Attorney General would be able to seek a court order to require a "service provider [to] take technically feasible and reasonable measures designed to prevent access by its subscribers . . . to the foreign infringing site." *Id.* Websites would, thus, have to worry they could be in violation of the law by linking to a "banned site". *Id.* But, SOPA and PIPA went without a vote after many online and offline protests against the bills. Julianne Pepitone, *SOPA and PIPA postponed indefinitely after protests*, CNN MONEY, Jan. 20, 2012, http://money.cnn.com/2012/01/20/technology/SOPA_PIPA_postponed/index.htm. Still, these acts target the content of the website for copyright infringement as opposed to censoring of free speech (though, some claim that the acts would in effect censor speech on websites). Magrid, *supra* note 49.

[50] 129 F.3d 327 (4th Cir. 1997).

[51] *Id.* at 329.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 331.

[59] *Id.* at 330.

[60] *Id.* For now, social media sites rely on their terms of use to help avoid problematic users by making users agree to policies that prohibit using social media services for unsavory purposes, like harassment and bullying. *See, e.g. Statement of Rights and Responsibilities*, FACEBOOK, Dec. 11, 2012, https://www.facebook.com/legal/terms.

problems.[61] *Zeran* has since been heavily relied upon in other courts for establishing the basic principles behind Section 230.[62]

Other cases have attempted to test the limits of immunity for third-party websites as established in *Zeran* with regard to social networking sites. In *Doe v. MySpace, Inc.*,[63] the mother of a teenage girl that was sexually assaulted by a friend she met on MySpace attempted to hold MySpace liable for the assault.[64] There, a thirteen (13)-year-old girl set up a MySpace profile after lying about her age by representing that she was eighteen (18).[65] A nineteen (19)-year-old boy subsequently contacted her through MySpace.[66] After communicating for several weeks, they arranged to meet for a date.[67] The mother alleged that during that date the daughter was sexually assaulted.[68] The mother then filed suit against MySpace for negligence, among other things.[69] In *Doe*, the United States District Court for the Western District of Texas noted that Section 230 immunity does not apply only to defamation suits.[70] Even though the mother attempted to hold MySpace liable for ineffective security measures with regard to age verification, the Court held that Section 230 would bar any such claim.[71]

Thus, it appears that any claim alleging tort liability against an intermediary would be barred by Section 230. This still left the door open for potential liability under a contract theory as shown in *Barnes v. Yahoo!, Inc.*[72] In *Barnes*, the plaintiff broke up with her boyfriend; afterward, the boyfriend created a number of profiles using her information (including nude photographs) on Yahoo! ("Yahoo").[73] Not only did the profiles contain the photographs, but they also included her address and phone number along with implications that she was open to solicitations for sex.[74] Ms. Barnes started receiving a number of calls, emails, and visits from men with the expectation of sex.[75]

Ms. Barnes contacted Yahoo to request removal of the fraudulent profiles and mailed a copy of her photo ID and a signed statement denying that she had any involvement with the profiles.[76] During the next two (2) months, Ms. Barnes asked Yahoo to remove the profiles three (3) more times, but to no avail.[77] During that period, a local news show prepared to broadcast a report about Ms. Barnes's situation.[78] A day before the report aired, Yahoo's Director of Communications contacted Ms. Barnes and told her she would "personally walk the statements

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[61] *Id.* at 331. The Court also rejected a theory of notice-based liability and held that such a harsh standard would defeat the purpose of Section 230. *Id.* at 333.
[62] On June 17, 2013, a search on Westlaw for citing references to *Zeran* revealed over 150 cases.
[63] 474 F. Supp. 2d 843 (W.D. Tex. 2007).
[64] *Id.* at 846.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 849.
[71] *Id.* at 850.
[72] 570 F.3d 1096 (9th Cir. 2009).
[73] *Id.* at 1098.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

over to the division responsible for stopping unauthorized profiles and they would take care of it."[79] Barnes claimed she relied on the statement by Yahoo's representative and took no further action.[80] Two (2) more months passed without action from Yahoo, at which point Ms. Barnes filed her lawsuit.[81]

In her lawsuit, Ms. Barnes made a claim for promissory estoppel based on the promise by Yahoo and her reliance on those statements.[82] The Court of Appeals for the Ninth Circuit noted that Section 230 precludes tort liability, but that liability under a theory of contract would have a different analysis.[83] Thus, the statements by Yahoo's representative that they would remove the profiles could have been an enforceable promise for the basis of a suit.[84] While the Court opened the door for potential liability for intermediaries under a type of notice-based theory through promissory estoppel, the Court did not reach the question of whether the statement by Yahoo was a viable contract claim.[85]

Although the Ninth Circuit has given credence to the promissory estoppel claim (thus, defeating a defense of complete immunity), the issue of whether Section 230 actually grants total immunity remains open. Indeed, a circuit split has developed around the issue, and it may remain unresolved until the Supreme Court decides the issue.[86]

IV.
PRE-TRIAL ISSUES

a. Discovery of Electronically Stored Information and the Intersection of Social Media

Since its inclusion in the Federal Rules of Civil Procedure in 2006, issues surrounding electronically stored information ("ESI") have erupted, particularly with respect to e-discovery.[87] Under the revised rules, litigants and attorneys have a duty to preserve potentially relevant ESI.[88] That duty to preserve even extends to social networking accounts.[89] Still, courts, attorneys, and litigants continue to struggle with the meaning of the amended rules as they relate to ESI.[90] Indeed, failure to produce ESI is now the most common basis for sanctions issued by courts.[91]

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[79] *Id.* at 1098–99.
[80] *Id.* at 1099.
[81] *Id.*
[82] *Id.* at 1106.
[83] *Id.* at 1107–08.
[84] *Id.* at 1108–09.
[85] *Id.* at 1009.
[86] *See* Hare v. Richie, Civ. ELH-11-3488, 2012 WL 3773116 at *14 (D. Md. Aug. 29, 2012) (noting a circuit split as to whether Section 230 is an immunity defense, citing the Eighth and Eleventh Circuit as recognizing immunity to suits under Section 230, and the Seventh and Ninth as not recognizing immunity under Section 230).
[87] BRENT R. AUSTIN, ESI, E-DISCOVERY, AND ETHICS: MANAGING PRE-TRIAL LITIGATION IN THE AGE OF ELECTRONICALLY STORED INFORMATION, 2012 WL 3058127 at *1 (Aspatore ed., 2012).
[88] *Id.* at *3.
[89] *Id.* at *8.
[90] *Id.* at *2.
[91] Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers,* 60 DUKE L. J. 789, 789 (2010).

The Federal Rules of Civil Procedure allow parties to obtain discovery on any relevant information to the suit as long as it "appears reasonably calculated to lead to the discovery of admissible evidence."[92] Courts in various jurisdictions have been consistent in finding that before production of private social media pages[93] will be compelled, there must be some indication from the publicly viewable pages that disclosure of the private pages will lead to admissible evidence.[94]

Take, for example, *Romano v. Steelcase, Inc.*[95] In *Romano*, the defendant viewed the public portions of plaintiff's MySpace and Facebook pages after she filed suit claiming she sustained permanent injuries that affected her enjoyment of life.[96] The public portions of her pages revealed her smiling happily outside of her home, despite her allegations that she was largely confined to her bed as a result of her injuries.[97] The Supreme Court for Suffolk County, New York held that based on her public profile pages, it was reasonable to infer that her private pages may contain information that was relevant to her claims or could lead to admissible evidence.[98] Further guiding the disclosure of information is the general principle that plaintiffs that place their physical condition in dispute cannot shield disclosure of material that is necessary to the defense of their action.[99]

Without the information present in *Romano*, courts have typically deemed requests for access to private social networking a "fishing expedition." In *Davids v. Novartis Pharmaceuticals Corp.*,[100] the United States District Court for the Eastern District of New York found that more than a smiling profile photograph of the plaintiff was required to gain access to a plaintiff's private Facebook information, even when the plaintiff claims ongoing suffering.[101] In contrast to *Romano*, the defendant had only the plaintiff's profile picture for evidence, whereas the defendant in *Romano* had multiple photos and statements on the plaintiff's social networking page to contradict her claims.[102] Without some factual predicate to infer that relevant information was on the plaintiff's private page, the Court would not allow access.[103]

Based on these cases, it is clear that there must be some sort of factual predicate from the person's public pages that will allow an inference that further information would be located on

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[92] FED. R. CIV. P. 26(b)(1).

[93] Private social media pages indicate pages that are not visible to the public (or the Internet at large); note, however, that different levels of "private" exist as people can set controls for each post that changesthe settings on a spectrum of open to the Internet to visible to only the author. *See Choose Who You Share* With, FACEBOOK, http://www.facebook.com/help/459934584025324/ (click "What does 'Public' mean?") (last visited June 24, 2013).

[94] *See, e.g., Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387 (E.D. Mich. 2012) (requiring a "threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence"); text accompanying notes 90–98 (citing to New York as requiring information on a public profile page that supports the proposition that private pages will reveal discoverable information as a part of the suit).

[95] 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).

[96] *Id.* at 429.

[97] *Id.* at 430.

[98] *Id.* at 432.

[99] *Id.* at 428.

[100] CV06-0432 (ADS)(WDW), slip op. (E.D.N.Y. Feb. 24, 2012).

[101] *Id.* at 2–3.

[102] *Id.*

[103] *Id.* at 3; *see also* Sean McDonough, *Florida Court Says, "No Phishing Expeditions Allowed on a Plaintiff's Facebook Page"*, JD Supra Business Advisor (Apr. 16, 2014).

the individual's private pages.[104] Attorneys can present such evidence to the court in a number of ways, including dated screenshots capturing the information and real-time accessing of the accounts in court.[105] Given the unique characteristic of social media of rapid change (and possible deletion) of information, preservation of information through screenshots that can be authenticated may be the best way to present evidence to a judge or jury.[106]

b. Privacy

Tempering the discussion on discovery is privacy. While people do have a reasonable expectation of privacy, courts have been clear that it is unreasonable to expect that disclosures made over social media will remain private.[107] Information conveyed through social media is thus public information that is not subject to any privileges.[108] As the Court of Appeals for the Fifth District of California stated in *Moreno v. Hanford Sentinel, Inc.*,[109] once an affirmative act is taken to publish information, the information is no longer a private fact and is now within the public domain.[110]

Similarly, in *McMillen v. Hummingbird Speedway*,[111] the Court of Common Pleas of Pennsylvania noted that "it would be unrealistic to expect that such disclosures would be considered confidential."[112] The Court in *McMillen* even took it a step further: the terms of use of both Facebook and MySpace clearly put users on notice that the information shared will not be kept private; thus, users cannot claim that the information is private or privileged after the fact.[113] In sum, it appears that while people may have a reasonable expectation of privacy, it certainly does not apply in situations where they share information, even if they keep it confined to a non-public page.

c. Subpoenas — Anonymity

Often plaintiffs do not know the identity of the people they seek to sue. In order to get this information, plaintiffs can file the suit and subsequently request a subpoena to serve upon Internet service providers to obtain the identity of the person using Internet Protocol (IP)

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[104] *See, e.g.*, Sterling v. May, No. 106493-2009, slip op. at 1–2 (N.Y. Sup. Ct. Nov. 18, 2011) (holding that mere testimony that someone has a social networking account without any further facts does not establish an inference that a private page would lead to the disclosure of admissible evidence).
[105] Timothy Flynn, *Authenticating Social Media Evidence for Trial*, LAYWERNOMICS, Dec. 17, 2012, lawyernomics.avvo.com/social-media/authenticating-social-media-evidence-for-trial.html.
[106] *Social Media: From Chat Room to Courtroom*, KROLL ONTRACK, www.krollontrack.com/resource-library/legal-articles/imi/social-media-from-chat-room-to-courtroom/ (last visited June 24, 2013).
[107] McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD, 2010 WL 4403285, slip op. at 3 (Pa. C.P. Sept. 9, 2010).
[108] *Id.* at 2–3.
[109] 172 Cal. App. 1125 (2009).
[110] *Id.* at 1130.
[111] No. 113-2010 CD, 2010 WL 4403285, slip op. (Pa. C.P. Sept. 9, 2010).
[112] *Id.* at 3.
[113] *Id.* at 4–5.

addresses.[114] When it comes to unmasking anonymous users, courts note that the right to anonymous Internet speech must be balanced against a person's need for discovery to address harm caused by actionable speech.[115]

In *Doe I v. Individuals*,[116] the plaintiffs, Doe I and Doe II, two (2) female students at Yale Law School, brought a suit against unknown individuals using thirty-nine (39) different usernames on a website postboard called AutoAdmit.com.[117] Some of the messages about the two (2) girls included: "hope[s] she gets raped and dies" and "Rate this HUGE breasted cheerful big tit girl from YLS."[118] After the girls filed the suit, they issued a subpoena *duces tecum* to AT&T for information about the identity of the person assigned to the IP address where an individual using the name AK47 had posted comments about one (1) of the girls.[119] AT&T sent a letter to the person whose IP address corresponded with the AK47 account, notifying him that it had been ordered to produce information relating to AK47's Internet account.[120] AK47, or Doe 21, then filed a motion to quash claiming that disclosure of his identity would be a violation of his First Amendment rights to anonymous speech.[121] When the United States District Court for the District of Connecticut considered Doe 21's motion to quash, it found that the balance between the right to anonymous speech with the right to redress wrongs was appropriately struck when a plaintiff can support a *prima facie* showing of its claims.[122] Accordingly, because Doe I was able to show sufficient evidence to support a *prima facie* case for libel and the plaintiff's interest in pursuing discovery outweighed Doe 21's First Amendment rights, it denied Doe 21's motion to quash the subpoena.[123]

The basic showing of a *prima facie* claim (or what is needed to survive a motion to dismiss) contrasts with the holding of *Solers, Inc. v. Doe*.[124] There, Doe reported Solers to the Software & Information Industry Association (the "SIIA") for copyright infringement.[125] Solers then filed suit and served a subpoena on the SIIA to determine the identity of Doe. Unlike *Doe I*,

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[114] An IP address is the "numeric address of a computer on the Internet." It uniquely identifies each computer that is linked to the Internet. *IP address*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ip%20address (last visited June 24, 2013). Internet service providers, like Verizon and AT&T, can either permanently assign an IP address to a computer or supply an IP address each time a computer connects to the Internet. *Id.*

[115] SaleHoo Grp., Ltd. v. ABC Co., 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010)

[116] 561 F. Supp. 2d 249 (D. Conn. 2008).

[117] *Id.* at 251.

[118] *Id.*

[119] *Id.* at 252.

[120] *Id.* The Stored Communications Act (the "SCA") requires this notice. Mark S. Sidoti et al., *How Private Is Facebook Under the SCA?*, LAW TECHNOLOGY NEWS, Oct. 5, 2010, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472886599&How_Private_Is_Facebook_Under_the_SCA. The SCA attempts to protect private communications from disclosure by Internet-based providers, including social media providers. *Id.* Critics have complained that the SCA is outdated and that courts struggle to apply the statute to modern forms of electronic communications. *Id.*

[121] *Id.* at 253.

[122] *Id.* at 257.

[123] *Id.* While this case focused on libel, all states have since enacted statutes aimed at cyberstalking and cyberharassing, targeting people who harass, threaten, or bully others online. *See State Cyberstalking and Cyberharassment Laws*, NCSL, Nov. 16, 2012, http://www.ncsl.org/issues-research/telecom/cyberstalking-and-cyberharassment-laws.aspx (for a complete list of state statutes).

[124] 977 A.2d 941 (D.C. 2009).

[125] *Id.* at 945.

the court rejected the notion that a plaintiff can simply plead his case to unmask a user.[126] Instead, the court imposed a heightened standard: the plaintiff cannot gain the identity of an anonymous defendant unless he can plead facts to defeat a motion for summary judgment.[127]

In *Solers*, the District of Columbia Court of Appeals employed a five (5)-prong test for evaluating a motion to quash a subpoena seeking the identity of anonymous defendants:

> (1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control,* and (5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit.[128]

There does not seem to be a clear direction for courts to follow. At least four (4) jurisdictions have adopted a standard similar to *Solers,*[129] and at least four (4) have adopted a standard similar to *Doe I*.[130] Nonetheless, at least one (1) court has noted that courts have begun to "coalesce around" the test similar to a summary judgment standard of *Solers*.[131]

V.
ISSUES AT TRIAL

a. "Voir Google"

Voir dire is a crucial step for attorneys in evaluating a panel of potential jurors. Social networking now allows attorneys to search for information to impeach or challenge jurors simply by searching for a juror's name on the Internet. Increasingly, attorneys have turned to social networking sites to find a basis for rehearing based on lack of candor by members of the venire.[132]

Such was the case in *State v. Dellinger*.[133] There, approximately one (1) week before trial began, a juror sent a message to the defendant in the case through MySpace.[134] The juror

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[126] *Id.* at 954.
[127] *Id.*
[128] *Id.* (emphasis in original).
[129] *Id.* at 952–54 (noting that New Jersey, Maryland, and Delaware have adopted a summary judgment standard similar to that in D.C.). This test is sometimes referred to as the *Dendrite* or *Cahill* test, as applied in other jurisdictions. *See id.* at 954 (noting the *Dendrite* and *Cahill* standards).
[130] *See Doe I*, 561 F. Supp. 2d at 256 (noting that Wisconsin, California, New York, and Connecticut have similar motion to dismiss standards).
[131] *Salehoo Grp., Ltd.*, 722 F. Supp. 2d. at 1214.
[132] *See infra* Part IV.C.
[133] 696 S.E.2d 38 (W.Va. 2010).
[134] *Id.* at 40. In the message, the juror told the defendant "Hey, I dont [sic] know you very well But I think you could use some advice! I havent [sic] been in your shoes for a long time but I can tell ya [sic] that God has a plan for you and your life. . . .". *Id.*

and the defendant then became MySpace friends after the message was sent.[135] When the venire was asked whether any of them had a relationship with the defendant, the juror remained silent.[136] The defendant eventually realized that he was MySpace friends with the juror after the verdict was announced.[137]

An investigation ensued, where it was revealed that the juror stated she "knew" the defendant during a hearing on juror misconduct, even though she never indicated that she knew him at the trial.[138] Indeed, at the hearing, the juror testified that although she had a MySpace connection with the defendant, she stated that she didn't respond because she "just didn't feel like [she] really knew him. I didn't know him personally."[139] She stated that being connected on MySpace "isn't that important."[140]

According to the Supreme Court of Appeals of West Virginia, the juror's lack of candor "undermined the purpose of *voir dire* and, as a result, deprived the appellant of the ability to determine whether she harbored any prejudices or biases against him."[141] The court cited to the inconsistencies in the juror's statements that she did not know the defendant well—as the court noted, she knew the defendant well enough to offer him advice and suggest that they talk soon in her MySpace message.[142] Thus, a juror's failure to come forward about a MySpace relationship with a party could put a juror's status in question, warranting a mistrial.[143]

As to friendships with relatives of a party, the question of candor becomes more complex. In *Sluss v. Commonwealth*,[144] a defendant made a motion for a mistrial after he learned that two (2) jurors were Facebook friends with the mother of the victim of his alleged crime.[145] During voir dire, neither juror indicated any knowledge of the victim's family.[146] The Supreme Court of Kentucky did not give the same weight to "friends" on Facebook as traditional friendships in the community, especially when people can be Facebook "friends" with people with whom they have no actual personal knowledge.[147] The Court noted that when a juror knows someone acquainted with a case, the question becomes "the extent of the interaction and the scope of the relationship." A mere "friendship" on Facebook will not be sufficient grounds for a new trial.[148] In this case, though, it appeared that the jurors made some misstatements about their use of Facebook, which prevented further exploration during voir dire of any possible relationship

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[135] *Id.*
[136] *Id.* The defendant claimed that at that time he did not recognize the juror as being the same person that sent him the message. *Id.* According to him, the juror looked much different from the photograph that she posted on MySpace. *Id.*
[137] *Id.*
[138] *Id.* at 41.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 43.
[142] *Id.* at 44.
[143] *See id.* at 44–45 (holding that the juror's lack of candor about the relationship between the defendant and juror through MySpace placed the jurors impartiality in question such that the case was remanded for a new trial).
[144] 381 S.W.3d 215 (Ky. 2012)
[145] *Id.* at 220–21.
[146] *Id.* at 221.
[147] *Id.* at 222.
[148] *Id.* at 223.

between the jurors and the victim's mother.[149] As the attorney was unable to ask adequate questions about the jurors' Facebook friendships before trial, the Court granted his motion for a new trial so that the defendant could explore whether the jurors were in fact fair and impartial.[150] Obviously, this presents the need to impanel more alternates and threatens to impose costs for the judicial system and litigants when cases require retrial. In criminal cases, liberty issues are also implicated as incarceration terms increase, leading to overcrowding, etc.

Even in the context of civil trials, conducting thorough research of jurors before trial is critical. In fact, many attorneys are already using the Internet to vet potential jurors, but are hesitant to discuss their methods until a definitive ethics statement is made about the practice.[151] Nonetheless, at least one (1) court—the Supreme Court of Missouri—has noted that an investigation into the history of selected jurors before the jury is impaneled should be done.[152] Indeed, the same court noted that because of the advances in technology, litigants can no longer lie in wait until a verdict has been rendered before they bring attention to matters like impeachment of jurors before the court.[153]

The practice of researching jurors has been deemed acceptable by New York County, which noted that it is both proper and ethical for lawyers to undertake a pretrial search of prospective juror's social networking sites, as long as they do not contact the prospective juror, "friend" the juror, or subscribe to the juror's accounts.[154]

From these cases and the guidance of the ethics opinion from the New York County Bar Association, it seems that lawyers can and should investigate whether prospective jurors have social media pages. Furthermore, if it is discovered that they do, attorneys should be allowed to explore whether the prospective jurors have a connection through these sites with any key party (or person related to a key party) in the case.[155] If they do, attorneys should be allowed to question the nature and extent of the relationship between the parties to determine whether the juror is biased.[156] Most importantly, attorneys should attempt to do this at the earliest possible stage of trial to avoid any challenges for timeliness.[157]

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[149] *Id.* at 223–24.

[150] *Id.* at 229. The court provided guidance that it must be determined when the jurors became Facebook "friends" with the victim's mother, whether the jurors' alleged Facebook accounts are in fact owned by the jurors, and the nature and extent of the jurors' relationships with the victim's mother. *Id.*

[151] *Id.* at 227.

[152] *See* Johnson v. McCullough, 306 S.W.3d 551, 558 (Mo. 2010) (en banc) (noting that attorneys should investigate the litigation history of all selected jurors prior to them being impaneled).

[153] *Id.* at 558–59.

[154] NYCLA Comm. on Prof'l Ethics, Formal Op. 743 (2011), *available at* http://www.nycla.org/siteFiles/Publications/Publications1348_0.pdf. This same procedure was subsequently adopted in Kentucky in *Sluss v. Commonwealth*. *Sluss*, 381 S.W.3d at 228. *See also* American Bar Assoc. Formal Ethics Op. 466 – *Lawyers Reviewing Jurors' Internet Presence* (Apr. 24, 2014); Allison Grande, *Facebook Peeks Risk Luring Attorneys Into Jury Selection Abuses*, LAW360 (Apr. 28, 2014).

[155] *See Sluss*, 381 S.W.3d at 229 (suggesting that attorneys should be allowed to question potential jurors as to their Facebook "friends").

[156] *See id.* (noting that once a Facebook "friend" with a key party is revealed, attorneys should be able to ask follow-up questions about the connection).

[157] *See Johnson*, 306 S.W.3d at 559 (noting that litigants should not be allowed to lie in wait and must endeavor to prevent retrials by making early investigations into jurors).

b. Evidence Authentication

Increasingly, attorneys turn to social media to prove facts at trial. While attorneys may have evidence of statements made in social networking settings, before the evidence can be admitted at trial, it must be authenticated. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[158] In the context of social media, it can be difficult to authenticate statements made on social networks, especially when anyone can create a profile and claim to be whomever they want.[159]

One (1) of the leading cases on evidence authentication—*Griffin v. State*[160]—highlights the many problems associated with authentication and social networking accounts. In *Griffin*, the Court of Appeals of Maryland was tasked with determining the proper way to authenticate information printed from MySpace.[161] There, Griffin was charged with the shooting death of an individual in Maryland.[162] At trial, the State wanted to introduce into evidence statements allegedly made by defendant Griffin's girlfriend on her MySpace account to show that she had allegedly threatened another witness called by the State.[163] The profile in question was under the name of "Sistasouljah"; described a 23 year-old-female from Port Deposit, Maryland with a birth date of "10/02/1983"; and contained a photo of an embracing couple.[164] The blurb on the pages read: "FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!"[165] Instead of using the girlfriend to authenticate her own page, the State attempted to authenticate the MySpace page through the testimony of a sergeant with the police department.[166]

The Court noted the problems with using a MySpace page to prove that someone created a profile and then further posted the statements on that page.[167] As the Court explained, anyone can create a MySpace page, and an outsider would not know whether the profile is legitimate.[168] Thus, the potential for promulgating fabricated or tampered information on a social media site posed significant challenges for authentication of evidence.[169] Given the potential for manipulation, the Court noted that electronically stored information requires "greater scrutiny of 'the foundational requirements' than letters or other paper records, to bolster reliability."[170] The Court agreed with the defendant that the evidence was not properly authenticated and should not

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[158] FED. R. EVID. 901.
[159] *See Drew*, 259 F.R.D. at 452 (where Lori Drew posed as a teenage boy named Josh Evans on MySpace to contact a teenage girl through MySpace).
[160] 19 A.3d 415 (Md. 2011).
[161] *Id.* at 416–17.
[162] *Id.* at 418.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.* at 419–22.
[168] *Id.* at 420–21.
[169] *Id.* at 422.
[170] *Id.* at 423. The Court also noted three (3) other jurisdictions (Massachusetts, New York, and the Seventh Circuit) that have suggested the same requirement of heightened scrutiny for electronic evidence on social networking sites because of the potential for manipulation and lack of transparency. *Id.* at 425–26.

have been admitted at trial.[171] The Court stated that the profile's picture and matching birth date and location with the girlfriend were not enough "distinctive characteristics" to authenticate the profile as belonging to her.[172]

The Court concluded by suggesting three (3) methods of authenticating printouts from social networking sites. First, attorneys could ask the purported creator if he in fact did create the profile and the post in question.[173] Second, attorneys could search the computer of the person who may have created the profile and post, and examine the computer's Internet history and hard drive to determine if the computer was used to originate the social media profile and post.[174] Last, attorneys could attempt to obtain information directly from the social media website where the profile was created.[175]

Whether the *Griffin* standard is too high to be practicable remains to be seen. In dissent, Judge Harrell of the Court of Appeals of Maryland suggested that the standard for authentication that should have been applied was whether a "reasonable juror could find in favor of authenticity."[176] Some courts have gone a different route than suggested in *Griffin*, and instead rely on circumstantial evidence to authenticate information on social networking pages.[177] Others have suggested that an expert who can attest to how secure a web page is and how social networking accounts work could be enough to authenticate statements on social networking sites.[178]

c. Juror Misconduct and Due Process Rights

Social media has impacted jurors by affording them greater opportunities to conduct research about cases and communicate with other jurors and non-jurors.[179] The resulting problem of juror misconduct pervades courts worldwide: in England, a juror conducted an

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[171] *Id.* at 423–24.
[172] *Id.* at 424.
[173] *Id.* at 427.
[174] *Id.*
[175] *Id.* at 428. The Court noted that this particular method was successfully used in *People v. Clevenstine*, where a legal compliance officer from MySpace explained that the "messages on the computer disk had been exchanged by users of accounts created by [the defendant] and the victims." *Id.* (quoting People v. Clevenstine, 68 A.D.3d 1448, 1450 (N.Y. App. Div. 2011)).
[176] *Id*. at 429 (Harrell, J., dissenting).
[177] *See In re F.P.*, 878 A.2d 91, 95 (Pa. Super. Ct. 2005) (where the Superior Court of Pennsylvania used circumstantial evidence, such as defendant referring to himself and statements that mirrored real life testimony, to establish that an instant messaging account under the name "Icp4Life30" belonged to appellant). *See also* Tienda v. State, 358 S.W.3d 633, 645 (Tex. Crim. App. Feb. 8, 2012) (where a MySpace page was authenticated based on circumstantial evidence, including numerous photographs of appellant, including unique body tattoos, references to a gang, references to a shooting and the victim of the shooting, and the matching email address of the appellant listed on the MySpace page).
[178] *See Commonwealth v. Williams*, 926 N.E.2d 1162, 1172–73 (Mass. 2010) (noting that an expert witness with knowledge about MySpace could authenticate information on a MySpace page).
[179] Thaddeus Hoffmeister, *Google, Gadgets, and Guilty: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 409 (2012).

informal poll on Facebook to decide whether a defendant was guilty.[180] In Australia, the government amended its Juries Act to raise the potential fine for jurors who improperly use the Internet during trial.[181] In New Zealand, a judge prevented the media from printing the names or images of two (2) defendants on trial for fear that jurors would conduct online research.[182] Indeed, the Internet has changed the landscape of juror misconduct: from 1999 to 2010 in the United States, at least ninety (90) verdicts were subject to challenge because of a juror's alleged Internet misconduct.[183]

Despite the obvious problems that social media can present during a trial, judges state that social media is difficult to detect: in 2011, seventy-nine percent (79%) of judges said "they had no way of knowing whether jurors had violated a social-media ban."[184] When judges do find out about violations of social media bans, they have taken stiff measures against the jurors, with some going as far as holding the juror in contempt.[185]

Jurors, though, seem oblivious to the problem of using social media during a trial. In the corruption trial against former Baltimore Mayor Sheila Dixon, five (5) jurors became Facebook "friends" during the course of the trial.[186] After the judge learned of the Facebook "friendship," he held a hearing on the matter.[187] Following the hearing, one (1) juror wrote on his Facebook page "F*ck the Judge."[188] When the juror was asked about the comment, he told the judge, "[T]hat's just Facebook stuff."[189]

What jurors fail to realize is that their posts on social networks can be construed as bias against one (1) of the parties.[190] A prejudiced juror, or a juror that has been influenced by

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[180] *Id.* at 413 (citing Urmee Khan, *Juror Dismissed from a Trial After Using Facebook to Help Make a Decision*, TELEGRAPH (Nov. 24, 2008, 10:01 AM), http://www.telegraph.co.uk/news/newstopics/lawreports/3510926/Juror-dismissed-from-a-trail-after-using-Facebook-to-help-make-a-decision.html).

[181] *Id.* (citing Ellen Whinnett, *DIY Jury Probe*, HERALD SUN (May 9, 2010, 12:00AM), http://www.heraldsun.com.au/news/diy-jury-probe/story-e6frf7jo-1225864033798).

[182] *Id.* (citing Edward Gay, *Judge Restricts Online Reporting of Case*, N.Z. HERALD (Aug. 25, 2008, 5:06 PM), http:/www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objected=10528866).

[183] Brian Grow, *As jurors go online, U.S. trials go off track*, Reuters (Dec. 8, 2010), http://www.reuters.com/article/2010/12/08/Internet-jurors-idUSN0816547120101208.

[184] Steve Eder, *Jurors' Tweets Upend Trials*, Wall St. J. (Mar. 5, 2012, 8:10 PM), http://online.wsj.com/article/SB10001424052970204571404577255532262181656.html.

[185] *See id.* (where a Florida juror was held in contempt and sentenced to three (3) days in jail for attempting to friend a defendant in a case); Martha Neil, *Juror Held in Contempt, Gets Community Service for Effort to Friend Defendant on Facebook*, A.B.A. J. (Aug. 29, 2011, 2:55 PM), http://www.A.B.A.journal.com/news/article/juror_held_in_contempt_gets_community_service_for_contacting_defendant/ (where a Texas juror was held in contempt and sentenced to two (2) days of community service after attempting to friend the defendant in his case); *Facebook juror sentenced to eight months for contempt*, BBC News (June 16, 2011, 9:53 AM), http://www.bbc.co.uk/news/uk-13792080 (where a British juror was held in contempt and sentenced to a suspended two (2)-month jail term for contacting the defendant via Facebook); Oregon Juror Jailed to Texting During Trial, CBS Seattle, Apr. 18, 2013, http://seattle.cbslocal.com/2013/04/18/oregon-juror-jailed-for-texting-during-trial/ (where a juror was caught texting and held in contempt).

[186] Brian Grow, *supra* note 183.

[187] *Id.*

[188] *Id.* (expletive omitted).

[189] *Id.*

[190] *See* Steve Eder, *supra* note 184 (noting that judges instruct jurors against communicating with anyone about the case because they are concerned that such communications could be construed as bias about the case); *see also* Leslie Gordon, *Why Can't We Be Friends?*, 96 AM. BAR ASSOC. J. 1 (2010).

extraneous information, is especially problematic in criminal cases where the Sixth Amendment[191] grants defendants the due process right to an impartial jury.[192] Personal biases, as expressed through social media, were heavily discussed in *Goupil v. Cattell.*[193] There, a juror wrote on his blog prior to jury selection, "Lucky me, I have Jury Duty! Like my life doesn't already have enough civic participation in it, now I get to listen to the local riff-raff try and convince me of their innocence."[194] The juror continued after he was seated on the jury (but before the trial began), "After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc."[195] The defendant alleged that the juror was not impartial based on these comments in his blog.[196] The United States District Court for the District of New Hampshire, however, disagreed noting that nothing in the record indicated personal bias or failure of his duties as a juror.[197]

Use of social media also potentially opens jurors up to prejudicial extraneous information. In *Commonwealth v. Guisti*,[198] the Supreme Judicial Court of Massachusetts considered whether a juror's act of posting to a listserv during trial the message: "stuck in a 7 day-long Jury Duty rape/assault case … missing important time from the gym, working more hours and getting less pay because of it! Just say he's guilty and lets [sic] get on with our lives!" deprived the defendant of a fair trial.[199] The Court found that although the statement itself did not involve extraneous matter, it was unclear whether the juror received any information regarding the case in response to her posting.[200] In effect, this left the juror vulnerable to receiving information about the case and could have exposed her to external influences.[201] The Court also found that voir dire of the juror should have been allowed to determine whether: (1) the juror was the person who posted the message; (2) if so, whether the juror received any responses to her messages; (3) the content of any such messages; and (4) whether the juror communicated the substance of any responses to any of her fellow jury members during the course of deliberations.[202]

From these cases, it appears that even though judges may instruct jurors not to use social media during jury service, jurors often disregard judges' instructions. As a court noted, "[n]o matter what the instructions may be, they are only as effective as the integrity of the juror who

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[191] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."). The Sixth Amendment is incorporated upon the states through the Fourteenth Amendment. U.S. CONST. amend. XIV.
[192] U.S. CONST. amend. VI.
[193] Civil No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008).
[194] *Id.* at *2.
[195] *Id.*
[196] *Id.* at *5.
[197] *Id.* at *8–*9.
[198] 747 N.E.2d 673 (Mass. 2001).
[199] *Id.* at 678–79.
[200] *Id.* at 679–80.
[201] *Id.* at 680.
[202] *Id.*

hears them."[203] Jurors now are trusted to refrain from using the Internet, and typically given stern admonitions to withhold from using these sites.[204] But as some are unable to resist the temptation, at least one (1) court has noted that sequestration may be the ultimate end point to ensure that jurors do not use the Internet to obtain outside information.[205] For now, strict admonitions will have to make due, even when jurors refuse to heed a judge's orders.[206]

VI.
POST-TRIAL CONCERNS: BANNED FROM THE INTERNET

Some courts have gone so far as to ban convicted criminals from the Internet, but such bans have raised questions about whether an outright Internet ban would be unconstitutional. Courts have found that while sentencing courts have the discretion to impose any conditions upon supervised release they consider appropriate, they must involve no greater deprivation of liberty than reasonably necessary.[207]

No court has found an outright Internet ban appropriate, but conditional bans have been upheld by courts in at least two (2) circuits.[208] In considering whether a ban on any use of a computer or Internet is appropriate, the Third Circuit has articulated three (3) factors that should be considered: "(1) the length and (2) coverage of the imposed ban; and, (3) the defendant's underlying conduct."[209] As to the third prong, typically courts have upheld restrictions when the underlying conduct somehow related to fraudulent use of computers or Internet.[210] Without that, courts have struggled to find a sufficient nexus between the restriction on use and the objectives of deterrence and protection of the public.[211]

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[203] People v. Jamison, 24 Misc. 3d 1238(A) at *6 (N.Y. Sup. Ct. Aug. 18, 2009).
[204] Ginny LaRoe, *Barry Bonds Trial May Test Tweeting Jurors*, LAW TECHNOLOGY NEWS, Feb. 15, 2011, http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202481944364.
[205] *Id.*
[206] *See* text accompanying note 180; *see Andrew Strickler, Jurors Must be Warned About Social Media Use, Study Says*, LAW 360 (Mar. 18, 2014).
[207] *See* United States v. Burroughs, 613 F.3d 233, 240 (D.C. Cir. 2010) (noting that conditions must involved "no greater deprivation of liberty than reasonably necessary"); United States v. Keller, 366 F. App'x 362, 363 n.2 (3d Cir. 2010) (affirming the judgment of the lower court because it involved "no greater deprivation of liberty than necessary").
[208] *See Keller*, 366 F. App'x at 364 (affirming a conditional, limited ban on Internet use); United States v. Suggs, 50 F. App'x 208, 211 (affirming a well-tailored ban on personal computer use).
[209] *Keller*, 366 F. App'x at 364 (quoting United States v. Heckman, 592 F.3d 400, 405 (3d Cir. 2010)).
[210] *See Keller*, 366 F. App'x at 364 (noting that there was a direct relationship between the underlying conduct of the conviction and the restriction on Internet use); *Suggs*, 50 F. App'x at 210–11 (noting that the lower judge's instructions of "You're to have no access to computers. Now, I'm not talking about if you're a cashier somewhere that you can't use that computer, I'm really referring to no access to personal computers, computers unassociated with a third party business, not your business, but if you're working for a company and you have to use their computer, you could have access to that computer, but you can have no access to a personal computer at all" were tailored to the underlying offense and not overly restrictive).
[211] *Compare Keller*, 366 F. App'x at 364 (finding a sufficient nexus between ban on creation of business websites and fraud through operation of online retail websites) and *Suggs*, 50 F. App'x at 210–11(finding a sufficient nexus between restricting computer use to employment purposes only and computer fraud) *with Burroughs*, 613 F.3d at 243–44 (restricting Internet use where offenses involved sexual abuse of a minor that did not involve a computer was unreasonable).

As to bans on social media, at least one (1) court has found that an individualized assessment is necessary before such a ban can be imposed. In *Doe v. Prosecutor, Marion County, Indiana*,[212] an Indiana statute prohibited registered sex offenders from usual social networking sites citing the state's interest in protecting children from predators.[213] The Court of Appeals for the Seventh Circuit found a complete ban of social media would only be appropriate if each banned activity was an "appropriately targeted evil."[214] Because this particular statute did not make such an assessment as to the need for incapacitation, the blanket ban was unconstitutional as it restricted free speech.[215] Even with this holding, the court was careful to state that the opinion here, "should not be read to affect district courts' latitude in fashioning terms of supervised release . . . or states from implementing similar solutions," which seems to imply that if there was an individualized assessment that found that Internet use would be too risky for a defendant, a limited ban may be appropriate and constitutional.[216]

Still, critics are quick to point out that judges perhaps lack appreciation of the importance of the Internet when imposing such bans.[217] Thus, when judges do impose bans on Internet use, judges should be careful to make individualized assessments as to the underlying conduct of the defendant and the scope of the ban. A case-by-case basis is the only reliable approach when it comes to Internet bans.

VII.
ETHICAL CONSIDERATIONS

The American Bar Association (A.B.A.) Commission on Ethics 20/20 (the "Commission") conducted a three (3)-year study of how technology has transformed the practice of law.[218] Despite finding that technology has fundamentally changed the practice of law,[219] the study suggested that a complete overhaul of the rules was not necessary, and suggested only minor changes.[220]

At the suggestion of the Commission,[221] the Model Rules of Professional Conduct now include a provision that competent attorneys must "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[222] Judges and

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[212] 705 F.3d 694 (7th Cir. 2013).
[213] *Id.* at 695.
[214] *Id*. at 698 (quoting Frisby v. Schultz, 487 U.S. 474, 485 (1988)).
[215] *Id.* at 703. The Court did note that limiting a defendant's access to the Internet may be appropriate if full access posed a high risk of recidivism. *Id.*
[216] *Id*.
[217] A. Jeff Ifrah & Steven Eichorn, *Banned from the Internet*, NAT'L L. J., Oct. 11, 2010, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202473282085&Commentary_Banned_From_the_Internet&slreturn=20130512144008.
[218] A.B.A. Commission on Ethics 20/20, Introduction and Overview 1 (2012), *available at* http://www.americanbar.org/content/dam/ABA/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf.
[219] *Id.* at 3.
[220] *Id.* at 2.
[221] *Id.* at 8.
[222] Model Rules of Prof'l Conduct, R. 1.1 cmt. 8 (2013). *See* Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113 (Dec. 18, 2009); Bottom Line Law Group, *Ethics Tips for Lawyers Using Social Media*, *available at* http://bottomlinelawgroup.com/wp-content/uploads/2012/02/Ethics-Tips-for-Lawyers-Using-Social-Media.pdf.

attorneys, thus, are bound by this rule and must, therefore, stay up-to-date with changes in technology.

a. Judges and Social Media

Not only are judges creating social media profiles, some use social media to research the attorneys and parties before them.[223] According to the A.B.A., judges may participate in social networking, but they must comply with all relevant provisions of the Code of Judicial Conduct and "avoid any conduct that would undermine the judge's independence integrity, or impartiality, or create an appearance of impropriety." [224]

As to a judge's "friends" on social networking sites, the context of the relationships matter.[225] In the *Public Reprimand of B. Carlton Terry, Jr.*,[226] a presiding judge friended one (1) of the attorneys before him.[227] On Facebook, the judge and the attorney had an exchange about the case on two (2) separate occasions.[228] The Judicial Standards Commission for North Carolina found that the judge had *ex parte* communications with counsel in a matter before him.[229] As a result of failing to abide by the principles of conduct contained in the judicial code, the judge was reprimanded.[230]

In a contrasting case, a judge had a previous Facebook relationship with the father of the girlfriend of a defendant before him.[231] Approximately one (1) week before the defendant entered a plea, the father sent the judge a Facebook message.[232] The message sought leniency for the defendant.[233] The judge responded advising the father that the message was in violation

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[223] *See* Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches #ABAChicago*, A.B.A. J. (July 31, 2009, 3:16 PM), http://www.A.B.A.journal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_A.B.A.chicago/ (where one (1) judge recounted using Facebook to find out that an attorney had lied when giving the reason for requesting a continuance); Purvis v. Comm'r of Soc. Sec., Civil Action No. 09-5318(SDW)(MCA), 2011 WL 741234 at * 7, n.4 (D.N.J. Feb. 23, 2011) (where judge noted that during her own research, she looked at profile picture on plaintiff's Facebook page); *Defendant's post-plea rant on Craigslist costs him sentence reduction for accepting responsibility*, SENTENCING LAW AND POLICY, Nov. 29, 2010, http://sentencing.typepad.com/sentencing_law_and_policy/2010/11/defendants-post-plea-rant-on-craigslist-costs-him-sentence-reduction-for-accepting-responsibility.html (where a judge used a defendant's statement on Craigslist as evidence that the defendant had not accepted responsibility for his crimes).

[224] A.B.A. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 462 (2013).

[225] *See* Youkers v. Texas, No. 05-11-01407-CR, slip op. 7 (Tex. Ct. App. May 15, 2013) (noting that context is necessary to understand whether judges "friending" someone is prejudicial).

[226] Inquiry No. 08-234, slip op. (N.C. 2008).

[227] *Id.* at 2.

[228] *Id.* The conversations included a post on Facebook by the attorney asking: "[H]ow do I prove a negative. [sic]" The judge responded that he had "two good parents to choose from" and that he "feels he will be back in court." The attorney then responded that he "ha[s] a wise judge." In the second conversation, the judge wrote on Facebook that "he was in his last day of trial." The attorney responded, "I hope I'm in my last day of trial." The judge replied, "[Y]ou are in your last day of trial." *Id.* The judge also visited one (1) of the party's websites about four (4) times. *Id.* at 3.

[229] *Id.* at 3.

[230] *Id.* at 4–5.

[231] *Youkers*, No. 05-11-01407-CR, at 3.

[232] *Id.*

[233] *Id.*

of rules against *ex parte* communications; that he stopped reading the message when he realized it was improper; and that any further communications about any pending legal matter would result in "de-friending."[234] The judge testified that he knew the father because both of them ran for office during the same election cycle, but that was "the extent of [their] relationship."[235] Here, the Court of Appeals for the Fifth District of Texas noted that "[m]erely designating someone as a 'friend' on Facebook 'does not show the degree or intensity of a judge's relationship with a person.'"[236] Based on the testimony of the judge and his quick disclosure of the communication, there was no implication of bias.[237] Thus, judges may use social media, but they should be aware of the context of their relationships before they "friend" an individual.[238]

b. Attorneys and Social Media

At times, it can be unclear when an attorney-client relationship is formed as potential clients turn to the Internet to contact attorneys. The Commission proposed changes to clarify when communications over blogs or social networking sites create an attorney-client relationship.[239] Now, "a person who *consults* with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."[240]

The Commission, though, has not attempted to define just what an attorney can do over social networking sites.[241] Instead, state bar associations have sought to fill the gap using their current ethics rules. New York, for example, has stated that attorneys may ethically access the public pages of another party's social networking site to gather information in pending litigation; however, they may not "friend" the other party or direct a third party to do so.[242] The Philadelphia Bar Association has similarly stated that it would be unethical to have a third-party

[234] *Id.* at 4. The judge also advised the father that he would place a copy of the message in the court's file, tell the lawyers about the message, and contact the judicial conduct commission to determine if anything further was required. *Id.*
[235] *Id.* at 3.
[236] *Id.* at 7 (quoting Am. Bar. Assoc. Op. 462).
[237] *Id.* at 9.
[238] Kentucky, New York, Ohio, and South Carolina seem to agree with this assessment. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Op. 2010-7 at 5–8 (2010). Florida has stated that judges may not add lawyers who appear before the judge as "friends" on social networking sites. *Id.* at 6. *See* Michael Pullano & Matthew Laver, *It's an Honor to be Your Friend?: Social Media and Judges*, LAW 360 (Apr. 27, 2014).
[239] A.B.A. Commission on Ethics 20/20, *supra* note 233 at 10.
[240] Model Rules of Prof'l Conduct, R. 1.18(a) (2013). The word "consults" replaced the former language of "discussion," which implied a two (2)-way verbal exchange between attorney and client. Am. Bar. Assoc. Commission on Ethics 20/20, *supra* note 222 at 10.
[241] Instead, the A.B.A. has only issued a formal opinion regarding lawyer websites. Am. Bar. Assoc., Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010), *available at* http://www.americanbar.org/content/dam/ABA./migrated/2011_build/professional_responsibility/ethics_opinion_10_457.authcheckdam.pdf. There, the A.B.A. indicated that when it comes to website content, "no website communication may be false or misleading, or may omit facts such that the resulting statement is material misleading." *Id.* at 1. The opinion stated an email is analogous to a phone or face-to-face conversation, but did not comment on whether this would apply to a Facebook or Twitter or other similar exchange. *Id.* at 4.
[242] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010), *available at* http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions826900/EO_843.pdf.

"friend" an unrepresented, adverse witness.[243] The State Bar of Arizona has commented that lawyers probably should not answer specific legal questions that are posted online because of the inability to screen for conflicts.[244] Still, the rules lack clarity as there are exceptions: at least one (1) state bar association allows people to pose as customers under the pretext of seeking services when it comes to suspected intellectual property right infringements.[245]

Attorneys that decide to actively participate in social media must be cautious about what they share. *In re Disciplinary Proceedings Against Peshek*,[246] an attorney published a blog with information about her work.[247] The blog contained confidential information about clients and derogatory comments about judges.[248] Because of her violation of the confidences of her clients, the Supreme Court of Illinois suspended Ms. Peshek's license to practice law in Illinois for sixty (60) days.[249] The Supreme Court of Wisconsin subsequently imposed an identical sixty (60)-day suspension on her licensed based on the same betrayal of client confidences.[250] In sum, attorneys may use social media, but they should be careful about what information they reveal on social networking sites.

VIII.
CONCLUSION

Social networking is now a part of the fabric of Internet use worldwide. Some jurisdictions like California and the Court of Appeals for the Ninth Circuit have embraced technology wholeheartedly, but others like Maryland have been more militant and restrictive in its use in the courtroom. Regardless of what position your jurisdiction might take, attorneys and judges must be aware not only of how the technology works, but also how it is best used and how to use it ethically. Going forward, social media users should be aware of the following:

1. Pay attention to how you use social media to avoid playing the personal jurisdiction game;[251]
2. Be aware that Section 230 will likely bar any suit against an intermediary interactive computer service provider;[252]

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[243] Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009), *available at* http://www.philadelphiabarr.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

[244] State Bar of Ariz. Ethics Op. 97-04 (1997), *available at* http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480.

[245] *See, e.g.*, Alabama State Bar Office of the Gen. Counsel Op. RO-2007-05 (2007), *available at* http://www.alabar.org/ogc/PDF/2007-05.pdf.

[246] 798 N.W.2d 879 (Wis. 2011).

[247] *Id.*

[248] *Id.* The comments included: "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.'" and calling a judge "Judge Clueless" and an "asshole." Wendy Akbar, *Dr. Seuss, Cheese and Social Media: Ethical Pitfalls Impacting Attorneys and Their Clients*, E-DISCOVERY BYTES (June 30, 2011, 12:36 PM), http://ediscovery.quarles.com/2011/06/articles/practice-tips/dr-seuss-cheese-and-social-media-ethical-pitfalls-impacting-attorneys-and-their-clients/.

[249] *Peshek*, 798 N.W.2d at 880.

[250] *Id.* at 881.

[251] *See* supra Part I.

[252] *See* supra Part II.

3. Know how to use subpoenas and discovery effectively to obtain and preserve the electronically stored information you want during the course of discovery;[253]
4. Learn how to use social media to your advantage by searching for jurors before and during voir dire and continue to monitor jurors throughout trial for potential misconduct;[254] and
5. Review your local jurisdiction's ethics opinions to determine how to use social media both effectively and ethically.[255]

[253] *See* supra Part III.
[254] *See* supra Part IV.
[255] *See* supra Part VI.