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Dance Like No One Is Watching, Post Like Everyone Is: The Accessibility of "Private" Social Media Content in Civil Litigation

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Dance Like No One Is Watching, Post Like Everyone Is: The Accessibility of “Private” Social Media Content in Civil Litigation

ABSTRACT

An increasing amount of information about an individual manifests in online activity, specifically through the use of the numerous social media platforms available today. Though these platforms offer users the ability to shield content behind various degrees of privacy options, even the most private information might be accessed in the course of robust legal proceedings. This Note analyzes the accessibility of private social media content in civil litigation through the vehicles of the Federal Rules of Civil Procedure, the Model Rules of Professional Conduct, and the Federal Rules of Evidence. The solution suggests methods for incorporating this new technological medium into existing legal frameworks, while also highlighting the importance of addressing contemporary notions of privacy.

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Facebook, Twitter, Instagram, Snapchat, Pinterest, LinkedIn, Google+, YouTube—this is not even an exhaustive list. Social media has become increasingly prevalent in the daily lives of American adults, with more and more personal information ending up in cyberspace.¹ Since extensive insight about litigants may be gathered from their activity on social media platforms,² this content is highly sought after in civil litigation contexts.³ While social media content was initially of particular interest in personal injury and family law cases, lawyers practicing in many civil litigation specialties—including products liability, employment law, intellectual property, defamation, insurance, breach of non-compete agreements, conversion, misappropriation of trade secrets, breach of confidentiality, and securities regulation—now seek information from social media.⁴ In certain circumstances, this content may even be used to establish minimum contacts for personal jurisdiction.⁵ While some content is

1. See Daniel A. Schwartz, *Social Media 2.0: The Next Generation of Hyperconnectivity*, 40 NO. 2 LAW PRAC. 30, 32 (2014); see also Jennifer K. Gregory, *#BewareofOvershare: Social Media Discovery and Importance in Intellectual Property Litigation*, 12 J. MARSHALL REV. INTELL. PROP. L. 449, 450–51 (2013).

2. See, e.g., Kathryn R. Brown, *The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs*, 14 VAND. J. ENT. & TECH. L. 357 (2012).

3. Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 U. KAN. L. REV. 235, 237 (Nov. 2015).

4. Robert M. Abrahams & Scott S. Balber, *The Impact of Technology on Document Discovery*, in NEW YORK PRACTICE SERIES – COMMERCIAL LITIGATION (Robert L. Haig ed., 2016); Ryan G. Ganzenmuller, *Snap and Destroy: Preservation Issues for Ephemeral Communications*, 62 BUFF. L. REV. 1239, 1240 (2014).

5. Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 912 (2013) (referring to *Wine Grp. LLC v. Levitation Mgmt., LLC*, No. Civ. 2:11-1704 WBS JFM, 2011 WL

easily accessible through a cursory Internet search, much more information is concealed behind the privacy settings of the various social media platforms.

This Note explores the accessibility of private social media content in civil litigation. Part I provides background information regarding social media, including the privacy settings, privacy policies, and privacy expectations of social media platforms. Part II examines the formal and informal methods of obtaining private social media content in civil litigation, potential ethical limitations on lawyers seeking such content, and the evidentiary issues faced subsequent to obtaining information from social media. Part III proposes effective and efficient solutions for accessing private social media for civil litigation. Finally, Part IV concludes this Note by reaffirming the importance of addressing this matter, as these issues will become increasingly prevalent in the years to come.

I. BACKGROUND

Social media provides platforms in the form of web sites, software tools, and mobile applications that allow individuals to connect with others through messaging, sharing links, posting photographs, and more.⁶ Users of social media interact with the platform itself and with other users, who may include new friends, old classmates, fellow professionals, and everyone in between.⁷ Some platforms are targeted toward certain demographics or interests, but most social media is meant for general use and new platforms are consistently appearing in the market.⁸ The information shared with others can include a user's daily activities, current location, thoughts, or even what the user ate for dinner, making social media essentially a chronicle of an individual's detailed personal behaviors.⁹ In 2015, the PEW Research Center reported that 65 percent of all American adults used social media in some capacity, compared to 7 percent in

4738335, at *5 (E.D. Cal. Oct. 6, 2011); *Bulk Process Equip. v. Earth Harvest Mills, Inc.*, No. 10-4176 (DWF/JSM), 2011 WL 1877836, at *3-4 (D. Minn. May 17, 2011); *Rios v. Ferguson*, 978 A.2d 592, 601 (Conn. Super. Ct. 2008)).

6. John M. Miller, *Is MySpace Really My Space? Examining the Discoverability of the Contents of Social Media Accounts*, 30 NO. 2 TRIAL ADVOC. Q. 28, 28 (2011).

7. Jonathan E. Moore, *Social-Media Discovery: It's a Matter of Proportion*, 31 T.M. COOLEY L. REV. 403, 405 (2014).

8. Miller, *supra* note 6.

9. Agnieszka McPeak, *Avoiding Misrepresentation in Information Social Media Discovery*, 17 SMU SCI. & TECH. L. REV. 581, 582 (2014); McPeak, *supra* note 3, at 240-41.

2005.¹⁰ Further, 90 percent of individuals age 18–29 maintain a social media presence.¹¹ These users are extremely active—there are 293,000 status updates on Facebook every minute and nearly 1 billion Tweets processed every forty-eight hours on Twitter.¹² Suffice it to say that social media is and will continue to be an integral facet of daily life.¹³

A. Social Media Content

Signing up for a social media account generally requires a user to input very basic information, such as an email address and birthday.¹⁴ But, in the process of creating a robust account, a user might provide extensive amounts of personal information, including educational programs attended, employment history, relationship status, personal contact information, current residence, past residences, political preferences, religious affiliations, causes a user supports, general likes and dislikes, family members' names, and photos.¹⁵ After creating an account on a given platform, users are able to select privacy settings for the content they choose to share. These privacy settings are not infallible, though, and users may encounter technical issues or unintended changes in their privacy settings that leave their personal information available to a broader audience.¹⁶ The following subsections will explore and define the differences between public, private, and ephemeral social media content as best these terms can be classified given the range of privacy controls available to users.

1. Public Social Media Content

Public social media content includes all content visible to any person who views the user's account on a social media platform

10. Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RES. CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/2015/Social-Networking-Usage-2005-2015/> [<https://perma.cc/26G4-LUTC>].

11. *Id.*

12. John G. Browning & Al Harrison, *What Is That Doing on Facebook? A Guide to Advising Clients to "Clean up" Their Social Media Profiles*, 53 HOUS. LAW. 26, 26 (2016) [hereinafter *What Is That Doing on Facebook?*].

13. Siri Carlson, *When Is a Tweet Not an Admissible Tweet? Closing the Authentication Gap in the Federal Rules of Evidence*, 164 U. PA. L. REV. 1033, 1034 (2016); Schwartz, *supra* note 1, at 33.

14. Brown, *supra* note 2, at 362.

15. McPeak, *supra* note 3, at 239; Kelly Ann Bub, *Privacy's Role in the Discovery of Social Networking Site Information*, 64 SMU L. REV. 1433, 1435 (2011).

16. McPeak, *supra* note 5, at 893.

without being explicitly granted permission to do so (in other words, not a “friend” or “connection” of the user who was specifically given access to this social media content).¹⁷ Some platforms dictate that certain features remain public regardless of other user-controlled settings, such as a personalized picture of the user known as a profile photo or cover photo.¹⁸ Public content does not carry any expectation of privacy since it is readily accessible to anyone who wishes to view it; therefore, courts generally treat public content the same as activities that occur in public view.¹⁹ As such, parties in litigation need not pursue access to this information through the discovery process in line with the Federal Rules of Civil Procedure, though this content is still subject to the Rules of Professional Conduct or the Federal Rules of Evidence.²⁰

2. Private Social Media Content

While individuals may post publicly accessible information on social media platforms, a user may also employ features to limit who is able to view the posted content. The predominant feature provided by social media platforms allows users to limit access to a specific group of people, rather than allowing access to anyone with an Internet connection. This group of people is typically referred to as the user’s “friends,” “followers,” or “connections,” depending on the platform.²¹ Users may further limit access by permitting only a certain subset of “friends” to see a post or by sending a message directly to a “friend” through chat or direct messaging features associated with the platform.²² While users are able to control to a certain extent the size and character of individuals given access to their data, these layers are not a guarantee of privacy.²³ “Friends” may tag a user in content, such as a photo or a link to an article, which then becomes viewable by individuals the user has not given permission to access his or her content.²⁴ The layers of privacy

17. McPeak, *supra* note 9, at 584.

18. McPeak, *supra* note 3, at 239.

19. Bub, *supra* note 15, at 1449; ANDREW T. STEPHENSON, HOW PRIVATE IS PRIVATE SOCIAL MEDIA?—DISCOVERY IN THE AGE OF SOCIAL MEDIA 6 (2016), <http://dri.org/docs/default-source/dri-online/course-materials/2016/product-liability/35b-how-private-is-private-social-media—discovery-in-the-age-of-social-media.pdf?sfvrsn=4> [<https://perma.cc/WA9M-56GU>].

20. Bub, *supra* note 15, at 1449.

21. Emma W. Sholl, *Exhibit Facebook: The Discoverability and Admissibility of Social Media Evidence*, 16 TUL. J. TECH. & INTELL. PROP. 207, 212 (2013).

22. *Id.*

23. Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1288 (2010).

24. *Id.*

settings have therefore become complex and convoluted, with users' content potentially left unintentionally exposed. Regardless of this possibility, for the purposes of this Note, private social media content is meant to refer to any content not generally accessible through a cursory Internet search but instead is limited to some smaller subset of social media users.

3. Ephemeral Social Media Content

Ephemeral social media is a recent development intended to provide users with a platform to share even more personal information, such as embarrassing photos, without a feeling of permanence due to the content's self-destructing nature.²⁵ The temporary nature of ephemeral content is thought to provide a platform that better focuses on communication and connection between users and better reflects users' feelings, personalities, and everyday life.²⁶ Since this sort of information is not easily accessible by a public audience, ephemeral social media will be included within the sphere of private social media content for the purposes of this Note.²⁷

There are now many ephemeral social media platforms, such as Snapchat, Vaporstream, Gryphn, Ansa, Burn Note, and TigerText.²⁸ Facebook, though not traditionally an ephemeral platform, recently introduced a new disappearing messaging system for its users in an effort to provide additional privacy safeguards.²⁹ Similarly, Instagram is incorporating ephemeral features into its platform.³⁰ However, Snapchat is the most popular and commonly used ephemeral platform to date; Snapchat first appeared in Apple's App Store in September

25. Clinton T. Magill, *Discovering Snapchat: How Will Snapchat and Similar Self-Destructing Social Media Applications Affect Relevance and Spoliation Under the Federal Rules of Civil Procedure?*, 9 CHARLESTON L. REV. 365, 367 (2015).

26. Ganzenmuller, *supra* note 4, at 1247–51.

27. *But see* Sara Anne Hook & Cori Faklaris, *Oh, Snap! The State of Electronic Discovery Amid the Rise of Snapchat, WhatsApp, Kik, and Other Mobile Messaging Apps*, 63 FED. LAW. 64, 67 (2016) (noting that some Snapchat features have been introduced that share “snaps” with individuals with whom a user is not “friends,” such as “live stories,” which are collections of “snaps” from users at the same public place or notable location).

28. Ganzenmuller, *supra* note 4, at 1247–55.

29. Hope King, *Facebook's 'Secret Conversations' Mode Deletes Messages for Extra Security*, CNN (Oct. 5, 2016), <http://money.cnn.com/2016/10/05/technology/facebook-secret-conversations-mode/index.html?sr=twCNN100516facebook-secret-conversations-mode1018PMVODtopLink&linkId=29582899> [https://perma.cc/FW43-92WG].

30. Mike Isaac, *Instagram Takes a Page from Snapchat, and Takes Aim at It, Too*, N.Y. TIMES (Aug. 2, 2016), https://www.nytimes.com/2016/08/03/technology/instagram-stories-snapchat-facebook.html?_r=0 [https://perma.cc/J7ZE-QJVF].

2011, and by October 2014, users were sending 700 million messages (“Snaps”) per day.³¹

Snapchat allows users to capture a photo or video; add features like text, filters, emojis, or geotags; and then send the content—the Snap—to specific users, upload the content to their “stories,” or both.³² The Snap sent via Snapchat is only visible by the selected audience for a specified amount of time, up to ten seconds, and then it disappears.³³ If the Snap is posted to a user’s “story,” in addition to or instead of being sent to a specific audience, it is visible to all the user’s friends on Snapchat for twenty-four hours, and friends are able to replay the user’s story as many times as they choose within that period.³⁴ The disappearing content shared through this platform is, at least in theory, not archived or stored once the messages are opened—though Snapchat conceded there might be some limited information about its users maintained by the platform, and there might be ways to access messages even after they are deleted or disappear.³⁵

B. *Expectations of Privacy*

Privacy is evolving in the world of ever-changing technology where high volumes of information are shared electronically. As the General Counsel for Microsoft Corporation put it, “the new definition of privacy means people don’t want to keep information secret, but they do want to ensure that they control who they share information with [and] . . . [t]hey want to control what those people use the information for.”³⁶ However, social media users typically think of their private social media content as just that: private.³⁷ When users deliberately utilize the platform’s privacy features in order to bar access by the general public and authorize only certain individuals to view certain content, the user expects that this creates a protected privacy interest.³⁸ From the perspective of its users, social media balances both openness and sharing with privacy and confidentiality in this way.³⁹ Nevertheless, courts have not agreed with this approach to date, and there continues to be a disconnect between social media

31. Ganzenmuller, *supra* note 4, at 1246.

32. *Id.* at 1247–51; Magill, *supra* note 25, at 371–72.

33. Magill, *supra* note 25, at 371.

34. Ganzenmuller, *supra* note 4, at 1249.

35. Hook & Faklaris, *supra* note 27, at 65–67.

36. Magill, *supra* note 25, at 366.

37. *Id.* at 367.

38. Zoe Rosenthal, “Sharing” with the Court: *The Discoverability of Private Social Media Accounts in Civil Litigation*, 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 227, 232 (2014).

39. McPeak, *supra* note 5, at 889.

users, lawmakers, and judges with regard to social media privacy (or lack thereof).⁴⁰

Generally, social media has not been afforded an expectation of privacy given that the very nature of this medium is to share information and facilitate connections between users.⁴¹ The information a user posts on social media may be disseminated by other users without the permission of the original poster, either through the platform itself or by other methods of electronic communication, and this further decreases the expectation of privacy on social media.⁴² There is no justifiable expectation that social media “friends” will keep another user’s information to themselves; accordingly, a greater social media presence maintained by a user—such as a large number of “friends”—serves to further diminish any belief that only people with permitted access would be able to view that user’s content.⁴³

Merely utilizing a platform’s privacy settings to restrict who may access and view content “does not provide a blanket exemption from discovery in civil litigation.”⁴⁴ In order to truly maintain a semblance of privacy on social media, an individual must refrain from using social media altogether and choose another form of communication.⁴⁵ Simply advising individuals to discontinue their activity on social media platforms does not so easily resolve the issue, however. Many individuals use social media as their primary method for keeping in touch with friends, family, or classmates; finding information about news, events, or promotions; sending direct messages; and much more, such that deactivating an account would lead to a feeling of social isolation.⁴⁶ Recognizing the inherent difficulties associated with balancing privacy against a desire to stay connected, social media platforms have attempted to explain the available protections through detailed privacy policies.

40. Sholl, *supra* note 21, at 207–08.

41. See *Jewell v. Aaron’s, Inc.*, No. 1:12-CV-0563-AT, 2013 WL 3770837, at *3 (N.D. Ga. July 19, 2013) (citing *Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-cv-632-J-JBT, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012)); *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 389 (E.D. Mich. 2012); *McPeak*, *supra* note 5, at 929.

42. Brown, *supra* note 2, at 363; *McPeak*, *supra* note 5, at 932.

43. *Reid v. Ingerman Smith LLP*, No. CV 2012-0307(ILG)(MDG), 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012) (citing *United States v. Meregildo*, No. 11 Cr. 576(WHP), 2012 WL 3264501, at *2 (S.D.N.Y. Aug. 10, 2012)).

44. *Anderson v. City of Fort Pierce*, No. 14-14095-CIV-MARTINEZ/LYNCH, 2015 WL 11251963, at *2 (S.D. Fla. Feb. 12, 2015).

45. *McPeak*, *supra* note 5, at 931–32.

46. *McPeak*, *supra* note 3, at 242.

1. Social Media Platforms' Privacy Policies

Social media platforms maintain and update detailed privacy policies and terms of service. Facebook's data policy, last updated on September 29, 2016, begins by stating the site's mission "to make the world more open and connected." It continues by explaining what information is collected, how information is collected and shared, and how users can delete information.⁴⁷ The policy maintains that users may manage their content and information but that Facebook stores data for as long as necessary for the purposes of providing its services to users.⁴⁸ Facebook further claims it may "access, preserve and share [user] information in response to a legal request (like a search warrant, court order or subpoena) if [Facebook] has a good faith belief that the law requires [it] to do so."⁴⁹ However, Facebook fails to qualify what a good faith belief might entail in this context.⁵⁰

Twitter's policies, last updated on September 30, 2016, vaguely mention the accessibility of its content ("Tweets") in legal contexts by stating that Twitter "may preserve or disclose your information if we believe that it is reasonably necessary to comply with a law, regulation, legal process, or governmental request; to protect the safety of any person; to address fraud, security or technical issues; or to protect our or our users' rights or property."⁵¹ However, unlike other platforms' policies, Twitter's policy interestingly goes on to state that "nothing in [Twitter's] Privacy Policy is intended to limit any legal defenses or objections that [users] may have to a third party's, including a government's, request to disclose [user] information."⁵² Twitter additionally notes that its platform is "primarily designed to help [users] share information with the world" and cautions users to "think carefully about what [they] are making public."⁵³ In other words, Twitter's policy takes additional steps to proclaim the potential ramifications of posting content on the platform—even if employing the available privacy settings—which is an especially explicit

47. *Data Policy*, FACEBOOK, https://www.facebook.com/full_data_use_policy [<https://perma.cc/7UQR-U3Q4>] (last visited Feb. 6, 2017).

48. *Id.*

49. *Id.*

50. *Id.* Facebook purchased Instagram in 2012, and as such the two platforms have similar policies, including their policy regarding responding to legal requests. *Privacy Policy*, INSTAGRAM, <https://help.instagram.com/155833707900388> [<https://perma.cc/6Z6C-LPAJ>] (last visited Feb. 6, 2017).

51. *Privacy Policy*, TWITTER, <https://twitter.com/privacy?lang=en> [<https://perma.cc/7N2Z-UQSX>] (last visited Feb. 6, 2017).

52. *Id.*

53. *Id.*

approach to explaining the privacy expectations attached to social media content.

While Snapchat's privacy policy claims it automatically deletes user information in order to keep with its mantra of living in the moment, it does caution users about various ways Snaps can be saved even though the platform itself destroys user content.⁵⁴ The privacy policies, last updated on January 10, 2017, further address the data collected and how it is used, including usage information, content information, and device information.⁵⁵ Snapchat also addresses the information it shares with third parties for legal reasons and specifically states that it

may share information about [its users] if [Snapchat] reasonably believe[s] that disclosing the information is needed to: comply with any valid legal process, government request, or applicable law, rule, or regulation; investigate, remedy, or enforce potential Terms of Service violations; protect the rights, property, and safety of us, our users, or others; or detect and resolve any fraud or security concerns.⁵⁶

Similar to the policies of other social media platforms, Snapchat does not clarify its reasonable belief standard.

2. Stored Communications Act

The Stored Communications Act (SCA or "Act") makes it unlawful for an individual to intentionally and without authorization access, obtain, alter, or prevent authorized access to electronic communication.⁵⁷ A person or entity providing an electronic communication service to the public is further prohibited from knowingly divulging the contents of a communication under the Act, but may be required to disclose information to a government entity pursuant to a valid search warrant.⁵⁸ Social media platforms are

54. Though the platform itself does not list "outside the app" methods of saving content, there are third-party apps available to save Snapchat posts. Hook & Faklaris, *supra* note 27, at 69; *Privacy Policy*, SNAPCHAT, <https://www.snap.com/en-US/privacy/privacy-policy/> [<https://perma.cc/664H-XFKJ>] (last updated Jan. 10, 2017). In its privacy policy, Snapchat notes:

Keep in mind that the users you send Snaps, Chats, and any other content to can always save that content or copy it outside the app. So, the same common sense that applies to the [I]nternet at large applies to Snapchat as well: Don't send messages or share content that you wouldn't want someone to save or share.

Id.

55. SNAPCHAT, *supra* note 54.

56. *Id.*

57. 18 U.S.C. § 2701 (2012).

58. *Id.* §§ 2702, 2703 (2012).

subject to the SCA.⁵⁹ Courts have interpreted the SCA so that social media platforms may not reveal more than basic user information to a non-government entity, even with a valid subpoena or court order.⁶⁰ There are, however, exceptions to the SCA, one of which allows information to be released to third parties if the user gives lawful consent.⁶¹ Overall, this Act does not prohibit or protect social media content from being accessed in the course of civil litigation—it only disallows parties from obtaining such content through the platforms themselves.⁶²

II. ANALYSIS

A. Formal Discovery

The Federal Rules of Civil Procedure dictate formal discovery in the course of civil litigation through several rules, including Rules 26, 34, and 37. Under Rule 26, “parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case,” and the rule explicitly states that the information sought “need not be admissible in evidence to be discoverable.”⁶³ This rule further provides specific limitations for electronically stored information, which has been judicially determined to encompass social media content, when production of this information would cause an undue burden or cost—though the court can still order production for good cause.⁶⁴ Rule 34 requires parties to describe their requests for information with reasonable particularity and to produce electronically stored information in a reasonably usable form.⁶⁵ Rule 37 provides for motions to compel discovery and, importantly, outlines the consequences for failing to properly preserve electronically stored information.⁶⁶

Like all of the Federal Rules of Civil Procedure, discovery provisions must be firmly limited to only allow discovery of relevant material in an effort to secure the just, speedy, and inexpensive

59. Bub, *supra* note 15, at 1446–48 (referencing *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010); *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-00764, 2010 WL 2265668 (M.D. Tenn. June 3, 2010)).

60. Rosenthal, *supra* note 38, at 234.

61. Sholl, *supra* note 21, at 214.

62. Rosenthal, *supra* note 38, at 235.

63. FED. R. CIV. P. 26(b)(1).

64. FED. R. CIV. P. 26(b)(2)(B).

65. FED. R. CIV. P. 34.

66. FED. R. CIV. P. 37.

determination of litigation.⁶⁷ Though the relevancy threshold for discoverable content is not considered particularly onerous, it is still an important limit.⁶⁸ Further, the court has a duty both *sua sponte* and when faced with a motion to compel to limit any discovery when “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”⁶⁹

Accessing social media content through the formal discovery process “requires the application of basic discovery principles in a novel context,” and courts have declined to distinguish a meaningful difference between typing a message, speaking aloud, or writing a note on paper for the purposes of discovery.⁷⁰ As such, courts now face the challenge of defining appropriately broad discovery limits for this content while providing guidance and predictability regarding discoverable information for parties to litigation.⁷¹ For formal discovery of private social media content, parties must make a threshold showing that the information sought is reasonably calculated to lead to the discovery of admissible evidence at the risk of otherwise engaging in the proverbial “fishing expedition.”⁷² There is an emphasis on relevance, as parties in litigation do not have a generalized right to rummage through information shaded from public view—even if private content is not privileged or entitled to protection through legal notions of privacy.⁷³ Courts will not, however, condone “attempt[s] to hide relevant information behind self-regulated privacy settings,” as the need for this information outweighs privacy concerns.⁷⁴ Clearly relevant information is likely to have production compelled despite any claims about burdensome production of such content.⁷⁵

67. *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012).

68. *Appler v. Mead Johnson & Co., LLC*, No. 3:14-cv-166-RLY-WGH, 2015 WL 5615038, at *2 (S.D. Ind. Sept. 24, 2015).

69. FED. R. CIV. P. 26(b)(2)(C).

70. *Farley v. Callais & Sons LLC*, No. 14-2550, 2015 WL 4730729, at *2 (E.D. La. Aug. 10, 2015); *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

71. *Simply Storage Mgmt., LLC*, 270 F.R.D. at 434; FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

72. FED. R. CIV. P. 26(b); *Potts v. Dollar Tree Stores, Inc.*, No. 3:11-cv-01180, 2013 WL 1176504, at *3 (M.D. Tenn. Mar. 20, 2013).

73. *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012).

74. *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 432–34 (N.Y. Sup. Ct. 2010).

75. *See Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-cv-632-J-JBT, 2012 WL 555759, at *2 (M.D. Fla. Feb. 21, 2012). *But see Palma v. Metro PCS Wireless, Inc.*, 18 F. Supp. 3d 1346, 1348 (M.D. Fla. 2014) (holding that “the burden of requiring all of the opt-in Plaintiffs

1. Relevance Determinations

To date, courts have lacked consistency in determining what information is relevant in the context of private social media content. When considering content arguably supporting claims of mental or physical conditions, some courts have deemed this issue insufficient to allow for formal discovery of social media, while others conversely state it is conceivable that private content may support or undermine claims of pain or suffering.⁷⁶ In cases involving claims of emotional distress or loss of enjoyment, courts hesitate to forbid discovery of private content since these plaintiffs affirmatively chose to put this aspect at issue, suggesting litigants should now expect that such a choice might lead to a potential investigation of their personal lives through social media.⁷⁷ Other courts fear unfettered access to a party's social media content would permit litigants "to cast too wide a net and sanction an inquiry into scores of quasi-personal information that would [otherwise] be irrelevant and non-discoverable."⁷⁸

Courts take varying stances when faced with discovery issues. Some courts note that relevance in the discovery context is a low threshold, such that information should ordinarily be discoverable unless the information clearly has "no possible bearing on the subject matter of the action."⁷⁹ With this broad scope of relevance in mind,

to review all of their postings on potentially multiple social media sites over a period of four years and determine which posts relate to their job, hours worked, or this case, would be 'an extremely onerous and time-consuming task'"); *Jewell v. Aaron's, Inc.*, No. 1:12-CV-0563-AT, 2013 WL 3770837, at *5 (N.D. Ga. July 19, 2013) (holding that "the burden imposed on a class of plaintiffs to produce such an overly broad swath of documents, while technologically feasible, is far outweighed by the remote relevance of the information").

76. See *Johnson v. PPI Tech. Servs., L.P.*, No. 11-2773, 2013 WL 4508128, at *2 (E.D. La. Aug. 22, 2013) ("Almost every plaintiff places his or her mental or physical condition at issue, and this Court is reticent to create a bright-line rule that such conditions allow defendants unfettered access to a plaintiff's social networking sites that he or she has limited from public view."); *Giachetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 115 (E.D.N.Y. 2013) ("If the Court were to allow broad discovery of Plaintiff's social networking postings as part of the emotional distress inquiry, then there would be no principled reason to prevent discovery into every other personal communication."). *But see Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 571 (C.D. Cal. 2012) ("Plaintiff has placed her emotional state at issue in this action and it is conceivable that some [social media] communications may support or undermine her claims of emotional distress.").

77. *Anderson v. City of Fort Pierce*, No. 14-14095-CIV-MARTINEZ/LYNCH, 2015 WL 11251963, at *2 (S.D. Fla. Feb. 12, 2015) ("[T]he Plaintiff has put her mental health and quality of life at issue, and the Defendant seeks the social media pictures for that reason."); *Mailhoit*, 285 F.R.D. at 571.

78. *Ogden v. All-State Career Sch.*, 299 F.R.D. 446, 450 (W.D. Penn. 2014).

79. *Kear v. Kohl's Dep't Stores, Inc.*, No. 12-cv-1235-JAR-KGG, 2013 WL 3088922, at *1 (D. Kan. June 18, 2013) (quoting *Snowden ex rel. Victor v. Commaught Lab.*, 137 F.R.D. 325, 341 (D. Kan. 1991)).

courts will permit access to private social media simply because it may lead to content that speaks to the claims at issue—so long as cognizable limits are specified, such as well-defined, manageable time intervals for requested information.⁸⁰ Other courts limit discovery to any private content that reveals or refers to aspects at issue in the case, but will not allow access to the entire contents of a party's account.⁸¹ Meanwhile, another subset of courts opts to use the public portions of the user's account to determine whether it is likely the private portions contain relevant material that should be discoverable.⁸²

2. Methods of Production

In addition to variations between courts regarding what social media content can be discovered, courts also disagree about how parties should produce the discoverable information. Courts typically employ three methods for review of private social media content: in camera review, counsel review, or exchange of account information. The method of review implemented by the court impacts how social media content must be produced. First, with in camera review, the court reviews the allegations in the complaint, along with the other filings in the course of the litigation, and reviews the party's social media account, presumably in its entirety.⁸³ After conducting the in camera review, the court will order production of the content deemed relevant.⁸⁴ Some courts only use in camera review when the discovery dispute alleges a privilege and will opt for other methods of review and production for mere relevance determinations.⁸⁵

Second, other courts have left the review up to the party's counsel, trusting these officers of the court will review their client's

80. *Id.* at *6.

81. *Smith v. Hillshire Brands*, No. 13-2605-CM, 2014 WL 2804188, at *5-6 (D. Kan. June 20, 2014) (quoting *Rozell v. Rose-Holst*, No. 05 CIV 2936(JGK)JCF, 2006 WL 163143, at *3-4 (S.D.N.Y. Jan. 20, 2006) (“[A]nything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of everything thought she may have reduced to writing”); *see also Held v. Ferrellgas, Inc.*, No. 10-2393-EFM, 2011 WL 3896513, at *1 (D. Kan. Aug. 31, 2011).

82. *Keller v. Nat'l Farmers Union Prop. & Cas. Co.*, No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at *4 (D. Mont. Jan. 2, 2013); *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 389 (E.D. Mich. 2012); *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (N.Y. Sup. Ct. 2010).

83. *Offenback v. L.M. Bowman, Inc.* No. 1:10-CV-1789, 2011 WL 2491371, at *2 (M.D. Penn. June 22, 2011).

84. *Id.*; *Bass v. Miss Porter's Sch.*, No. 3:08cv1807, 2009 WL 3724968, at *1 (D. Conn. Oct. 27, 2009); *Root v. Balfour Betty Const. LLC*, 132 So. 3d 867, 871 (Fla. Dist. Ct. App. 2014).

85. *Tompkins*, 278 F.R.D. at 389 n.4 (quoting *Collens v. City of New York*, 2004 WL 1395228, at *2 (S.D.N.Y. 2004)).

content and, erring in favor of production, provide all relevant information relating to the discovery request.⁸⁶ In camera review and opposing counsel review may be accomplished through the Download Your Information feature of Facebook, the Download Your Twitter Archive feature of Twitter, or the Download My Data feature of Snapchat, which allow the social media user to easily produce all of their social media content in one file.⁸⁷ For Facebook and Twitter, these features download virtually all content associated with a user regardless of privacy settings, which may include deleted information or direct communications sent between users through the platform's messaging component; such extensive information might be over-inclusive for the purposes of discovery on narrow issues.⁸⁸ Snapchat's feature downloads a more limited version of a user's content, including Snaps sent and received over the last thirty days and the geographic location of Snapchat activity.⁸⁹ Facebook, Twitter, and Snapchat are the only platforms to provide such an option, and new production challenges could arise as other social media platforms increase in popularity. Finally, with the exchange of account information method, courts may order a user to provide the password to their account so it may be examined for relevant private content, presumably by someone qualified to make that determination in good faith.⁹⁰

B. Informal Discovery and Its Ethical Concerns

Informal discovery is research conducted in the early stages of civil litigation and "is favored by many courts as an affordable and effective way to narrow issues in litigation, obtain important facts to guide formal discovery, and find evidence to use at trial."⁹¹ In some situations, informal gathering of research might be necessary to file a sufficient initial pleading.⁹² Given the dynamic nature of social media content, informal discovery of it allows research to be conducted in a timely manner without the risk of pertinent information

86. *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344–45 (D. Minn. 2011); *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010).

87. *Appler v. Mead Johnson & Co., LLC*, No. 3:14-cv-166-RLY-WGH, 2015 WL 5615038, at *1 (S.D. Ind. Sept. 24, 2015).

88. McPeak, *supra* note 5, at 917.

89. *My Data*, SNAPCHAT, <https://accounts.snapchat.com/accounts/downloadmydata> [<https://perma.cc/BNA8-NSUW>] (last visited Feb. 6, 2017).

90. *Gallion v. Gallion*, No. FA1141169558, 2011 WL 4953451, at *1 (Conn. Sept. 30, 2011).

91. Agnieszka McPeak, *Social Media Snooping and Its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 847 (2014).

92. Steven C. Bennett, *Ethical Limitations on Informal Discovery of Social Media Information*, 36 AM. J. TRIAL ADVOC. 473, 478–79 (2013).

disappearing.⁹³ While informal discovery may be beneficial, it also presents ethical concerns.

The American Bar Association's Model Rules of Professional Conduct ("Model Rules") serve as a general ethical guide for lawyers and apply in nearly all jurisdictions within the United States.⁹⁴ The Model Rules are not meant to exhaustively specify all ethical duties; rather, they provide a broad framework of ethical conduct to which lawyers must adhere.⁹⁵ Further, ethics opinions from the American Bar Association and state or city bar associations provide tailored guidance to ethical issues where the Model Rules are not clear.⁹⁶ These rules and ethical guidelines extend to individuals under a lawyer's supervision, such as paralegals, non-legal staff, and investigators.⁹⁷ Though the Model Rules do not explicitly address informal discovery of social media content, multiple rules and various ethics opinions touch on these issues—specifically through a duty to consider this content, a duty to refrain from inappropriate uses of social media, and a duty to preserve content.

1. The Duty to Affirmatively Consider Social Media Content

Under the Model Rules, a lawyer has a duty to provide clients with competent representation, including the requisite "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁹⁸ Importantly, the Comment to Model Rule 1.1 includes knowledge of the "benefits and risks associated with relevant technology" as part of competent representation.⁹⁹ The Model Rules also stipulate that a lawyer must be diligent in his or her representation of clients and refrain from bringing frivolous claims—a point further echoed by Federal Rule of Civil Procedure 11.¹⁰⁰

93. Allison Clemency, *"Friending," "Following," and "Digging" up Evidentiary Dirt: The Ethical Implications of Investigating Information on Social Media Websites*, 43 ARIZ. ST. L.J. 1021, 1029 (2011).

94. Bennett, *supra* note 92, at 477.

95. MODEL CODE OF PROF'L CONDUCT Scope (AM. BAR ASS'N 1983).

96. See, e.g., *Standing Committee on Ethics and Professional Responsibility*, AM. B. ASS'N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility.html [<https://perma.cc/C3PU-G562>] (last visited Feb. 6, 2017).

97. Bennett, *supra* note 92, at 483.

98. MODEL CODE OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

99. MODEL CODE OF PROF'L CONDUCT r. 1.1, cmt. 8 (AM. BAR ASS'N 1983).

100. FED. R. CIV. P. 11(b) (requiring pleadings and written motions be, among other things, presented for a proper purpose, warranted by current law or a nonfrivolous argument, and grounded in factual content with evidentiary support); MODEL CODE OF PROF'L CONDUCT r. 1.3, 3.1 (AM. BAR ASS'N 1983).

Together, these Model Rules impose a requirement to use reasonable efforts in performing sufficient research into factual contentions and legal claims.

The Model Rules also signify a duty to affirmatively consider social media content in the course of civil litigation in order to meet ethical standards of competence and diligence and to avoid frivolous claims.¹⁰¹ Depending upon the context of the case, a lawyer may be able to comply with these rules by simply possessing a working knowledge of social media platforms or searching to determine whether a litigant holds a social media account.¹⁰² It might mean carefully advising a client about privacy settings or ensuring content is properly preserved.¹⁰³ Regardless of the specific manner in which this obligation manifests, a lawyer must be mindful of the implications of social media in pending civil litigation, as doing so might make the difference between winning a case and receiving sanctions.¹⁰⁴ While the Model Rules create a duty for lawyers to consider social media content during both formal and informal discovery, legal professionals must be cautious to avoid violating other ethical duties in that pursuit.

2. The Duty to Refrain from Inappropriate Uses of Social Media

A lawyer has a general duty to refrain from misconduct, such as engaging in “dishonesty, fraud, deceit or misrepresentation,” either through his or her own conduct or through the acts of another.¹⁰⁵ The Model Rules additionally forbid lawyers from making false statements of material fact to a third person and from communicating with represented parties in litigation.¹⁰⁶ These rules, taken together, speak to the practice of sending “friend requests” to parties or witnesses in civil litigation in order to circumvent the formal discovery process and gain access to the user’s private content. Ethical concerns may arise if a lawyer or lawyer’s agent falsifies her social media identity to obtain private content (e.g., creating a fake social media user account in

101. See, e.g., McPeak, *supra* note 91, at 875–80.

102. *Id.* at 880.

103. Browning & Harrison, *supra* note 12, at 27.

104. See, e.g., *Lester v. Allied Concrete Co.*, Nos. CL08–150, CL09–223, 2010 WL 7371245, at *6 (Va. Cir. Ct. May 27, 2010) (sanctioning plaintiff’s attorney for “maintaining and certifying the accusation that Defense counsel ‘hacked into’ and/or made unauthorized access to Plaintiff’s Facebook account during the hearing in open court on March 3, 2010, based on no inquiry into the relevant facts beyond the bare, unsubstantiated assertions of his client”).

105. MODEL CODE OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 1983).

106. MODEL CODE OF PROF’L CONDUCT r. 4.1–2 (AM. BAR ASS’N 1983).

order to send a “friend request” to a litigant or witness).¹⁰⁷ Similarly, absent deceptive methods, there may be ethical issues with sending a “friend request” to a litigant or witness at all unless the request is accompanied by full and proper disclosure regarding access to the user’s content for the purposes of litigation.¹⁰⁸ This conduct could also violate rules pertaining to communication between a lawyer and a represented party during the course of litigation.¹⁰⁹

The Philadelphia Bar Association Professional Guidance Committee, the New York City Bar Association’s Committee on Professional Ethics, and the San Diego County Bar Association Ethics Committee addressed these concerns through various ethics opinions and generally agreed, while the applicable rules of professional conduct did not explicitly forbid informal discovery of social media content, lawyers must be especially cautious not to deceive when sending a “friend request” to a social media user in order to gain access to his private social media content for the purposes of litigation.¹¹⁰ The New Jersey Supreme Court permitted the New Jersey Office of Attorney Ethics to pursue discipline against lawyers who allegedly violated the applicable rules of professional conduct by instructing a paralegal to “friend” an adverse, represented party for the purpose of accessing private content.¹¹¹ Other courts confronted with analogous attorney conduct will likely follow New Jersey’s lead in order to give proper force to the Model Rules within this modern phenomenon. These Model Rules against contact, deception, and misrepresentation, taken together, are meant to counterbalance zealous advocacy and loyalty to a lawyer’s own client and, in the context of social media, may mean that enticing methods for informal discovery must be carefully avoided.¹¹²

3. The Duty to Preserve Social Media Content and Spoliation

The duty to preserve attaches in civil litigation when a party is on “notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”¹¹³ If a party fails to preserve information and instead

107. Clemency, *supra* note 93, at 1036.

108. *Id.*

109. *Id.* at 1035.

110. *Id.*

111. Robertelli v. New Jersey Office of Atty. Ethics, 134 A.3d 963 (N.J. 2016).

112. McPeak, *supra* note 91, at 863.

113. Howell v. Buckeye Ranch, Inc., No. 2:11-cv-1014, 2012 WL 5265170, at *2 (S.D. Ohio Oct. 1, 2012); Thurmond v. Bowman, 14-CV-6465W, 2016 WL 1295957, at *7 (W.D.N.Y. Mar. 31, 2012) (quoting Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)).

destroys or significantly alters content, the party could be subject to spoliation sanctions from the court.¹¹⁴ Spoliation is “[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usually a document.”¹¹⁵ Spoliation sanctions range from dismissal of a claim, judgment in favor of the prejudiced party, suppression of evidence, adverse inference instructions, fines, or attorneys’ fees.¹¹⁶ Adverse inference instructions, also referred to as the “spoliation instructions,” may be given if four factors are satisfied: (1) the information was in the party’s control, (2) the information was actually suppressed or withheld, (3) the information was relevant to claims or defenses at issue, and (4) the information was reasonably foreseeable as discoverable.¹¹⁷ These sanctions are not illusory, as one Virginia plaintiff and attorney learned during a wrongful death case in 2009 when spoliation sanctions resulted in an adverse inference instruction to the jury, hefty monetary fines (\$542,000 for the attorney and \$180,000 for the plaintiff), and a subsequent five-year suspension of the attorney’s license from the Virginia State Bar for engaging in “dishonesty, fraud, deceit, or misrepresentation.”¹¹⁸

The duty to preserve private content presents complicated issues.¹¹⁹ The aforementioned Virginia lawyer instructed his client to “clean up” his social media accounts and later had the client sign interrogatories attesting he did not have an active Facebook account—prompting the harsh spoliation sanctions.¹²⁰ However, other bar associations have issued guidance on the matter of spoliation of social media content and instead permit lawyers to counsel their clients on privacy and even permit “cleaning up” of accounts so long as the information is properly preserved in case it proves relevant and discoverable.¹²¹

The New York State Bar Association, for example, issued social media guidelines in March 2014 which explained that “there was no problem with a lawyer advising a client about privacy settings, reviewing what a client planned to post, or recommending social media policy,” but that lawyers should be careful to ensure that potentially relevant information is not deleted unless an appropriate

114. *Gatto v. United Airlines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285, at *3 (D.N.J. Mar. 25, 2013).

115. *Spoliation*, BLACK’S LAW DICTIONARY (10th ed. 2010); *see also Thurmond*, 2016 WL 1295957, at *7.

116. *Gatto*, 2013 WL 1285285, at *3.

117. *Id.*

118. *Browning & Harrison*, *supra* note 12, at 26–27.

119. *Thurmond*, 2016 WL 1295957, at *8.

120. *Browning & Harrison*, *supra* note 12, at 26.

121. *Id.* at 28.

record is preserved.¹²² Pennsylvania, North Carolina, Florida, and West Virginia have issued similar guidance, creating a broad ethical standard allowing lawyers to advise a client to “clean up” content and enhance privacy settings, so long as the lawyer does not destroy relevant social media content or withhold information from the formal discovery process.¹²³ Given the courts’ various approaches to relevance, a lawyer cannot have reasonable certainty as to what information will be discoverable. Thus, courts and bar associations have drawn an indistinct and at times conflicting line between competent and diligent representation of a client and spoliation of social media content.

C. Evidentiary Concerns

The legal concerns regarding private content in civil litigation are certainly not limited to formal and informal discovery; there are also evidentiary concerns in regard to all social media content that should be addressed. The admissibility of information obtained in the pre-trial period is a crucial issue relating both to evidentiary rulings at trial and to properly supporting motions for summary judgment.¹²⁴ Even when permitting discovery of social media content, courts have yet to clarify the admissibility of this material, and parties may face concerns regarding relevance, hearsay, and authentication.¹²⁵

Evidence, generally, is relevant if it makes “a fact more or less probable than it would be without the evidence” and that fact is integral in the matter.¹²⁶ Relevant evidence is admissible unless “its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹²⁷ Admission of evidence on relevance grounds can be contested through a pretrial motion in limine or left to the determination of the factfinder.¹²⁸ Relevance, however, is considered a low threshold, and it is onerous for an opponent to show that a court

122. *Id.* at 27.

123. *Id.* at 27–28; John Levin, *Social Media – Advising Your Client*, 29 CBA REC. 40, 40 (2015).

124. Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 MISS. C. L. REV. 185, 193 (2012).

125. *Anderson v. City of Fort Pierce*, No. 14-14095-CIV-MARTINEZ/LYNCH, 2015 WL 11251963, at *3 (S.D. Fla. Feb. 12, 2015); Sholl, *supra* note 21, at 220.

126. FED. R. EVID. 401.

127. FED. R. EVID. 402, 403.

128. Brown, *supra* note 2, at 379.

should exclude relevant evidence.¹²⁹ Relevant social media content can speak to a party's credibility or provide pivotal insight on a party's claims, but it may also unfairly prejudice or misrepresent a party.¹³⁰

Social media content is, by definition, hearsay, as it is comprised of statements "the declarant does not make while testifying at the current trial or hearing."¹³¹ Hearsay is meant to exclude unreliable statements from trial, but social media content has the potential to reveal unique, real-time perspectives of individuals before the distorting effects of litigation. Therefore, these statements—while made out of court—could serve an important truth-seeking function.¹³² Hearsay should not be an insurmountable admissibility obstacle, as this content should fall within a hearsay exception when it is offered against the party opponent, made in an individual capacity, and believed by the party to be true, though questions remain as to the exact application of the existing hearsay exceptions to various forms of social media.¹³³

Evidence must also be authenticated, which means that evidence is not admissible unless the offering party can sufficiently show that the evidence genuinely is what the proponent claims it to be.¹³⁴ In the context of social media, attorneys face the challenge of attributing authorship of any content introduced as evidence to the individual user.¹³⁵ Authentication issues with social media content can arise if a party claims the account itself was fake or hacked, if a party claims a third party was responsible for posting the content in question, or if there is not proper foundation for authenticating the content.¹³⁶ Additional authentication issues can arise with the metadata associated with social media, which can indicate when or where content was created, since this metadata can be manipulated.¹³⁷ Courts have not developed a consistent approach to authentication of social media content, though there is a strong reliance upon circumstantial evidence.¹³⁸ Circumstantial evidence will demonstrate similarities between this content and other authenticated evidence, or it might draw upon individualized information about the user—such

129. Sholl, *supra* note 21, at 220.

130. Brown, *supra* note 2, at 380.

131. FED. R. EVID. 801(c)(1).

132. Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 11 (2013).

133. FED. R. EVID. 801(d)(2)(A)–(B); Sholl, *supra* note 21, at 220–21.

134. FED. R. EVID. 901(a).

135. Sholl, *supra* note 21, at 222.

136. *Id.* at 221.

137. Carlson, *supra* note 13, at 1043.

138. Elizabeth A. Flanagan, *#Guilty? Sublet v. State and the Authentication of Social Media Evidence in Criminal Proceedings*, 61 VILL. L. REV. 287, 296–98 (2016).

as information about his interests and hobbies—to attribute the evidence to that individual.¹³⁹ However, some courts may make authentication burdensome by requiring specific or even expert testimony to demonstrate actual authorship of content.¹⁴⁰

III. SOLUTION

A. Consistently Apply the Federal Rules of Civil Procedure

Discovery generally requires a case-by-case inquiry within the framework provided by the Federal Rules of Civil Procedure, and the discoverability of private social media content should be no different in that regard.¹⁴¹ There need not be an entirely separate standard to address private content, as discovery should focus on the information at issue and not the platform on which the information is stored (assuming production is not unduly burdensome).¹⁴² The Federal Rules of Civil Procedure are flexible enough to accommodate technological advances, and courts are appropriately exercising their discretion when the opportunity arises to apply basic discovery principles to this novel context.¹⁴³

Moreover, it is unlikely the Federal Rules of Civil Procedure could be amended frequently enough to include effective social media-specific rules given the complex rulemaking process.¹⁴⁴ Unfortunately, inconsistent and polarizing approaches presently employed by some courts potentially endanger the normative foundations inherent to formal discovery.¹⁴⁵ Social media platforms are multifaceted, and an over-simplistic “all-or-nothing” approach to formal discovery will either leave individuals with insufficient information to properly litigate claims or allow the proverbial “fishing expedition” that discovery has long aimed to avoid.¹⁴⁶

139. Sholl, *supra* note 21, at 222.

140. Flanagan, *supra* note 138, at 302–03. Effective expert testimony may be difficult to obtain, if required, as Snapchat will not provide expert testimony in legal proceedings (and perhaps other social media platforms will follow suit). See SNAPCHAT, SNAP, INC., LAW ENFORCEMENT GUIDE 14 (2016), <https://www.snapchat.com/lawenforcement> [<https://perma.cc/KM25-7U95>].

141. McPeak, *supra* note 5, at 937.

142. Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 13 (2012).

143. E.E.O.C. v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010); Gensler, *supra* note 142, at 10.

144. Gensler, *supra* note 142, at 34.

145. McPeak, *supra* note 5, at 888.

146. See Ogdan v. All-State Career Sch., 299 F.R.D. 446, 450 (W.D. Penn. 2014) (“Defendant is no more entitled to such unfettered access to plaintiff’s personal email and social

The Federal Rules of Civil Procedure do not provide litigants with any mechanisms to exclude relevant material just because an individual hoped to keep that information secret or restrict access to it, and it follows that courts should continue to treat private content as discoverable information despite any user-employed privacy settings.¹⁴⁷ However, while it should not be a dispositive fact, courts should recognize that private social media content is distinct from public information even if it is ultimately discoverable.¹⁴⁸ Courts should strongly caution against finding the entire contents of a user's account discoverable, as that would allow discovery of an extremely large amount of information, much of which is unlikely to be relevant.¹⁴⁹ Courts should also refrain from ascertaining discovery limits through a user's public content, as some litigants may only permit sparse content to be publicly accessible while much more private content is available. Rather, litigants should adhere to the reasonable particularity approach of the Federal Rules of Civil Procedure and send tailored requests for private social media content that speak specifically to the issues of the case and are most likely to lead to the discovery of admissible evidence.¹⁵⁰ Courts, if so required, should liberally grant thoughtful requests for private content and should utilize the available mechanisms for ensuring privacy of sensitive information when necessary, such as protective orders under Rule 26(c) or filing documents under seal.¹⁵¹

In terms of production, courts should keep with the straightforward application of the Federal Rules of Civil Procedure and place the burden of production on the user and her counsel to review and turn over the requested relevant content.¹⁵² Courts should avoid methods that overextend the role of courts in discovery, like in camera review, and instead restrict their involvement to assessing the sufficiency of a discovery answer when called upon to do so.¹⁵³ However, in cases where social media content is particularly

networking communications than it is to rummage through the desk drawers and closets in plaintiff's home."); McPeak, *supra* note 5, at 937.

147. Gensler, *supra* note 142, at 20.

148. McPeak, *supra* note 5, at 939.

149. Gensler, *supra* note 142, at 14–15; McPeak, *supra* note 5, at 937.

150. Farley v. Callais & Sons LLC, No. 14-2550, 2015 WL 4730729, at *3 (E.D. La. Aug. 10, 2015); McPeak, *supra* note 5, at 941.

151. Gensler, *supra* note 142, at 22.

152. See *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 115 (E.D.N.Y. 2013); *Robinson v. Jones Lang LaSalle Ams., Inc.*, No 3:12-cv-00127-PK, 2012 WL 3763545, at *2 (D. Or. Aug. 29, 2012) (noting that counsel is expected to properly “determine what information falls within the scope of this court’s order in good faith and consistent with their obligations as officers of the court”); Gensler, *supra* note 142, at 24.

153. Gensler, *supra* note 142, at 26.

pertinent, courts may find it prudent to require litigants to sign declarations under penalty of perjury that affirm all information has been provided to counsel or that all content is properly preserved.¹⁵⁴ The practices just described are consistent with the overall formal discovery practice in civil litigation, and that is the key here: consistency. If courts continue to consistently and vehemently maintain the Federal Rules of Civil Procedure and their underlying aims, then private social media content will not upset the current discovery framework, providing no greater challenge than discovery of financial documents, personal letters, or phone records.¹⁵⁵

B. Modifications to the Model Rules of Professional Conduct

Like the Federal Rules of Civil Procedure, the Model Rules are meant to be flexible enough to withstand progressive changes to the legal landscape without constant amendment. The Model Rules, at this point, do not require amendments to extend lawyers' ethical duties to the realm of social media because the text as written can be sufficiently applied to this area.¹⁵⁶ The American Bar Association should instead elect to append Comments to the Model Rules that lawyers should be particularly mindful of in the context of social media. As noted in the Scope of the Model Rules, the Comments accompanying the Rules, while not authoritative, provide guidance as to the meaning and purpose of a rule.¹⁵⁷ New Comments could be simple sentences highlighting the main ethical concerns that implicate social media. This approach would be labor intensive and the comments may be overlooked since only the text of the Model Rules is commanding, but comments would "eliminate the inferential step that the current Model Rules necessitate because social media is not specifically mentioned."¹⁵⁸ There seems to be a greater chance for

154. See *Farley*, 2015 WL 4730729, at *5.

155. See *Appler v. Mead Johnson & Co., LLC*, No. 3:14-CV-166-RLY-WGH, 2015 WL 5615038, at *6 (S.D. Ind. Sept. 24, 2015) ("[W]eighing of the relevancy and necessity of information requested, the burden of production, the privacy interests at stake, and other concerns mentioned in Federal Rule of Civil Procedure 26(b)(1) does seem, at a minimum, necessary to make a proper ruling on this type of discovery issue.").

156. Angela O'Brien, *Are Attorneys and Judges One Tweet, Blog, or Friend Request Away from Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 532 (2010).

157. MODEL CODE OF PROF'L CONDUCT Scope (AM. BAR ASS'N 1983).

158. O'Brien, *supra* note 156, at 534. In 1899, the Connecticut Supreme Court refused to admit photographs as evidence because of the likelihood that the medium was manipulated or misleading; today, ironically, social media content in the form of photographs rarely raise concerns about authentication, which demonstrates the typical skepticism of new technology in courtrooms and its eventual disappearance as the legal community becomes more comfortable

ethical missteps in the area of private social media, though, and supplemental Comments would be a worthwhile endeavor to provide some clarity and direction in an inconsistent area.

C. Amend (Slightly) the Federal Rules of Evidence

New forms of evidence introduced in courtrooms are typically met with skepticism and conservative application of admissibility standards, and social media is no exception.¹⁵⁹ In some respects, this content will gradually be accepted within the framework provided by the current Federal Rules of Evidence as this information is more commonly used in trial. However, some slight modifications to the Federal Rules of Evidence would ease this adaption.

Evidence must first be authenticated before a court can even face other evidentiary issues, which renders the application of Federal Rules of Evidence 901 and 902 to social media content particularly important.¹⁶⁰ Authentication is a constant concern in litigation because traditional written documents and social media content could be altered or fraudulently created.¹⁶¹ Courts, however, have made inconsistent determinations regarding the authentication of this content, and such variation is undesirable in civil litigation.¹⁶² Though uncertainties will arise about the specific author of a signature on paper or a Tweet, social media content requires a different approach to scrutiny for authentication than the current Federal Rules of Evidence sufficiently contemplate.¹⁶³

Recognizing a need for guidance in the area of electronic communication, the Advisory Committee on the Rules of Evidence proposed two amendments to the rules on self-authenticating evidence. The new Rules 902(13) and 902(14) would allow the introduction of a certificate of authentication for records generated by an electronic process and for data copied from an electronic device or electronic file in an effort to alleviate unnecessary costs and burdens associated with authentication of electronic communication.¹⁶⁴ These Rules have been transmitted to the Supreme Court and are on track to

with that medium. See Orenstein, *supra* note 124, at 204 (referring to *Cunningham v. Fair Haven & W.R. Co.*, 43 A. 1047 (Conn. 1899)).

159. Breanna M. Democko, *Social Media and the Rules on Authentication*, 43 U. TOL. L. REV. 367, 379 (2012); Orenstein, *supra* note 124, at 203.

160. Democko, *supra* note 159, at 380–81.

161. *Id.* at 396.

162. Carlson, *supra* note 13, at 1045.

163. See Orenstein, *supra* note 124, at 222, 224.

164. COMM. ON RULES OF PRACTICE & PROCEDURE, RULES RECOMMENDED FOR APPROVAL AND TRANSMISSION 3 (2016) (transmitting proposed changes to federal rule of evidence 902).

become effective on December 1, 2017.¹⁶⁵ If adopted, these Rules should provide guidance and lend consistency in authenticating social media content. In an effort to reach consistency in the interim, and in situations where this content might not fall within the proposed amendments, courts should look to Rules 104(a), 104(b), and 901 together to uniformly and predictably evaluate whether the authentication threshold has been met.¹⁶⁶

After the hurdle of authentication, relevance should not prove a substantial barrier to admissibility since it is considered a low-threshold requirement. However, hearsay might present an issue. Though an existing hearsay exception should apply to social media, there is still a concern that crucial out-of-court statements may be excluded. For example, it is uncertain whether a Facebook status update will fall within a “present sense impression” hearsay exception or whether a capitalized Tweet is an “excited utterance.”¹⁶⁷ Compelling evidence stemming from the social media activity of bystanders or other uninterested parties will not qualify as statements of a party opponent and will fall outside of the hearsay exceptions.¹⁶⁸

For that reason, the “Statement of Recent Perception” hearsay exception included in the original draft of the Federal Rules of Evidence and approved by the Supreme Court—but rejected by Congress due to its potential breadth¹⁶⁹—should now be slightly modified and adopted to safeguard the admission of authenticated and relevant social media content. This exception as originally drafted reads:

A statement, not in response to the instigation of a person engaged in investigation, litigation, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.¹⁷⁰

165. *Pending Rules and Forms Amendments*, U.S. CTS., <http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> [<https://perma.cc/9RN8-K9TS>] (last visited Feb. 13, 2017).

166. FED. R. EVID. 104(a), 104(b), 901; *see also* Carlson, *supra* note 13, at 1048–49.

167. Bellin, *supra* note 132, at 25 (further questioning whether “retweets” or “likes” constitute an adoptive admission where social media users do not make a statement themselves but instead arguably support another user’s statement).

168. Jeffrey Bellin, *The Case for eHearsay*, 83 FORDHAM L. REV. 1317, 1321 (2014).

169. Bellin, *supra* note 132, at 33–34.

170. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 377 (1969).

Adding such an exception to the Federal Rules of Evidence—either as-is, modified to only include recorded statements of recent perception, or modified to include a good faith safeguard—would ensure that compelling information regarding events, exactly as observed during a time when it was fresh in the individual’s mind, is admitted as evidence without the need to stretch existing evidence rules too far.¹⁷¹ Moreover, though such a proposal is meant to address evidentiary concerns associated with social media content, it is not so narrowly tailored that it will be rendered useless by the development of new technology. Instead, while admittedly broadening the ambit of admissible evidence, this exception would just provide a limited vehicle to uniformly address reliable social media content as admissible evidence now and in the future.¹⁷²

D. Understanding Privacy on Social Media Platforms

Along with the realm of legal procedural frameworks and ethical guidelines, it is important to integrate privacy expectations into the context of social media platforms. Though users consent and affirmatively choose to make their personal information available online, their use of available restrictive settings suggests a want for privacy regulation to recognize and adapt to the realities of new technologies and the digital age.¹⁷³ This is not to say that there should be a sort of “social media privilege” in regard to discovery or admissibility of evidence in civil litigation, as that would hardly be reasonable when large audiences of individuals have potentially seen this information already.¹⁷⁴ Further, it is unclear such broad privacy privileges would be effective, as it is rarely a government actor, company, or social media platform that is arguably invading user privacy, but instead, intrusions come from other users or private actors.¹⁷⁵ Thus, technology itself is not invading privacy but the technology users might be, which presents a difficult balance between individual privacy protections and free communication amongst individuals.¹⁷⁶

Users should not have to isolate themselves entirely from technology to ensure information they hoped to keep private is not

171. Bellin, *supra* note 132, at 54; see Bellin, *supra* note 168, at 1328–29.

172. Bellin, *supra* note 132, at 60; Bellin, *supra* note 168, at 1328.

173. McPeak, *supra* note 5, at 936–37.

174. *Id.* at 946.

175. Lothar Determann, *Social Media Privacy: A Dozen Myths and Facts*, 2012 STAN. TECH. L. REV. 7, 2–3 (2012).

176. *Id.* at 17.

otherwise disseminated.¹⁷⁷ Cyberspace is not an unregulated frontier; new and existing laws and rules are already applied to social media platforms, making it unlikely that further legislation would properly implement protections without sacrificing the free use of social media platforms. Currently, data protection, privacy, and competition laws require social media platforms to notify users or seek consent for practices that exploit users' data for mining, behavioral advertising, or sharing.¹⁷⁸ However, these regulations have not resulted in meaningful privacy protections because many users do not read the notifications or do not understand the ramifications of consent.¹⁷⁹ Therefore, instead of introducing more regulation, courts should view privacy concerns on a similar spectrum as that which the platforms themselves aim to offer their users: with public content being afforded a much lower expectation of privacy than private or ephemeral content.¹⁸⁰ Moreover, social media platforms should work to remedy ambiguities in their privacy policies and implement meaningful features to better ensure that users truly understand the legal ramifications of posting content. But ultimately, users must use social media platforms carefully and understand that private social media content is not infallibly private.¹⁸¹

IV. THE END, BUT NOT OF SOCIAL MEDIA IN CIVIL LITIGATION

Social media might showcase trending topics, but social media use is not just a trend. Given its widespread and persistent use, information desired for civil litigation purposes will continue to be collected from these platforms. Additionally, new media will continue to arise, creating questions not yet contemplated.¹⁸² Excessive change

177. McPeak, *supra* note 5, at 936–37.

178. Determann, *supra* note 175, at 5 (citing Chris Jay Hoofnagle, Ashkan Soltani, Nathaniel Good, Dietrich J. Wambach & Mika D. Ayenson, *Can Advertisers Learn That “No Means No”?*, 10 *Privacy & Sec. L. Rep. (BNA) No. 38*, at 1398 (Sept. 26, 2011)).

179. *Id.*

180. McPeak, *supra* note 5, at 936–37.

181. See *Higgins v. Koch Dev. Corp.*, No. 3:11-CV-81-RLY-WGH, 2013 WL 3366278, at *2–3 (S.D. Ind. July 5, 2013) (noting there are “no cases supporting the proposition that setting a Facebook profile to ‘private’ entitles a person to a greater expectation of privacy”).

182. For example, police in Arkansas requested audio records from Amazon’s Echo in connection with a murder investigation. Amazon declined to provide the data. While acknowledging the differences between this data and private social media content, this demonstrates that technological developments (and particularly those that store private communication) will present a myriad of new legal questions. See Elizabeth Weise, *Police Ask Alexa: Who Dunnit?*, USA TODAY (Dec. 29, 2016, 8:13 AM), <http://www.usatoday.com/story/tech/news/2016/12/27/amazon-alexa-echo-murder-case-bentonville-hot-tub-james-andrew-bates/95879532/> [<https://perma.cc/9BVQ-2KLK>].

to legal frameworks, however, would do little to remedy current concerns over inconsistencies and overly specific rules would be obsolete by the time they were enacted, used, or understood by the legal community. This does not mean new technology can be ignored, as the Model Rules of Professional Conduct demonstrate that an understanding of social media platforms and their privacy settings are an integral part of modern legal representation. The fast-paced nature of technological developments and the proliferation of use, particularly in the area of social media, necessarily mean technological developments pertinent to civil litigation should be incorporated as best they can into existing legal frameworks. Any formal changes to existing legal frameworks should be progressively adapted as necessary to remedy any limitations of the current rules for civil procedure, professional conduct, and evidence—as opposed to changing the law at the same rate as technology.

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