

The  
JOURNAL  
of  
CIVIL LITIGATION

Published Quarterly by the  
Virginia Association of Defense Attorneys

---

---

SOCIAL MEDIA AND DISCOVERY—NEW TOOLS, SAME RULES

James J. O’Keeffe  
& Joshua C. Johnson

SOCIAL MEDIA AND LITIGATION

The JOURNAL is pleased to publish in this issue what can only be called a spontaneous symposium on the topic of social media and litigation.

By pure happenstance, the JOURNAL recently received three separate articles on the topic by members of the VADA. Although the articles overlap in part, each contributes its own important considerations to a host of issues, including questions of ethics.

In *Social Media and Discovery—New Tools, Same Rules*, James J. O’Keeffe and Joshua C. Johnson provide analysis of such issues as authentication of social media content under the Federal Rules of Evidence and use of social media to impeach. And in *You’ve Been Poked: Social Networking and Civil Litigation*, Elizabeth Perrow and Aaron Houchens survey cases in areas such as privacy, domestic relations, and juror conduct. Among the matters addressed by Anne Rife in *Access to Protected Media Content by Virginia Civil Practitioners* is a decision of the Virginia Workers’ Compensation Commission on whether it could require Facebook to respond to a party’s subpoena.

Allow these authors to introduce you to a new and challenging area of practice.

SOCIAL MEDIA AND DISCOVERY—NEW TOOLS, SAME RULES

James J. O’Keeffe\*  
Joshua C. Johnson\*

---

The consequences of social media’s rise as a cultural phenomenon continue to make headlines. *The Social Network*, the film adaptation of Facebook’s origins and founders, opened in first place at the nation’s box offices in early October 2010.<sup>1</sup> Days before the film’s release, a student at Rutgers University used another social media application, Twitter, to broadcast his roommate’s sexual encounter over the Internet. The roommate, an eighteen-year-old freshman, posted on his Facebook account: “Jumping off of the gw bridge sorry,” and

---

\* Mr. O’Keeffe and Mr. Johnson are lawyers in the Roanoke firm of Gentry Locke Rakes & Moore, LLP, and are members of the Virginia Association of Defense Attorneys. The authors would like to thank Ms. Sharon D. Nelson for providing several helpful resources. This article is based on a manuscript originally prepared for Virginia CLE’s Civil Litigator’s Short Course in October 2010 by the same authors.

<sup>1</sup> Andrew Stewart, ‘*Social Network*’ Makes Friends at the B.O., *Variety*, Oct. 3, 2010, <http://www.variety.com/article/VR1118025058.html?categoryid=13&cs=1>.

jumped to his death. Two Rutgers students have been charged with invasion of privacy—the most serious charge carrying a maximum sentence of five years.<sup>2</sup> The prosecutors will likely base their case on the Twitter and Facebook postings.

Social media have become almost as pervasive in our culture as the Internet. The full extent of their impact on the law remains to be seen.

This article explores one aspect of the growing interplay between social media and the law in Virginia: the use of social media in discovery. It will outline the current case law, statutes, and rules guiding lawyers on how they can and cannot use social media as a discovery tool in litigation.

## I. OVERVIEW OF SOCIAL MEDIA

The term *social media* refers to the use of Internet-based applications that allow the creation and exchange of user-generated content.<sup>3</sup> They facilitate communication and convey autobiographical information; as a consequence, they are potentially an effective source of evidence.

Numerous social media applications exist, but the most frequently used and best-known are Facebook, Twitter, and YouTube. The following is a brief description of some of these applications:

- *Facebook*. Founded in 2004, Facebook has become one of the most-trafficked web sites in the world.<sup>4</sup> According to statistics on its web site, Facebook boasts more than 500 million active users.<sup>5</sup> For context, only 310 million people live in the United States; there is about 1 Facebook user for every 14 people on the planet.<sup>6</sup> People spend more than 700 billion minutes per month on Facebook.<sup>7</sup> Facebook users create a page on the utility's web site where they can post and share pictures and information, connect with friends, join groups, exchange messages, and share photos and videos.
- *Twitter*. Twitter is a social media utility that creates a profile for users, who can then write short updates of up to 140 characters that are posted to the user's profile and sent to the user's followers.<sup>8</sup> In essence, it is like

<sup>2</sup> Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010, <http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=1&sq=tyler%20clementi&st=cse&scp=2>.

<sup>3</sup> Wikipedia entry for Social Media, [http://en.wikipedia.org/wiki/Social\\_media](http://en.wikipedia.org/wiki/Social_media) (last visited Oct. 18, 2010) citing Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, BUSINESS HORIZONS, Jan.-Feb. 2010, at 59-68.

<sup>4</sup> Facebook Press Room FactSheet, <http://www.facebook.com/press/info.php?factsheet> (last visited Oct. 18, 2010).

<sup>5</sup> Facebook Press Room Statistics, <http://www.facebook.com/press/info.php?statistics> (last visited Oct. 18, 2010).

<sup>6</sup> U.S. Census Bureau, U.S. & World Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited Oct. 18, 2010).

<sup>7</sup> Facebook Press Room Statistics, *supra* note 6.

<sup>8</sup> Twitter Help Center, Twitter Basics, Frequently Asked Questions, <http://support.twitter.com/entries/13920-frequently-asked-questions> (last visited Oct. 18, 2010).

a glorified message board. As of April 2010, Twitter had signed up more than 100 million users since it was founded in 2006.<sup>9</sup>

- *LinkedIn*. LinkedIn is a professionally oriented social networking web site that was founded in 2002.<sup>10</sup> LinkedIn claims more than 80 million registered users in more than 200 countries.<sup>11</sup> LinkedIn users can post information about themselves as professionals, build connections, join groups, and exchange messages.<sup>12</sup>
- *MySpace*. MySpace is another social networking, user-generated web site that claims 122 million active users.<sup>13</sup> Of late, MySpace has lost ground to various other social networking sites, such as Facebook, and in June 2009, laid off thirty percent of its workforce.<sup>14</sup>
- *YouTube*. Founded in February 2005, YouTube is a video-sharing web site that allows users to upload and share video content.<sup>15</sup> Google Inc. purchased YouTube in 2006 for \$1.65 billion.<sup>16</sup> According to YouTube's web site, every minute, 24 hours of video are uploaded to YouTube. People watch 2 billion videos on YouTube a day.<sup>17</sup>
- *Blogs*. A weblog, or "blog," is an interactive web site that allows the user to post and update content, and generally allows visitors to post comments or give each other messages. This interactivity distinguishes a blog from a typical static web site.<sup>18</sup> As of 2007, reports indicated that there were more than 100 million active blogs.<sup>19</sup>

## II. SOCIAL MEDIA AS A LITIGATION TOOL

A typical feature of social media web sites is a user's profile. One of a user's first steps in creating a page on a social networking site is to fill out a profile page that provides other users, or anyone with access to the Internet, with a person's user-generated, shared information. Many social media sites allow the

<sup>9</sup> Reuters, *Twitter Snags over 100 Million users, Focus on Revenue*, (Apr. 14, 2010 3:25 P.M.) <http://www.reuters.com/article/idUSTRE63D46P20100414>.

<sup>10</sup> LinkedIn—Public Relations, Company History, <http://press.linkedin.com/history> (last visited Oct. 18, 2010).

<sup>11</sup> LinkedIn—Public Relations, About Us, <http://press.linkedin.com/about> (last visited Oct. 18, 2010).

<sup>12</sup> *Id.*

<sup>13</sup> MySpace Fact Sheet, <http://www.myspace.com/pressroom?url=/fact+sheet/> (last visited Oct. 18, 2010).

<sup>14</sup> David Goldman, *MySpace to Cut 30% of Workforce*, CNNMoney.com (June 16, 2009, 2:18 PM ET) [http://money.cnn.com/2009/06/16/technology/myspace\\_layoffs/index.htm](http://money.cnn.com/2009/06/16/technology/myspace_layoffs/index.htm).

<sup>15</sup> YouTube Fact Sheet, *supra* note 6.

<sup>16</sup> Paul R. La Monica, *Google to Buy YouTube for \$1.65 Billion*, CNNMoney.com (Oct. 9, 2006, 5:43 PM ET) [http://money.cnn.com/2006/10/09/technology/googleyoutube\\_deal/](http://money.cnn.com/2006/10/09/technology/googleyoutube_deal/).

<sup>17</sup> YouTube Fact Sheet, [http://www.youtube.com/t/fact\\_sheet](http://www.youtube.com/t/fact_sheet) (last visited Oct. 18, 2010).

<sup>18</sup> Wikipedia entry for Blog, <http://en.wikipedia.org/wiki/Blog> (last visited Oct. 18, 2010).

<sup>19</sup> Jenna Wortham, *After 10 Years of Blogs, the Future's Brighter Than Ever*, WIRED (Dec. 17, 2007) [http://www.wired.com/entertainment/theweb/news/2007/12/blog\\_anniversary](http://www.wired.com/entertainment/theweb/news/2007/12/blog_anniversary).

user to list age, education and work history, interests and activities, friends, family and contacts, photos and videos, hometown, and candid messages to friends. A fully completed Facebook profile, for example, contains dozens of user-generated pieces of identifying information.

A second, important feature of social media is that they broadcast and record users' comments in unguarded moments—"exactly the sort of evidence that can be invaluable during litigation."<sup>20</sup> Further, social media facilitate the exchange of photographs and video, not merely words.

The information on these web sites could assist a lawyer in practically any type of litigation—whether in terms of developing basic facts or preparing material for impeachment—but a few obvious examples spring to mind.

- In a personal injury or workers' compensation case, the plaintiff's web presence may include information that undermines claims about the severity of injury, such as photographs from a recent vacation or activity.
- In the family law context, information shared over social media can shed light on parents' fitness by documenting their activities and associations—whether they include PTA meetings or a night out partying.
- With regard to employment law, the victims and perpetrators of an inappropriate workplace interaction may have recorded their impressions and reactions in almost real time. An employee or supervisor who is difficult at work may have a web presence that is even less appealing, or more revealing.
- Defamation—social media can document the spread of a defamatory rumor.<sup>21</sup>

### III. TO WHAT EXTENT AND HOW CAN LAWYERS USE SOCIAL MEDIA?

#### A. DISCOVERY RULES AND SOCIAL MEDIA

Under both federal and state rules—and at the risk of gross oversimplification—parties are generally entitled to seek discovery of nonprivileged information that appears reasonably calculated to lead to admissible evidence.

Both the state and federal systems have adopted rules specifically addressing electronic discovery. The federal e-discovery rules were designed to deal with e-mail and electronic information stored on computers. Despite the rules being designed for other applications, they provide a framework for litigants in federal court attempting to perform discovery on social media. Federal Rule of Civil Procedure 34 states:

<sup>20</sup> Griffin v. Maryland, 192 Md. App. 518, 995 A.2d 791 (2010) (quoting Seth P. Berman *et al.*, *Web 2.0: What's Evidence Between "Friends"?*, 53 B.B.J. 5, 6 (Jan/Feb 2009)).

<sup>21</sup> These examples were derived from Gregor Pryor, Joseph Rosenbaum, Douglas Wood & Stacy Marcus, eds., *Network Interference, A Legal Guide to the Commercial Risks and Rewards of the Social Media Phenomenon*, available at <http://www.legalbytes.com/2010/04/articles/social-and-digital-media-law/new-edition-of-reed-smith-white-paper-network-interference-a-legal-guide-to-the-commercial-risks-and-rewards-of-the-social-media-phenomenon/>.

- (a) In General. A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form . . . .

The postings and information contained on social media web sites fall within the scope of electronically stored information. Federal Rule of Civil Procedure 26(b)(2)(B) provides a limitation on the discovery of electronically stored information when it imposes an undue burden or cost.

Electronic discovery in Virginia state courts is governed by the Rules of the Supreme Court of Virginia, which on this particular point, generally track the federal rules. Rule 4:9 states:

- (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 4:1(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to produce any such documents or electronically stored information to the court in which the proceeding is pending at the time of trial . . . .

#### (b)(iii)(B) Electronically Stored Information

- (1) Responses to a request for production of electronically stored information shall be subject to the provisions of Rules 4:1(b)(7) and 4:1(b)(8).
- (2) If a request does not specify the form or forms for producing electronically stored information, or if a responding party objects to the requested form or forms of production, a responding party must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably

usable. A party need not produce the same electronically stored information in more than one form.

Rule 4:1(b)(7) also addresses e-discovery. It states:

Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 4:1(b)(1). The court may specify conditions for the discovery, including allocation of the reasonable costs thereof.

## B. COURTS' TREATMENT OF SOCIAL MEDIA

### 1. Virginia Opinions

The Supreme Court of Virginia has not yet addressed discovery issues specific to social media. In fact, social media have been mentioned in only a few Virginia cases.

In a recent case from the Circuit Court for the City of Charlottesville, *Lester v. Allied Concrete Co.*, the court ordered the plaintiffs' attorney to pay reasonable costs and attorneys' fees for drafting, among other things, a motion for sanctions based on unsubstantiated allegations that the defense attorney had "hacked" into the plaintiff's Facebook account.<sup>22</sup>

The Virginia federal courts have dealt with more cases involving social media. In *Key v. Robertson*, the U.S. District Court for the Eastern District of Virginia considered evidence, without objection, from the plaintiff's Facebook profile and a video uploaded to YouTube in granting the defendants' motion for summary judgment.<sup>23</sup> Similarly, in accepting a guilty plea in a child pornography case, the U.S. District Court for the Western District of Virginia recently accepted evidence, without objection, from the government regarding the defendant's use of his MySpace profile in the commission of certain child pornography crimes.<sup>24</sup>

### 2. Authority from Other Jurisdictions

Case law from outside the Commonwealth is slightly more developed and should provide persuasive authority.

<sup>22</sup> *Lester v. Allied Concrete Co.*, (Charlottesville Cir. Ct., Order entered May 25, 2010); see *Attorney Sanctioned for Lack of Factual Basis in Allegations against Opposing Counsel*, 22(3) J. CIV. LITIG. 427.

<sup>23</sup> *Key v. Robertson*, 626 F. Supp. 2d 566 (E.D. Va. 2009).

<sup>24</sup> *United States v. Rimmer*, 2010 U.S. Dist. LEXIS 79175 (W.D. Va. Aug. 3, 2010).

For example, in *EEOC v. Simply Storage Management*, a sexual harassment case, the U.S. District Court for the Southern District of Indiana recently held that an employer could obtain discovery of two employees' social networking sites—including information that the employees had not made available to the general public.<sup>25</sup> The *Simply Storage* court did not hold that all messages and photos were discoverable, but it determined that "the appropriate scope of relevance" is any profiles, postings, messages, photographs, and SNS applications (*i.e.*, programs used on their social media profile) related to any emotion, feeling, or mental state, "as well as communications that reveal, refer or relate to events that could reasonably be expected to produce a significant emotion, feeling or mental state."<sup>26</sup>

In another recent case, *Crispin v. Christian Audigier, Inc.*, the U.S. District Court for the Central District of California determined that the defendants' request for information from three social networking sites (Facebook, MySpace, and Media Temple) were subject to the Stored Communications Act.<sup>27</sup> The Stored Communications Act is privacy legislation that prevents providers of communication services from divulging private communications to certain entities and individuals. The *Crispin* court quashed subpoenas seeking private messages. But with regard to messages posted to the Facebook wall and MySpace comments, the court remanded for further investigations into the plaintiff's privacy settings because the Stored Communications Act is not applicable to information readily available to the general public.<sup>28</sup>

In *Bass v. Miss Porter's School*, the U.S. District Court for the District of Connecticut reviewed, *in camera*, documents related to the plaintiff's Facebook account.<sup>29</sup> In response to the plaintiff's objection to producing all such documents on the grounds that many were irrelevant and immaterial, the court found "no meaningful distinction" between the pages produced and the pages withheld. It stated that "Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting," and ordered the production of all the documents.

In *Leduc v. Roman*, a Canadian case from the Superior Court of Justice in Ontario, the Master refused to compel the production of Mr. Leduc's Facebook pages.<sup>30</sup> On appeal, the Superior Court granted leave for further cross-examination regarding the content posted by Leduc on Facebook, and it determined that a "party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile . . . [b]oth

<sup>25</sup> *EEOC v. Simply Storage Mgmt.*, 110 Fair Empl. Prac. Cas. (BNA) 49, 2010 U.S. Dist. LEXIS 52766 (S.D. Ind. 2010).

<sup>26</sup> *Id.* at \*14-\*15.

<sup>27</sup> *Crispin v. Christian Audigier, Inc.*, 2010 U.S. Dist. LEXIS 52832 (C.D. Cal. May 26, 2010).

<sup>28</sup> *Id.* at \*77-\*78.

<sup>29</sup> *Bass v. Miss Porter's School*, No. 3:08cv1807, 2009 U.S. Dist. LEXIS 99916 (D. Conn. Oct. 27, 2009).

<sup>30</sup> *Leduc v. Roman*, [2009] O.J. No. 681, 2009 ON.C. LEXIS 1505, \*9 (Can.).

are obliged to identify and produce any postings that relate to any matter in issue in an action.”<sup>31</sup>

Finally, in *Mackelprang v. Fidelity National Title Agency*, the U.S. District Court for the District of Nevada denied a motion to compel served on MySpace as to private messages on the plaintiff’s MySpace page on the grounds that it was a fishing expedition.<sup>32</sup> The court, however, commented: “Nothing in this Order prevents Defendants from serving such discovery requests on Plaintiff to produce her Myspace.com private messages that contain information regarding her sexual harassment allegations in this lawsuit or which discuss her alleged emotional distress and the cause(s) thereof.”<sup>33</sup>

### C. INTRODUCING SOCIAL MEDIA INTO EVIDENCE

Once social media content is obtained in discovery, the next important question deals with how the lawyer can use it. Basic rules of evidence still apply: Is the document relevant? Is it authentic? Is it hearsay?

#### 1. Authentication in Federal Court

Federal Rule of Evidence 901(a) discusses authentication, and it states: “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.”

Federal Rule of Evidence 901(b) lists examples of authentication, and 901(b)(1) states that the testimony from a witness with knowledge that a matter is what it is claimed to be is sufficient for purposes of authentication. Under 901(b)(1), authentication can come from the individual who posted the matter or—like other Internet information—from the individual who retrieved it from the web site. In the context of social media, as opposed to a traditional company web site, the opponent might contest whether the information had been authored by someone else, or altered or manipulated.

Federal Rule of Evidence 1003 permits the admissibility of duplicates to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

In *Lorraine v. Markel American Insurance Co.*, the U.S. District Court for the District of Maryland outlined the evidentiary rules of authentication of computer-generated evidence.<sup>34</sup> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the exhibit is what the proponent claims.<sup>35</sup> A web page

<sup>31</sup> *Id.* at \*21-\*22.

<sup>32</sup> *Mackelprang v. Fidelity Nat’l Title Agency*, 2007 WL 119149 (D. Nev. 2007).

<sup>33</sup> *Id.* at \*25-\*26.

<sup>34</sup> *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007).

<sup>35</sup> *Id.* at 542.

can be authenticated by answering three questions: (1) What was actually on the web site? (2) Does the exhibit or testimony accurately reflect it? (3) If so, is it attributable to the owner of the site?<sup>36</sup> The following factors should influence courts in ruling whether to admit such evidence:

- the length of time the information was posted on the site
- whether others report having seen it
- whether it remains on the web site for the court to verify
- whether the data are of a type ordinarily posted on that web site or web sites of similar entities (*e.g.*, financial information from corporations)
- whether the owner of the site has elsewhere published the same data, in whole or in part
- whether others have published the same data, in whole or in part
- whether the data have been republished by others who identify the source of the data as the web site in question<sup>37</sup>

#### 2. Authentication in Virginia State Court

Similar rules apply in state court. Almost ten years ago, the Supreme Court of Virginia affirmed a trial court’s admission of certain evidence of instant message communications.<sup>38</sup> The defendant argued that the evidence should not have been admitted because there was no reliable evidence demonstrating that he made the statements.<sup>39</sup> The Supreme Court of Virginia affirmed the lower court’s holding that the identification of the communicator was sufficiently supported by factual details and demonstrated knowledge of prior communications shown through direct and circumstantial evidence.<sup>40</sup>

More recently, in a child pornography case, the Supreme Court of Virginia affirmed the court of appeals’ ruling that the best evidence rule is limited to written documents and that photographs taken from a reproduced hard drive were properly admitted into evidence because they were offered in a form shown to be reliable reproductions of the electronic images stored on the hard drive.<sup>41</sup>

#### 3. Authentication—Persuasive Authority

The Maryland courts recently addressed a murder case in which the trial court admitted a printout from a MySpace profile downloaded by a police investigator.<sup>42</sup> The Court of Special Appeals of Maryland, in an opinion summarizing the current landscape of social media law, affirmed the trial court’s decision finding

<sup>36</sup> *Id.* at 555-56.

<sup>37</sup> *Id.*

<sup>38</sup> *Bloom v. Commonwealth*, 262 Va. 814, 554 S.E.2d 84 (2001).

<sup>39</sup> *Id.* at 819.

<sup>40</sup> *Id.* at 820-21.

<sup>41</sup> *Midkiff v. Commonwealth*, 280 Va. 216, 219-20, 694 S.E.2d 576, 578 (2010).

<sup>42</sup> *Griffin v. State of Maryland*, 192 Md. App. 518, 524, 995 A.2d 791, 795 (2010).

that circumstantial evidence was sufficient to authenticate the MySpace profile printout.

By contrast, in a murder trial in Massachusetts, the prosecution introduced MySpace messages to show that the defendant's brother had urged a key witness not to testify.<sup>43</sup> The MySpace messages were admitted into evidence through the testimony of the recipient who claimed that they were sent by someone with the alleged sender's MySpace screen name. The appellate court, however, determined that the Commonwealth had failed to establish the identity of the person who actually sent the communications.<sup>44</sup> It ruled that "there was insufficient evidence to authenticate the messages and they should not have been admitted."<sup>45</sup> The conviction was affirmed on other grounds.

#### D. USING SOCIAL MEDIA TO IMPEACH WITNESSES

No Virginia opinions yet address the use of social media for impeachment. Courts in other jurisdictions, however, have considered the issue.

The Indiana Supreme Court upheld the trial court's admission of evidence taken from a criminal defendant's MySpace page. The defendant's testimony had put his character at issue, and the posting rebutted his defense that he had acted recklessly as opposed to intentionally.<sup>46</sup>

In a second-degree murder case, the Court of Appeals of Michigan upheld the trial court's admission of a photograph from the defendant's MySpace page because the photograph was relevant to identify the defendant and to show his familiarity with the weapon used in the offense.<sup>47</sup>

#### IV. HOW FAR CAN LAWYERS GO IN USING SOCIAL MEDIA?

The Rules of Professional Conduct define how far a lawyer can go in using social media.

Rule 4.2 of the Rules of Professional Conduct requires that in the representation of a client, a "lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so." Asking a represented party to be a friend or contacting that party in any way on a social media web site is impermissible under Rule 4.2, just as it would be in real life.

Under Rule 8.4 of the Rules of Professional Conduct, it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law. Under Rule 8.4(a), it is professional misconduct for a lawyer to violate or at-

<sup>43</sup> Commonwealth v. Williams, 456 Mass. 857, 868, 926 N.E.2d 1162, 1172 (2010).

<sup>44</sup> *Id.* at 868-69.

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

<sup>46</sup> Clark v. State, 915 N.E.2d 126 (Ind. 2009).

<sup>47</sup> People v. Liceaga, 2009 Mich. App. LEXIS 160, \*11 (Jan. 27, 2009).

tempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. In other words, a lawyer may not create a false social media page and friend a litigant, and a lawyer may not induce another person to do the same.

The Philadelphia Bar Association's Professional Guidance Committee recently addressed a related question: Is it proper to friend an unrepresented adverse witness to gain impeachment material? Specifically, a lawyer asked whether he could cause a third party to access the witness's Facebook and MySpace pages, which were not generally accessible to the public, to gather information for use at trial. The Professional Guidance Committee determined that the lawyer could not ethically engage in that conduct, which implicated Rules 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 5.3(c)(1) (holding a lawyer is responsible for non-lawyer agents); and 4.1 (prohibiting a lawyer from making a false statement of fact or law to a third person). The committee found that the proposed friending would constitute deception in violation of Rules 4.1 and 8.4, and a supervisory violation under Rule 5.3.<sup>48</sup>

More recently, the New York State Bar Association determined that a lawyer representing a client in pending litigation may access the public pages of another party's social networking web site for the purpose of obtaining information for use in the litigation.<sup>49</sup>

#### V. CONCLUSION

While social media expand the opportunities for clever lawyers—and the pitfalls for unwary litigants—the underlying rules remain the same. Discovery must be reasonably calculated to lead to admissible evidence. Evidence must be relevant and authentic, and to the extent it is offered for its truth, it must satisfy hearsay concerns. These principles apply to social media in the same way that they apply in more traditional discovery and evidentiary contexts.

<sup>48</sup> Philadelphia Bar. Op. 2009-02 (Mar. 2009) (summarized in New York State Bar Association, Committee on Professional Ethics, Op. 843 (9/10/10)).

<sup>49</sup> New York State Bar Association, Committee on Professional Ethics, Op. 843 (9/10/10).