COMMENT

FACEBOOK FACTS AND TWITTER TIPS—PROSECUTORS AND SOCIAL MEDIA: AN ANALYSIS OF THE IMPLICATIONS ASSOCIATED WITH THE USE OF SOCIAL MEDIA IN THE PROSECUTION FUNCTION

INTRODUCTION

Modern society has become increasingly dependent on technology. An estimated 294 billion emails are sent daily, resulting in 107 trillion emails alone in 2010.[1] One area of technology that has experienced tremendous growth in recent years is social networking websites.

Social networking websites can be defined as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."[2] The three types of social interactions that social networking enables include (1) creation of an online *identity*, (2) establishment of *relationships* between users, and (3) development of layered *communities* defined by the lists of connections each user establishes.[3]

One of the well-known common social networking websites, Facebook, currently has more than 800 million active users.[4] Those users in the United States alone represent sixty-five percent of the global audience.[5] Another quickly evolving social networking website, Twitter, has over 200 million accounts.[6] Twitter users account for approximately sixty-eight million tweets per day, resulting in twenty-five billion tweets in the year 2010 alone.[7] Twitter is similar to Facebook in terms of linking people based on profile information and in allowing users to communicate

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[1] *Internet 2010 in Numbers*, PINGDOM (Jan. 12, 2011), http://royal.pingdom.com/2011/01/12/internet-2010-in-numbers/.

[2] Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 98 (2011) (quoting Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMMC'N 210, 211 (2007)).

[3] James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1151-59 (2009).

[4] *Statistics*, FACEBOOK, http://www.facebook.com/press/info.php?statistics (last visited Jan. 22, 2012); *see also* CHECKFACEBOOK, http://www.checkfacebook.com/ (last visited Jan. 22, 2012).

[5] *Id.*

[6] Tom Johansmeyer, *200 Million Twitter Accounts . . . But How Many Are Active?*, SOCIAL TIMES (Feb. 3, 2011, 11:15 AM), http://socialtimes.com/200-million-twitter-accounts-but-how-many-are-active_b36952.

[7] *Internet 2010 in Numbers*, *supra* note 1.

directly through their cell phones.[8] With Twitter, users post "tweets," or statements limited to 140 characters, and "followers" receiving those "tweets" can then make responsive comments.[9] Like Facebook, Twitter accounts are not limited to individuals, with users ranging from organizations like the American Bar Association and various law schools, to individual attorneys, politicians, athletes, and celebrities.[10] These social networks offer an opportunity for prosecutors to build and maintain their professional networks, while presenting a fast and efficient way to exchange information in order to stay connected. Law enforcement professionals can utilize social networks to help with crime prevention, community outreach, and press relations.[11]

In the ever-growing realm of virtual reality, new technologies create interesting challenges to long-established legal concepts. Prosecutors across the country are utilizing social networking sites like Facebook and Twitter to research information about the backgrounds of parties, witnesses, opposing counsel, jurors, and even judges. In doing so, prosecutors may encounter limits on the discovery and admissibility of content collected from such sites. Furthermore, prosecutors may face legal ethics issues or disciplinary action related to the various aspects of social networking. Part I evaluates the benefits of social networking available for prosecutors as both individual attorneys and elected officials. Part II analyzes the ethical implications associated with various aspects of social media, including prosecutorial postings, ex parte communications, and juror misconduct. Part III examines the consequences of violating ethical rules as related to social media and considers the immunity protections prosecutors may

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[8] *See, e.g.*, 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 (2010).

[9] *About Twitter*, TWITTER, http://www.twitter.com/about (last visited Jan. 22, 2012).

[10] *Id.* Additionally, more and more businesses have started marketing campaigns via social networking websites, measuring success in terms of how many "followers" on Twitter and how many "friends" and "likes" on Facebook. *See, e.g.*, Ten Elvis, *Social Media Contest Ideas – Social Media & SEO Tips Powered by Majestic Social Media!*, MAJESTIC SOCIAL MEDIA (Mar. 8, 2011), http://www.articlesbase.com/social-marketing-articles/social-media-contest-ideas-social-media-seo-tips-powered-by-majestic-social-media-4370216.html.

[11] *See infra* notes 12-24 and accompanying text.

claim when faced with potential lawsuits challenging their actions.

I. BENEFITS OF SOCIAL NETWORKING, SPECIFICALLY FOR PROSECUTORS

People everywhere are harnessing the power of social networking websites to their advantage, and prosecutors are no exception. Prosecutors have established social networking sites to help fight crime,[12] promote awareness within the community,[13] and market their professional services.[14]

Social networking websites provide another outlet for community members to call in with "tips" to help fight reprehensible crimes, allowing prosecutors to gather information from the community more efficiently.[15] For example, police officers and prosecutors in Houston, Texas followed electronic trails and evaluated comments and photos to catch a child molester.[16] Similarly, the Dallas Police Department posted a surveillance video of a robbery on its Facebook page in hopes of identifying the

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[12] *See Montgomery County District Attorney*, FACEBOOK, http://www.facebook.com/home.php#!/pages/Montgomery-County-District-Attorney/96910904678?sk=info (last visited Jan. 22, 2012). The Montgomery County District Attorney's office posts official press releases on its Facebook page and encourages citizens to provide any additional information related to unsolved crimes. *Id.* Additionally, the office posts pictures (or mug shots) of individuals after arrests have been made. *Id.* This helps publicize information regarding those charged with crimes to the general public.

[13] *See Cuyahoga County Prosecutor's Office*, FACEBOOK, http://www.facebook.com/home.php#!/pages/Cuyahoga-County-Prosecutors-Office/165402593480208?sk=info (last visited Jan 22, 2012) (posting public interest cases on a weekly basis and providing reminders of upcoming community events).

[14] *See Marion County Prosecutor's Office*, FACEBOOK, http://www.facebook.com/search.php?q=Marion%20County%20Prosecutor%E2%80%99s%20Office&type=all&init=srp#!/MCProsecutors?sk=info (last visited Jan. 22, 2012) (taking a marketing approach and publicizing positive photos and articles regarding the prosecutor's office).

[15] *See* @RivCoDa, *Riverside County District Attorney's Office*, TWITTER (May 20, 2010, 6:38 PM), http://twitter.com/#!/RivCoDA ("A child molester is on the run. Have you seen him? Report a tip to Crime Stoppers at (760) 341-STOP."); *see also supra* note 12 and accompanying text.

[16] Courtney Zubowski, *Prosecutors Using Social Networking Skills in Court Cases*, KHOU (Mar. 18, 2010, 10:36 PM), http://www.khou.com/news/local/Harris-County-Prosecutors-Using-Social-Networking-Skills-in-Court-88500432.html.

suspects, and community members were able to post information regarding the incident in response.[17]

Additionally, social media allows prosecutors to educate the community in crime prevention practices. When a prosecutor's office can readily access a large majority of its citizens, it is vital to provide the community with as much information as possible. Prosecutors can use social media to update the community about neighborhood watch programs, women's self-defense classes, gang awareness conferences,[18] or coordinate efforts in finding missing persons.

Police departments across the country have recently taken advantage of social networks as well to serve a variety of needs in their local communities. Many departments have followed a similar format on their social networking sites: including press release-type information, photos of suspect mug shots and officers involved in community events, and additional information on weather updates, school closings, and crime-stoppers' tips.[19] For instance, the Atlanta Police Department's Facebook page has over 1500 Facebook fans,[20] the Dallas Police Department Facebook page has more than 7600 fans,[21] the Chicago Police Department has almost 22,000 Facebook fans,[22] and the New York City Police Department has over 22,400 followers on Twitter;[23] each with the

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[17] *Dallas Police Department*, FACEBOOK, https://www.facebook.com/home.php#!/pages/Dallas-Police-Department/126927037411 (last visited Jan. 22, 2012).

[18] *See* @ManhattanDA, *Cyrus Vance, Jr.*, TWITTER (Mar. 15, 2011, 11:19 PM), http://twitter.com/#!/ManhattanDA ("DA Vance speaks at a Gang Awareness workshop . . . .").

[19] Sara Inés Calderón, *Police Use Facebook to Fight Crime, Talk to Residents*, INSIDE FACEBOOK (Feb. 19th, 2010), http://www.insidefacebook.com/2010/02/19/police-use-facebook-to-fight-crime-talk-to-residents/. As an example, the Oxford, Mississippi Police Department posts twenty-four hour summaries of department actions including arrests, citations, and vehicular accident reports. *See Oxford MS Police Department*, FACEBOOK, http://www.facebook.com/pages/Oxford-MS-Police-Department/276424854506?sk=wall (last visited Jan. 22, 2012).

[20] *City of Atlanta Police Department*, FACEBOOK, https://www.facebook.com/pages/City-of-Atlanta-Police-Department/55588696911?sk=info (last visited Jan. 22, 2012).

[21] *Dallas Police Department*, FACEBOOK, https://www.facebook.com/DallasPD (last visited Jan. 22, 2012).

[22] *Chicago Police Department*, FACEBOOK, https://www.facebook.com/ChicagoPolice Department (last visited Jan. 22, 2012).

[23] *See* @NYPDnews, *NYPD NEWS*, TWITTER, http://twitter.com/#!/NYPDnews (last visited Jan. 22, 2012).

goal of creating a conversational site that consistently engages community members on a local level.

Social networking websites offer an opportunity to publicize the work of the prosecutors, as well as present alternative outlets for accessibility to the public by providing contact information, safety tips, and other valuable information.[24]

A. Elected Officials

As an elected official, the prosecutor plays an indispensible role in the community. Social networking websites allow prosecutors to stay connected to the local community in a number of ways. For example, sites like Facebook and Twitter offer both inbound and outbound communication to a large number of people.[25] Prosecutors can post comments or "tweet" updates as mini press releases,[26] and community members can respond with feedback.[27] Some prosecutorial social networks even act as avenues for fundraising.[28]

Additionally, as an elected or appointed official, a prosecutor may also use social media to help stay in touch with voters, control his or her public image, and update the public on the achievement of his or her campaign goals. For instance, the current Philadelphia District Attorney was elected after successfully utilizing his Twitter account throughout his campaign.[29]

Social media also offers prosecutors the opportunity to reach more people through a completely new technological avenue. One author recently described the unique nature of the "civic social

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[24] *See supra* note 12 and accompanying text.

[25] *See supra* notes 12-24 and accompanying text.

[26] For a discussion of the ethical implications of the mini press releases as statements to the media, see *infra* notes 122-38 and accompanying text.

[27] For example, Bill Gibbons, Shelby County, Tennessee District Attorney frequently "tweets" about his speaking events and book signings to which constituents respond. *See* @DABillGibbons, *Bill Gibbons*, TWITTER, http://twitter.com/#!/DABillGibbons (last visited Jan. 22, 2012).

[28] Facebook friends can "Like" a specific post, and money can be donated with each "Like."

[29] Seth Williams successfully used his Twitter account to update constituents on speaking engagements and events. Since being elected, @Seth4DA frequently tweets city statistics like, "Sadly, there have been 200 homicides in Philadelphia this year." @Seth4DA, *Seth4DA*, TWITTER (Aug. 23, 2010, 9:36 PM), http://twitter.com/#!/Seth4DA.

network" as "an emerging political institution, characterized by a high degree of transparency and intense public pressure for accountability."[30] Moreover, because of their capacity for mass communication, social networks can be seen as "the new public square."[31] Thus, it is important for prosecutors and other elected officials to take advantage of every opportunity online to be accessible to potential voters in this new public forum.

B. Voir Dire

Prosecutors may also take advantage of social media in trial scenarios, especially during voir dire. For some attorneys, utilizing information on social networking sites is merely taking advantage of every available tool in the public domain. Websites like Facebook and Twitter allow attorneys to learn more than the bare minimum about potential jurors, extending research beyond the basic name, religion, employer, and number of children provided.[32] Many attorneys consider it a fundamental right to learn more about jurors;[33] and the additional online research further ensures a fair jury, since it allows both prosecutors and defense attorneys to get to know the biases of potential jurors.[34]

In Wi-Fi compatible courtrooms, prosecution and defense attorneys using iPads, smart phones, or laptops are able to cross-check background information of prospective jurors.[35] They take into consideration potential jurors' favorite television shows, interests and hobbies, and religious affiliations.[36] The district

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[30] Sherman, *supra* note 2, at 95-96.

[31] *Id.*

[32] Ethical implications associated with this research are discussed *infra* Part II.

[33] 76 AM. JUR. *Trials* § 127 (2000). Both prosecution and defense attorneys scour the sites looking for personal information that may be helpful in selecting jurors, particularly with the ultimate goal of finding the specific juror more inclined to choose their side at trial.

[34] Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 317-18 (2010) ("Trial counsel are already given broad discretion when questioning potential jurors during voir dire in order to expose their biases and potential prejudices.").

[35] Ana Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, WALL ST. J., Feb. 22, 2011, at A2.

[36] *Id.* Josh Marquis, District Attorney of Clatsop County in Oregon, described the importance of even the smallest details. *Id.* For example, if a person's favorite

attorney's office in Cameron County, Texas frequently engages in cross-checking potential jurors.[37] In doing so, the prosecutor is able to anticipate what the defense may already know about a potential juror.[38] Depending on the specific information attorneys find about potential jurors online, they may then convince judges to eliminate jurors "for cause."[39] On the other hand, if the information discovered is negative, but cannot support a challenge "for cause," an attorney may decide to use one of their "precious peremptory challenges" to strike the juror at issue.[40]

Consider the prospective jurors summoned for service in the highly publicized murder trial of Casey Anthony—charged with killing her two-year-old daughter.[41] While potential jurors answered questions about their backgrounds and qualifications to serve, lawyers were able to instantaneously check those responses against online social media websites.[42] Prosecutors then used a peremptory challenge to prevent the seating of one particular person who, after a fender-bender, tweeted "Cops in Florida are

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television show is *CSI: Crime Scene Investigation* or *Law & Order*, it could give the potential juror unrealistic expectations about the trial.

[37] Laura B. Martinez, *District Attorney to use Facebook Profiles in Jury Selection*, BROWNSVILLE HERALD (Jan. 17, 2011), http://www.brownsvilleherald.com/articles/district-121729-attorney-use.html.

[38] *Id.* Cameron County District Attorney District Attorney Armando R. Villalobos stated, "You always want to be ahead of the defense bar or at least on par with it . . . ." *Id.* Defense lawyers often assert that prosecutors already have an advantage in researching backgrounds and criminal records of potential jurors and not sharing the information could result in an unfair panel; thus, use of social media would balance the scales. *See, e.g.*, Anne Constable, *Background Checks of Jurors Routine: Use of National Crime Information Center Database, as in* Fierro *Trial, not as Common*, SANTE FE NEW MEXICAN (Sept. 23, 2009), http://www.santafenewmexican.com/LocalNews/Background-checks-of-jurors-routine ("Jury selection is supposed to be an open process in which everyone has the same chance to strike or keep a juror. [Currently, the scales are tipped] unfairly toward the prosecution." (alteration to original) (internal quotation marks omitted)).

[39] Anita Ramasastry, *Googling Potential Jurors: The Legal and Ethical Issues Arising From the Use of the Internet in Voir Dire*, FINDLAW (May 30, 2010), http://writ.news.findlaw.com/ramasastry/20100730.html.

[40] *Id.*

[41] State v. Anthony, No. 2008CF15606, 2011 WL 2641392 (Fla. Cir. Ct. July 7, 2011).

[42] Associated Press, *Social Media Affects Jury Picks in Casey Anthony Case*, DAYTONA BEACH NEWS J. (May 15, 2011), http://www.news-journalonline.com/news/florida/2011/05/15/social-media-affects-jury-picks-in-casey-anthony-case.html.

idiots and completely useless."[43] Thus, prosecutors were able to prevent a potentially biased juror from being seated.

Under the duty of zealous representation or prosecution, lawyers may have an obligation to look into what potential jurors are saying on social media sites.[44] A recent Missouri decision implied that lawyers have a duty to perform a requisite amount of research on jurors prior to trial.[45] Various appellate courts have upheld attorneys' rights to research jurors online, including one in New Jersey that reversed a lower-court judge's ruling prohibiting a plaintiff's attorney from using the Internet in the courtroom.[46] In that case, the court determined, "[t]he fact that the plaintiff's lawyer had the foresight to bring his laptop computer to court and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of fairness or maintaining a level playing field."[47] Thus, prosecutors may gain an advantage by installing necessary technological equipment in their local courtrooms.

Utilizing information from Facebook profiles and other social networking websites during voir dire, however, involves considerable risks. Sometimes the searches can extend far beyond the basic "Google" inquiry, reaching into personal, privacy-protected, social networking sites. For instance, if the individual has restricted privacy settings that prohibit the general public from accessing information, and an attorney improperly accesses

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[43] *Id.*

[44] *See generally* CAROLYN ELEFANT & NICOLE BLACK, SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER (2010).

[45] Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010). In *Johnson*, a potential juror in a medical malpractice suit denied he had been a party to any civil litigation. *Id.* at 554-55. After a verdict for the defense, the plaintiff's attorney filed for a new trial. *Id.* at 555. The state's highest court determined "a party must use reasonable efforts to examine the litigation history on [the case record service] of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial." *Id.* at 559. In holding that the juror had acted improperly, the Court observed that a more thorough investigation of the juror's background would have obviated the need to set aside the jury verdict and conduct a retrial. *See, e.g.*, New York Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics Op. 743 (2011).

[46] Campoy & Jones, *supra* note 35; *see, e.g.*, Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

[47] *Id.* (internal quotation marks omitted).

that information through alternative means,[48] those attorneys may open themselves up to possible malpractice suits or disciplinary action.[49] Model Rule of Professional Conduct 3.5 governs improper juror contact, which may be applicable to these types of situations.[50] Prosecutors investigating potential jurors on the Internet must be sure not to contact the potential juror at issue, for such contact could constitute a breach of an attorney's ethical obligations.[51] As such, a prosecutor must be very careful to follow the ethical guidelines and to ascertain only the information necessary to determine biases of potential jurors.

Additionally, prospective jurors may claim a constitutional right to privacy that protects them from the disclosure of personal information during voir dire.[52] Determining whether a prosecutor's questioning of a prospective juror's internet activity rises to a level sufficient to constitute an invasion of privacy will probably depend on the specific type of internet activity involved.[53]

If the user chooses not to alter his or her default security settings on social media, the profile remains open to the public, available for all to view; and a prosecutor could access the information without infringing on a person's privacy

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[48] By using an agent or investigator in a deceptive manner, an attorney engages in pretext. See *infra* Part II for a further discussion of the ethical concerns associated with social networking.

[49] *See infra* Part II (further discussing the ethical rules associated with a lawyer's use of social networking for investigation purposes).

[50] MODEL RULES OF PROF'L CONDUCT R. 3.5 (2010) ("A lawyer shall not seek to influence a . . . juror, [or] prospective juror . . . [or] communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order; . . ."); *see, e.g.*, Robert S. Kelner & Gail S. Kelner, *Social Networks and Personal Injury Suits*, N.Y. L.J. (Sept. 24, 2009), http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=12024 34026615 (examining the extent to which adversaries may invade a plaintiff's personal social networking site).

[51] Ramasastry, s*upra* note 39.

[52] Michael R. Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 711-12 (1982) (asserting that a citizen's obligation to serve on a jury in a criminal matter should not amount to a willing waiver of the expectation of privacy).

[53] McGee, *supra* note 34, at 319. *Compare* Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001) ("Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting."), *with* United States v. Padilla-Valenzuela, 896 F. Supp. 968, 972 (D. Ariz. 1995) ("To be meaningful, the right to privacy must preclude the offending questions from being asked of any prospective jurors.").

expectations.[54] Given the widespread publicity associated with social media and the general information-sharing nature of social networks, it would be difficult for an individual to assert a reasonable expectation of privacy.[55] The prosecutor must be wary in using such information though, because many people on the internet post information painting themselves as who they want to be as opposed to who they actually are.[56] The opinions expressed in the posting may not be an accurate reflection of the potential juror's character or actions.[57]

Courtroom decorum may also play a role in voir dire. Some judges make their own courtroom rules, and some may require notice so that both sides have equal opportunity to research potential jurors.[58] As long as both prosecutors and defense lawyers have equal access to these social networking sites, however, most judges probably will not object.[59]

Another possible concern with prosecutors accessing potential information is the use of taxpayer dollars to provide technological equipment in the courtroom, as many taxpayers have issues with spending public money on Wi-Fi accessibility and iPads or other tablets for prosecutorial use.[60] Fully equipping the courtroom with the necessary technology, however, may allow for greater success within the prosecution function.

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[54] *See* United States v. Maxwell, 45 M.J. 406, 417-18 (C.A.A.F. 1996) (analogizing Internet activity to mailing a letter and finding that "the more open the method of transmission . . . the less privacy one can reasonably expect").

[55] Dianne M. Timm & Carolyn J. Duven, *Privacy and Social Networking Sites*, 124 NEW DIRECTIONS FOR STUDENT SERVS. 89, 92 (2008) (describing social networking websites as those designed to promote user-sharing information and created "to provide individuals with a means for communicating and interacting with one another").

[56] *See generally* Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 ILL. B.J. 366 (2010).

[57] *Id.*

[58] Campoy & Jones, *supra* note 35, at A2.

[59] Constable, *supra* note 38.

[60] *See* Martinez, *supra* note 37 (discussing objections of some Cameron County, Texas taxpayers for expenditures related to prosecutorial use of certain technology in the courtroom that could be used to invade privacy rights of potential jurors).

C. Discovery

Prosecutors and other attorneys can find a treasure trove of discoverable information on social networking websites to establish their cases. The law governing discovery of online personal information, however, is relatively murky, and only a handful of courts have directly addressed the issue.[61] Frequently, a prosecutor will look to social networking websites specifically for information that will either corroborate or undermine a case.[62] There are few cases dealing specifically with prosecutorial discovery issues, however, other civil cases can help illustrate issues similar to those prosecutors may encounter. Although discoverability of social media is still a new area of law, the majority of the courts addressing these issues have allowed discovery of relevant information posted to social networking websites.[63]

In personal injury cases, for example, where the plaintiff places his or her health directly at issue, lawyers have been known to request information from social networking websites to use in assessing the issue of damages. In *Ledbetter v. Wal-Mart Stores, Inc.*, an electrical system shorted out, and two electricians were severely burned.[64] They brought suit for their injuries, and one wife brought a claim for loss of consortium.[65] During discovery, the defendant sent subpoenas to several social media accounts, and the plaintiffs asserted that items from their personal social media accounts should be protected under a marital privilege or doctor-patient privilege.[66] The court determined that because the plaintiffs put the confidential facts in

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[61] Boggs & Edwards, *supra* note 56, at 367 (citing Sean P. O'Donnell, *The Use of Information Posted on Facebook and MySpace in Litigation*, SUBROGATION & RECOVERY ALERT, Oct. 19, 2009, *available at* http://www.cozen.com/cozendocs/outgoing/alerts/ 2009/subro101409.pdf).

[62] Boggs & Edwards, *supra* note 56, at 366.

[63] *Id.* at 367.

[64] Ledbetter v. Wal-Mart Stores, Inc., No. 06-CV-01958-WYD-MJW, 2009 WL 1067018, at *1 (D. Colo. Apr. 21, 2009).

[65] *Id.*

[66] *Id.*

issue, the request was reasonably calculated to lead to the discovery of admissible evidence.[67]

Conversely, in *T.V. v. Union Township Board of Education*, a New Jersey court reached the opposite conclusion.[68] In that particular case, a teenager was sexually assaulted by a fellow middle school student and claimed that the school failed to adequately supervise.[69] The court found that the information on the plaintiff's social networking website was protected because "the student's privacy interests prevailed, absent a particular showing of relevance."[70] Because the defense had not sufficiently shown why the messages were needed, the judge made a preliminary ruling that personal social networking pages were only discoverable if there is a particularized showing that the information is relevant, due to privacy concerns. [71]

Electronic social media presents criminal prosecutors and civil parties alike with potentially valuable opportunities for both evidence and discovery. In *Lenz v. Universal Music Corporation*, the Northern District Court of California determined, "When a client [uses social media and] reveals to a third party that something is 'what my lawyer thinks,' she cannot avoid discovery on the basis that the communication was confidential."[72] Because the decision of *Lenz* has broad relevance in a public digital environment, communications by a party can run a serious risk of compromising the attorney-client privilege with respect to key

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[67] *Id.* at *2; *see also* Evan Brown, *Court Allows Wal-Mart to Subpoena Facebook and Myspace*, INTERNET CASES (Apr. 26, 2009), http://blog.internetcases.com/2009/04/26/court-allows-wal-mart-to-subpoena-facebook-and-myspace/.

[68] Mary Pat Gallagher, *MySpace, Facebook Pages Called Key to Eating-Disorder Coverage Dispute*, N.J. L.J., Feb. 1, 2008, at 1, *available at* http://www.law.com/jsp/article.jsp?id=1201779829458 (citing T.V. v. Union Twp. Bd. of Educ., No. UNN-L-4479-04 (N.J. Super. Ct. Dec. 22, 2004)).

[69] *Id.*

[70] *Id.*; *see also* Henry Gottlieb, *MySpace, Facebook Privacy Limits Tested in Emotional Distress Suit*, N.J. L.J. (June 8, 2007), http://www.law.com/jsp/law/international/LawArticleFriendlyIntl.jsp?id=900005555723 (recognizing the court in *T.V.* held, "Without a particularized showing that the [MySpace and Facebook] texts are relevant, the plaintiff's privacy interests prevail.").

[71] Gallagher, *supra* note 68.

[72] Lenz v. Universal Music Corp., No. 5:07-CV-03783 JF (PVT), 2010 WL 4789099, at *5 (N.D. Cal. Nov. 17, 2010).

issues in a case.[73] Though courts are more reluctant to allow discovery of e-mail messages than an actual social network profile, several courts have allowed the discovery of social-media messages if they are relevant.[74]

Additionally, prosecutors may utilize social networking to gather information from informants; especially since this information would not necessarily need to be disclosed at trial.[75] These rules may cause conflicts between the prosecutor and the defense, however, based on whether or not social media postings planned to be used at trial would constitute "reports, statements, or opinions . . . recorded or otherwise preserved, made in connection with the particular case" or "physical evidence and photographs relevant to the case" that would need to be disclosed.[76] Future courts evaluating these scenarios will have to consider whether any of the information discovered by a prosecutor could be considered "work product" and thus, privileged; or whether the information was freely discoverable as public information.

Another problem often encountered in prosecutors discovering information from social media, comes in a person's inability to ever actually "delete" anything from the Internet.[77]

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[73] *Id.* at *4; *see also* United States v. Ebersole, 263 F. App'x 251, 253 n.4 (3d Cir. 2008) (noting defendant's MySpace page was admitted into evidence); Michigan v. Liceaga, No. 280726, 2009 WL 186229, at *3-4 (Mich. Ct. App. Jan. 27, 2009) (holding the trial court did not erroneously admit evidence of MySpace photographs, which supported the State's contention that the trial court properly found that the defendant committed second degree murder and was in possession of a firearm during the commission of a felony).

[74] Boggs & Edwards, *supra* note 56, at 368.

[75] *See* UNIF. R. CIR. CT. AND COUNTY CT. PRAC. R. 9.04(B)(2). This rule governs discovery and states:

> Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose her/her identity will infringe the constitutional rights of the accused or unless the informant was or depicts himself or herself as an eyewitness to the event or events constituting the charge against the defendant.

Id.

[76] *Id.* R. 9.04(A)(4).

[77] Information posted on social media may be retained by Google's online cache, even after the material is deleted. Brock Read & Jeffrey R. Young, *Facebook and Other Social-Networking Sites Raise Questions for Administrators*, CHRON. HIGHER EDUC., Aug. 4, 2006, at A29.

Information posted on social media websites, specifically social networks, is written in an addictively mesmerizing, permanent ink. Thus, prosecutors could use this permanency aspect of social media in their favor to uncover information to be used at trial. Social networking sites have become just another way that people say things or do things that come back to haunt them.[78] President Barack Obama reiterated the permanency aspect of social media and stated, "I want everybody . . . to be careful about what you post on Facebook, because in the YouTube age, whatever you do, it will be pulled up again later somewhere in your life."[79]

Furthermore, the Library of Congress recently acquired the entire Twitter database.[80] The library received all public tweets from the 2006 inception of the service to present.[81] As such, "tweets" may be seen as part of the public record and may be more easily used by prosecutors.

In the end, prosecutors must be careful because even if a court determines that information from a social networking site is discoverable, it may or may not be admissible, and it may or may not need to be disclosed pre-trial.[82]

D. Evidence

The potential availability of helpful evidence on internet-based sources makes utilizing information from social networks an attractive new weapon in a prosecutor's arsenal of formal and informal discovery devices.[83] Not only can evidence from social-networking sites reveal personal communications, establish motives and personal relationships, and provide location information, but it can also prove and disprove alibis, and establish crime or criminal enterprise.[84] Prosecutors can use

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[78] *Obama Warns U.S. Teens of Perils of Facebook*, REUTERS (Sept. 8, 2009, 4:55 PM), http://www.reuters.com/article/idUSN0828582220090908.

[79] *Id.*

[80] Matt Raymond, *Twitter Donates Entire Tweet Archive to Library of Congress*, LIBR. OF CONGRESS (Apr. 15, 2010), http://www.loc.gov/today/pr/2010/10-081.html.

[81] *Id.*

[82] Boggs & Edwards, *supra* note 56, at 369.

[83] *See, e.g.*, Bass *ex rel.* Bass v. Miss Porter's Sch., 3:08cv1807 (JBA), 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

[84] U.S. DEP'T OF JUSTICE: COMPUTER CRIME & INTELLECTUAL PROP. SECTION, OBTAINING AND USING EVIDENCE FROM SOCIAL NETWORKING SITES: FACEBOOK,

information from social networking sites when presenting evidence at trial to determine how a judge or jury will perceive a particular witness.[85] It can be used to specifically attack the credibility of a character witness or to demonstrate elements of a particular crime.[86] For example, federal prosecutors in the case against the man charged in an Arizona shooting rampage targeting United States Representative Gabrielle Giffords may use a message posted on the man's MySpace page saying, "Goodbye friends," hours before the shooting.[87] With a few clicks of the mouse, prosecutors can cast doubt on a witness's character and motives.

Potentially relevant information can be discovered from users' wall posts, status updates, photos, and locations at particular times. Many people use social networking to post what they feel, what they think, or where they are at the time of a particular event; and as such, prosecutors are eager to access that information to later use against defendants. Information accessed from social media can be used to show physical health, similar to the way "day in the life" videos are used to counter claims of injury or disability.[88]

In one specific case, a defense attorney used information she accessed online to dismiss the charges against her client.[89] The particular situation involved a forcible rape claim in Oregon, where a teenager told the police she would never willingly engage in intercourse.[90] The defense attorney viewed the "victim's"

MYSPACE, LINKEDIN, AND MORE (2010), *available at* https://www.eff.org/files/filenode/social_network/20100303__crim_socialnetworking.pdf.

[85] Boggs & Edwards, *supra* note 56, at 369.

[86] Joseph Goldstein, *"On Tha Run for Robbin a Bank" and Other Online Postings That Investigators Love*, N.Y. TIMES, Mar. 3, 2011, at A25.

[87] *Id.*; *see, e.g.*, Doug Rule, *Police, Prosecutors Look for Evidence on Facebook, Twitter*, MOBILEDIA (March 3, 2011, 1:51 PM), http://www.mobiledia.com/news/83193.html.

[88] *See, e.g.*, Leduc v. Roman, 2009 CanLII 6838, *15 (Can. Ont. Sup. Ct. J.), *available at* http://www.canlii.org/en/on/onsc/doc/2009/2009canlii6838/2009canlii6838.pdf (finding that Facebook photos would be admissible for a personal injury suit involving a loss of enjoyment of life claim, when they contain relevant information about that party's lifestyle).

[89] Stephanie Francis Ward, *MySpace Discovery: Lawyers are Mining Social Networks for Nuggets of Evidence*, 93 A.B.A. J. 34 (2007), available at http://www.abajournal.com/magazine/article/next.

[90] *Id.*

MySpace page, where she talked about parties, drinking, and engaging in sexual activity, and posted provocative pictures of herself.[91] Thus, based on what was posted, the attorney could see how the teenage "victim" would be perceived by jurors.[92] The defense attorney called her as a witness, and ultimately, the charge against her client was dismissed.[93]

Furthermore, prosecutors can evaluate a person's associations and affiliations to perhaps boost a claim of discrimination or bias. One prosecutor used pictures of young men posing with guns posted on a social networking site to obtain a conviction of several gang members.[94] Most court decisions, thus far, indicate that if the information found is relevant, it will be admitted as evidence.

Prosecutors can even use information accessed from photos on social networks that are merely "tagged" to an individual, regardless of whether they posted the particular photos or not.[95] For instance, in the civil custody case of *Lalonde v. Lalonde*, the court awarded the father custody of the minor based on evidence that the child's mother had been drinking—something her psychiatrists warned could adversely interfere with her medication.[96] There may be problems regarding the use of photos from social media sites in the future, however, as courts become less reliant on photos as authenticated evidence, especially given the ability to manipulate photographs with "Photoshop" or hack into another social networking account so easily.[97]

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[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Facebook Thugs: Gun-toting Gangsters Jailed After Campaigner Collected Brazen Internet Poses*, DAILY MAIL REP. (Sept. 8, 2009), http://www.dailymail.co.uk/news/article-1211722/Gun-toting-gang-members-jailed-named-shamed-Facebook.html#ixzz1K7hyAXfG.

[95] Social networking users do not necessarily have to obtain another user's permission or authorization to "tag" a photo. *See Facebook Photos*, FACEBOOK, https://www.facebook.com/apps/application.php?id=2305272732&sk=info (last visited Jan. 22, 2012). In fact, facial recognition software is frequently pre-installed on cameras to automatically recognize and "tag" individuals upon uploading the pictures to certain social networking websites. *See* Lalonde v. Lalonde, 2009-CA-002279-MR, 2011 WL 832465, at *2 (Ky. Ct. App. Feb. 25, 2011) (finding that permission is not necessary to "tag" a photo of a person on Facebook.).

[96] *Lalonde*, 2011 WL 832465, at *2.

[97] Goldstein, *supra* note 86, at A25.

E. Sentencing

After a prosecutor uses damaging information posted online as evidence to cast doubt on the character and motives of a defendant to obtain a conviction, a prosecutor can then use the information during sentencing hearings in order to argue for harsher punishment. Prosecutors frequently use Facebook and Twitter post-conviction to see if the defendant is truly remorseful, interested in reform or rehabilitation, and whether the defendant is empathetic toward the victim.[98]

Prosecutors do not always immediately turn to social networking sites while preparing for sentencing, despite embarrassing photos of criminal defendants that are sometimes available in plain sight and accessible under a person's real name. As discussed in Part II, attorneys can encounter problems in authenticating whether a person actually posted the particular material and must follow ethical guidelines in pursuit of such information.[99] In circumstances where prosecutors have reason to suspect incriminating pictures online, or have been tipped off to a particular person's MySpace or Facebook page, however, the sites can produce critical character evidence. In one particular instance, a twenty-year-old young man, who just two weeks after he was charged in a drunken driving crash that seriously injured a woman, attended a Halloween party dressed as a prisoner.[100] Some of the party pictures depicted him in a black-and-white striped shirt and an orange jumpsuit costume labeled "Jail Bird."[101] After someone posted the pictures on Facebook, the prosecutor offered them as convincing evidence during the drunken-driving case.[102] The prosecutor used the pictures to portray the accused as an unrepentant young man more interested in drunkenly celebrating while his seriously-injured

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[98] Ken Strutin, *The Role of Social Media in Sentencing Advocacy*, N.Y. L.J. (Sept. 29, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472638649&The_Role_of_Social_Media_in_Sentencing_Advocacy&goback=.gde_2364615_member_30861667#.

[99] *See infra* Part II.

[100] *Social Networks Help Detectives Solve Crimes*, REDORBIT (July 19, 2008), http://www.redorbit.com/news/technology/1486314/social_networks_help_detectives_solve_crimes/.

[101] *Id.*

[102] *Id.*

victim recovered in the hospital.[103] A judge agreed with the prosecutor and called the pictures "depraved" in sentencing the young man to two years in prison.[104]

This revolutionary implementation of social media, specifically social networking, also shows the increasing need for the establishment of new rules and guidelines within the court system and legal profession.[105] Therefore, as more courts interpret the impact of social media, prosecutors must be cautious in performing all of their legal obligations.

II. HAZARDS ASSOCIATED WITH USE OF SOCIAL MEDIA IN THE PROSECUTION FUNCTION

The prevalence of social networking websites and the potential benefits of accessing them to obtain evidence present ethical challenges for prosecutors attempting to navigate the virtual world. Even though information from social media websites may be both discoverable and admissible, ethical rules and guidelines can limit an attorney's ability to freely access an individual's social networking account.[106] Prosecutors must be reminded that all of their actions will be scrutinized; and therefore, it is essential that they abide by the Model Rules of Professional Conduct in all aspects of the profession. Specifically regarding social media, these rules govern the prosecutor's personal social network postings, ex parte communications on social media, and even a prosecutor's role in relation to the jury.

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[103] *Id.*

[104] *Id.* Rhode Island Superior Court Judge Daniel Procaccini said the prosecutor's presentation changed his sentencing decision. *Id.* He stated, "I did feel that gave me some indication of how that young man was feeling a short time after a near-fatal accident, that he thought it was appropriate to joke about and mock the possibility of going to prison." *Id.*

[105] Many bar associations and ethics committees have recently started to reconsider rules that apply to lawyers in the virtual world. *See, e.g.*, Colo. B.A. Ethics Comm., Formal Op. 119 (2008); Ariz. B.A. Comm. on R. Prof'l Conduct, Formal Op. 09-04 (2009) ("[T]he Committee also recognizes that technology advances may make certain protective measures obsolete over time. . . . As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients' documents and information."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006); Md. B.A. Ethics Comm., Op. 2007-09 (2006).

[106] Boggs & Edwards *supra* note 56, at 369.

A. The Ethical Issues Associated with Prosecutorial Postings

Ethical issues may arise when prosecutors post comments on their own social media accounts. Because prosecutors are bound by professional codes of conduct, their freedom to vent, complain, and gripe is much more limited than that of the average citizen.[107] As an officer of the court, an attorney loses the full ability to criticize that court.[108] Thus, prosecutors must be prudent in posting information online related to an ongoing case, opposing counsel, judge, or jury.

For example, a Florida prosecutor faced discipline after his Facebook status updates resulted in a mistrial.[109] During the felony assault trial of a known gang member, the prosecutor unprofessionally made updates to the tune of the theme song from *Gilligan's Island*.[110]

Similarly, a Florida defense attorney—angry with a Fort Lauderdale judge for asking defendants whether they were ready for trial within only one week of their arraignment—decided to include his thoughts in his personal blog, calling the judge an "evil, unfair witch" and questioning the judge's motives and competence in asserting that she was "seemingly mentally ill" and "clearly unfit for her position."[111] In its conclusion that the

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[107] John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. TIMES, Sept. 13, 2009, at A1.

[108] *Id.*

[109] Todd Wright, *Lawyer Marooned After "Gilligan's Island" Facebook Poem: Lawyer's Facebook Joke Goes Wrong*, NBC MIAMI (Apr. 22, 2010, 1:41 PM), http://www.nbcmiami.com/news/weird/Lawyer-Marooned-After—Gilligans-Island-Facebook-Poem-91810124.html.

[110] Some of the post included:

> Just sit right back and you'll hear a tale, a tale of a fateful trial that started from this court in St. Lucie County. The lead prosecutor was a good woman, the 2nd chair was totally awesome. Six jurors were ready for trial that day for a four hour trial, a four hour trial.
>
> The trial started easy enough [but] then became rough. The judge and jury confused, If not for the courage of the fearless prosecutors, the trial would be lost, the trial would be lost. The trial started Tuesday, continued til Wednesday and then Thursday With Robyn and Brandon too, the weasel face, the gang banger defendant, the Judge, clerk, and Ritzline here in St. Lucie.

Id.

[111] *Id.*; *see, e.g.*, Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, A.B.A.J.COM (Feb. 1, 2011, 4:20 A.M.),

attorney violated five different state ethics rules, including Rule 4-8.2(a), prohibiting attorneys from making false or reckless statements regarding the qualifications or integrity of a judge, and Rule 4-8.4(d), prohibiting engaging in professional conduct that is prejudicial to the administration of justice, the Florida Bar publicly reprimanded the attorney and imposed a $1250 fine.[112]

In another instance, a lawyer in Illinois lost her job as an assistant public defender and violated legal ethics rules based on blog postings that belittled jurists, described clients, and revealed confidential client details.[113]

Additionally, a lawyer in San Diego was responsible for having a criminal conviction set aside and sent back to a lower court because of his blog posts while serving as a juror.[114] During the trial, the attorney-juror posted details of the case on his personal blog.[115] Because he failed to disclose his occupation during jury selection, and because of the blog posts, the attorney-juror received a forty-five-day suspension, paid $14,000 in legal fees, and lost his job.

1. Competence and Diligence

Because the Model Rules require lawyers to be competent and diligent in their representation of clients, prosecutors may be obligated to develop specific knowledge related to social media use.[116] For example, Rules 1.1 and 1.3 impose certain standards on attorneys regarding "keep[ing] abreast of changes in the law and its practice . . . ."[117] This suggests that the duties of diligence and competence may necessarily include a duty to regularly monitor changes to the rules governing lawyers to stay up-to-date on advancements in aspects of the law related to technology, especially social media.

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http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/.

[112] *Id.*; *see also* Wright, *supra* note 109.

[113] *Id.* Some of the "thinly veiled" case details included statements like, "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.'" Schwartz, *supra* note 107.

[114] *Id.*

[115] *Id.*

[116] MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2010).

[117] *Id.* R. 1.1 cmt. 6.

Furthermore, prosecutors must be diligent in monitoring not only what they post on their own social media themselves, but also what is posted by someone else and relates to their professional actions.[118] Additionally, even more than simply monitoring their own online activities, attorneys should remind their clients that their online activities may be monitored by judges or opposing counsel which could result in adverse consequences.[119] For example, one defendant in a personal injury case posted pictures of an active social life on Facebook which an opposing counsel later used against him.[120] Another client in a custody case made a post on a social networking site that she was single and had no children, and this information was used against her in court to illustrate her dishonesty.[121]

2. Statements to the Media

When a prosecutor's actions result in an egregious prosecutorial mistake, certain consequences must be faced. In order to avoid these conflicts, there are specific rules of professional conduct governing the prosecutor's statements made to the press, and these rules can be applied to statements made using social media.

The rule governing trial publicity, Rule 3.6(a), provides that "[a lawyer] shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding . . . ."[122]

In the modern age, a prosecutor should know the very nature of social media promotes information-sharing.[123] As such,

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[118] *See, e.g.*, Margaret DiBianca, *Complex Ethical Issues of Social Media*, BENCHER (Nov. 2010), http://www.innsofcourt.org/Content/Default.aspx?Id=5497.

[119] *Id.*

[120] Michael E. Getnick, *Social Media: The Good, the Bad, and the Ugly*, N.Y. ST. B.A. J., Oct. 2009, at 5 (discussing the negative impact the pictures posted had on the defense's contention that the defendant was responsible and professional).

[121] *Id.*

[122] MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2010).

[123] *See* Steven C. Bennett, *Look Who's Talking: Legal Implications of Twitter Social Networking Technology*, N.Y. ST. B.A. J., May 2009, at 11 (noting that "[t]he essential

statements made by prosecutors on social media, specifically social networking sites, could have a prejudicial effect on the proceeding if they involve statements related to: the character, credibility, reputation, or criminal record of a party, suspect, or identity of a witness;[124] the contents of any confession, admission, or statement given by a defendant or suspect, or that persons' refusal or failure to make a statement in a criminal case or proceeding;[125] the performance or results of any examination or test;[126] any opinion as to the guilt or innocence of a defendant;[127] information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial;[128] or the fact that a defendant has been charged with a crime, unless a statement explaining that a charge is merely an accusation, and an individual is presumed innocent until proven guilty is included.[129]

Because any information posted on social media, specifically social networking accounts, would very easily be disseminated to a large number of people; prosecutors must be very careful in their social networking habits in order not to materially prejudice an ongoing proceeding by making statements regarding the information enumerated in Rule 3.6, Comment 5.

On the other hand, a prosecutor *can* make a general statement or posting on a social networking website *without elaboration* about the general nature of the claim or defense involved;[130] the information contained in a public record;[131] information related to an investigation that is in progress, including the general scope of the investigation;[132] the scheduling or result of any step in litigation;[133] or in a criminal case, the

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purpose of Twitter . . . is to keep connected to friends . . ."); *see also supra* note 55 and accompanying text.

[124] MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 5(1) (2010).

[125] *Id.* R. 3.6 cmt. 5(2).

[126] *Id.* R. 3.6 cmt. 5(3).

[127] *Id.* R. 3.6 cmt. 5(4).

[128] *Id.* R. 3.6 cmt. 5(5).

[129] *Id.* R. 3.6 cmt. 5(6).

[130] *Id.* R. 3.6(b)(1) (emphasis added).

[131] *Id.* R. 3.6(b)(2) (including tweets, *see supra* notes 80-81 and accompanying text).

[132] *Id.* R. 3.6(b)(3).

[133] *Id.* R. 3.6(b)(4).

identity, residence, occupation, and family status of the accused;[134] information necessary to aid in apprehension of that person;[135] the fact, time, and place of arrest;[136] and the identity of investigating and arresting officers.[137] Thus, as long as a statement falls under one of these categories, prosecutors can safely post information on their personal social networking pages without fear of violating the professional rules of conduct.[138]

3. Lack of Candor Toward the Tribunal

Model Rule of Professional Conduct 3.3, like many state bar association rules, prohibits lawyers from knowingly making a false statement of material fact to a tribunal.[139] Some judges report incidences where lawyers make statements in court that do not appear to align with their recent social media updates.

Sometimes, a prosecutor may even get caught in a fib, based on internet postings.[140] In one instance, a young lawyer requested a delay in a trial, citing a death in his family.[141] After granting the delay, the judge checked the attorney's Facebook page and found more posts about partying than grief.[142] Boldly enough, at the end of the first delay, the lawyer sought an additional one; which the judge quickly declined.[143]

4. Confidentiality

Prosecutors could also face penalties for breaches of confidentiality related to their social networking habits. Model Rule of Professional Conduct 1.6, governing confidentiality of information states, "A lawyer shall not reveal information relating

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134 *Id.* R. 3.6(b)(7)(i).

135 *Id.* R. 3.6(b)(7)(ii).

136 *Id.* R. 3.6(b)(7)(iii).

137 *Id.* R. 3.6(b)(7)(iv).

138 When a prosecutor makes a statement in his or her official capacity, or on the district attorney's official social networking website, however, he or she may be opening themselves up to potential liability. *See supra* notes 12-24 and accompanying text; *infra* notes 168-86 and accompanying text.

139 MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010).

140 Schwartz, *supra* note 107, at A1.

141 *Id.*

142 *Id.*

143 *Id.*

to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted . . . ."[144] Revealing privileged information about a client's actions that are "embarrassing or detrimental" could be a violation of legal ethic rules protecting a client's confidentiality.[145] Breaches of confidentiality can occur when a prosecutor posts information on his or her own social networking site or in communication made publicly between "profiles" of several "friends" or "followers" including clients.[146] Prosecutors must be careful though, because "even seemingly innocuous posts can reveal information."[147] Ultimately, as long as the ethics rules are followed and clients' privacy and confidentiality are safeguarded, prosecutors can embrace social media and enjoy all of its benefits.

5. Contacting a Represented or Unrepresented Party

Because the majority of jurisdictions have professional conduct rules governing contact with an opposing party if that party is represented by counsel, an invitation to become "friends" or a "follower" on a social networking site, and thus, an invitation to access personal information, could possibly be considered impermissible direct contact.[148] Rule 4.2 governs the communications of a lawyer and his agents with parties known to be represented by counsel and prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law.[149] Therefore, if a lawyer attempted to "friend" a *represented* party in a pending litigation, then the lawyer's conduct would be subject to Rule 4.2. If the lawyer attempted to "friend" an *unrepresented* party, however, the

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144 MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010).

145 Several state rules provide for a two-pronged standard which protects both information safe guarded by the attorney-client privilege, as well as information obtained in the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *See, e.g.*, N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101 [1200.19]: Preservation of Confidences and Secrets of a Client.

146 O'Brien, *supra* note 8, at 516.

147 *Id.*

148 Kelner & Kelner, *supra* note 50.

149 MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010).

lawyer's conduct would fall under Model Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel.[150]

According to the Oregon State Bar Association, if information posted on a social media account is publicly accessible, an opposing attorney can access the posted data because it could be considered the same as "reading a magazine article . . . written by that adversary."[151] Moreover, the attorney simply could be reading "information posted for general public consumption . . . not communicating with the represented owner of the Web site."[152]

The situation would be different, however, if an attorney or her agent had to specifically interact with a represented party to be able to access the party's social media account.[153]

6. Using Pretext to Obtain a Person's Information on a Social Networking Web Site

If an attorney uses deceptive tactics to access a social networking website, he or she may be in violation of state privacy and tort laws, as well as rules of professional conduct.[154] Deceptive tactics may include an attorney hiring an investigator to become "Facebook friends" with a non-party witness. For example, a recent Philadelphia Bar Association Professional Guidance Committee opinion recognized that it was unethical deception for an attorney to surreptitiously access a social networking profile page of any party involved in litigation.[155] The Philadelphia Bar Association found that it would violate ethics rules for an attorney or attorney's investigator to make a friend

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[150] *Id.* at R. 4.3.

[151] Or. B.A. Legal Ethics Comm., Formal Op. 2005-164 (2005); *see also* Seidenberg, *supra* note 111.

[152] Or. B.A. Legal Ethics Comm., Formal Op. 2005-164 (2005).

[153] *Id.*

[154] Sean P. O'Donnell, *The Use of Information Posted on Facebook and MySpace in Litigation*, SUBROGATION & RECOVERY ALERT, Oct. 19, 2009, http://www.cozen.com/cozendocs/outgoing/alerts/2009/subro101409.pdf.

[155] Philadelphia B.A. Prof'l Guidance Comm., Formal Op. 2009-02, at 1 (2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

request to an unrepresented person using his or her real name.[156] Specifically, the inquiring lawyer's intention to have a third party "friend" or "follow" the unrepresented witness implicated Rule 8.4(c).[157] The conduct also violated Rule 5.3(c)(1), which holds a lawyer responsible for the conduct of a non-lawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the rules if engaged in by the lawyer; and Rule 4.1, which prohibits a lawyer from making a false statement of fact or law to a third person.[158]

Similarly, the Oregon State Bar Association determined that if a lawyer sought to "'friend' the enemy" who was represented by counsel to access the party's webpage, then this would constitute communication between the lawyer and opposing party in violation of Model Rule 4.2.[159]

The New York State Bar Association found that because Facebook and MySpace sites are accessible to all members of the social network, the Rules of Professional Conduct would not be implicated.[160] The New York State Bar Association found that a lawyer who represents a client in a pending litigation, and who has access to the Facebook, MySpace, or other social network used by another party in litigation, may access and review the *public* social network pages of that party to search for potential impeachment material.[161] As long as the lawyer did not "friend"

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[156] *Id.* at 3.

[157] *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2010).

[158] Philadelphia B.A. Prof'l Guidance Comm., Formal Op. 2009-02, at 2 (2009). Specifically, the Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact. *See also* MODEL RULES OF PROF'L CONDUCT R. 5.3 & 4.1 (2010).

[159] Or. B.A. Legal Ethics Comm., Formal Op. 2005-164 (2005); *see* Seidenberg, *supra* note 111.

[160] N.Y. State B.A. Comm. on Prof'l Ethics, Formal Op. 843 (2010). Note, one of several key distinctions between the scenarios discussed in the Philadelphia opinion and the New York State Bar opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas the New York State opinion concerned a *party*. *Id.* at 2 n.1.

[161] *Id.* at 3; *see* O'Donnell, *supra* note 154 ("Successful privacy violations require the plaintiff demonstrate he or she had a subjective expectation of privacy at the time of the invasion. Proof of this expectation is difficult to demonstrate, because 'the inherent nature of the profile . . . works against any notion of an expectation of privacy.' Accordingly, there is a presumption that an individual who posts information to a

the other party or direct a third person to do so, accessing the social network website of the party would not violate Rule 8.4, Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by non-lawyers acting at their direction), or Rule 4.1.[162]

On the other hand, the Bar Association of the City of New York Committee on Professional and Judicial Ethics determined that an attorney can withhold strategic information when making a friend request and "may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request."[163] The committee determined that "a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence."[164]

Few other committees have dealt with the implications associated with social media and Rules 4.2 and 4.3. Therefore, as more and more prosecutors turn to social networks for trial purposes, the need for clearer standards and ethical guidelines will only increase.

7. Spoliation of Evidence

If a prosecutor or other attorney were able to ethically discover relevant information to a case online, the Rules of Professional Conduct govern the preservation of that information. Specifically, Model Rule 3.4(a) prohibits lawyers from unlawfully altering or destroying evidence and from assisting others from doing so.[165] Thus, lawyers have an ethical duty to preserve electronic evidence, including information discovered on social networks.[166] Failure to preserve such information could result in serious sanctions. For example, if an attorney instructs his client

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social networking website does not have a reasonable expectation of privacy in the information he or she posts.").

[162] N.Y. State B.A. Comm. on Prof'l Ethics, Formal Op. 843 (2010).

[163] *Id.*; *see, e.g.*, B.A. of City of N.Y. Comm. on Prof'l & Jud. Ethics, Formal Op. 2010-2 (2010).

[164] B.A. of City of N.Y. Comm. on Prof'l & Jud. Ethics, Formal Op. 2010-2, at 4 (2010).

[165] MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2010).

[166] DiBianca, *supra* note 118.

to delete evidence online, it may constitute spoliation of evidence, which could result in an adverse inference instruction to a jury or sanctions.[167]

8. Impact on an Ongoing Trial

A prosecutor may also be subject to repercussions for impermissibly contacting judges, jurors, opposing counsel, parties, or witnesses via social media.[168] According to Model Rule of Professional Conduct 3.5, which governs impartiality and decorum of the tribunal, a prosecutor must maintain proper deference and respect in the courtroom and must not engage in ex parte communications.[169] Furthermore, Model Rule 8.4 prohibits a lawyer from engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation.[170] Thus, attorneys must be careful to abide by the Rules of Professional Conduct, even outside of the courtroom, because those actions can have a detrimental effect on an ongoing trial.

There are several recent examples of social media use that interfered with legal proceedings. In North Carolina, a judge was reprimanded for "friending" a defense lawyer in an ongoing child support and custody case, for posting and reading messages discussing the trial, and accessing information about the opposing party.[171] Even while the case was still proceeding, the judge and defendant's attorney posted messages regarding the case on their individual Facebook pages; and since they had become "friends," each could view the content on the other's page.[172] For instance,

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[167] *Id.*

[168] Note, too, that judges may be subject to rules regarding online conduct as well. *See infra* notes 171-86 and accompanying text.

[169] MODEL RULES OF PROF'L CONDUCT R. 3.5 (2010) ("A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official . . . (b) communicate ex parte with such a person . . . unless authorized to so by law or court order; (c) communicate with a juror or perspective juror after discharge of the jury . . . or (d) engage in conduct intended to disrupt a tribunal.").

[170] *Id.* R. 8.4.

[171] Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer and Googling Litigant*, A.B.A.J.COM (June 1, 2009, 6:20 AM), www.abajournal.com/news/judge_reprimanded_for_friending_lawyer_and_googling_litigant; *see also In re* Terry, No. 08-234, N.C. Jud. Standards Comm'n (Apr. 1, 2009), *available at* http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

[172] *Terry*, No. 08-234, N.C. Jud. Standards Comm'n, at 1.

the defense attorney's post asked, "How do I prove a negative?" in reference to the issue of whether his client had engaged in an extramarital affair.[173] The judge later posted that he had "two good parents to choose from" and felt "that he will be back in court," leaving the impression that the case was not settled.[174] Soon after, the defense attorney posted, "I have a wise judge."[175] The Judicial Standards Commission found these actions to be in violation of ethical rules prohibiting impartiality and decorum of the tribunal, because they could be considered conduct prejudicial to the administration of justice.[176] Additionally, the attorney involved in the social media relationship could face ethics charges under Model Rule of Professional Conduct 8.4(f), which forbids a lawyer from knowingly assisting a judge in behavior that violates the rules of judicial conduct.[177]

In addition to prosecutors and other attorneys, judges must also use caution online, because their social media habits could also have an effect on a trial. For example, Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit was investigated for off-color humor that, although not intended to be public, was accessible on his family's web server.[178] Although he was officially cleared of wrongdoing, a three-judge panel admonished him for not safeguarding the website, which they found "judicially imprudent."[179]

Additionally, ethics opinions disagree on whether a judge can "friend" or "follow" an attorney on a social media account if the attorney might appear before the particular judge in court.[180] The Florida Supreme Court's Judicial Ethics Advisory Committee issued an opinion holding that it is judicial misconduct for a judge to add lawyers who may appear before that judge as "friends" on

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[173] *Id.* at 2.

[174] *Id.*

[175] *Id.*; *see also* Seidenberg, *supra* note 111.

[176] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.5 (2010); N.C. CODE OF JUDICIAL CONDUCT CANON 2A (2006) (governing failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

[177] Seidenberg, *supra* note 111; *see also* MODEL RULES OF PROF'L CONDUCT R. 8.4(f) (2010).

[178] Schwartz, *supra* note 107, at A1.

[179] *Id.*

[180] Seidenberg, *supra* note 111.

Facebook or other online social networks.[181] The committee commented that listing lawyers who might appear before the judge as "friends" on a judge's social networking site would reasonably convey to others the impression that these lawyer "friends" are in a special position to influence the judge.[182]

On the other hand, bar associations from Kentucky, New York, and South Carolina take a different approach. Judicial ethics authorities in those states have opined that "friending" or "following" someone on online social networks does not necessarily imply a special connection to those Internet friends.[183] The Ethics Committee of the Kentucky Judiciary explained:

> [T]he committee's view is that the designation of a 'friend' on a social networking site does not, in and of itself, indicate the degree or intensity of a judge's relationship with the person who is the "friend." The committee conceives such terms as "friend," "fan" and "follower" to be terms of art used by the site, not the ordinary sense of those words.[184]

The state bar associations did offer one caveat and warned that a judge must carefully consider whether, in any particular case, the judge's social media connections with an attorney—whether alone or in combination with other facts—rise to the level of a "close social relationship."[185] Because if such a relationship exists, the judge must disclose it to opposing counsel or recuse himself from the case or both.[186]

B. Prosecutorial Immunity

Prosecutors may face consequences for actions related to their social networking including sanctions, public reprimands,

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[181] Fla. S. Ct. Jud. Ethics Advisory Comm., Op. 2009-20 (2009).

[182] *Id.*; *see also* VA. CODE OF JUD. CONDUCT, Canon 2B (1999). According to the Florida opinion, the online communication would violate Canon 2B of the state's Code of Judicial Conduct, which is similar to Rule 2.4(c) of the ABA Model Code of Judicial Conduct. Moreover, such an online friendship would violate state judicial Canon 5A—akin to ABA Model Code Rule 3.1(c)—by casting "reasonable doubt on the judge's capacity to act impartially." Seidenberg, *supra* note 111.

[183] Seidenberg, *supra* note 111.

[184] Ethics Comm. of Ky. Judiciary, Formal Jud. Ethics Op., JE-119 (2010).

[185] Seidenberg, *supra* note 111.

[186] *Id.*

overturned convictions, potential disbarment, or even civil suits. Because of these potential repercussions, a prosecutor may try to claim immunity to deflect the possibility of lawsuits. Generally speaking, a prosecutor is entitled to absolute immunity if his or her actions fall within the prosecutorial function; if those actions occur outside of the prosecutorial function, however, a prosecutor may only have qualified immunity.[187] Several cases help to explain this distinction.

In *Imbler v. Pachtman*, the Supreme Court concluded that a prosecutor enjoys absolute immunity in actions which involve initiating and presenting a prosecution.[188] Thus, the prosecutor has absolute immunity against section 1983 actions arising out of his or her actions as a prosecutor.[189] Accordingly, if a prosecutor makes statements on his or her social networking page related to the *initiation* or *presentation* of the case, just as if he or she made the statements from the courthouse steps, then they would be shielded from suits under absolute immunity.[190] The *Imbler* Court's policy explanation of protecting prosecutors from constant threats of litigation also applies to a modern prosecutor's use of social media in relation to their professional duties.[191] Additionally, if the prosecutor were subject to liability constantly, he or she would be deprived of the benefits social media offers to

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[187] *See infra* notes 188-206 and accompanying text.

[188] 424 U.S. 409 (1976).

[189] *Id.* Frequently, prosecutors may be subjected to 42 U.S.C. § 1983 suits claiming a violation of the right to a fair trial. According to *Imbler*, however, as long as the prosecutor remains within the function of the prosecutor's duties, he or she will be immune. *Id.* at 427.

[190] *Id.* at 430-31.

[191] *Id.* at 424-26.

> If a prosecutor has only a qualified immunity, the threat of section 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. . . . The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, . . . [Further, the prosecutor's] energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Id. at 424-25.

both the prosecutor individually and the community he or she serves.[192]

The Supreme Court addressed the question of absolute prosecutorial immunity fifteen years later in *Burns v. Reed*.[193] In determining that the prosecutor cannot be absolutely immune when performing *all* functions of the office, the Court did not define the line between the protected adversarial functions and the semi-protected investigatory or administrative functions.[194] As such, prosecutors looking to *Burns* may have difficulty understanding the immunity standards and the dividing line of what is considered protected when using it for press relations or when mining social media for evidence.

In *Buckley v. Fitzsimmons*, the Supreme Court reaffirmed the distinction between the advocacy function and investigatory function of the prosecutor and determined that because the prosecutors' actions were investigatory in nature, they were not entitled to absolute immunity.[195] The *Buckley* Court concluded, "When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same."[196] Because of this reasoning, prosecutors may claim that they should be entitled to the same protection as police departments when it comes to social networking; and therefore, should be able to post the same or similar information without opening themselves up to liability.

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[192] *See supra* notes 12-24 and accompanying text. The *Imbler* decision did not determine that the prosecutor was absolutely immune for all activities, noting that prosecutors can have investigative duties similar to those of police and other law enforcement, which would fall under a qualified immunity standard. *Id.* at 430. This notion was discussed later in *Burns v. Reed*, 500 U.S. 478, 495 (1991).

[193] 500 U.S. 478 (1991). The Court considered whether the prosecutor was immune when giving legal advice to police regarding the legality of their investigation and whether the prosecutor had immunity when participating in the probable cause hearing. *Id.* at 495.

[194] *Id.* at 491-92, 494-95.

[195] 509 U.S. 259, 272 (1993). *Buckley* illustrated the two primary functions of the prosecutor. *Id.* First, there is an investigatory function, in which the prosecutor works with local police to evaluate the case to determine whether to charge someone with a crime. *Id.* Second, after making the decision to prosecute, a prosecutor functions as an advocate. *Id.* Because of the conflicting duties, a prosecutor is not entitled to absolute immunity until there is probable cause. *Id.* Accordingly, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274.

[196] *Id.* at 276.

The *Buckley* Court also evaluated immunity of prosecutors in making statements to the media.[197] The Court determined that because "[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions," prosecutor's statements to the press were not entitled to absolute immunity.[198] As such, modern prosecutors may face challenges under the *Buckley* reasoning, in determining whether statements made on social media would be considered statements to the press and whether they would be protected.[199] Until courts evaluate this conflict to fully determine whether social networking can be considered another form of communication a prosecutor may use within the prosecution function, prosecutors must proceed with caution.

There are many other cases involving media statements by prosecutors. For instance, in *Martin v. Merola*, six plaintiffs brought action under section 1983 alleging that their right to a fair trial had been infringed by the district attorney, when the prosecutor announced the arrest of the plaintiffs to the press with the assertion that they were linked directly to mafia crime families.[200] The Second Circuit determined that while the statements to the press may have breached professional responsibility rules, they did not amount to a deprivation of rights under the Constitution.[201] In *Marrero v. City of Hialeah*, the Fifth Circuit held that making statements outside of the courtroom was beyond the protection of absolute immunity.[202] In elaborating, the Court noted:

> [W]hen a prosecutor steps outside the confines of the judicial setting, the checks and safeguards inherent in the judicial

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[197] *Id.*

[198] *Id.* at 278.

[199] As opposed to the *Imbler* line of thought. *See supra* note 190 and accompanying text.

[200] 532 F.2d 191, 193-94 (2d Cir. 1976). In his concurring opinion, Judge Lumbard further stated that prosecutorial immunity would not "protect the prosecutor against responsibility for his acts when they are clearly beyond the proper exercise of his authority and exceed any possible construction of the power granted to his office . . . ." *Id.* at 195 (Lumbard, J., concurring).

[201] *Id.*

[202] 625 F.2d 499, 509 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

> process do not accompany him, and thus there is greater need for private actions to curb prosecutorial abuse . . . . No surveillance comparable to that of a judge serves to check a prosecutor's zeal when he makes statements about individuals outside the courtroom or when he engages in investigative activities . . . in obtaining evidence.[203]

Based on this line of cases, if a prosecutor can be found to have "shopped" for evidence on social networking websites, he or she may not be entitled to absolute immunity.[204] The prosecutor may be subject to civil suits for invading constitutional rights of individuals,[205] and complaints for violating professional rules of conduct.[206] Furthermore, the prosecutor must be careful in making statements using social media, as serious immunity concerns may arise involving whether the posting was made inside or outside of the courtroom.

These decisions reiterate the importance of discretion in prosecutorial postings. Because statements made on social media may not be entitled to absolute immunity, prosecutors must strive to be professional in all aspects of their lives, including their virtual ones.

C. Juror Misconduct

Technology is obviously changing the courtroom experience. Along with judges and lawyers, jurors have been known to undermine cases in using social media and other internet sites to conduct research and communicate outside of the courtroom.[207] As modern jurors engage in such internet-related misconduct, courts nationwide are forced to declare mistrials, wasting both time and

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[203] *Id.* at 509.

[204] *See, e.g.*, Kalina v. Fletcher, 522 U.S. 118, 118-19 (1997) (evaluating whether a prosecutor may be held liable for conduct in obtaining an arrest warrant and determining that a prosecutor is not protected by absolute immunity when acting as a complaining witness).

[205] For example, with certain privacy settings, prosecutors may be accused of violating privacy rights. *See supra* notes 48-57 and accompanying text.

[206] *See supra* notes 108-67 and accompanying text.

[207] *See* Vesna Jaksic, *A New Headache for Courts: Blogging Jurors*, 29 NAT'L L.J. 2007, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1174035813248.

taxpayer money.[208] Prosecutors must take additional efforts to educate jurors about the dangerous impact social media can have on an ongoing trial.

Because jurors have been known to seek suggestions from social networking sites on how to vote, tweet about the perceived guilt or innocence of the accused, and even investigate crime scenes using Google Earth; many courts have had to address the issue of whether juror access to extraneous information on the Internet supports a motion for a new trial.[209]

In *Wilgus v. F/V Sirius*, *Inc.*, a juror in Maine contacted the plaintiff's attorney after trial, inquiring whether he knew his client advocated binge drinking and drug use, based on information he learned from Facebook.[210] Although the court questioned both the juror and the jury foreperson, the motion for a new trial based on juror misconduct was denied because the juror was adamant that he conducted the research after the trial; and the jury foreperson stated there was no mention of the Facebook page during deliberations.[211]

A Michigan court fined a juror $250 for posting on her social networking site, during the middle of the trial, that she thought the defendant in the case was guilty.[212] In addition, the judge ordered the juror to write an essay on the right to a fair trial.[213]

On the other hand, in a Florida federal drug case, federal prosecutors spent two years developing their arguments against doctors, pharmacists, and businessmen who were operating an illegal internet pharmacy network.[214] After seven weeks of trial, a juror admitted to the judge that he had been conducting research

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[208] McGee, *supra* note 34, at 302.

[209] Jonathan Berr, *Why Facebook, Twitter and Jurors Don't Mix*, DAILYFINANCE (Sept. 12, 2010), http:www.dailyfinance.com/2010/09/12/why-facebook-twitter-and-jurors-don't-mix/.

[210] 665 F. Supp. 2d 23, 24 (D. Me. 2009).

[211] *Id.* at 27-28.

[212] Berr, *supra* note 209.

[213] *Id.*

[214] Deirdra Funcheon, *Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies*, BROWARD-PALM BEACH NEW TIMES (Apr. 23, 2009), http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies (discussing United States v. Hernandez, No. 07-60027-CR, 2007 WL 2915856 (S.D. Fla. Oct. 4, 2007)).

about the case online.[215] After the judge questioned the remaining jurors, and discovered eight other jurors had been engaging in similar conduct, the judge was forced to declare a mistrial.[216]

Similarly, the attorney for the Mayor of Baltimore, Maryland sought a mistrial in the mayor's conviction for embezzlement.[217] In that case, five of the jurors became "Facebook friends" and chatted on the social networking site, while the trial was ongoing, despite orders not to communicate with each other outside of the jury room.[218] There, the mayor's attorney asserted that the "Facebook friends" became a clique that altered jury dynamics.[219]

During a civil trial in Arkansas involving a building products company, one juror used his personal Twitter account to send related updates and messages during the trial.[220] The juror's messages included, "oh and nobody buy [that company's products]. It's bad mojo and they'll probably cease to exist, now that their wallet is 12m lighter and so . . . , what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money."[221] Although the juror maintained that he had not posted any messages relating to the substance of the case, counsel for the building products company asked the court to overturn the multi-million dollar judgment, which the court later denied.[222]

All of these scenarios show the importance of judges and attorneys, specifically prosecutors, taking the time to discuss with jurors the magnitude of refraining from posting anything outside

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[215] *Id.*

[216] John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1. The other jurors had been conducting Google searches on the lawyers and the defendant, looking up news articles about the case, checking definitions on Wikipedia and searching for evidence that had been specifically excluded by the judge. *Id.*

[217] *See* Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace*, BALTIMORE SUN (Dec. 13, 2009), http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13_1_deliberations-period-florida-drug-case-jurors; *see also* Weiss, *supra* note 171.

[218] Siegel, *supra* note 217.

[219] *Id.* Ultimately, the mayor's conviction was upheld. *Id.*

[220] Schwartz, *supra* note 216.

[221] McGee, *supra* note 34, at 308-09 (internal quotation marks omitted); *see also* Christopher Danzig, *Mobile Misdeeds: Jurors with Handheld Web Access Cause Trials to Unravel*, INSIDE COUNSEL, June 1, 2009, at 38.

[222] McGee, *supra* note 34, at 308-09.

of the courtroom in order to ensure a fair trial and to avoid mistrials. Based on the statistics of people using social media, it is vital for judges and prosecutors to set clear standards for jurors, because the chances of having a jury consist of people without having access to social media are slim.[223] Moreover, jurors must understand the gravity of their actions, as they can be subject to contempt charges.[224] Courts are now facing "Blackberry-addicted jurors who [feel that] a simple trip to the grocery store can compel an Internet update."[225] These examples also illustrate the serious delay that can be caused in the judicial system by juror misconduct, preventing efficiency and justice.

Clear guidelines and rules must be established in order to preserve the court system in today's society. The Judicial Conference recently released guidelines for federal judges in issuing new jury instructions to spell out clearly at the onset of trials that jurors must not communicate "through email, Blackberry, iPhone, text messages, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube."[226] Likewise, prosecutors must understand the importance of explaining the critical role of the jury before a trial begins.[227] Part of the prosecutor's role as an elected official is to ensure efficiency in the cases tried. As an administrator in the justice system, prosecutors have both an individual interest and an official obligation to the legal profession to help develop the necessary guidelines for social media use in the courtroom. As prominent members of the legal profession, prosecutors must be willing to take the lead to ensure that each person involved in a trial is aware of the possible consequences of his or her online actions. By establishing clear guidelines and

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[223] *See supra* notes 1-10 and accompanying text.

[224] McGee, *supra* note 34, at 319.

[225] McGee, *supra* note 34, at 309-10; *see, e.g.*, Ahnalese Rushmann, *Courtroom Coverage in 140 Characters*, 33 NEWS MEDIA & L. 28 (2009).

[226] Denise Zamore, *Can Social Media Be Banned from Playing a Role in Our Judiciary?* A.B.A. LITIGATION NEWS, http://apps.americanbar.org/litigation/litigationnews/practice_areas/minority-jury-social-media.html (last visited Jan., 22, 2012).

[227] Shane Read, *A Prosecutor's Role*, AMERICA.GOV (July 1, 2009), http://www.america.gov/st/usg-english/2009/July/20090706174555ebyessedo0.8992731.html.

developing a better standard for social media use, prosecutors can take the reasonable steps necessary to not only avoid dismissed cases, mistrials, and wrongful convictions, but also to continue to promote honesty and efficiency in both the prosecutorial profession and the judicial process.

CONCLUSION

Courts across the country may encounter many more technology-based problems in the future, especially as younger generations—more adept at social networking—emerge in a profession governed by centuries of legal tradition. Prosecutors utilizing social media to campaign for office, research potential jurors, or discover incriminating information for evidence must understand the nature and consequences of their actions.

It is essential to educate attorneys about the potential ethical ramifications involved in their use of social media and to establish clear standards and guidelines for the profession to help prevent future ethical violations. Until more bar association ethics committees and courts decide the issue of social media use in the legal profession, however, prosecutors must be aware of the potential ways the professional rules of conduct govern all actions of the profession, specifically the prosecution function, and the consequences they may face as a result of social networking.

Moreover, attorneys, specifically prosecutors, must be aware of the impact their actions will have on others involved in the judicial process. As leaders of the legal profession, prosecutors have an obligation to help develop the standards necessary to avoid dismissals, mistrials, and wrongful convictions, and ultimately, to ensure that justice prevails. Part of this obligation may very well include the duty to develop guidelines for the legal profession regarding courtroom social media.

In establishing clear boundaries for utilizing information that is readily available in modern society, courts will be able to still respect the long-established legal concepts of our nation's history, and embrace the technological advancements of the modern world that can positively impact the legal profession.

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