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### The Blurred Boundaries of Social Networking in the Legal Field: Just 'Face' it

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# The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” it

KATHLEEN ELLIOTT VINSON\*

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*You don't get to 500 million friends without making a few enemies.*<sup>1</sup>

## I. INTRODUCTION

The growing use of social networking is explosive in the legal field.<sup>2</sup> Along with that growth, issues have arisen about the unique risks posed by social networking for those in the legal

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1. Poster for "The Social Network" movie by Columbia Pictures released October 1, 2010, available at <http://www.thesocialnetwork-movie.com>.

2. Wikipedia describes a social network as a service focusing on building online communities of people who share interests and/or activities, or who are interested in exploring the interests and activities of others. See *Social Network Service*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Social\\_network\\_service](http://en.wikipedia.org/wiki/Social_network_service) (last visited Nov. 5, 2010) (defining social networks). Most social network services are web-based and provide a variety of ways for users to interact, such as e-mail and instant messaging services. Social networking has created new ways to communicate and share information. Social networking websites are being used regularly by millions of people, and it now seems that social networking will be an enduring part of everyday life. See Debra Bruce, *Ethically Navigating the Social Media Landscape*, 73 TEX. B.J. 196, 196 (2010) (opining that "[m]ore and more lawyers are . . . embracing social media"). Use of social media has become so pervasive, and its implications on the legal field so far reaching, that a blog developed by a recent law school graduate dedicated to social media and the legal profession has amassed over 6600 readers, 76,000 followers on Twitter, and over 700,000 hits since its inception in 2008. SOC. MEDIA L. STUDENT, <http://socialmedialawstudent.com> (last visited Nov. 5, 2010). Social networking sites include FACEBOOK, <http://www.facebook.com>, MYSPACE, <http://www.myspace.com>, TWITTER, <http://twitter.com>, LINKEDIN, <http://www.linkedin.com>, and GOOGLE BUZZ, <http://www.google.com/buzz>. See *List of Social Networking Websites*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_social\\_networking\\_websites](http://en.wikipedia.org/wiki/List_of_social_networking_websites) (last visited Nov. 5, 2010) (providing current list of social networks). Sixty percent of adult Internet users use social networks. Gena Slaughter & John G. Browning, *Social Networking Dos and Don'ts for Lawyers and Judges*, 73 TEX. B.J. 192, 192 (2010). The use of social networks by adults quadrupled between 2005 and 2008. AMANDA LENHART, PEW RESEARCH CTR., ADULTS AND SOCIAL NETWORK WEBSITES 1, 3 (2009), available at <http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx>. In 2009, eighty-six percent of lawyers 25–35 years old belonged to online social networks. Slaughter & Browning, *supra*.

community.<sup>3</sup> As the relationship between social networking and members of the legal community continues to evolve, the boundaries between personal and professional worlds are often blurred, creating legal and ethical minefields.<sup>4</sup>

Thus, beginning in law school and continuing throughout the legal profession, education, awareness, and guidelines are necessary to illustrate to the legal community the benefits as well as the risks of venturing into or embracing social networking. Such guidance will reduce adverse consequences of engaging in social networking by empowering those in the legal field to make informed choices and appropriately adapt or modify their participation accordingly.<sup>5</sup> As those in the legal field struggle to navigate social networking in the legal landscape, this Article raises awareness of the benefits and pitfalls of this media and how to avoid the blurring of public and private boundaries.

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3. See Scott Duke Harris, *World Wide You Living in a Fishbowl: As Facebook Leads a Privacy Revolution, Users' Posts, Pictures—Lives—Become More Exposed to the World*, SAN JOSE MERCURY NEWS, Jun. 27, 2010, at 1A (likening Facebook to a “fishbowl” and noting that the term “privacy policy” lures users into false sense of security). Use of social networks and their inherent lack of privacy can be analogized to a driver in a car who is oblivious to or ignores her behavior’s exposure to other drivers. The driver may sing, talk to herself, or pick her teeth (or worse) due to her false sense of privacy created by the physical space of the car itself, including the metal shell, the small space in relation to the vast hectic world, and the lack of attention on her. The driver assumes, however, that even if someone was paying attention, it is likely the driver next to her does not know her, and thus she generally may not care about the other driver’s opinion of her behavior.

4. See generally Slaughter & Browning, *supra* note 2, at 192–94 (discussing examples of blurred boundaries). Examples of blurred boundaries include investigating social networking profiles of some bar applicants; jeopardizing job offers; subjecting users to disciplinary action; violating professional rules of conduct; disclosing client confidences; disparaging judges; impeaching defendants or exonerating them; gathering evidence; engaging in *ex parte* communications; and judges “friending” lawyers and jurors “friending” judges. *Id.*

5. Nicolas P. Terry, *Physicians and Patients Who “Friend” Or “Tweet”*: *Constructing A Legal Framework for Social Networking in a Highly Regulated Domain*, 43 IND. L. REV. 285, 295 (2010) (noting 80% reduction in publicly visible accounts of medical students through increased privacy settings). Merely educating students on privacy risks and advocating increased privacy settings prompted a great reduction in publicly available information. *Id.*

This Article will focus on the most used social networking site, Facebook, and will use it as the lens through which social networking issues can be refracted. Part I of the Article provides an overview of social networking by summarizing its history, describing its growth, and reviewing available privacy options. Part II of the Article examines how different members of the legal community use social networks, like Facebook, beginning with law students, faculty, and law schools, as well as bar examiners, lawyers, clients, judges, and jurors. The Article then analyzes the implications of these different uses. The Article summarizes the beneficial implications, including marketing, networking, and exchanging information, and examines negative implications when private and public boundaries are blurred in the legal landscape, ranging from embarrassing privacy scenarios to life-altering consequences. It provides examples of adverse effects in legal education, bar admittance, discipline, employment, the administration of justice, and the practice of law. To satisfy the need to reduce such adverse consequences, Part III recommends how the legal profession can educate, provide awareness, and develop written guidelines specifically and directly addressing the use of social networks and their potential to affect the legal community.

## II. OVERVIEW OF SOCIAL NETWORKING

One of the latest phenomena in technology is social networking. Social networking sites provide online communities via a web-based service that enables users to interact, connect, reconnect, communicate, and collaborate in various ways—such as through audio, words, pictures, or video—with friends, family, acquaintances, professional colleagues, and others.<sup>6</sup> Social net-

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6. Social networking sites are numerous and often have common characteristics, which allow users to expand their social networks, but differ in certain features. See Sajai Singh, *Anti-Social Networking: Learning the Art of Making Enemies in Web 2.0*, J. INTERNET L., Dec. 2008, at 3–4 (2008). “The common thread among most social networking web sites is that they combine email, instant messaging, blogs, personal profiles, and photo galleries into one easily accessible interface.” *Id.* at 4; see also Daniel Findlay, *Recent Development: Tag! Now You’re Really “It” What Photographs on Social Networking Sites Mean for the Fourth Amendment*, 10 N.C. J.L. & TECH. 171, 182–83 (discussing the process of tagging photos and detagging). Two main types of social net-

working includes many web-based sites,<sup>7</sup> like Facebook, MySpace, LinkedIn, and Twitter.<sup>8</sup> Most social networks function similarly; however, this Article will primarily discuss Facebook and use Facebook as the conduit to examine the issues surrounding the blurred boundaries of social networking in the legal field.

Similar to other social networks, Facebook enables users to register with the service and create a profile within a bounded system,<sup>9</sup> identify a list of others with whom they have a connection or

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works are 1) professional or business purposes/networking, like LinkedIn and 2) social connections, like Facebook. *See* Debra Bruce, *Social Media 101 for Lawyers*, 73 TEX. B.J. 186 (2010) (describing different kinds of social networks); Ethan Gilsdorf, *Facebook World*, BOS. GLOBE, July 11, 2010, [http://www.boston.com/ae/books/articles/2010/07/11/facebook\\_world/](http://www.boston.com/ae/books/articles/2010/07/11/facebook_world/) (noting on Facebook “everyone can be an editor, a content creator, a producer, and a distributor” (quoting DAVID KIRKPATRICK, *THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD* (2010))). For a discussion of the various ways that social networking sites provide for online interaction with friends, relatives, colleagues, social acquaintances, and/or general public, see *About Facebook*, FACEBOOK, <http://www.facebook.com/facebook> (last visited Nov. 6, 2010); *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Nov. 6, 2010); *About Us*, LINKEDIN, <http://press.linkedin.com/about> (last visited Nov. 6, 2010); *MySpace Quick Tour*, MYSPACE, <http://www.myspace.com/index.cfm?fuseaction=userTour.home> (last visited Nov. 6, 2010).

7. *See List of Social Networking Websites*, WIKIPEDIA, *supra* note 2.

8. TWITTER, *supra* note 2. Twitter is perhaps the fastest growing social network, where users read or follow information or updates posted by other users. *See* Terry, *supra* note 5, at 288–89 (describing Twitter and noting it shows largest growth over other social network websites); AMANDA LENHART & SUSANNAH FOX, PEW RESEARCH CTR., *TWITTER AND STATUS UPDATING* (2009), available at <http://pewinternet.org/Reports/2009/Twitter-and-status-updating.aspx> (describing use of Twitter). Users of Twitter are limited to 140 characters to “tweet” or broadcast what they are doing or what is happening at a particular time, and other Twitter subscribers “follow” these tweets. “What’s on your mind” on Facebook is similar, but generally on Twitter posters will not (although they could) restrict the viewing of the post to a specified group of contacts, although the users themselves choose whether or not to subscribe to and follow the tweets of another user. *See About Twitter*, TWITTER, *supra* note 6. Twitter users can also link their “tweets” to Facebook. *See Twitter*, FACEBOOK, <http://www.facebook.com/apps/application.php?id=2231777543> (last visited Nov. 6, 2010).

9. *See* FACEBOOK, *supra* note 2. Profiles are individual web pages. Depending on a user’s privacy settings, Facebook profiles may display user-

relationship;<sup>10</sup> view and post content on other users' profiles; send messages, establish and join networks and groups; invite members

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created content, such as personal information, like the following: a user's address, relationship status, picture, education, e-mail, birthday, gender, hometown, religion, political affiliation, interests, favorite music, links, videos, activities, groups they belong to, applications they use, etc. Some information, such as a user's name and profile picture, gender, and networks, is visible to everyone because Facebook thinks it is necessary to help people find and connect with users and thus privacy settings are not available for this content. *See Controlling How You Share*, FACEBOOK, <http://www.facebook.com/privacy/explanation.php/policy.php> (last visited Nov. 6, 2010). Other information, like hometown and interests, is visible to everyone under the default settings. *Id.* Profile creation is the easiest way to develop a presence on Facebook and is free. Account options include personal profiles, groups, fan pages, and applications.

10. To identify those with whom users have a relationship, users can search for others on Facebook or request, via e-mail, that someone join Facebook. A social networking service may provide a search engine or one that is keyed to an e-mail address that will identify existing users of the social network that the user has a connection with offline. *See Privacy Policy*, GOOGLE BUZZ, <http://www.google.com/buzz/help/privacy.html> (last updated Oct. 15, 2010) (suggesting users from frequent contacts in Google accounts). Google Buzz's privacy policy notes that it may automatically suggest users to "follow" based on a new user's most frequent contacts, and may suggest that other users follow the new user once that user is established on the site. Users can then block other users from following them. *See id.* On Facebook, once a user finds another user they want to connect with online they send a "friend" request. *See* FACEBOOK, *supra* note 2. Facebook turned the noun "friend" into a verb when it is used in the context of Facebook. *See* Gilsdorf, *supra* note 6. It also coined the word "unfriend." *See id.* (describing Facebook's coinage of term "unfriend" and its redefinition of friendship). Although the term "friend" is used in a social networking context, it merely means a person is a contact, not necessarily someone you would let crash on your couch overnight or a friend in the traditional pre-Internet sense. *See id.* (suggesting that of 756 Facebook "friends" perhaps not many could be counted on in crisis). On Facebook, once a registered user has accepted another user's "friend" request, the social network loop is established—the two users' personal profiles plus their social networks are revealed to each other—thus expanding each user's network. *See* Johnny Diaz, *Facebook's Squirmy Chapter*, BOS. GLOBE, Apr. 16, 2008, [http://www.boston.com/jobs/news/articles/2008/04/16/facebooks\\_squirmy\\_chapter](http://www.boston.com/jobs/news/articles/2008/04/16/facebooks_squirmy_chapter) (describing consequences of accepting "friend" requests and resulting network sharing). Users can send friends messages and leave postings on friends' profile pages through comments and wall posts. Depending on privacy settings, a user's profile, updates, and photos are sometimes available to the public or to any member who is a friend. Some users have profile pages available to every-

to events; and search for other members.<sup>11</sup> Facebook launched in 2004 and was initially geared towards college students and available to those with a valid university-issued e-mail address.<sup>12</sup> In 2005, Facebook opened its membership to high-school students.<sup>13</sup> Since 2006, anyone over thirteen years of age with a valid e-mail address could sign up for a Facebook account. Today, its use is pervasive, with an estimated 500 million active users.<sup>14</sup> Over the

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one, including nonmembers of Facebook, which are accessible through search engines. Others limit access to their profile page to friends only, friends of friends, or a select few by customizing their privacy settings. *See Controlling How You Share*, FACEBOOK, *supra* note 9; *see also Facebook's Privacy Policy*, FACEBOOK, <http://www.facebook.com/policy.php> (last updated Oct. 5, 2010). Facebook offers "recommended" or preset privacy settings, or a user can customize her settings. If a user does not change any of the privacy settings, the "recommended" group of privacy settings will apply by default. Sharing on Facebook involves a user deciding who can see the content the user posts (i.e. status updates, photos, etc.), information about the user (birthday, contact information, etc.) and content others share about the user (comments on the user's posts and photos the user has been tagged in). *See Controlling How You Share*, FACEBOOK, *supra* note 9.

11. Facebook has recently changed its privacy settings as a result of complaints regarding privacy concerns. *See Hiawatha Bray, Blanket of Privacy for Facebook*, BOS. GLOBE, June 3, 2010, at B5, available at [http://www.boston.com/business/technology/articles/2010/06/03/blanket\\_of\\_privacy\\_for\\_facebook](http://www.boston.com/business/technology/articles/2010/06/03/blanket_of_privacy_for_facebook). Facebook offers a private system, which allows users to communicate privately with each other, and a public system, "The Wall," where "friends" post comments to a user's profile that may be viewed by other users. *See Facebook's Privacy Policy*, FACEBOOK, *supra* note 10. *See generally* CHRIS TREADAWAY & MARI SMITH, FACEBOOK MARKETING: AN HOUR A DAY (2010) (describing basics of setting up profiles and communication via Facebook tools).

12. Mark Zuckerberg, CEO of Facebook, helped launch the site from a dorm room with Eduardo Saverin, Dustin Moskovitz, and Chris Hughes, while he was an undergraduate at Harvard. *See Mark Zuckerberg*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Mark\\_Zuckerberg](http://en.wikipedia.org/wiki/Mark_Zuckerberg) (last visited Nov. 6, 2010); *see also* Dan Fletcher, *Friends Without Borders*, TIME, May 31, 2010, at 32, available at <http://www.time.com/time/business/article/0,8599,1990582,00.html> (describing Facebook's evolution from college network to Internet "superpower"); Gilsdorf, *supra* note 6 (explaining transformation of two earlier projects—Facemash and Course Match—into today's Facebook). *See generally* DAVID KIRKPATRICK, THE FACEBOOK EFFECT (2010) (discussing how Facebook is connecting the world).

13. *See* Gilsdorf, *supra* note 6.

14. *See* Terry, *supra* note 5, at 288 n.17 (citing Owen Thomas, *Facebook at 5: What the Future Holds*, GAWKER (Feb. 4, 2009), <http://valley>

past six years, Facebook has made some changes and has expanded features offered; yet the basic idea is the same—finding and maintaining relationships and connections and sharing information with others.

Facebook's mission is "to share and make the world more open and connected."<sup>15</sup> Critical to the success of Facebook is users' willingness to share their information.<sup>16</sup> Facebook seems to

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wag.gawker.com/5145975/facebook-at-5-what-the-future-holds); *Facebook 101: What is Facebook? Introduction*, GCF LEARNFREE, <http://www.gcflearnfree.org/facebook101/1.1> (noting number of users over 500 million, seventy percent residing outside of North America) (last visited Oct. 25, 2010); see also Fletcher, *supra* note 12, at 32 (noting number of active Facebook users is two-thirds bigger than U.S. population and would be world's third largest country). Social networking has been reported to be the fourth most popular online activity. John G. Browning, *Served Without Ever Leaving the Computer: Service of Process Via Social Media*, 73 TEX. B.J. 180, 180 (2010); see Gilsdorf, *supra* note 6 (describing how Facebook has become home base of social networking). Gilsdorf notes that at last check prior to publication of his article, Facebook was the world's second most visited website and that the average user spends approximately one hour per day on the site. *Id.* Over half a million people join the site every day, with the fastest growing group on Facebook people over thirty. *Facebook 101: What is Facebook? How it Came to be Facebook*, GCF LEARNFREE, <http://www.gcflearnfree.org/facebook101/1.2> (last visited Nov. 6, 2010). Facebook is also the number one photo-sharing site in the world. *Id.*

15. *About-Info*, FACEBOOK, <http://www.facebook.com/facebook?v=info> (last visited Nov. 6, 2010).

16. See Fletcher, *supra* note 12, at 33 (stating "willingness of Facebook's users to share and overshare" is key to success); Gilsdorf, *supra* note 6 (noting Google, Microsoft and Yahoo were salivating at users' willingness to divulge personal information on Facebook). Facebook counts the "Wall"—where postings are added to the profile—as the center where "all the action takes place." *Facebook 101: What is Facebook? What Can You Do on Facebook?*, GCF LEARNFREE, <http://www.gcflearnfree.org/facebook101/1.3> (last visited Nov. 6, 2010). The "Wall" is the main portion of the Facebook profile and is where users share status updates, photos, videos, ideas and "anything else," with friends. *Id.* It is also the place where friends post comments and users can post comments back to walls of friends, which is called "Wall-to-Wall." *Id.* This kind of sharing is central to Facebook and most of what is posted on the "Wall" connects to the News Feed, which displays recent thoughts, status updates, photos and other Facebook activities. *Facebook 101: What is Facebook? Exploring the Facebook Home Page*, GCF LEARNFREE, <http://www.gcflearnfree.org/facebook101/1.4> (last visited Nov. 6, 2010). The extent of this "feed" from the "Wall" depends on the level of privacy settings employed by the user. See *Con-*

count on users lacking limits to what they will share, which greatly benefits the company.<sup>17</sup> Thus, users are encouraged to share openly; however, users may have different expectations of privacy.<sup>18</sup>

Indeed, many users are not aware of or do not understand the privacy options and the default settings, underutilize the privacy control settings or find them difficult to use, or perhaps are among those users who represent a cultural shift toward openly and willingly broadcasting their lives online, resulting in Facebook making money.<sup>19</sup> Even if aware of privacy settings, many users in the legal community do not appreciate the implications of using Facebook and, even when users opt to utilize these privacy settings, social networking appears to remain a good way to discover information that people may not want to expose.<sup>20</sup>

Facebook has a history of making privacy changes, often without much warning, and then quelling outcries of privacy con-

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*trolling How You Share*, FACEBOOK, *supra* note 9 (noting users may not only limit general content on profile, but also control who sees daily postings).

17. See Gilsdorf, *supra* note 6 (describing “incredible value” of users’ willingness to divulge personal information and corporate exploitation thereof); see also *supra* note 16 (discussing centrality of use of profile’s “Wall”).

18. See Bray, *Blanket of Privacy*, *supra* note 11, at B5 (navigating Facebook’s new privacy controls in consideration of differing levels of desired privacy by users); see also Sarah Perez, *The 3 Facebook Settings Every User Should Check Now*, N.Y. TIMES, Jan. 20, 2010, <http://www.nytimes.com/external/readwriteweb/2010/01/20/20readwriteweb-the-3-facebook-settings-every-user-should-c-29287.html?em> (noting that Facebook’s new privacy settings place the company on par with more open social networking sites); Brian Stelter, *Facebook’s Users Ask Who Owns Information*, N.Y. TIMES, Feb. 16, 2009, <http://www.nytimes.com/2009/02/17/technology/internet/17facebook.html> (describing how Facebook responded to the “online swell of suspicion” about the company’s ownership and control over users’ information).

19. See Fletcher, *supra* note 12, at 34 (describing confusion over ever-changing privacy settings and uproar at over-divulgence of personal information); see also Slaughter & Browning, *supra* note 2 (providing guide to limiting exposure on social network sites for legal practitioners); Gilsdorf, *supra* note 6 (noting widespread sharing of private information had investors “falling over [each] other to woo Facebook”).

20. See generally Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, A.B.A. J., July 31, 2009, [http://www.abajournal.com/news/article/facebooking\\_judge\\_catches\\_lawyers\\_in\\_lies\\_crossing\\_ethical\\_lines](http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines) abachicago (describing ethical pitfalls for legal professionals sharing information on social networks).

cerns by readjusting privacy settings only when necessary due to complaints and concerns of users, the Federal Trade Commission,<sup>21</sup> legislators, or state attorney generals.<sup>22</sup> Facebook tended to make the default setting maximum exposure, putting the burden on users to “scramble for cover” and attempt to navigate confusing privacy controls to restrict access to their information.<sup>23</sup> In 2006, Facebook launched News Feed, a streaming collection of user’s friends’ status updates. Everyone on a user’s friend list would get a broadcast of a status update instead of individual users going to a profile page to see an update.<sup>24</sup> Although there was an outcry protesting this feature, Facebook persevered and it was not modified.<sup>25</sup> In 2007, the default setting automatically enrolled users in Facebook Beacon, which sent all of a user’s friends’ updates about purchases a user made on some third-party sites, like eBay.<sup>26</sup> Originally, users could not opt out of the service.<sup>27</sup> An outcry of com-

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21. See Fletcher, *supra* note 12, at 34 (stating FTC complaint seeks to require clarification of Facebook’s privacy policies). The FTC complaint specifically asks that Facebook specify what happens to each piece of information when it is shared. *Id.*

22. See Hiawatha Bray, *Plugging Privacy Leaks*, BOS. GLOBE, July 10, 2010, at B5, available at [http://www.boston.com/business/technology/articles/2010/07/10/plugging\\_privacy\\_leaks](http://www.boston.com/business/technology/articles/2010/07/10/plugging_privacy_leaks) (advocating for law requiring companies like Facebook to pay damages to users whose privacy is violated); Fletcher, *supra* note 12, at 32 (describing FTC complaint). Advocates believe that legal ramifications to online privacy violations would curb “lax attitudes” toward safeguarding user privacy. *Id.*; see also Anne Barnard, *New York Investigating Facebook’s Safety Rules*, N.Y. TIMES, Sept. 25, 2007, <http://www.nytimes.com/2007/09/25/nyregion/25facebook.html> (describing New York Attorney General’s investigation into Facebook’s privacy controls). In 2007, New York Attorney General Andrew Cuomo began an investigation into marketing and privacy practices of Facebook following reports of sexual predators using the network to contact undercover agents posing as young teenagers. Barnard, *supra*. The investigation sought to prompt stronger safety controls and a more diligent response to complaints by users of inappropriate conduct by users on the site. *Id.*

23. Fletcher, *supra* note 12, at 34 (stating users “scrambled” to restrict who could view private information).

24. *Id.* at 38.

25. *Id.*

26. *Id.* at 36.

27. *Id.* (explaining users had to click “No Thanks” with each purchase to opt out of this service).

plaints ensued, resulting in a public apology by CEO Mark Zuckerberg, a change to make Beacon an opt-in system, and then eventually an option allowing users to turn off Beacon completely in December 2007.<sup>28</sup>

In 2008, Facebook launched Facebook Connect, which allows users' profiles to follow them around the web, like a passport, and allows users to register their opinions on other sites without having to register with that site (sites accept Facebook profiles as proxies for signing in).<sup>29</sup> In December 2009, the default settings allowed everyone, even non-Facebook users, to see a great deal of information, including status updates and lists of friends and interests.<sup>30</sup> Facebook changed its privacy controls and made some profile details public, such as a user's name, profile photo, status updates, and college or professional networks.<sup>31</sup> Also, Facebook launched OpenGraph, allowing users to voice their preferences regarding what they like on the Web, and allowing Facebook to show its members' preferences on any website.<sup>32</sup> OpenGraph lets other websites put a Facebook "Like" button next to content so that Facebook users flag content from as many web pages as possible, displaying their profile picture on the website next to the piece of

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28. *Id.* at 34, 38.

29. Dave Morin, *Announcing Facebook Connect*, FACEBOOK DEVELOPER BLOG (May 9, 2008, 2:32 PM), <http://developers.facebook.com/blog/post/108> (describing workings of Facebook Connect).

30. Fletcher, *supra* note 12, at 34.

31. *Id.* at 38 (describing OpenGraph and its settings as of Spring 2010). *But see* Bray, *supra* note 11 (indicating in June 2010 users may restrict publication of favorite web pages through privacy settings). Default settings, which almost never change, push profile information to all of a user's friends, and their photos and videos to the entire world. A user must know where to click in order to restrict access to that information. *See id.*; Randall Stross, *When Everyone's a Friend is Anything Private?*, N.Y. TIMES, Mar. 7, 2009, <http://www.nytimes.com/2009/03/08/business/08digi.html?scp=1&sq=when%20everyone's%20a%20friend%20is%20anything%20private> (noting 80% of users do not change default settings).

32. Fletcher, *supra* note 12, at 36 (describing OpenGraph and its settings as of spring 2010). *But see* Bray, *Blanket of Privacy*, *supra* note 11 (indicating in June 2010 users may restrict publication of favorite web pages through privacy settings).

content.<sup>33</sup> Once a user clicks on the Facebook “Like” button, that piece of content will be automatically filed on the user’s profile.<sup>34</sup>

In April 2010, Facebook started providing third-party applications, such as the MobWars App, more access to users’ data.<sup>35</sup> Applications are the programs users run from inside Facebook, which can collect personal information, such as a user’s birthday, biographical data, and whether the user is logged into Facebook, as well as data on users’ friends.<sup>36</sup> It may be nearly impossible for users to tell how their data is used in Facebook applications, but users can disconnect applications.<sup>37</sup>

Also, in the spring of 2010, Facebook launched Instant Personalization, which automatically enrolled users and allows some websites to piggyback onto Facebook user data to create recommended engines.<sup>38</sup> When users logged into certain websites it would automatically share their Facebook data with the operators of the site.<sup>39</sup> Facebook now offers a way to disable Instant Personalization.<sup>40</sup>

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33. Fletcher, *supra* note 12, at 36. One month after OpenGraph was launched, 100,000 companies integrated the technology to attract millions of Facebook users, following the logic that if a user’s friend “Likes” something, it will encourage other users to “Like” or purchase it as well. *Id.* at 34; see Gilsdorf, *supra* note 6 (describing Google, Yahoo and Microsoft as “drool[ing]” over voluntary mass publication of otherwise private information).

34. Fletcher, *supra* note 12, at 36. Friends of users can be notified that a friend has clicked on a “Like” button by viewing the friend’s profile, getting a status update about the activity, or going to the third-party webpage and seeing their friend’s profile picture displayed next to the “Liked” content. *But see* Bray, *Blanket of Privacy*, *supra* note 11 (noting potential for increased privacy settings regarding “Like” function).

35. Fletcher, *supra* note 12, at 38 (noting Apps like MobWars formerly only were able to keep Facebook user’s data for twenty-four hours, but now can store data forever unless user uninstalls App). MobWars is an application that allows users to engage in online, fictional “mafia warfare.” *See MobWars–Wall*, FACEBOOK, <http://www.facebook.com/apps/application.php?id=8743457343&v=wall> (last visited Nov. 6, 2010).

36. Bray, *Blanket of Privacy*, *supra* note 11.

37. *Id.*

38. *Id.*

39. *Id.* This application allowed other online websites, such as online retailers, to obtain personal information such as a user’s birthday or preferred activities, seemingly to solicit the user’s business based on this information. *Id.*; *see* Fletcher, *supra* note 12, at 33 (noting how Facebook makes money by users

In April 2010, Facebook launched a new feature, Community Pages, which it automatically generates based on what users put in their profiles.<sup>41</sup> The feature connects users based on shared topics or experiences and then creates a page that is owned collectively by those connected to it.<sup>42</sup> Legitimate serious content as well as satirical or unconventional content are mixed together.<sup>43</sup> Users have voiced concern over confusion of who controls or owns the page, as well as the risk of diluting their brand, damaging the image of their business, losing control over their web presence, or seeing it transformed based on what users post on personal pages.<sup>44</sup>

The last week of May 2010, Facebook announced a new privacy policy and tools to make it easier for users to make their personal information private and reduce the amount of information that must be visible to everyone.<sup>45</sup> A user's name, gender, photo,

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sharing information). After the privacy settings changed in May, applications can only see information a user has made visible to everyone and her friend list and have to ask permission to access more. See Fletcher, *supra* note 12, at 33–34. May 31, 2010 was QuitFacebook Day, a protest organized by users of the social network who were upset over its use of their private information. See Bray, *Blanket of Privacy*, *supra* note 11. Despite enduring privacy concerns, only about 35,000 people actually signed the pledge, representing a mere few thousandths of a percent of all Facebook 500 million users. *Id.*

40. Bray, *Blanket of Privacy*, *supra* note 11.

41. Jenna Greene, *Firms No Fan of Facebook Pages*, 32 NAT'L L.J. \*1 no. 38 (2010), available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202458966925&Firms\\_no\\_fan\\_of\\_Facebook\\_pages&hbxlogin=1&loginloop=o](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202458966925&Firms_no_fan_of_Facebook_pages&hbxlogin=1&loginloop=o) (describing community pages).

42. *Id.*

43. *Id.* (describing how pages may mix legitimate professional experiences with random individualized associations with certain positions). For example, because Facebook creates community pages based on user-generated descriptions, if an associate at a law firm puts "slave" as her position at the law firm in her profile, a community page can be created for that position. *Id.* The position "slave" would then be associated with the law firm listed. *Id.*

44. *Id.* (relating concerns of professional companies regarding unauthorized community pages). Companies, especially law firms, are concerned about brand confusion and negative publicity generated from private individual user information. *Id.* Law firm sensitivity regarding brand recognition is especially implicated where there is confusion over who owns the community pages. *Id.*; see Stelter, *supra* note 18 (discussing who owns information on Facebook).

45. See Bray, *Blanket of Privacy*, *supra* note 11 (setting forth Facebook's new privacy policy); *Facebook's Privacy Policy*, FACEBOOK, *supra* note 10

and membership in “networks” (i.e. communities on Facebook) are still public, but users can choose to make other information, like their hometown, residence, favorite pages, and list of friends, private.<sup>46</sup> Facebook provides tools for private communication between two users and allows for instant messages that can only be viewed temporarily.<sup>47</sup> Users can control who can see their posts—by clicking on the “lock” icon and limiting publication of their posts—and who can find them when searching on Facebook or public search engines. Facebook also allows separation of “friends” into different categories that can then have different access or privacy control.<sup>48</sup> Prior to Facebook’s privacy changes it was difficult to choose to make information private.<sup>49</sup>

While the number and the ease of use of security or privacy settings has recently increased, making increased privacy the de-

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(allowing users to limit information displayed in profiles and control who can view their profiles). Facebook’s privacy settings had expanded to six pages and forty different options, so the company planned to simplify them in a single, easy to navigate page. Jenna Wortham, *Facebook to Offer New Features to Allow Users to Control Privacy of Information*, N.Y. TIMES, July 1, 2009, at B7, available at <http://www.nytimes.com/2009/07/02/business/02facebook.html> (reporting that fewer than quarter of users regularly adjusted privacy settings). Facebook focused on three things in rolling out its new privacy settings: 1) a single control for users’ content; 2) more granular controls for users’ basic information; and 3) easy controls to turn off applications. See *Controlling How You Share*, FACEBOOK, *supra* note 9.

46. Bray, *Blanket of Privacy*, *supra* note 11.

47. See *Help Center—Chat: Privacy and Abuse*, FACEBOOK, <http://www.facebook.com/help/?page=1162> (last visited Nov. 6, 2010); *Help Center—Messages and Inbox: Privacy*, FACEBOOK, <http://www.facebook.com/help/?page=940> (last visited Nov. 6, 2010). However, even if a user removes information, copies may remain visible elsewhere if it has been shared with others or distributed, copied, or stored by others. See *Facebook’s Privacy Policy*, FACEBOOK, *supra* note 10.

48. See Alison Driscoll, *Facebook Fail: How to Use Facebook Privacy Settings and Avoid Disaster*, MASHABLE, (Apr. 28, 2009), <http://mashable.com/2009/04/28/facebook-privacy-settings>; *Controlling How You Share*, FACEBOOK, *supra* note 9 (giving users a master switch to control privacy settings with one click). The main privacy setting provides an option to share with friends only, friends of friends, everyone on Facebook, or allows a user to create a customized setting. *Controlling How You Share*, FACEBOOK, *supra* note 9.

49. Bray, *Blanket of Privacy*, *supra* note 11.

fault is still contradictory to the networking sites' business.<sup>50</sup> Thus, even though Facebook has improved its privacy control methods, users should not take privacy for granted. These controls are not automatic and still reveal personal information by default.<sup>51</sup> By default, privacy settings allow everyone to find a user in a search.<sup>52</sup> Further, as the features and applications of Facebook continue to grow, so does the amount of information available about its users.<sup>53</sup>

Users may not be making conscious decisions about their use of social networking technology, like Facebook, or may have a false sense of security about personal information on social networking sites.<sup>54</sup> If users do not change their privacy settings, then the "recommended" group of privacy settings will apply by default. Facebook recommends users share with "everyone" basic information like status updates and posts, share with "friends of friends" content like photos and videos, and share with "friends only" sensitive items like contact information.

Overall, users should be aware of some of the hallmarks of social networking, which result in heightened risks: permanence, searchability, replicability, transformability, and unintended au-

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50. See Bray, *Plugging Privacy Leaks*, *supra* note 22 (commenting on Facebook's lax attitude for privacy); see also Terry, *supra* note 5, at 295–96 (describing ability to privatize information but cautioning against taking protections for granted); Gilsdorf, *supra* note 6 (asking whether Facebook makes it "too easy to play . . . voyeur, exhibitionist, and narcissist").

51. Bray, *Blanket of Privacy*, *supra* note 11.

52. When a user has the default privacy settings, anyone clicking on the user's search listing is able to see the user's name, gender, status, personal photo albums, family and relationships, and biography. Other information is automatically shared with friends of friends, and Facebook keeps contact information and the ability to post on a user's wall limited to friends only under the default setting. See *Choose Your Privacy Settings*, FACEBOOK, <http://www.facebook.com/settings/?tab=privacy> (last visited Nov. 6, 2010).

53. See Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 21 (2009) (noting breadth and depth of personal information available grows along with social networks).

54. Bray, *Blanket of Privacy*, *supra* note 11. Some privacy settings a user may especially wish to review include who can view shared information (status updates, photos, videos), who can view personal information (contact information, workplace, etc.), and what Google may access to allow third parties to search openly for the user on its search engine. See Perez, *supra* note 18.

diences. The status of the content uploaded on social networks is ever changing regarding privacy controls, as well as rights to the content and whether uploaded content continues to exist after the user deletes it.<sup>55</sup> Facebook cannot ensure that information users share on Facebook will not become publicly available and disclaims responsibility if it does. Also, messages cannot be removed. Even for content that can be deleted, a record of it may remain in Facebook's archives after deletion.

Even if users utilize privacy settings, they are still exposed to risks by fellow users who do not privatize information, and nothing prevents one of a user's friends from cutting and pasting something a user posted elsewhere on a network.<sup>56</sup> Further, some users exercise poor judgment in choosing who to "friend," thus exposing themselves to risks, even if using privacy controls.<sup>57</sup> Sometimes it is not poor judgment, but pressure to accept someone as a friend to avoid hurting a person's feelings, or negatively impacting a work relationship or a chance for promotion. Users often do not comprehend or are not aware of the extended network of their friends and thus may not have as much control over who among their friends' extended networks has access to confidential

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55. See Bray, *Blanket of Privacy*, *supra* note 11 (discussing new privacy settings unveiled in Spring 2010); see also Stelter, *supra* note 18 (addressing ownership of information). In February 2009, Facebook changed its terms of use regarding its rights to content and then changed back to its earlier terms of use after a flood of user complaints and threat of legal action. Brad Stone & Brian Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES, Feb. 18, 2009, <http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html> (describing changes to terms regarding data ownership); see *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php> (last visited Nov. 6, 2010). The changes in February 2009 seemed to indicate that Facebook was claiming ownership over all data and content posted by users, which prompted protests by thousands of users. Stone & Stelter, *supra* (describing changes to terms regarding data ownership). Facebook asserted that it was simply a misunderstanding that resulted from a botched attempt to simplify the Facebook "terms of service" and switched back to the prior terms to quell user discontent and avoid a lawsuit. *Id.*

56. Posts using foul language, tirades, or critical comments or content could be interpreted negatively.

57. See *infra* note 92 (discussing the use of Facebook by sexual predators).

information.<sup>58</sup> When a user posts information on another user's profile or comments on another's post, that information is subject to the other user's privacy settings. Content a user shares and actions they take will be visible on the user's friends' home pages and other pages they visit. If a user is tagged in a photo or video, the user can detag herself from the photo or video or limit who can see content in which the user has been tagged; however, the photo or video remains.<sup>59</sup> Also, the owner of the photo or video can still share the photo with others with whom the user is not friends. In addition, even if users do not post negative content, membership in certain groups could be viewed negatively.<sup>60</sup>

Facebook pages are also searchable from any search engine. Users can be "Googled" and are vulnerable to hackers, solicitors, and scammers. Facebook users may be searched by e-mail address, school, and network, so using a fake name or alias will not hide a user's information from potential employers or unintended audiences.<sup>61</sup> Users should also be aware of the possibility of hackers.<sup>62</sup> Even if the account is private, hackers can access a user's Facebook account and begin posting content, so even innocuous communications can lead to problems or embarrassment. Several schemes and scams affect users, such as when a "friend" posts on a user's wall informing her that some of her pictures are posted on a random website.<sup>63</sup> Then, when she clicks on the link to the site,

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58. Eccentric friends in real life spill over to social networks and may be displayed on a user's Facebook page or wall unless a user adjusts privacy settings. See Jessica E. Vascellaro, *OMG, We're Not BFFs Anymore? Getting 'Unfriended' Online Stings*, WALL ST. J., Dec. 24, 2008, <http://online.wsj.com/article/SB123007984542431845.html> (discussing getting "unfriended" if users do not keep in touch or misbehave).

59. Photos often depict users consuming alcohol or drugs.

60. See Eric M. Fink, *Facebook & the Web of Group Affiliation: Socializing, Socialization, and Social Network Site Use Among Law STUDENTS*, 27 J. MARSHALL J. COMPUTER & INFO. L. 325, 347 (2010) (listing groups law students join, such as "I have a drinking habit, it's called Law School").

61. See *Statement of Rights and Responsibilities*, *supra* note 55 (prohibiting use of fake names on Facebook).

62. Kali Geldis, 3 *Facebook "Friends" to Avoid & How to Do It*, MAINSTREET, <http://www.mainstreet.com/print/13590> (last visited Oct. 27, 2010) (cautioning against allowing strangers access to their profile by "friending" anyone and everyone).

63. *Id.*

she gives the hacker access to her account, allowing the hacker to post the same message on the walls of all of her friends.<sup>64</sup> Moreover, virtual crooks can steal a user's identity.<sup>65</sup> Many Facebook applications are vulnerable to hackers and may allow the hacker to view personal information sent to the application.<sup>66</sup>

Users often do not read the terms of use, which gives Facebook a great deal of control over how postings may be used.<sup>67</sup> In

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64. *Id.*

65. See David Connett, *Interpol Chief Has Identity Stolen*, THE INDEP., Sept. 19, 2010, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/interpol-chief-has-identity-stolen-2083305.html> (reporting criminals used Facebook to steal head of Interpol's identity and attempt identity fraud); Tom S. Noda, *Facebook Still a Hotbed of Identity Theft, Study Claims*, PCWORLD (Dec. 12, 2009, 9:15 AM) [http://www.pcworld.com/article/184522/facebook\\_still\\_a\\_hotbed\\_of\\_identity\\_theft\\_study\\_claims.html](http://www.pcworld.com/article/184522/facebook_still_a_hotbed_of_identity_theft_study_claims.html) (citing study conducted to show ease of identity theft by using personal information on Facebook); Fred Mamoun, *Facebook Identity Theft Scam*, NBC NEWS L.A., July 7, 2010, <http://www.nbclosangeles.com/news/local-beat/Facebook-Identity-theft-Scam-97974634.html> (explaining that "social media outlets, such as Facebook, are providing a new way for thieves to hijack identities").

66. Chris Soghoian, *Hackers Target Facebook Apps*, CNET NEWS, Mar. 27, 2008, [http://news.cnet.com/8301-13739\\_3-9904331-46.html](http://news.cnet.com/8301-13739_3-9904331-46.html) (indicating app developers not equipped to handle security concerns that leave app users vulnerable).

67. See Ida Bergstrom, *Facebook Can Ruin Your Life. And So Can MySpace, Bebo...*, THE INDEP., Feb. 10, 2008, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-can-ruin-your-life-and-so-can-myspace-bebo-780521.html> (pointing out "[f]ew people bother to read the fine print of a social network's site agreement"). Facebook's Terms of Use describe its privacy, safety, and security provisions for users, but if users do not read these provisions, they will not be aware of these policies and how best to protect their privacy. See Terry, *supra* note 5, at 295 (indicating social networking "risk management . . . [is] seriously under-utilized" because most keep default privacy and security settings); *Statement of Rights and Responsibilities*, *supra* note 55. Terry cites to an MIT study that found over seventy percent of Facebook profiles are open to the public. See Terry, *supra* note 5, at 295; see also Jordan McCollum, *1 in 4 Users Clueless About Privacy*, MARKETING PILGRIM, (May 6, 2010), <http://www.marketingpilgrim.com/2010/05/1-in-4-facebook-users-clueless-about-privacy.html> (reporting twenty-three percent of Facebook users "didn't know . . . [about] privacy controls or chose not to use them" (quoting *Consumer Reports Survey: Social Network Users Post Risky Information*, CONSUMERREPORTS.ORG (May 4, 2010), <http://blogs.consumerreports.org/electronics/2010/05/social-networks-facebook-risks-privacy-risky-behavior-consumer-reports-survey-findings-online-threats-state-of-the-net-report.html>)).

addition, another company could acquire Facebook and that new company may not share the same intentions regarding privacy and ownership as Mark Zuckerberg.<sup>68</sup> Thus, users should avoid posting content if they are not comfortable permanently forfeiting their ownership rights because the content may belong to Facebook or fall into the hands of an entirely different company.

While the overhaul of Facebook's privacy model has improved how and what users can control regarding privacy settings, Facebook remains about sharing information. Thus, users in the legal field still must be educated and aware of how they participate in social networks and the implications of that participation.

### III. HOW MEMBERS OF THE LEGAL FIELD USE SOCIAL NETWORKING AND ITS IMPLICATIONS

As the use of social networks, like Facebook, becomes ubiquitous in the legal field, legal and ethical issues arise.<sup>69</sup> Indeed, cases and headlines are replete with examples of alleged misconduct, imprudent conduct, and legal issues that arise because of content on Facebook and other social networks. Issues begin in law school, affect bar admission, and transcend all types of practice and areas, as well as all types of people in the legal field, including clients, judges, and jurors. As the legal field grapples with the

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68. Facebook claims that in event of a sale of the company or change of control, they may transfer users' information to the new owner but such information would remain subject to the promises made in any preexisting policy. Facebook's rights and obligations are "freely assignable" in connection with merger or sale. *See Statement of Rights and Responsibilities*, FACEBOOK, *supra* note 55.

69. *See* Terry, *supra* note 5, at 288 n.17 (citing Owen Thomas, *Facebook at 5: What the Future Holds*, GAWKER (Feb. 4, 2009, 7:30 AM), <http://valleywag.gawker.com/5145975/facebook-at-5-what-the-future-holds>); *see also* Fletcher, *supra* note 12, at 32 (noting that the number of active Facebook users is two-thirds bigger than the U.S. population and would be world's third largest country). Social networking has been reported to be fourth most popular online activity. *See* Browning, *Served Without Ever Leaving the Computer*, *supra* note 14, at 180; Gilsdorf, *supra* note 6 (describing how Facebook has become home base of social networking). Gilsdorf notes that at last check prior to publication of his article, Facebook was the world's second most visited website and that the average user spends approximately one hour per day on the site. Gilsdorf, *supra* note 6.

growth and prevalence of social networking, there do not yet seem to be bright lines clarifying the legal issues involved and social networking often outpaces and changes the law itself.<sup>70</sup> Online communication on social network sites, which are open to misperception or manipulation, may have consequences in the real world, leading to civil or criminal liability and moral, ethical, and legal issues.

Facebook can be a treasure trove of information, not only for those with whom users *intend* to share, but also with outside entities, like employers and even legal authorities.<sup>71</sup> After all, if a picture says a thousand words, then profiles, postings, videos, and photos on social networking sites like Facebook not only reveal a snapshot of the user's state of mind at the time they were posted, but also may provide broad insight into the user's relationships.<sup>72</sup>

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70. Social networking has often outpaced discovery rules, ethical guidelines, and amendments to the Federal Rules of Evidence. *See generally* Terry, *supra* note 5 (examining legal framework—or lack thereof—of social networking); *infra* Part II.C (reviewing social networking in context of ethical rules and discovery and evidentiary issues). Social networking has resulted in various First Amendment cases as the courts explore the limits of free speech within social networking. *See infra* note 73 (introducing First Amendment cases). Cases involve discretion granted to the court and sometimes courts do not directly address users' expectations of privacy. *See* Terry, *supra* note 5, at 305–07 (discussing court treatment of privacy expectations in various invasion of privacy cases).

71. *See* Kendall Kelly Hayden, *The Proof is in the Posting: How Social Media is Changing the Law*, 73 TEX. B. J. 188, 189 (2010); *see also* Bass *ex rel.* Bass v. Miss Porter's Sch., No. 3:08cv1807 (JBA), 2009, WL 3724968, at \*1–2 (D. Conn. Oct. 27, 2009) (seeking discovery of over 750 pages of wall postings, photographs and other Facebook content). Users share 25 billion pieces of information each month on Facebook. Fletcher, *supra* note 12, at 33–34. The information on a user's social network, like Facebook, may be a rich site of information or evidence. Areas of the law affected by social networks include, but are not limited to: evidence, discovery, Fourth Amendment privacy issues (reasonable expectation of privacy for information posted and accessible to the public or if privacy settings used), other constitutional issues, criminal and civil issues, family law, copyright, and defamation. *See infra* Part II (covering legal issues arising from social networking); *see also* Terry, *supra* note 5, at 297–318 (discussing social networking and tort liability, ethical issues, privacy concerns and regulatory developments).

72. *See* Bass, 2009 WL 3724968, at \*1–2 (determining Facebook content relevant to plaintiff's damages and liability in case).

Courts generally have not recognized a reasonable expectation of privacy in content voluntarily posted to social networks where users fail to utilize any privacy settings to restrict access to such content.<sup>73</sup> Therefore, it is possible that any postings on social network sites may defeat users' expectations of privacy, regardless of their individual privacy settings. Even if a user utilizes privacy settings, it may not protect her from blurred boundaries that result in subpoenas, discovery, ethical and legal issues, and private postings becoming public. Thus, members of the legal community must understand social networking, assess reasons for using it, be aware of its potential implications, and develop guidelines to navigate social networking in the legal landscape.

#### *A. Legal Education*

Students, faculty, and administrators of law schools are using social networking in numerous ways and for various reasons, such as education, communication, marketing, fundraising, information, and socialization. While law schools may benefit from using social networking, its use also raises concerns about not only student privacy and reputation, but also the potential impact from student, faculty, and staff profiles on the privacy and reputation of the institutions themselves.

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73. For example, the court in *Maldonado v. Municipality of Barceloneta*, No. 07-1992 (JAG)(JA), 2009 WL 636016, at \*2 (D. P.R. Mar. 11, 2009) held that messages sent to a user's Facebook inbox were not "public domain," where First Amendment rights may apply, because they were not publicly viewable. See also *In re K.E.L.*, No. 09-08-00014-CV, 2008 WL 5671873, at \*5 (Tex. App. Feb. 26, 2009) (viewing inappropriate MySpace content as evidence against father in custody case); Hayden, *supra* note 71 (discussing First Amendment implications in use of social networking content at trial). Text messages and tweeting have also been the subject of lawsuits. See, e.g., *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629–30 (2010) (discussing whether police officer had reasonable expectation of privacy when sending out sexual text messages on city phone). In *United States v. Shelmutt*, No. 4:09-CR-14 (CDL), 2009 WL 3681827, at \*1–2 (M.D. Ga. Nov. 2, 2009), the court denied the request of a reporter to Tweet from the courtroom, citing Federal Rule of Criminal Procedure 53, which prohibits broadcasting of judicial proceedings from the courtroom. *Id.* The court reasoned its ruling did not unconstitutionally restrict the freedom of the press pursuant to the First Amendment. *Id.*

## 1. Law Students

The use of social networking sites, like Facebook, is widespread among law students.<sup>74</sup> After all, they are native technology users who grew up with Facebook.<sup>75</sup> They like to be connected and often have a reduced sense of personal privacy, yet they are entering a conservative profession with professional conduct rules.<sup>76</sup> The overall culture of the legal profession, including privacy, confidentiality, and conservatism, conflicts with the disclosure culture of Facebook. Students should not be lulled into an expectation of privacy even though Facebook may offer an illusion of intimacy.<sup>77</sup> Even if something is deleted from Facebook, it still may be accessible to the public.<sup>78</sup> Thus, law students should be cognizant of the benefits and risks of using social networks effectively and professionally and be aware of the implications these

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74. A Suffolk University Law School technology survey to all students showed 84% of the students responding had a Facebook account, 44% had a LinkedIn account, 17% had a Twitter account, and 10% reported not using social networking. Suffolk University Law School, Technology Survey (Oct. 2009) (on file with author). See generally Fink, *supra* note 60 (surveying social networking use of law students). The results showed 81.8% of law students had active Facebook accounts with 4.9% reporting an inactive account and 13.2% reporting never having an account. Fink, *supra* note 60, at 334.

75. John Schwartz, *The Legal Battle: Online Attitude Vs. Rules of the Bar*, N.Y. TIMES, Sept. 12, 2009, <http://www.nytimes.com/2009/09/13/us/13lawyers.html> (describing young lawyers' diminished sense of privacy and comfort with social media).

76. *Id.* See generally George L. Blum, Annotation, *Validity of Adverse Personnel Action or Adverse Action Affecting Student's Academic Standing Based on Internet Posting or Expression, Including Social Networking*, 49 A.L.R. 6th 115 (2009) (exploring instances of online student activity and potential negative impact on academic standing).

77. Videotape: On-line Communities—How to Stay Safe and Maintain Your Privacy (Dylan Steinberg 2006) [hereinafter Videotape: On-line Communities], available at <http://www.combatviolenceagainstwomen.org/video.html> (outlining methods for maintaining privacy online to reduce incidents of violence against women); see also Bray, *Blanket of Privacy*, *supra* note 11 (noting new privacy features of Facebook but cautioning against “taking privacy for granted”).

78. A cache is the temporary storage area where frequently accessed data can be stored for rapid access allowing future use by accessing the cached copy.

networks may have on their legal education or their future legal careers.

The use of social networks by law students may have pedagogical and social benefits. For example, social networking may be a medium for collaborative learning beyond the time and space constraints of the classroom. Social networking may be a way to harness student engagement; because students are already actively engaged in social networks like Facebook, the potential exists to channel that engagement into collaborative learning.<sup>79</sup> Social networking may also provide the benefit of social value—isolated students stay connected with family, friends, and fellow students; they make new connections by finding roommates and by networking with lawyers and alumni; and they expand their networks by connecting to new people with similar interests. Student bar groups, clubs, law reviews, and other organizations may use social networks as well. Thus, social networks could be personally and professionally beneficial to students.

Nevertheless, law students tend to use Facebook for social purposes and less to exchange information about law school activities, events, or studies.<sup>80</sup> Students, therefore, may not be consciously thinking about what they post on Facebook, who can access it, or its implications for their online identity, as well as real world consequences. For example, student users may post photos or comments about their drinking, sex life, drug use, lack of studying, or musings and offensive comments about others. Also, the groups students align with on Facebook, and what they post, may not accurately depict who they are or who they want to be, but ra-

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79. Fink, *supra* note 60, at 327.

80. See generally *id.* Over half of the respondents in the survey reported having one or more faculty or staff as Facebook friends. *Id.* at 338. Sixty percent reported they were members of law student-oriented Facebook groups, i.e., pages dedicated to specific interests or activities where group members can post comments and other content to the group pages and can identify their group membership on their own Facebook home page. *Id.* at 341. The most popular groups are humorous, while groups devoted to practical, academic information, and law school activities and events are less populated. *Id.* at 341–44. Practical groups, such as a book exchange, questions and answers on recent cases covered in class, etc., have grown dormant. *Id.* at 343–44.

ther may be misrepresentations of themselves or attempts to be humorous.<sup>81</sup>

Without the benefit of the context, tone, or circumstances of real world face-to-face communication, communication via social networking may be misinterpreted or be considered oversharing. Students' exhibitionist behavior is probably nothing new, but the new method of communication through social networking poses greater risks with longer term effects that they may not realize can affect their personal and professional lives.<sup>82</sup> Some schools may actively monitor social networking sites, while others may not unless posted content comes to their attention and is illegal or vi-

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81. See Fink, *supra* note 60, at 347 (listing examples of law students' Facebook groups).

82. Users often act in an exhibitionist manner on Facebook, yet would not post a sign in front of a stranger's house or dorm room, showing pictures of them drinking or comments about their sex life, nor would they freely talk to strangers, or hand over the keys to their house. See Fink, *supra* note 60, at 347 (citing various social/humor student-created groups law students join). Groups students "belong to" on Facebook—particularly those that tend to expose personal feelings about law school and could be viewed as inappropriate—include, "Damn you law school, gimme my friends back," "I have a drinking habit, its called Law School," "I've thought about dropping out of law school at least 10 times," "Keep your f\*\*\*ing hand down in lecture and shut up. No one cares," among others. *Id.*; see also Donna Gerson, *Your Internet Image: Employers Investigate Job Candidates Online Now More Than Ever. What Can You Do to Protect Yourself?*, 36 STUDENT LAW., no. 2, Oct. 2007, available at [http://www.donnagerson.com/articles\\_image.html](http://www.donnagerson.com/articles_image.html) (noting student lost a clerkship because MySpace page said she "like[s] to relax with . . . bong hits"); John Hechinger, *College Applicants, Beware: Your Facebook Page Is Showing*, WALL ST. J., Sept. 18, 2008, <http://online.wsj.com/article/SB122170459104151023.html> (indicating warnings against students posting "foul . . . language, nudity, or photos of drinking and drug use"); Greg Lukianoff & William Creely, *Facing Off Over Facebook: Who's Looking at You, Kid?*, BOS. PHX., Mar. 2, 2007, <http://thephoenix.com/tools/print/?id=34242> (reporting racially themed parties at University of Connecticut Law School discovered via Facebook postings). One law student, while working as a summer clerk, sent Facebook "friend" requests to attorneys at her firm. See *We Know What You Did Last Summer*, A.B.A. J., Sept. 2010, at 12, available at [http://www.abajournal.com/magazine/article/we\\_know\\_what\\_you\\_did\\_last\\_summer](http://www.abajournal.com/magazine/article/we_know_what_you_did_last_summer) (sharing stories about summer law clerks and interns). The clerk was not invited back the following summer after the attorneys she "friended" saw explicit photographs of her on her Facebook page. *Id.*

olates a school policy.<sup>83</sup> For example, content on a social networking website could provide evidence once a complaint about a student or her behavior is made.

Students may not understand that what is misconduct in the real world is misconduct online.<sup>84</sup> Improper conduct via Facebook is not protected and it can come back to haunt law students.<sup>85</sup> Thus, students should be mindful of violating the law via social networks.<sup>86</sup> There are plenty of opportunities on social networks to publish false statements that cause harm to the reputation of the target.<sup>87</sup> Posting information on Facebook could expose them to claims of defamation, libel, slander, invasion of privacy, false light, misappropriation of likeness claims, harassment, and copyright.<sup>88</sup> Users of social networks, not the social network provider, may be on the hook and bear the burden of defending a lawsuit.<sup>89</sup>

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83. Pennsylvania State University identified fifty students, who rushed the field after a football game in violation of a school policy, by searching Facebook and found the students on the Facebook group “I rushed the field.” See Laure Batch Ergin, Remarks at the Suffolk University Law School, Advanced Legal Studies Program: Current Issues in Higher Education (Oct. 5, 2007) (on file with author). Syracuse University expelled four freshmen for creating a Facebook group, “Clearly Rachel doesn’t know what she is doing,” and posting sexually explicit and cruel descriptions of why they hated an English Doctoral student named Rachel Collins. *Id.* San Francisco State University tries to use students’ knowledge and use of Facebook in a positive way by allowing incoming freshman, who agreed to participate, to select their roommate using Facebook by filling out a questionnaire and then sending a list of potential roommates that students can research. *See id.*

84. Videotape: On-line Communities, *supra* note 77.

85. *Id.*

86. *Id.*

87. See Communications Decency Act, 47 U.S.C. § 230 (2006) (providing safe harbor from defamation claims for social networking web sites).

88. Videotape: On-line Communities, *supra* note 77.

89. 47 U.S.C. § 230 (outlining liability of service providers). Users may be liable for defamation, but federal law broadly protects websites that merely distribute information created by a third party. See Nelson et al., *supra* note 53, at 24. Also, when users post information on social networks—in the form of text, pictures or videos, etc.—they should keep in mind whether copyright laws apply or they may risk liability. *See id.* at 27–29 (discussing copyright issues involved in social networking). Social networking sites generally are not liable for copyright infringement because of safe harbor provisions of the Digital Millennium Copyright Act (DMCA) if the provider followed “notice and take

In one case, however, a student's rants about a teacher on Facebook resulted in her suspension, but a federal magistrate judge ruled it was protected speech under the First Amendment.<sup>90</sup>

In addition, law school is stressful;<sup>91</sup> therefore, students should think about how social networking could affect their personal well-being.<sup>92</sup> Social networking sites are a fertile ground for

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down" provisions of the statute, but recent changes in the legal landscape of copyright law may prove otherwise. *Id.* at 27 (citing the Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2006)).

90. Hannah Sampson, *Judge: Student's Facebook Rants About Teacher Are Protected Speech*, MIAMI HERALD, Feb. 16, 2010, <http://www.miamiherald.com/2010/02/15/1481980/judge-students-facebook-rants.html>. A Florida high school student was disciplined for cyber bullying a teacher on Facebook, and sued the school principal for violating her free speech rights. See David Kravets, *Student Who Created Facebook Group Critical of Teacher Sues High School Over Suspension*, WIRED (Dec. 9, 2008, 2:59 PM) <http://www.wired.com/threatlevel/2008/12/us-student-inte> (reporting that a student started a Facebook group devoted to her English teacher, "Ms. Sarah Phelps is the worst teacher I've ever met!").

91. Law students are susceptible to higher instances of depression, anxiety, substance abuse and addiction, and other stress-related illnesses. See Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 114 (2002); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 229, 229 (2002); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 271 (2004); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 889 (2007).

92. Sexual predators tap into social networks. See Nelson et al., *supra* note 53, at 23–26 (implicating dangers facing minor users on social networks). Facebook has a minimum age restriction of thirteen years old for users, but in reality many users are younger. *Id.* at 24. Social networks have been immune from liability under the Communications Decency Act of 1996 (CDA) or found by courts not to owe a duty to protect others from criminal or tortious acts by their users. See 47 U.S.C. § 230 (providing statutory immunity); Michael D. Marin & Christopher V. Popov, *Doe v. MySpace, Inc.: Liability for Third Party Content on Social Networking Sites*, 25 COMM. LAW. 3, 3 (2007) (setting forth judicially interpreted immunity of social networks for harmful actions of users). The New York State Attorney General launched an investigation into allegations by parents about inappropriate and sexually explicit material that was not timely

stalking, harassment, and cyber bullies.<sup>93</sup> For example, if a user posts content on her profile or in a posting that a cyber bully does not like, the bully could create an “anti-you” group on the social network site.<sup>94</sup> Also, Facebook can be addictive, causing a distraction from schoolwork and studying, as well as avoidance of en-

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addressed by Facebook, even though Facebook claims it has a safe online environment. See Joseph Spector, *Cuomo Launches Sex Predator Probe of Facebook*, J. NEWS, Sept. 25, 2007, at B1.

93. Bullying via social networking sites like Facebook falls under anti-bullying legislation in Massachusetts. Peter Schworm, *Lawmakers Expected to Pass Antibullying Legislation Today*, BOS. GLOBE, Apr. 29, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/04/29/lawmakers\\_expected\\_to\\_pass\\_antibullying\\_legislation\\_today](http://www.boston.com/news/local/massachusetts/articles/2010/04/29/lawmakers_expected_to_pass_antibullying_legislation_today).

94. Daniel E. Harmon, *Five Months of “Faces”: Notes on Social Networking’s Advantages & Risks*, 26 No. 24 LAW. PC 1 (discussing cyber bullying on social networks). The majority of states have measures to combat bullying in public schools, including cyber bullying. See Peter Schworm, *State Bill Targeting Bullying Approved: Aims at School, Cyber Behavior; One of Toughest Measures in US*, BOS. GLOBE, Apr. 30, 2010, at A1. The national outcry after two suicides in Massachusetts because of cyber bullying spurred the legislature to pass a law, one of the toughest measures in the United States, cracking down on school bullying, including cyber bullying. *Id.* (noting that the law requires all school employees report incidents of suspected bullying and principals investigate each case). Examples of this type of cyber bullying include Facebook pages targeting female students by featuring pictures with sexually explicit and derogatory comments beneath them, accusing these students of promiscuity. James Vaznis & Maria Cramer, *City Targets Web to Dull Bullies’ Barbs: Urgency Rises After Girl’s Recent Suicide*, BOS. GLOBE, Apr. 2, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/04/02/city\\_targets\\_web\\_to\\_dull\\_bullies\\_barbs](http://www.boston.com/news/local/massachusetts/articles/2010/04/02/city_targets_web_to_dull_bullies_barbs). The police had trouble identifying perpetrators because they had been using fake names when they registered with Facebook to create the pages. *Id.* Under the new law in Massachusetts, schools could discipline students for posting obscene or hateful language on Facebook pages. *Id.* A Facebook spokeswoman stated the company was looking into the Boston incidents and encourages those who notice bullying to report it to them. *Id.* A group of high school students in Arkansas formed a Facebook group against another middle school student for his alleged homosexual orientation, including an entry asking a friend to beat up the student. *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 600 F. Supp. 2d 1011, 1017–18 (W.D. Ark. 2009). That afternoon the student was punched and further harassing statements were posted on Facebook. *Id.* The student’s family filed a lawsuit against the school district and principal for defamation, false light claims, and First Amendment retaliation. *Id.* at 1015. The court held enough evidence existed to proceed to trial in part because Facebook was used as a social media tool against the student. *Id.* at 1021.

agement in real world social interactions.<sup>95</sup> Even if the law school does not monitor student use of social networking sites, others could do so, such as future employers, criminals, other students, and judges.<sup>96</sup> Students need to understand that their legal career and their reputations begin in law school, not when they graduate. Thus, even if their participation in social networks did not have any negative implications in law school, they could still be creating negative perceptions from their content on social network sites that can be permanent and searchable by future employ-

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95. See Gilsdorf, *supra* note 6 (noting social network users forgo real life activities for daily time online). In addition to posting information, Facebook has photos, videos, music, games, and applications. *Id.* A user can give virtual gifts. *Id.* Also, when a user is on Facebook she is alerted to which of her friends are simultaneously on Facebook as well. *Id.*

96. Law schools and other universities are increasingly implementing policies and guidelines for student use of social networks, particularly when students access the sites through institutional networks. See Terry, *supra* note 5, at 323 n.302 (citing Adam Lisberg, *Employers May Be Searching Applicants' Facebook Profiles, Experts Warn*, DAILY NEWS (Mar. 10, 2008, 12:19 PM) [http://www.nydailynews.com/money/2008/03/10/2008-03-10\\_employers\\_may\\_be\\_searching\\_applicants\\_fa.html](http://www.nydailynews.com/money/2008/03/10/2008-03-10_employers_may_be_searching_applicants_fa.html)); Heather Havenstein, *One in Five Employers Uses Social Networks in Hiring Process*, COMPUTER WORLD (Sept. 12, 2008, 12:00 PM) [http://www.computerworld.com/s/article/9114560/One\\_in\\_five\\_employers\\_uses\\_social\\_networks\\_in\\_hiring\\_process](http://www.computerworld.com/s/article/9114560/One_in_five_employers_uses_social_networks_in_hiring_process) (surveying employer use of social networking to evaluate clients); Melissa Newton, *Employers Use MySpace, Facebook to Screen Applicants*, NBC DALL.-FORT WORTH, Nov. 19, 2008, <http://www.nbcdfw.com/news/business/Employers-Use-MySpace-Facebook-to-Screen-Applicants.html> (noting screening using social networks common but can be risky for employers); Videotape: On-Line Communities, *supra* note 77; *infra* notes 103–05 and accompanying text (discussing university approaches to social media use by staff and students); see also *infra* notes 111–12 and accompanying text (noting implications on bar admission of social networking use). Applicants for federal or government employment, as well as any position exposed to classified information, undergo rigorous screening and background investigation. See Derrick Dortch, *Getting a Security Clearance*, WASH. POST, Jun. 25, 2004, <http://www.washingtonpost.com/wl/jobs/Content?Content=/communities/industries/govt/clearance.htm> (explaining security clearance for government jobs and private sector jobs involving access to secret information); *Careers*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbijobs.gov/61.asp#3> (last visited Nov. 8, 2010) (noting all applicants must undergo “intensive background investigation” including polygraph and drug tests, credit and record checks, and “extensive interviews” with family, friends, co-workers, neighbors, etc.).

ers. Questionable participation in social networking may also call into question the student's character and fitness for evaluation for bar admission.<sup>97</sup> Law students are adults; they make their own decisions, but with this freedom comes the responsibility to recognize the implications of the use of social networks and to comply with any guidelines regarding its use.<sup>98</sup>

## 2. Faculty

Social networking can blur the boundaries between the private life and professional life of a student and teacher. Professors may never fully separate themselves from their identities as educators, so they still need a modicum of distance and professionalism in both the real and online worlds.<sup>99</sup> Faculty should keep in mind the unequal relationship they have with students in the real world and understand that the potential exists for students to access a professor's private life shared on a social network, such as Facebook. On social networking sites, the faculty member, who may identify where she teaches, not only has the ability to post information about her personal problems, but also may vent about students, engage in inappropriate communication with students, and rant about colleagues and administrators.<sup>100</sup>

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97. Florida Bar News, *On Facebook? FBBE May Be Planning a Visit*, FIN. NEWS & DAILY REC., Aug. 31, 2009, [http://www.jaxdailyrecord.com/showstory.php?Story\\_id=528931](http://www.jaxdailyrecord.com/showstory.php?Story_id=528931); see also *infra* Part II.B and notes 111–12 (discussing how social networks can affect bar admission).

98. Videotape: On-line Communities, *supra* note 77.

99. Some think that professors joining the social network phenomenon is an example of the growing trend that a professor's job is to entertain students and to meet students' demands to be more chummy/friendly. Stephanie Rosenbloom, *The Professor as Open Book*, N.Y. TIMES, Mar. 20, 2008, available at 2008 WLNR 5383395.

100. Some faculty may prefer LinkedIn, which is a social network site used to make professional connections, rather than Facebook, which is a more socially-oriented site. See LINKEDIN, [www.linkedin.com](http://www.linkedin.com) (last visited Oct. 28, 2010). While LinkedIn may be geared toward business networking more than other social media sites, users should carefully format their profiles to fit the professional tone of the site, and be selective in adding other professionals to their networks. See Carolyn Lavin, *Don't Just Get LinkedIn—Stand Out*, MASS. LAWYER'S WEEKLY, Aug. 16, 2010 (explaining benefits of social networking, particularly LinkedIn, but advocating careful use of site). Ms. Lavin reminds users that LinkedIn profiles are a direct reflection of a user and the user's busi-

Faculty using social networks may struggle with numerous issues related to professionalism, impartiality, fairness, and ethics and should consider how their use of social networks may reflect on them as individual professors, their classes, and their law school as an institution. Faculty must consider how to respond to “friend” requests from current students, parents of students, former students, prospective students, alumni, colleagues, administrators, and staff. Some faculty will not friend a student currently enrolled in their classes, while some will never friend a student even after she graduates. Some may accept a “friend” request from a student once grades come out, but may untag photos of themselves so that student-friends may have limited access to personal information.

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ness. *Id.* She recommends that users use professional writing when creating profiles, but more importantly, use professional judgment when selecting their networks because existing contacts can view a user’s new network connections. *Id.*; see also Sydney Lupkin, *Teacher Resigns Over Facebook Posting: Called Cohasset Residents Snobby*, BOS. GLOBE, Aug. 19, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/08/19/teacher\\_resigns\\_over\\_facebook\\_posting/](http://www.boston.com/news/local/massachusetts/articles/2010/08/19/teacher_resigns_over_facebook_posting/) (resigning after caught on Facebook calling residents snobby and her dread at starting another year teaching at the school); Jack Stripling, *Not So Private Professors*, INSIDE HIGHER ED (Mar. 2, 2010), <http://www.insidehighered.com/news/2010/03/02/facebook> (explaining overexposure of professor’s private content to students). An East Stroudsburg University professor, generally careful with her privacy settings, vented on Facebook about her students, thinking only family and friends could see the postings. *Id.* A small change in her profile settings, however, led to the postings being viewed by her students because “friends of friends” could read the updates. *Id.* The professor was put on administrative leave because students reported her musing could be interpreted as threats, such as when she posted “Does anyone know where to find a very discreet hitman? Yes, it’s been that kind of day . . .” and “had a good day today, DIDN’T want to kill even one student . . .” *Id.*; see also *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 312–13 (D. Conn. 2008) (holding school warranted in firing teacher for unprofessional interactions with students on MySpace). In *Hughes*, the teacher challenged the school’s refusal to renew his contract on First Amendment and Due Process grounds, among others. *Id.* at 299. The court granted summary judgment for the school on all claims, and with regard to the First Amendment claim, held that the teacher’s informal interactions with students through his page along with inappropriate sexual material posted on the page could “very well disrupt the learning atmosphere of a school.” *Id.* at 313. The school’s interest in maintaining order and preventing such interactions between students and teachers outweighed the value of the teacher’s speech. *Id.* at 312–13.

Some law professors have a teaching philosophy that includes being friends with students and thus may have been friends with students before social networking. These professors may view their participation in social networking as improving the student-teacher relationship by making faculty seem human, relatable, and accessible to students. While some may argue it lets students see faculty's human side or persona outside of the classroom, self-disclosure may be inappropriate, inadvertent, excessive, and create boundary problems. Research examining faculty-student interaction on social networking sites revealed that female students were twice as likely as men to object to faculty having a presence on Facebook due to concerns about affecting a professor's perception of the student and interacting with faculty in an informal social context.<sup>101</sup> Also, teachers have been fired or disciplined for posts on social networks like Facebook.<sup>102</sup>

Some faculty may use Facebook for pedagogical reasons. For example, some professors will set up a Facebook page designated for their class or for other purposes so that students may become "fans" and obtain class information that way. Group pages

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101. See Fink, *supra* note 60, at 331 n.37 (citing Anne Hewitt & Andrea Forte, Crossing Boundaries: Identity Management and Student/Faculty Relationships on the Facebook (Nov. 4-8, 2006), available at <http://www.andreaforte.net/HewittForteCSCWPoster2006.pdf> (indicating disparity between female and male student attitudes toward faculty on social networks)). Two-thirds of students—one-third female and two-thirds male—were comfortable with faculty on social networking sites, but the survey found no effect on students' actual perception of the professor. *Id.* at 332 nn.30 & 40; see also Geoffrey Rapp, *It Would Be Weird if All Your Professors Had Facebook*, PRAWFSBLAWG (Sept. 10, 2007, 1:55 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2007/09/it-would-be-wei.html>. Some students did not have concerns about their professors interacting with them on Facebook, and some even valued it in anticipation of greater motivation to learn, a more favorable classroom atmosphere, and more favorable perceptions of the faculty member. See Fink, *supra* note 60, at 331–32.

102. See Ann Doss Helms, *Charlotte Teachers Face Action Because of Facebook Postings*, HERALDONLINE (Nov. 12, 2008, 12:52 AM) <http://www.heraldonline.com/2008/11/12/950992/charlotte-teachers-face-action.html> (reporting a teacher's firing after listing "teaching chitlins in the most ghetto school of Charlotte" as an activity and drinking as a hobby). Another teacher posted that she hated her students. *Id.*; see also *supra* note 100 and accompanying text (illustrating instances of teacher postings on Facebook and MySpace resulting in adverse employment action).

that allow faculty to communicate with students on Facebook and to post course materials and relevant links have gotten positive feedback from students.<sup>103</sup> Some faculty may put all students (present and former) who are Facebook friends into a group called “students” and control this group’s access to personal information via privacy settings.<sup>104</sup> This group would have limited access, but a faculty member could still disseminate information to current or former students that way. Once a faculty member creates a Facebook group for the class, students can join the group and get updates and content posted to the page.<sup>105</sup>

Moreover, some faculty utilize the issues relating to the benefits and pitfalls of social networks and social networking’s effect on the legal landscape as teaching opportunities.<sup>106</sup> For example, they use social networks as the subject of research and writing assignments, class hypotheticals, and exam questions. Illustrations of how social networking issues arise in torts, criminal law, evidence, and especially ethics show not only how social networking has affected the law itself, but also serve as a deterrent for students to avoid the potential hazards of social networking.<sup>107</sup>

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103. See Tracy McGaugh, *Sample Facebook Course Page*, MILLENNIAL LAW PROF (June 12, 2008, 7:12 AM), <http://www.themillennials.org/2008/06/sample-facebook-course-page.html>; see also *Tax Law Rocks*, FACEBOOK, [www.facebook.com](http://www.facebook.com) (search “Tax Law Rocks” and select the entry of that title designated as a “Common Interest” group) (last visited Nov. 7, 2010) (displaying group page created by Professor Meredith Conway, Suffolk University Law School, which posts job listings, continuing legal education programs, networking opportunities for current and former students, and provides a place to have fun with tax).

104. Facebook allows a user to see how her page appears to other users by typing in a particular person’s name while in the privacy settings area.

105. See MILLENNIAL LAW PROF, *supra* note 103. The group can be open to the general Facebook public or by invitation only and can be listed as public Facebook group or viewable by invitation only and unlisted.

106. See *Idea Bank*, LEGAL WRITING INSTITUTE, <http://www.lwionline.org/search.html?search=idea+bank> (last visited Oct. 28, 2010) (on file with author).

107. See *Course Materials*, Suffolk University Law School Advanced Legal Studies, Current Issues in Higher Education (Oct. 5, 2007) (on file with author) (explaining Cornell University’s discussion of legal employment implications of Facebook and online student branding); see also Tracy Mitrano, *Thoughts on Facebook*, CORNELL U. (Apr. 2006), <http://www.cit.cornell.edu/policy/memos/facebook.html>. The University of Maryland encourages

### 3. Administrators and Others

Social networks can be a powerful medium for law school administrators to disseminate news and information to faculty, stu-

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student affairs staff to use Facebook to communicate with students. See Kate Wadas, *The Challenges and Advantages of Facebook*, U OF MD., <http://www.nethics.umd.edu/resources/facebook.html> (last visited Nov. 7, 2010). Texas Woman's University encourages students to understand how social networking may take advantage of students. See TWU Counseling Center, *Safety on Communal Websites*, TEX. WOMAN'S U., [http://www.twu.edu/downloads/counseling/A-19\\_Safety\\_on\\_the\\_Internet.pdf](http://www.twu.edu/downloads/counseling/A-19_Safety_on_the_Internet.pdf) (last visited Nov. 7, 2010). DePaul University's Social Media Working Group is currently drafting a policy to guide its students in their use of social media and the University itself—through its many departments—has a major presence on social networking sites Facebook, Twitter, and LinkedIn, as well as on blogs and iTunes. See *Social Media at DePaul*, DEPAUL U., <http://www.depaul.edu/socialMedia/index.asp> [hereinafter DEPAUL, *Social Media*] (last visited Nov. 7, 2010). DePaul's working guidelines encourage students and employees to "share knowledge, express . . . creativity and connect with others," but also seek to provide students and employees with "best practice[s]" for effective use of social networks that allow them to protect their "personal and professional reputation, and follow university policies." See *Brand Resources—Social Media Guidelines*, DEPAUL U., [http://brandresources.depaul.edu/vendor\\_guidelines/g\\_socialmedia.aspx](http://brandresources.depaul.edu/vendor_guidelines/g_socialmedia.aspx) [hereinafter DEPAUL, *Guidelines*] (last visited Nov. 7, 2010). DePaul's guidelines recommend transparency—honesty about identity as a poster, accuracy, respect, informed and thoughtful posting—being mindful of the potential audience, and concern for privacy. *Id.* DePaul cautions that "there's no such thing as a 'private' social media site," and comments and pages can linger in cyberspace for years after publication and can be forwarded or copied. *Id.* The University cautions users to think before they post and not to post when feeling too impassioned about a subject. *Id.* Tufts University provides similar guidelines to its employees and students participating in social media networking, some of which were adapted from DePaul. See *Social Media Best Practices and Guidelines*, TUFTS U., <http://webcomm.tufts.edu/?pid=25&c=38> [hereinafter TUFTS, *Best Practices*] (last visited Nov. 7, 2010). Tufts also provides a "Media Planning Guide" to help potential users predetermine their purpose, objectives, target audience and a plan for maintenance of a social media account in order to make an informed decision about how and why to participate in social media. *Social Media Planning Guide*, TUFTS U., <http://webcomm.tufts.edu/downloads/TuftsUniversitySocialMediaPlanningGuide.pdf> (last visited Nov. 7, 2010). Both DePaul and Tufts are careful to emphasize that users associated with the universities should include disclaimers on their personal social media accounts noting they are not speaking on behalf of the institution and to separate users' personal views from those of the university.

dents, alumni, and staff, as well as to market the law school, because they create brand awareness, increase visibility, make and keep connections, and assist with fundraising.<sup>108</sup> To leverage the technology of social networking, a school must keep its finger on its online reputation. Controlling a law school's online reputation may have become more difficult with Facebook's new Community Pages. Many schools fear the new Facebook Community Pages will undermine their branding efforts because the pages aggregate content about topics, such as a law school, by pulling uncontrolled and individualized information from posts by Facebook users related to these topics.<sup>109</sup>

Administrative offices generally do not use personal profiles on Facebook. Groups are a better fit for these offices, which are like real life organizations or clubs—e.g. Class of 20\*\* Group. Many admonish departments or members thereof not to create groups or personal profiles, opting instead to create business pages where users have the option to become a fan. Fan pages, designed for large organizations to promote their brands and get feedback from users, are the best fit to attract prospective students. Typical content for such pages includes basic information, like office location, hours, contact information, and staff information, as well as

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108. See *Social Media Guidelines*, GEO. U. L. CTR., <http://www.law.georgetown.edu/communications/socialmedia.html> [hereinafter GEO., *Guidelines*] (keeping students, alumni and staff up to date on “happenings” at Georgetown Law through university social media accounts) (last visited Nov. 7, 2010); see also *supra* note 107 (discussing examples of institutional approaches to social media networking). Both DePaul and Tufts maintain official university-based accounts on social media channels, including individual department pages, and encourage students to interact with the university through these channels. See DEPAUL, *Social Media*, *supra* note 107; TUFTS, *Best Practices*, *supra* note 107.

109. Mark Parry, *Colleges 'Freaking Out' Over New Facebook Community Pages*, CHRON. OF HIGHER EDUC., May 12, 2010, <http://chronicle.com/blogPost/Colleges-Freaking-Out-Over/23936/>. DePaul, Tufts, and Georgetown Law all provide guidelines to university departments creating pages on the university's behalf and require approval from appropriate administrative bodies. See DEPAUL, *Guidelines*, *supra* note 107; GEO., *Guidelines*, *supra* note 108; TUFTS, *Best Practices*, *supra* note 107. The guidelines also caution against the use of university logos on personal websites and request disclaimers be used on personal pages of those affiliated with the institutions so that personal views are not attributed to the universities. See DEPAUL, *Guidelines*, *supra* note 107; GEO., *Guidelines*, *supra* note 108; TUFTS, *Best Practices*, *supra* note 107.

answers to frequently asked questions, current events, links, and any appropriate information that would create a buzz about the school.<sup>110</sup> An assigned point person or persons should update the page frequently.

### *B. Bar and Licensing Issues*

Postings on social networking sites, like Facebook, can affect students' prospects for bar admission. For example, the Florida Board of Bar Examiners' Character and Fitness Commission recommended that a question be added to the Florida Bar application to require applicants to list personal web sites and grant access to the board to expand its current review of personal web sites during background investigations.<sup>111</sup> The Board of Bar Examiners decided to adopt a policy that investigates certain applicants' social networking sites on a case-by-case basis.<sup>112</sup> Thus, law students should be aware that depending on where they take the bar exam, they may get a visit from the jurisdiction's committee on character and fitness.

### *C. Practitioners*

#### 1. Overview

Technology has already affected the practice of law through electronic filings, e-mail, and e-discovery, and now social

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110. See, e.g., *Arizona State University*, FACEBOOK, <http://www.facebook.com> (search "Arizona State University," click "See More Results," then select entry of that title designated "Education") (last visited Nov. 7, 2010); *Boston College: Carroll Graduate School of Management*, FACEBOOK, <http://www.facebook.com> (search "Boston College: Carroll Graduate School Of Management") (last visited Oct. 28, 2010); *Suffolk University Law School Career Development Office*, FACEBOOK, <http://www.facebook.com> (search "Suffolk University Law School Career Development Office") (last visited Nov. 7, 2010).

111. See Florida Bar News, *supra* note 97.

112. See *id.* The Florida Board of Bar Examiners' policy grants investigation of social networking sites for the following bar applicants: applicants who are required to establish rehabilitation; applicants with a history of substance abuse; applicants with significant candor concerns; applicants with a history of unlicensed practice of law allegations; applicants who have worked in the legal field; and applicants who have disclosed involvement in an organization advocating the overthrow of the U.S. government. *Id.*

networking.<sup>113</sup> Lawyers are sometimes more reticent than the general public to jump on the technology bandwagon, but even they are increasingly utilizing social networking for marketing purposes.<sup>114</sup> Law firms are joining Facebook by creating “pages.”<sup>115</sup> Benefits from social networking can help level the playing field among solo practitioners, small firms, and large law firms in various ways: free marketing, establishing themselves as experts in certain areas of law, attracting potential clients, attracting media attention, receiving speaking invitations and business opportunities, connecting with colleagues, and gathering information.<sup>116</sup> Firms, however, are increasingly concerned about Facebook’s automatically generated Community Pages and negative content that may be included on them.<sup>117</sup> For example, posts about associates being slaves at their firm or bimbos at the office show up on Facebook’s Community Pages where any posts regarding the firm are aggregated.<sup>118</sup> A number of law firms block access to or put restrictions on popular social networking sites, while others have done nothing with regard to site access.<sup>119</sup>

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113. Tari D. Williams & Abigail Lounsbury Morrow, *Want to Know Your Employees Better? Log On to a Social Network*, 69 ALA. LAW. 131, 131 (2008).

114. As recently as 2004, critics of the pace of legal technology were commenting that there is still a percentage, albeit small, of lawyers refusing to use e-mail. See Sharon D. Nelson & John W. Simek, “*May I Have My Electronic Discovery in Paper Please?*” *Lawyers Inch Their Way Toward a Paperless Practice*, L. PRAC. TODAY (Jan. 2004), <http://www.abanet.org/lpm/lpt/articles/tch01041.html>; cf. Nelson et al., *supra* note 53, at 12–13 (discussing lawyer use of social networking).

115. See Bruce, *supra* note 6, at 186 (describing business use of Facebook, including “pages”); Greene, *supra* note 41; *supra* notes 41–44 (explaining community pages and discussing concerns about their use).

116. See Nelson & Simek, *supra* note 114 (discussing law firm use of social networks).

117. See Greene, *supra* note 41 (illustrating negative implications of community pages).

118. *Id.*

119. See Nelson et al., *supra* note 53, at 33 (reporting forty-five percent of law firms have blocked access to some social network sites); Doug Cornelius, *Online Social Networking: Is it a Productivity Bust or Boon for Law Firms?*, L. PRAC., Mar. 2009, at 28, available at <http://www.abanet.org/lpm/magazine/articles/v35/is2/pg28.shtml>.

In addition to marketing purposes, lawyers are mining social networking sites as treasure-troves of evidence.<sup>120</sup> Seeking and discovering such evidence from social networking sites, however, has numerous legal, evidentiary, and ethical implications.<sup>121</sup> It has become common practice to search social networking sites to find out information about opponents, clients, witnesses, jurors, judges, and others.<sup>122</sup> As future employers of law students, many lawyers search applicants' social networking sites. They may, however, run the risk of defending a discrimination case based on an employer's screening of an applicant or taking adverse employment action based on information from a social networking site (e.g., race, religion, disability, sexual orientation, etc.).<sup>123</sup> Social networking has also affected law enforcement and the collection of evidence of crimes or anticipated crimes.<sup>124</sup> Police and

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120. Nelson et al., *supra* note 53, 12–13.

121. Daniel L. Brown & Aimee R. Kahn, *The Smoking Gun in an Adversary's Network*, N.Y. L.J., Sept. 11, 2009, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202433691927> (discussing use of social networks in litigation); *see also* FED. R. EVID. 401, 403.

122. *See* Brown & Kahn, *supra* note 121.

123. Screening social networks may reveal inappropriate comments, imprudent photos and videos, criticism of prior employers, coworkers or clients, or inappropriate comments by friends and relatives. Seventy percent of employers in the U.S. rejected applicants because of what they found online. Stephanie Goldberg, *Young Job-Seekers Hiding Their Facebook Pages*, CNN, Mar. 29, 2010, <http://www.cnn.com/2010/TECH/03/29/facebook.job-seekers/index.html> (citing Microsoft survey of employers). If a user could see who is looking at her profile, lawyers may need to be aware that their snooping could itself be snooped on.

124. Examples of evidentiary uses of social networking content include police discovering illegal drag races due to an online forum, police identifying people suspected of participation in riots by accessing YouTube, police discovering pictures on Facebook resulting in defendant's DWI conviction, and police using social networking to target underage drinking. *See* Molly McDonough, *First Thing Lawyer Tells New Clients: Shut Down Facebook Account*, A.B.A. J., Feb. 9, 2010, [http://www.abajournal.com/news/article/first\\_thing\\_lawyer\\_tells\\_new\\_clients\\_shut\\_down\\_facebook\\_account](http://www.abajournal.com/news/article/first_thing_lawyer_tells_new_clients_shut_down_facebook_account); Debra Cassens Weiss, *DWI Defendant Goes to Jail After Posting 'Drunk in Florida' Facebook Photo*, A.B.A. J., Jan. 28, 2010, [http://www.abajournal.com/news/article/dwi\\_defendant\\_goes\\_to\\_jail\\_after\\_posting\\_drunk\\_in\\_florida\\_facebook\\_photo](http://www.abajournal.com/news/article/dwi_defendant_goes_to_jail_after_posting_drunk_in_florida_facebook_photo); *see also* Sarah Randag, *Police Use Social Networking to Target Underage Drinkers*, A.B.A. J., Nov. 25, 2009, <http://www.abajournal.com/news/article/>

prosecutors use social network sites for investigation, such as sites of gang members, who discuss activities on social networking sites, and photos of drinking by DWI defendants or underage drinkers.<sup>125</sup>

Social networking sites may present a plethora of information, including a potentially admissible smoking gun in a given case.<sup>126</sup> The ability to use information from social networking

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police\_use\_social\_networking\_to\_target\_underage\_drinkers. In *A.B. v. State*, 885 N.E.2d 1223 (Ind. 2008), a juvenile who posted vulgar comments against her ex-middle school principal on a MySpace page—falsified as the principal’s, but actually created by the defendant’s friends—was ruled a delinquent child by the trial court. *Id.* If she had been an adult she would have committed harassment. *Id.* On appeal, the Indiana Supreme Court reversed the original ruling against the juvenile because there was no evidence that she had the required intent for the harassment offenses (i.e., a subjective expectation that the conduct would likely come to the attention of the victim/ principal) when she only posted to a group of twenty-six friends rather than to the public. *Id.* at 1225, 1227–28. In *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858 (Cal. Ct. App. 2009), a college student posted negative comments about her hometown on MySpace. *Id.* at 861. She removed the postings six days later, but not before her principal sent them to her hometown newspaper, which copied them for republication. *Id.* The court ruled that she had no reasonable expectation of privacy regarding the published material. *Id.* at 862–63. In *People v. Liceaga*, No. 280726, 2009 Mich. App. Lexis 160, at \*1, (Mich. Ct. App. Jan. 27, 2009), an appellate court upheld the admission of MySpace evidence from the defendant’s profile, including photos of himself and the gun involved in the alleged murder, as well as photos of the defendant displaying a gang sign. *Id.* at \*7. The court held the probative value was not substantially outweighed by the unfair prejudice. *Id.* at \*10. In a September 2010 New York personal injury case, a judge decided that refusing to allow discovery of postings and photos depicting the plaintiff’s active lifestyle that could potentially negate the plaintiff’s claims regarding the extent of her injuries would “go against the liberal discovery policies of New York favoring pretrial disclosure [and] would condone Plaintiff’s attempt to hide relevant information behind self-regulated privacy settings.” Noeleen G. Waldner, *Judge Grants Discovery of Postings on Social Media*, N.Y. L.J., Sept. 24, 2010, [http://www.law.com/jsp/article.jsp?id=1202472483935&Suffolk\\_County\\_NY\\_Judge\\_Grants\\_Discovery\\_of\\_Postings\\_on\\_Social\\_Media](http://www.law.com/jsp/article.jsp?id=1202472483935&Suffolk_County_NY_Judge_Grants_Discovery_of_Postings_on_Social_Media).

125. See Vesna Jaksic, *Litigation Clues Are Found on Facebook*, NAT’L L.J., at 1, 7, Oct. 15, 2007, available at [http://vesnajaksic.com/?page\\_id=35](http://vesnajaksic.com/?page_id=35); Randag, *supra* note 124; Weiss, *supra* note 124.

126. See N.Y. C.P. L. R. 308(5) (MCKINNEY 2010); N.Y.C.P.L.R. 311(b) (MCKINNEY 1999) (allowing substitute service of process when serving party can show ordinary service is impracticable and the substitute service will reach the party); see also Browning, *Served Without Ever Leaving the Computer, su-*

sites as evidence, however, is still being debated.<sup>127</sup> Courts may need to consider several evidentiary issues, such as relevance, authentication, and hearsay.<sup>128</sup> Even if not admissible at trial, trolling social network sites for information may provide fodder for cross-examination or impeachment of witnesses.<sup>129</sup>

## 2. Ethics

Various ethical issues arise regarding gaining access to witnesses, adverse parties, jurors, and others for information for cross-examination or discovery via social networking sites. Lawyers should be aware that ethics rules apply online as well as in the real world and must remain alert to potential ethical issues involved in the use of social networking. This new form of communication via social networking does not change lawyers' ethical duties and responsibilities. Social networking is relevant to attorney ethics in numerous areas, such as communication, solicitation, advertisement, the creation of inadvertent attorney-client relationships, and the unauthorized practice of law.<sup>130</sup>

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*pra* note 14 (discussing growing number of jurisdictions outside the U.S. allowing parties to be served via social networking sites like Facebook). First time service via social networking is allowed. Numerous other issues relate to social networking, such as: Facebook and subpoena power; document requests for Facebook pages; destruction of Facebook accounts by a witness; and caching services capturing a snapshot of a Facebook page at a certain time.

127. Brown & Kahn, *supra* note 121. *But see* Walder, *supra* note 124 (indicating plaintiff's social networking profiles potentially contain material evidence contradicting personal injury claims).

128. Brown & Kahn, *supra* note 121. Third party wall posts or comments that are sought to be admitted into evidence may raise hearsay issues, and claims that the user was not the one who posted information may raise authentication issues. *Id.*; *see also* People v. Clevestine, 891 N.Y.S.2d 511, 514 (NY. App. Div. 2009) (ruling testimony from MySpace representative along with the defendant's wife indicated it was unlikely that another person accessed the defendant's MySpace page and sent the messages under his username). *But see In re J.W.*, No. 10-09-00127-CV, 2009 WL 5155784, at \*1-4 (Tex. Ct. App. Dec. 30, 2009) (upholding trial court's decision allowing evidence of what a victim read on the defendant's MySpace page even though the victim had no personal knowledge that defendant had typed it onto his MySpace page).

129. *See* Hayden, *supra* note 71, at 189-90.

130. *See generally* Slaughter & Browning, *supra* note 2 (highlighting areas of ethical concerns for legal practitioners using social networks).

*a. Communications*

Online communication is still subject to bar regulation. ABA Model Rule 7.1 requires lawyers to avoid false or misleading communications about their abilities or services.<sup>131</sup> Thus, information lawyers post on social networking sites must be true and accurate because profiles on social networking sites can constitute communications between a lawyer and a client if a potential client has access to the site.

In addition, ABA Model Rule 1.6 prohibits revealing confidential information.<sup>132</sup> Social networking provides new ways for lawyers to reveal confidential information, sometimes inadvertently.<sup>133</sup> For example, simply posting a list of contacts publicly on a social networking site may constitute disclosure in violation of the rules if client information is included.<sup>134</sup>

In general, “friend” requests to or from current clients, prospective clients, colleagues, judges, witnesses, and others can pose various ethical issues for lawyers.<sup>135</sup> Further, ABA Model Rule 8.4 prohibits lawyers from engaging in any conduct that is dishonest, fraudulent, deceitful or misrepresentative.<sup>136</sup> Ethics opinions illustrate the need for attorneys to be careful when gathering information from a person’s social networking profile page.<sup>137</sup> In one case, a Philadelphia attorney asked a third party to send a “friend” request to a witness in order for the attorney to discover impeaching information on that witness’s Facebook profile page.<sup>138</sup> The third party did not reveal his connection to the lawyer.<sup>139</sup> In March 2009, the Philadelphia Bar Association ethics

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131. MODEL RULES OF PROF’L CONDUCT R. 7.1 (1983).

132. *Id.* at R. 1.6.

133. Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 118–19 (2009).

134. *Id.* at 119.

135. For example, a lawyer could make a friend request or receive one from a former colleague who is now representing a party in a related case on the opposing side.

136. MODEL RULES OF PROF’L CONDUCT R. 8.4.

137. Brown & Kahn, *supra* note 121.

138. Phila. Bar Ass’n Prof’l Guidance Comm., Ethics Op. 2009-02 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf).

139. *Id.*

advisory opinion held that a lawyer could not use a third party to send a “friend” request to an adverse witness to get impeaching evidence on the witness’s private Facebook profile page.<sup>140</sup> The Professional Guidance Committee noted such a deceptive practice is unethical and violates the rules of professional conduct.<sup>141</sup> The opinion stated that an attorney must disclose his true intentions when attempting to access a member’s profile page and that lawyers are responsible for actions of third-party, non-lawyer assistants.<sup>142</sup>

Also, lawyers should reflect on the implications of the personal content they post on social networks. For example, a lawyer may not want a client to know she is going on vacation because the client may think that the only reason the lawyer wants the client to settle is to get the case off her desk. Or, if a lawyer is supposed to be preparing a case over the weekend or has a trial on Monday, posts about the lawyer partying all weekend could be viewed negatively.

Moreover, ABA Model Rule 3.6(a) prohibits lawyers from making “extrajudicial statement[s] [that] . . . will be disseminated by means of public communication [where the communication has] a substantial likelihood of materially prejudicing” a legal proceeding, such as posting content on social networks about an ongoing case.<sup>143</sup> For example, a prosecutor posted derogatory comments on Facebook about people from Somalia and a comment about a juror during a trial.<sup>144</sup> After the defendant—a Somali man—was convicted of attempted murder, he moved for a new trial on the grounds of prosecutorial misconduct.<sup>145</sup>

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140. *Id.*

141. *Id.*; see Slaughter & Browning, *supra* note 2 (highlighting ethical pitfalls of social networking).

142. Phila. Bar Ass’n Prof’l Guidance Comm., Ethics Op. 2009-02 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf).

143. MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (1983).

144. Rochelle Olson, *Hennepin County Prosecutor Accused of Anti-Somali Posting on Facebook*, STAR TRIBUNE, Feb. 17, 2010, <http://www.startribune.com/local/84525452.html>.

145. *Id.*

*b. Solicitation*

ABA Model Rule 7.3 prohibits a lawyer from soliciting employment from a prospective client by electronic communication if the prospective client has made known to the lawyer that she does not want to be solicited, or the solicitation involves harassment, duress, or coercion.<sup>146</sup> Rule 7.3 also requires that any electronic communication from a lawyer soliciting employment from a prospective client known to need legal services must include the words “advertising material” at the beginning and end of the communication unless the recipient is a lawyer or has a prior relationship with the lawyer.<sup>147</sup> It follows that solicitation on social networking sites must also be marked as such.

ABA Model Rule 7.3(a) provides guidance regarding real-time electronic communication that puts prospective clients on the spot and is comparable to prohibited in-person or verbal solicitation.<sup>148</sup> It is not clear if information posted on a social networking site is considered real-time communication or merely general advertising, which is not prohibited. This determination depends on the interactivity and immediacy of the social network.<sup>149</sup>

*c. Advertisement*

ABA Model Rule 7.1 includes electronic communication as a type of communication that can constitute advertisement, but it is not clear if profiles posted on social networks are considered advertisements.<sup>150</sup> Multijurisdictional issues arise with advertising on social networking sites because they are not limited to a single

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146. MODEL RULES OF PROF'L CONDUCT R. 7.3.

147. *Id.*

148. *Id.*

149. *See* MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. (1983) (discussing dangers of immediate and direct contact with prospective clients). The Model Rules are specifically concerned with “direct in-person, live telephone or *real-time* electronic contact” posing the risk of undue influence over potential clients because of their immediacy and personal, confrontational quality. *Id.* (emphasis added). In contrast, “general advertising and written, recorded or electronic communications,” are acceptable methods of communication because they allow the client to make an informed judgment about available legal services without the risk of direct, immediate persuasion. *Id.*

150. *Id.* at R. 7.1.

state or even a country. Also, Rule 7.2 discusses advertising and permits a lawyer to advertise services through electronic communication.<sup>151</sup> In general, lawyers may use social networking profiles to advertise their services, but the advertisements may be subject to state regulations on advertising. Thus, lawyers should be careful of what information they put on social network sites, as testimonials may be prohibited and certain states may have more stringent regulations.

*d. Creation of an Attorney-Client Relationship*

An attorney-client relationship may be implied from parties' conduct. If a client reasonably relies on advice of an attorney, an attorney-client relationship exists.<sup>152</sup> The Third Restatement of the Law Governing Lawyers defines an attorney-client relationship as arising when a person expresses an intent that the lawyer provide legal services to her, the lawyer consents to do so or fails to demonstrate lack of consent, and the lawyer knows or should know the person reasonably relied on the lawyer to provide services.<sup>153</sup> The speed of social networking may cause referrals, advice, and the formation of an implied attorney-client relationship where casual interactions are sometimes difficult to distinguish from formal relationships.<sup>154</sup> Thus, social networking profiles of attorneys should contain a disclaimer, clarifying that information on the site is not intended to create an attorney-client relationship.<sup>155</sup>

*e. Unauthorized Practice of Law*

An attorney's social networking profile may reach clients in all states and countries simultaneously. If a lawyer has a highly active social network profile and is conducting business, a lawyer

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151. *Id.* at R. 7.2.

152. Cydney Tune & Marley Degner, *Bloggng and Social Networking: Current Legal Issues*, in INFORMATION TECHNOLOGY LAW 2009, at 134 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Ser. No. 19051, 2009).

153. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

154. Bennett, *supra* note 133, at 122.

155. Tune & Degner, *supra* note 152.

could be engaged in the unauthorized practice of law. ABA Model Rule 5.5 prohibits a lawyer who is not admitted to practice in a jurisdiction from establishing an office or other continued presence in the jurisdiction for the practice of law, or hold out to the public that the lawyer is admitted to practice in that jurisdiction.<sup>156</sup> Also, Rule 8.5 provides that lawyers who are not admitted in a jurisdiction are still subject to disciplinary action in that jurisdiction if they offer legal services there.<sup>157</sup> Lawyers who are active in social networking should be careful to include disclaimers on personal social networking profiles stipulating that none of the information included therein is intended to act as legal advice and that they do not purport to represent the interests of any other users, nor do their personal views represent the views of their legal employers. Because the reach of social networks is so pervasive, reaching across national and international jurisdictions, lawyers must be extremely cautious when using social networks as a business-generating tool, as ethical rules vary from state to state. Social networking lawyers using their profiles as advertising or marketing tools should be cautious to limit their reach to those jurisdictions whose professional ethics guidelines they observed for advertising and solicitation of clients, so as not to be subject to discipline in outside jurisdictions.

#### *D. Clients*

With today's technological advances and the ubiquitous presence and use of social networks like Facebook, the first thing lawyers may ask their clients is whether they have a Facebook page and then advise clients to deactivate it.<sup>158</sup> Lawyers advise clients against discussing cases with friends and relatives through social networks and, if clients remain active on social networks, it may be helpful for lawyers to review postings, especially in divorce and custody cases where social network content has been widely used for evidentiary purposes. For example, in a divorce case, a wife's friend had access to the husband's Facebook page, which enabled the wife to discover her husband's infidelity when

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156. MODEL RULES OF PROF'L CONDUCT R. 5.5.

157. *Id.* at R. 8.5.

158. See McDonough, *First Thing Lawyer Tells New Clients*, *supra* note 124.

she talked to his lover on the page.<sup>159</sup> In a custody case, information a mother posted on Facebook—that she was single and had no children—was used against her to illustrate her dishonesty.<sup>160</sup> Defense lawyers have also used social networking sites for evidence against plaintiffs in sexual harassment cases<sup>161</sup> and personal injury cases.<sup>162</sup>

### E. Judges

Judges use social networking sites in various ways. For example, many judges use social networking in their political campaigns.<sup>163</sup> Some use it to gather impeachment evidence to use against attorneys appearing in their courtrooms.<sup>164</sup> A judge's pres-

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159. Nelson et al., *supra* note 53, at 13. Different courts may rule differently on authentication issues arising in such cases. For example, in *Dockery v. Dockery*, No. E2009-01059-COA-R3-CV, 2009 WL 3486662 (Tenn. Ct. App. Oct. 29, 2009), the court held that a third party's authentication of pictures damaging to a spouse's case was admissible in lieu of testimony from a MySpace representative. *Id.* at \*6. In another case, the evidence that resulted from social networking sites helped the child victim. See *In re K.E.L.*, No. 09-08-00014-CV, 2008 WL 5671873, at \*5 (Tex. Ct. App. Feb. 26, 2009). In *In re K.E.L.*, the court of appeals held that content of the father's MySpace page, which was admitted into evidence, properly led the trial court to hold the mother more responsible to designate the child's primary residence. *Id.* at \*5. Similarly, in *Mann v. Department of Family & Protective Services*, No. 01-08-01004-CV, 2009 WL 2961396 (Tex. Ct. App. Sept. 17, 2009), the court ruled that the trial court's admittance of pictures from the appellant-mother's MySpace page, which showed her drinking underage and visibly intoxicated, demonstrated that the mother violated the court's order to not engage in criminal activity. *Id.* at \*10.

160. See Belinda Luscombe, *Facebook and Divorce: Social-Networking Sites are Great for When You Want to Connect. But What About When You Split?*, TIME, Jun. 22, 2009, at 93, available at <http://www.time.com/time/magazine/article/0,9171,1904147,00.html>.

161. See, e.g., *Mackelprang v. Fid. Nat'l Title Agency of Nev., Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 U.S. Dist. LEXIS 2379 (D. Nev. Jan. 9, 2007) (involving alleged use of MySpace messaging to facilitate sexual relationships).

162. Michael E. Getnick, *Social Media: The Good, the Bad, and the Ugly*, N.Y. ST. B.J., Oct. 2009, at 5, 5 (noting case using Facebook to rebut personal injury claims). Getnick explains how a client claimed injuries prevented him from having an active social life, but Facebook postings revealed him hosting parties and going on weekend outings. *Id.*

163. See Slaughter & Browning, *supra* note 2, at 194.

164. See McDonough, *Facebooking Judge*, *supra* note 20 (discussing Texas judge utilizing Facebook to monitor behavior of lawyers and litigants).

ence on Facebook may assist her in keeping lawyers honest.<sup>165</sup> For example, in one instance, a lawyer asked for a continuance due to an alleged death in the family.<sup>166</sup> Using Facebook, however, the state court judge viewed the attorney's profile page, which showed her engaged in a week of partying.<sup>167</sup> Judges have also caught lawyers venting on social networks about courtrooms, their clients, and opposing counsel.<sup>168</sup> In addition, litigants have been caught boasting on social networks about how much money they anticipated receiving from their lawsuits.<sup>169</sup>

In addition to monitoring attorneys, judges have monitored social network sites of defendants.<sup>170</sup> For example, they utilize sites to access photos where defendants may be pictured using drugs or engaged in other prohibited behavior to determine if defendants have violated probation during the sentencing process.<sup>171</sup>

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165. *See id.*

166. *Id.*

167. *Id.*

168. *See id.* Once you become an officer of the court you lose the ability to criticize the court even if others do. John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. TIMES, Sept. 12, 2009, <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

169. *See* McDonough, *Facebooking Judge*, *supra* note 20 (indicating judge reprimanded litigant for bragging about potential recovery in tort case).

170. In 2008, Joshua Lipton had photos of him posted on Facebook by someone, showing him in a prisoner costume and labeled "Jail Bird," at a Halloween party. *See* Eric Tucker, *Facebook Used as Character Evidence, Lands Some in Jail*, USA TODAY, July 16, 2008, [http://www.usatoday.com/tech/webguide/internetlife/2008-07-19-facebook-trials\\_N.htm](http://www.usatoday.com/tech/webguide/internetlife/2008-07-19-facebook-trials_N.htm). The party took place two weeks after Mr. Lipton was charged with drunk driving and had seriously injured a woman who was still recovering in a hospital. *Id.* The judge emphasized how the photos were depraved and sentenced the defendant to two years in prison. *Id.* In sentencing in criminal cases, courts have also permitted information discovered on social networking sites to be used as evidence. *See* *United States v. Villanueva*, 315 F. App'x 845, 848 (11th Cir. 2009). In *Villanueva*, the court held that post-conviction photos on defendant's MySpace page of him holding a loaded weapon after he had been convicted of a violent felony could be used to enhance sentencing. *Id.* at 848-49.

171. *See* Richard Acello, *Web 2.Uh-Oh: Judged by Facebook*, A.B.A. J., Dec. 2009, at 27, available at [http://www.abajournal.com/magazine/article/web\\_2.uh-oh/](http://www.abajournal.com/magazine/article/web_2.uh-oh/) (describing case where defendant's probation violation was discovered from Facebook pictures depicting her smoking marijuana). The use of information found on social networking sites raises evidentiary issues

One juvenile judge requires all juveniles within her jurisdiction to “friend” her on Facebook, thereby allowing her to review their postings for any inappropriate conduct that would return them to her court.<sup>172</sup>

Judges’ use of social network sites can have numerous ethical implications. In January 2009, a New York judicial ethics opinion advised that judges may participate in social networking as long as they comply with the rules governing judicial conduct, but should remain aware of the “appearance created” by social network connections with attorneys or anyone else appearing before them in court.<sup>173</sup> Similarly, an ethics opinion from South Carolina found that judges may be Facebook friends with court employees and law enforcement personnel, so long as they avoid discussing work-related matters.<sup>174</sup> The opinion reasoned that “a judge should not become isolated from the community in which the judge lives,” and allowing a judge to belong to a social network enables the

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regarding its admissibility depending at what point in the process the information is sought to be used. *Id.*; see also *Munoz v. State*, No. 13-08-00239-CR, 2009 WL 695462, at \*3 (Tex. Ct. App. Jan. 15, 2009). In *Munoz*, the defendant appealed his conviction for aggravated assault and engaging in deadly conduct by arguing the evidence was insufficient to prove he was a member of a criminal street gang. *Munoz*, 2009 WL 695462, at \*1. The appeals court upheld the judgment of the trial court, reasoning the admission of pictures of the defendant posted on his MySpace page were proper and sufficient evidence. *Id.* at \*13. The pictures showed the defendant wearing gang colors, throwing gang signs, and associating with gang members. *Id.*; see also *State v. Soza*, No. 2 CA-CR 2007-0383, 2008 WL 4455613, at \*2 (Ariz. Ct. App. Oct. 3, 2008) (allowing identification of defendant through MySpace pictures); *State v. Greer*, No. 91983, 2009 WL 2574160, at \*1 (Ohio Ct. App. Aug. 20, 2009) (admitting incriminating MySpace pictures). In *Soza*, the court of appeals ruled that the trial court’s admission of evidence was permissible when a witness identified a picture of the defendant on MySpace and testified the defendant was the shooter with tattoos on his arm. *Soza*, 2008 WL 4455613, at \*2. In *Greer*, the court of appeals affirmed a trial court’s admission of a picture of the defendant on his MySpace page, with the handle of a gun, the murder weapon in the case, sticking out of his pants. *Greer*, 2009 WL 2574160, at \*6.

172. Slaughter & Browning, *supra* note 2, at 194.

173. *Id.* at 193–94.

174. *Id.*; see S.C. Judicial Dep’t, Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009).

community to view how the judge communicates and offers the community a better understanding of the judge.<sup>175</sup>

Depending on the jurisdiction, however, a judge may not be allowed to participate in social networks with members of the legal field. For example, a Florida Judicial Ethics Advisory Committee ruled that judges may not “friend” lawyers who may appear before them or allow such lawyers to “friend” them.<sup>176</sup> The concern the committee expressed was the appearance that such friends may hold influence over the judges, although a minority on the committee would have allowed judges a social networking profile, stressing that “friends” on social networks are not actual friends. In North Carolina, a judge was publicly reprimanded by the North Carolina Judicial Standards Commission for communicating with defense counsel on his Facebook page during a pending child custody trial and for posting and reading messages about the case and accessing the website of the opposing party.<sup>177</sup> The Commission ruled that the judge’s *ex parte* communications and gathering of information constituted conduct prejudicial to the administration of justice.<sup>178</sup> Similarly, a judge in Georgia retired after it was revealed that the judge had contacted a defendant through Facebook and advised her on how to plead before the court.<sup>179</sup> He also nego-

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175. S.C. Judicial Dep’t, Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009).

176. Fla. Supreme Court, Judicial Ethics Advisory Comm., Op. 2009-20 (2009) (noting a judge may post comments or other material on another judge’s page on a social networking site if such publication would not otherwise violate the Code of Judicial Conduct). See John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 11, 2009, [http://www.nytimes.com/2009/12/11/us/11judges.html?\\_r=1](http://www.nytimes.com/2009/12/11/us/11judges.html?_r=1).

177. Slaughter & Browning, *supra* note 2, at 194.

178. *Id.* Judge Carlton Terry and lawyer Charles Shieck “friended” each other after discussing a child support and custody case. *Id.* Shieck then posted messages about the case onto Judge Terry’s profile, including a comment about having a “wise judge.” *Id.* Judge Terry responded to the attorney’s message and independently researched the case by Googling the business run by the opposing counsel’s client and by finding poems written by the client. *Id.* After the trial, the judge told both parties he visited the client’s website. *Id.* Judge Terry then disqualified himself and vacated his order at opposing counsel’s request. *Id.* A new trial was ordered. *Id.*

179. *Id.*

tiated an agreement on her behalf with the prosecution and loaned the defendant money.<sup>180</sup>

#### F. Jurors

Jurors are accustomed to getting and sharing information on social networks like Facebook.<sup>181</sup> As their use of social networking increases, so does the likelihood that jurors will use these sites to post information during trials.<sup>182</sup> If a juror is the type of user addicted to posting mundane facts about everyday life on Facebook, like what they are eating for lunch, the attraction of posting commentary about an interesting trial may be hard to resist.<sup>183</sup>

Because of the second nature of using social networks, jurors may not consciously recognize the risks of posting information about a case; however, jurors' use of social networking has caused mistrials and overturned verdicts.<sup>184</sup> Several cases have involved jurors researching and discussing cases on Facebook.<sup>185</sup> For example, a new trial was sought because some jurors became Facebook friends and the resulting clique changed jury dynam-

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180. *Id.*

181. John G. Browning, *When All That Twitters is Not Told: Dangers of the Online Juror*, 73 TEX. B.J. 216, 217 (2010).

182. *Id.*

183. Nelson et al., *supra* note 53, at 4.

184. Browning, *All That Twitters*, *supra* note 181, at 217.

185. See Terry, *supra* note 5, at 297, n.75 (citing Scott Michels, *Cases Challenged Over 'Tweeting' Jurors: Lawyers Say They Will Appeal Verdicts After Jurors Comment on Facebook, Twitter*, ABC NEWS (Mar. 17, 2009) <http://abcnews.go.com/Technology/Story?id=7095018&page=1> (relaying cases involving appeals following discovery of case-related juror postings on social networks)); see also Martha Neil, *Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict*, A.B.A. J., Sept. 2, 2010, [http://www.abajournal.com/news/article/oops.\\_juror\\_calls\\_defendant\\_guilty\\_on\\_facebook\\_though\\_verdict\\_isnt\\_in](http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in) (referencing a case where a juror was posting on a social network about her predetermined conclusion about the defendant's guilt); John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, N.Y. TIMES, Mar. 18, 2009, <http://www.nytimes.com/2009/03/18/us/18juries.html> (discussing a federal trial where a juror admitted to researching the case online); *Facebook, Twitter Throw U.S. Legal System into Disarray*, ABC NEWS (Australia) (Mar. 18, 2009), <http://www.abc.net.au/news/stories/2009/03/18/2520009.htm>.

ics.<sup>186</sup> In another case, a juror tried to “friend” a witness in a New York case involving the death of firefighters.<sup>187</sup> In a child abduction-sexual assault trial in England, a juror posted details of the case online for her Facebook friends and announced she was torn on how to vote and was holding a poll.<sup>188</sup>

Yet, not all juror participation in social networks has resulted in new trials or appeals and behavior that occurred after the jurors reached a verdict is not as questionable. In October 2009, United States District Court Judge D. Brock Hornby denied a motion for a new trial in a wrongful death case even after a juror sent a Facebook “friend” request to two of the plaintiffs, had discovered plaintiffs’ “party animal” behavior from their Facebook pages, and e-mailed plaintiffs’ attorney to tell him that his client promoted drug use and drinking over the Internet.<sup>189</sup> The judge reasoned that the juror found the photos and postings via a social network after the verdict was reached and, thus, the information from Facebook was never utilized during deliberations.<sup>190</sup>

In another case, a juror used Facebook to post information about the trial of Pennsylvania State Senator Vincent Fumo during deliberations, but the court rejected his complaint on his post-verdict appeal of his conviction.<sup>191</sup> The court reasoned the general status updates on Facebook did not reveal anything and because

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186. Debra Cassens Weiss, *Jurors’ Wikipedia Research, Friending at Issue in Two Maryland Cases*, A.B.A. J., Dec. 14, 2009, [http://www.abajournal.com/news/article/jurors\\_wikipedia\\_research\\_friending\\_at\\_issue\\_in\\_two\\_maryland\\_cases/](http://www.abajournal.com/news/article/jurors_wikipedia_research_friending_at_issue_in_two_maryland_cases/) (discussing cases overturned because of juror online access during trials). Weiss highlights trials where convictions were overturned, one where the Facebook friend’s “clique” influenced juror deliberations. *Id.*

187. Olson, *supra* note 144.

188. Browning, *All That Twitters*, *supra* note 181, at 217. The juror was dismissed once the court found out about her Facebook poll. *Id.* Browning also discusses a Supreme Court of Appeals of West Virginia case where the court reversed a conviction of felony sexual abuse of two teenage girls when two jurors looked up the MySpace profile of one of the alleged victims and shared the contents with other jurors. *Id.*

189. *Id.* at 218 (discussing *Wilgus v. F/V Sirius, Inc.*, 665 F. Supp. 2d 23 (D. Me. 2009)).

190. *Id.*

191. *United States v. Fumo*, No. 06-319, 2009 WL 1688482, at \*58–67 (E.D. Pa. Jun. 17, 2009) (discussing juror’s social network postings about trial).

the jury's decision had been made, it was too late for the postings to have a negative influence.<sup>192</sup>

Judges face the challenge of controlling the information the jurors receive, as well as the information that jurors put out, and may want to alert jurors about possible monitoring of their social network use. Attorneys can also reduce the risk of juror misconduct by searching for communication by jurors on social networks before, during, and after voir dire. Trial attorneys can help by asking jurors during voir dire about whether they have a Facebook profile so that an attorney may monitor those profiles during trial. In addition to spotting juror misconduct, attorneys can use social network sites open to public viewing to obtain information about potential jurors, like political views, truthfulness in answering the juror questionnaire, and may even use such information to tailor arguments to juror interests and social views.<sup>193</sup>

#### IV. RECOMMENDATIONS

Members of the legal community must be aware of how social networking straddles their professional and private worlds and need guidelines to navigate the legal and ethical minefields. The pervasiveness of social networking in our daily lives has heightened opportunities for stepping on such minefields, put a spin on old legal issues, and created new ones. Unlike communications that occur offline, whose reach is limited, social networks break down boundaries, make it easy for intended private communications to become public, and have a seemingly limitless reach. In today's Facebook age, "the new normal of constant public exposure" creates digital intimacy and intimate strangers.<sup>194</sup> Ultimately

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192. *Id.*

193. Lawyers, however, cannot gain information under false pretenses, like fake "friending." See Phila. Bar Ass'n Prof'l Guidance Comm., Ethics Op. 2009-02 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf); see also *supra* Part II.C (discussing examples of lawyers inappropriately using social networks).

194. Steven Johnson, *Web Privacy: In Praise of Oversharing*, TIME, May 20, 2010, at 39, available at <http://www.time.com/time/business/article/0,8599,1990586,00.html>. Facebook CEO Zuckerberg predicts users will share twice as much information as they did the year before. *Id.*

the onus and responsibility of inappropriate content or reckless use of social networking lies with the user.<sup>195</sup>

As social networks like Facebook continue to evolve and become more ubiquitous, social networking will play an increasing role in the future of legal practice. This Article recommends educating members of the legal field about the implications of using social networking, rather than prohibiting it, and setting forth guidelines to appropriately navigate the pitfalls of social networking in the legal landscape. Through education and awareness, users will more willingly and effectively utilize privacy and security settings available on social network sites.<sup>196</sup>

Those in the legal field cannot afford to simply ignore or outright prohibit social networking, but should develop social network guidelines.<sup>197</sup> Law schools, professional and continuing education programs, law firms and other legal employers, bar associations, and the judiciary should have institutional risk management strategies or written guidelines in place directly addressing social networking. Furthermore, they should offer training or educational opportunities to create general awareness of the different levels of risks so that legal professionals may appropriately adjust or modulate their online activity.

A social networking policy should explain its intent or purpose and should address the benefits and risks involved, as well as outline the laws, social norms, and professional practices of online communication via social networking practices and ways to avoid

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195. Section 79 of the Information and Technology Act gives protection to the administration/management against penal action for hosting content on social networks. Information Technology Act, 2000, § 79, No. 21, Acts of Parliament, 2000 (India). *Cf.* Nelson et al., *supra* note 53, at 34 (stating that Air Force cadets often advise, “Never jump with a parachute packed by someone else”).

196. Terry, *supra* note 5, at 295.

197. Prohibiting the use of social networks likely will not be effective because if you are a Facebook holdout or if you try to leave Facebook, you get pressure regarding how much you will miss. Fletcher, *supra* note 12, at 33–34. If a user wants to stop using her Facebook account, she may deactivate it or delete it. When a user deactivates an account, it will not be visible to any user, but it will not be deleted. Facebook saves the user’s profile information in case the user later decides to reactivate her account. When a user deletes an account, it is permanently deleted from Facebook. *See Facebook’s Privacy Policy, supra* note 10. For examples of social networking policies, see *supra* notes 107–08 (providing policies of DePaul, Georgetown, and Tufts).

negative consequences.<sup>198</sup> It should also note that any internal governance policies, such as codes of conduct or professionalism, or those relating to unlawful harassment or discrimination, extend to social networking. It should include prohibitions against revealing confidential information; posting derogatory, defamatory, or inflammatory content about others; posting anything illegal or inappropriate; and violating ethical rules, as well as requirements for respecting privacy rights of others. Policies should also set forth a non-exhaustive listing of examples of prohibited conduct.<sup>199</sup>

#### *A. Legal Education*

Policies or guidelines regarding the use of social networking are applicable and necessary for everyone in the legal field because social networking is available to everyone. Law schools need to educate members of their community regarding the reasons to use social networks and how to use them and then must develop clear and consistent guidelines for students, faculty, administrators, and staff that specifically address social networks. Schools need to consider whether to outright ban access to social networking at school, as well as any prohibitions on “friending” students, students’ parents, employees, alumni, and others (however, that may be impractical to enforce given student access to social networks outside of school). Some schools may decide to actively monitor social networking, while others may merely regulate inappropriate behavior on social networks when brought to the attention of the administration.<sup>200</sup> Schools should be cautious because an attempt to monitor or protect students from harm on the Internet may be perceived as creating a duty to do so, which then makes the failure to perform that monitoring function a potential liability.<sup>201</sup> In light

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198. The policy should address how users’ participation on social networks can affect the user and the institution, firm, court, employer, etc. and whether a user may use company equipment or time to post. *See* Fink, *supra* note 60, at 344; *supra* notes 107–08 (providing policies of DePaul, Georgetown, and Tufts as examples of social networking policies).

199. *See* Mitrano, *supra* note 102; *see also* Fink, *supra* note 60, at 344; *supra* notes 107–08.

200. *See supra* notes 107–08 (providing examples of educational institutions’ approaches to regulating social networking).

201. *See* RESTATEMENT (SECOND) OF TORTS § 323 (1965); Ergin, *supra* note 83; Fink, *supra* note 60, at 332–33 n.41 (discussing possible creation of

of this, law schools should, at the very least, institute and disseminate a social networking policy.

Law schools may have a general responsible computer use policy already in place that allows for flexibility to cover social networks and withstand future developments in technology instead of having to update and amend the policy.<sup>202</sup> A general computer use policy regarding the personal use of computers and expectation of privacy, however, may not be enough. Instead, law schools need to specifically address social networking and make sure policies related to computer use, such as confidential and proprietary information, harassment, and professionalism, specifically incorporate and address social networking.

The social networking policy should have a general introduction laying out the purpose for the policy, educating about rights and responsibilities of members of the institution, and how technical inability or legal ignorance is not an excuse for misconduct. Rather, it is the computer user's responsibility to know the rules and regulations and comply with them. Once law schools have a clear and express written policy regarding social media, they should then distribute it to all potential users. For example, the guidelines could be included in the student, faculty, and staff handbooks, as well as on the school's webpage.

To facilitate education and awareness of the benefits and challenges to the legal world posed by use of social networks, law schools must be proactive.<sup>203</sup> For example, some schools educate students at orientation about the use of Facebook by showing students and parents an informational video expounding on risks of use, such as stalking, sexual harassment, identity theft, and ha-

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duty of care and resulting potential for tort liability if school monitors social networking sites).

202. See *Policy on Responsible Use of University Computing and Networking Resources*, OHIO ST. U. (May 10, 2000), [http://cio.osu.edu/policies/responsible\\_use.html](http://cio.osu.edu/policies/responsible_use.html).

203. See Fink, *supra* note 60, at 332–33 n.41. Fink cites proactive recognition and promotion of proper MySpace, Facebook, and Google use by Drake University, Suffolk University Law School, and the University of Michigan. *Id.* Some schools may broadly advise students about responsible computer use in their overall computer use policies; however, social networking should be specifically addressed. *Id.*

rassment in cyberspace, and provides tips on privacy settings.<sup>204</sup> Law schools could designate a school representative responsible for social media and could provide training sessions on the most effective and least risky uses of social networking for staff, faculty, students, and administrators.

Even if a law school does not have a policy addressing social networking, faculty should have a clear, consistent policy regarding their own use of social networks that they explain to their students up front and apply across the board. A blanket policy helps students respect and understand the faculty's position and avoids offensive, difficult, uncomfortable, or regrettable situations, or the awkwardness that could result from students viewing a faculty member's personal information, or a faculty member accepting students as friends, not accepting them as friends, or "unfriending" them.<sup>205</sup> Faculty should consider whether their use of social networks is really for the students' and faculty members' educational benefit, as well as whether the risks outweigh the possible benefits.

Law schools should have guidelines that require individual administrative departments to develop clear reasons for utilizing social networks and to seek approval from the administration. Schools should also appoint an office of communications to oversee administrative use of social networks. Such a policy avoids individual departments creating a presence on social networks that is not consistent with the branding of the school.

A law school should develop guidelines that include who maintains administration pages at the law school (such as an office of communications); how to create a social network presence, including choosing your Facebook username and designating an e-mail address; consistent branding elements like photos and logos; warnings about content being distributed to the general public; and warnings that deleted or edited content may continue to exist in cyberspace. Guidelines could provide advice about responding to posts by utilizing privacy settings that allow the administrator to control wall postings and comments, as well as regarding accepting

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204. Videotape: On-line Communities, *supra* note 77.

205. Professors may have a policy to "friend" everyone or no one, as opposed to merely "friending" a certain group of students based on gender, intelligence, academic performance, etc.

and making “friend” requests.<sup>206</sup> Law schools could also alert students to whether the bar examiners in their state review applicants’ social network sites.

*B. Practitioners, Judges, and Jurors*

Practitioners should also become educated regarding the utility of social networks and their career implications.<sup>207</sup> Many law firms and legal employers do not have formal policies or guidelines regarding the utilization of social networks, but they should. A law firm policy regarding social networking should include guidelines that caution against the appearance of establishing an attorney-client relationship and revealing confidential information; advocate the use of strict privacy settings instead of relying on default settings open to the public; mandate the use of disclaimers<sup>208</sup> when posting content related to work by the firm; prohibit the use of the firm’s logo until checking with the firm’s marketing department; and promote good judgment and general awareness that copyright and financial disclosure laws apply to online conduct.<sup>209</sup> Finally, firms, legal employers, bar associations, and continuing legal education programs should educate attorneys about social networking guidelines through seminars, videos, and presentations, and should provide opportunities for users to ask questions about the guidelines.<sup>210</sup>

In addition to practitioners, judges should be advised through guidelines or rules of judicial conduct whether they can participate in social networks with members of the legal field. Also, inconsistency exists among and within courts regarding how they address juror use of social networks. Courts must take active steps toward educating jurors of the potential admonitions resulting

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206. For example, should an admissions officer accept or make a “friend” request to a prospective student or an applicant? Also, if a school has a policy, is it now open to liability because it has a duty?

207. See generally Brown & Kahn, *supra* note 121; Slaughter & Browning, *supra* note 2 (expounding on ethical implications and guidelines for social networking by legal practitioners).

208. An example of a disclaimer could be, “The postings on this site do not necessarily reflect or represent my firm’s and are instead my own.” See Nelson et al., *supra* note 53, at 33.

209. *Id.* at 33–34.

210. *Id.* at 34.

from online communication of trial information to ensure trials are not compromised by a juror's use of social networks. Educating jurors about what is forbidden and why, such as constitutional prohibitions against outside research, will diminish problems.<sup>211</sup> Existing juror instructions should be revised or supplemented to specifically address social networking.<sup>212</sup> For example, admonitions regarding communication with anyone about the facts, issues, or people related to the case and prohibiting outside research should specifically reference electronic means and social networking and should ban all electronic communication during trials used to obtain or share information.<sup>213</sup> Jurors could then be asked to sign declarations confirming that they have been advised about the prohibitions against social networking, that they understand the prohibitions, and that they pledge not to use social networks to research or communicate about the case.<sup>214</sup>

In response to the increasing incidents of jurors using the Internet to communicate with others about a case, in January 2010 the Judicial Conference of the United States—the federal courts' top administrative office—issued “Twitter instructions” to every federal judge, to be read to jurors at the beginning of a trial and before jury deliberations begin.<sup>215</sup> These recommended federal instructions prohibit the use of any electronic device or media in connection with the case, as well as any website use, such as Facebook.<sup>216</sup> State court jury instructions should adopt similar juror instructions as their instructions are still evolving to grapple with juror's use of social networking technology to communicate about a case, which continues to cause mistrials, overturned convictions, and delays in court proceedings.<sup>217</sup> While courts may struggle with the practicality of enforcing social networking guidelines, they still need to maintain the core features of justice.

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211. Browning, *All That Twitters*, *supra* note 181, at 219 (explaining potential solution to problematic juror use of social networks through instructions).

212. *Id.*

213. *Id.* at 220 (discussing changes to jury instructions in Michigan, Florida, Maryland, and San Francisco courts).

214. *Id.*

215. Paul Elias, *Courts Say Jurors, PDAs Shouldn't Mix*, BOS. GLOBE, Mar. 14, 2010, at A8.

216. *Id.*

217. *Id.*; *see supra* Part II.F and accompanying notes.

## V. CONCLUSION

Social networking creates opportunities for expression, self-publishing, and interaction with an expanding universe of people and the creation of new communities by connecting, collaborating, and communicating. It also creates obligations and responsibilities for appropriate legal and ethical use. Members of the legal field must remember the consequences of personal expression and posted content on social network sites. Users of social networks should not be lulled into a false sense of privacy—this content can be scrutinized by a student's law school, bar, future employers, current employers, clients, other attorneys, judges, police, peers, and other unintended audiences. The default setting for social network sites still allows public exposure, so the breadth of users' disclosures should not be underestimated and they must assess the risks involved.<sup>218</sup> Users should be aware that openness is key to Facebook's growth and that the network will continue to expand the range of information users share and will press users to share more.<sup>219</sup> Before members of the legal field incorporate Facebook or other social networks into their daily lives, both professionally and personally, they should give it thoughtful consideration. They should be aware that social networking has potential to benefit their career but also can be perilous. Privacy concerns may outweigh the benefit of extended networks; however, members of the legal field are not immune to the temptations of social networking. The risk averse may want to avoid using social networks or use multiple profiles created on different sites.<sup>220</sup> Overall, to harness the potential and avoid the pitfalls of social networking, members of the legal community should become informed and receive guidelines, beginning in law school and continuing

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218. Browning, *All That Twitters*, *supra* note 181, at 217.

219. Fletcher, *supra* note 12, at 32 (reporting 176 billion banner ads flashed in first three months of 2010). The more updates made to the system and more users make public, the more data the system can pool for advertisers who can increasingly target users. *Id.* Facebook makes money from its ad system. *Id.*

220. Terry, *supra* note 5, at 294–95 (citing LENHART, ADULTS AND SOCIAL NETWORK WEBSITES, *supra* note 2, at 1, 8). Twenty-five percent of social network users who have multiple profiles do so to separate their followers—i.e., professional relationships on one site and personal ones on the other. *Id.*

throughout their careers, so they may avoid blurring the boundaries of their personal and professional worlds.