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# **SOCIAL MEDIA IN THE SUNSHINE: DISCOVERY AND ETHICS OF SOCIAL MEDIA - FLORIDA'S RIGHT TO PRIVACY SHOULD CHANGE THE ANALYSIS**

SPENCER KUVIN\* AND CHELSEA SILVIA\*\*

## **INTRODUCTION**

Social media has vastly transformed society and the way people communicate. Statistics show that as many as eighty-three percent of Internet users in America between the ages of eighteen and twenty-nine use a social networking site, such as Facebook, Twitter, Pinterest, Instagram, or Tumblr.<sup>1</sup> The legal system has not escaped social media's broad and sweeping effect.<sup>2</sup> Most notably, social media has changed the way discovery is conducted in litigation because there is more personal information available on a social networking site than any attorney could possibly expect to acquire from medical records, standard interrogatories, or requests for production.<sup>3</sup> In many situations, with a simple Internet search, an attorney can learn what kind of mood opposing counsel's client was in the day after she filed her complaint against his client.<sup>4</sup>

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1. MAEVE DUGGAN & JOANNA BRENNER, THE DEMOGRAPHICS OF SOCIAL MEDIA USERS – 2012, PEWRESEARCHCENTER 2 (Feb. 14, 2013), available at [http://pewinternet.org/~media/Files/Reports/2013/PIP\\_SocialMediaUsers.pdf](http://pewinternet.org/~media/Files/Reports/2013/PIP_SocialMediaUsers.pdf).

2. See Allison Clemency, Comment, "Friending," "Following," and "Digging" up Evidentiary Dirt: The Ethical Implications of Investigating Information on Social Media Websites, 43 ARIZ. ST. L.J. 1021, 1021 (2011). Social media has had a great effect on attorneys and judges, who are actually participating in the trend and have their own profiles and blogs. *Id.* For example, a court in Australia actually allowed a default judgment to be served to a defendant by posting on the defendant's Facebook wall. *Id.* at 1021–22.

3. See *id.* at 1022 (discussing the "plethora of information contained on any given social media profile that can serve as evidence"); John M. Miller, *Is Myspace Really My Space? Examining the Discoverability of the Contents of Social Media Accounts*, 30 TRIAL ADVOC. Q. 28, 28 (2011) (asserting "there is no denying the fact that social media content can serve as an excellent and unparalleled source of information").

4. See *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (allowing for discovery of sexual harassment claimants' "profiles, postings, or messages

For instance, imagine you have just signed up what you think will be a great auto accident personal injury claim. Your client, Jane Doe, comes into your office in what appears to be great pain, limping, and holding her neck. Her MRIs come back with significant herniations, she is taking various pain medications, and she is recommended for surgery. During your initial intake, you fail to ask about Ms. Doe's social media accounts. During Ms. Doe's deposition with defense counsel, attorney Joe Black presents Ms. Doe with photographs printed from her Facebook profile showing Ms. Doe at Disney with her kids, riding roller coasters, and drinking around the world at Epcot. Ms. Doe is outraged and asks you, "How is he allowed to do this to me?" It appears that Ms. Doe has not only posted these photos just a few months after her car crash, but she also has failed to set any privacy settings on her photos so anyone with an internet connection could view and download these photos, including Joe Black. Welcome to the world of Internet discovery.

In addition to its effect on discovery, the advent of social media in the legal system has widely affected the behavior of aspiring attorneys, practicing attorneys, and judges, testing their ethical boundaries.<sup>5</sup> This article will discuss the effect social media is having nationally, with a focus on Florida litigation. The ethical issues regarding the use of social media, which start at admission to the Florida Bar through practicing law and even at the level of the judiciary, will also be covered. While most federal and state courts thus far have focused their analysis on the broad nature of discovery and social media's similarity to any other electronic discovery, this analysis misses a significant distinction under Florida law, specifically article I, section 23 of the Florida Constitution and a citizen's right to privacy. Florida's Constitution currently addresses only government intrusion, which includes court orders of discovery.<sup>6</sup> Further, strong suggestions have been made that this provision should be amended in the next Constitutional Convention to expand this provision to private or

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(including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) . . . that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state").

5. See THE SEDONA CONFERENCE, PRIMER ON SOCIAL MEDIA 36 (Oct. 2012) (discussing the potential ethical issues raised when an attorney seeks to acquire information contained on a social media database); Jessica Belle, Article, *Social Media Policies for Character and Fitness Evaluations*, 8 WASH. J.L. TECH. & ARTS 107, 108-09 (2012). Aspiring attorneys who apply to the Florida Bar are also affected by social media websites' broad effect on the legal system because in 2009, Florida became the first jurisdiction to articulate a policy that allows the Bar to request a bar applicant's social media accounts in certain circumstances. Belle, *supra* at 109.

6. See *Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. Dist. Ct. App. 1997).

corporate intrusions into private lives. Social media is not just any electronic discovery, social media is a window into an individual's sometimes highly private circle of friends and family. With today's strict privacy settings, it can reasonably be said that some users have a reasonable expectation of a right to privacy which should be upheld absent a waiver or compelling interest.

The question is whether the liberal discovery rules have gone too far and where the line should be drawn in Florida to protect the privacy interests of individuals from being implicated by overly permissive rules of discovery. Current case law on this issue is informative, but demonstrates that courts need direction on how to decide these complex issues in a uniform manner. The courts that have rendered decisions regarding discovery of social networking sites ("SNS") have made attempts to balance individual privacy interests in the information contained on the SNS with the broad rules of discovery.<sup>7</sup> Focusing on Florida law, this article will argue that, even in the absence of a constitutional or legislative amendment, federal discovery rules and Florida law dictate that individual privacy interests should play a larger role in a court's determination of whether the content contained on SNS is automatically discoverable.

## I. BACKGROUND

### A. STATISTICS

According to the latest statistics compiled by Online Schools, the use of Facebook has exploded over the last five years.<sup>8</sup> With over 500 million users, one in every thirteen people on earth now uses Facebook, with over 250 million of them (over fifty percent) logging in every day.<sup>9</sup> Forty-eight percent of eighteen to thirty-four-year-olds check Facebook when they wake up, with about twenty-eight percent doing so before even getting out of bed.<sup>10</sup> Over 700 billion minutes per month are spent on Facebook,

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7. Miller, *supra* note 3, at 28.

Determining whether social media content may be discoverable in any given context requires the courts to balance a number of factors, including the relevancy of the information sought, the need for the information in the subject litigation, the availability of the information from other sources, and the privacy interests of the party from whom the information is sought.

*Id.*

8. See *Obsessed with Facebook*, USA TODAY COLLEGE, <http://www.usatodayeducate.com/staging/index.php/obsessed-with-facebook> (last visited Oct. 19, 2013) (presenting "Obsessed with Facebook" infographic produced by Online Schools).

9. *Id.*

10. *Id.*

twenty million applications are installed per day, and over 250 million people interact with Facebook from outside the official website on a monthly basis, across two million websites.<sup>11</sup> In just twenty minutes on Facebook, one million links are shared, almost two million friend requests are accepted, and almost three million messages are sent.<sup>12</sup> Not far behind these shocking Facebook statistics, a study shows that Twitter awareness grew from five percent of Americans in 2008 to eighty-seven percent of Americans in 2010 and has over 105,779,710 registered users.<sup>13</sup>

## B. USING FACEBOOK & RELEVANCE

Evidence from social networking sites can prove pivotal in all kinds of cases:<sup>14</sup> imagine the possibility of an incriminating Facebook statement of a criminal defendant, damaging pictures of a personal injury plaintiff, or a YouTube video in a bitter child-custody battle.<sup>15</sup> Additionally, consider the relevance of a glowing testimonial on LinkedIn when used to make or break an employment case. To prove this point, the *Proceedings of the National Academy of Sciences* recently published findings which show that by merely accessing a person's "likes" on Facebook, scientists can accurately predict attributes including: sexual orientation, political views, personality traits, intelligence, happiness, and use of addictive substances, among other factors.<sup>16</sup> The accuracies of these predictions were, in some

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11. See Jeff Bullas, *50 Fascinating Facebook Facts and Figures*, JEFFBULLAS.COM, <http://www.jeffbullas.com/2011/04/28/50-fascinating-facebook-facts-and-figures/> (last visited Oct. 19, 2013).

12. *Obsessed with Facebook*, *supra* note 8.

13. TOM WEBSTER, EDISON RESEARCH, *TWITTER USAGE IN AMERICA: 2010*, at 2 (2010); see also *Twitter User Statistics Revealed*, HUFFINGTON POST, [http://www.huffingtonpost.com/2010/04/14/twitter-user-statistics-r\\_n\\_537992.html](http://www.huffingtonpost.com/2010/04/14/twitter-user-statistics-r_n_537992.html) (last updated May 25, 2011, 5:10 PM).

14. See, e.g., Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook*, PRIVACY ENHANCING TECHNOLOGIES, 1 (2006), <http://people.cs.pitt.edu/~chang/265/proj10/zim/imaginedcom.pdf> (providing examples of postings on social networking sites which negatively affected the users including: (1) a student who was written up for pictures on his Facebook that indicated he was having a party in violation of school policy, (2) corporations that invested in software to monitor what their employees post on blogs, and (3) a college student majoring in criminal justice who admitted to shoplifting on his MySpace page).

15. See Clemency, *supra* note 2, at 1022; see also *Ashby v. Murray*, Nos. 5D11-3650, 5D12-2958, 2013 WL 557180, at \*1 n.3 (Fla. Dist. Ct. App. 2013) (illustrating a custody dispute in which a father attached a page from his former wife's Facebook page to contradict her testimony about where she was working on a certain date); *Hall v. Ryan*, 98 So. 3d 1195, 1196-97 (Fla. Dist. Ct. App. 2012) (per curiam) (alleging a violation of domestic violence protective order because the defendant "friend" requested the sixteen-year-old daughter of his ex-wife/girlfriend through Facebook).

16. Michael Kosinski, David Stillwell & Thore Graepel, *Private Traits and Attributes are*

cases, as high as ninety-five percent.<sup>17</sup>

Contrary to some users, and judicial understanding of social media, Facebook allows users to maintain very strict privacy restrictions. Facebook has provided the following explanations concerning the available privacy restrictions that users are permitted to take advantage of:

- Your friends on Facebook are the same friends, acquaintances and family members that you communicate with in the real world.
- We built Facebook to make it easy to share information with your friends and people around you.
- We understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information. Our default privacy settings limit the information displayed in your profile to your networks and other reasonable community limitations that we tell you about.
- Facebook is about sharing information with others—friends and people in your networks—while providing you with privacy settings that restrict other users from accessing your information. We allow you to choose the information you provide to friends and networks through Facebook. Our network architecture and your privacy settings allow you to make informed choices about who has access to your information.<sup>18</sup>

The availability of these restrictions that users have the option to place on their Facebook pages has certainly not narrowed the widespread effect social media has had on litigation. A majority of users either decide to allow their profiles to remain public or have an insufficient understanding of their privacy options.<sup>19</sup>

While photos, videos, and statements posted on a social networking site are what most lawyers seek during discovery, the evidentiary value of other features associated with such profiles should not be overlooked. For example, mood indicators and emoticons are often employed by a user to share his or her current mood.<sup>20</sup> What was the “mood” of the litigant the

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*Predictable from Digital Records of Human Behavior*, 110 PNAS 5802, 5802 (2013), available at <http://www.pnas.org/content/110/15/5802.full.pdf+html>.

17. See *id.* at 5803.

18. See Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2009/2009-20.html> (reproducing terms of Facebook’s privacy policy). See generally *Data Use Policy*, FACEBOOK, [http://www.facebook.com/full\\_data\\_use\\_policy](http://www.facebook.com/full_data_use_policy) (last visited Oct. 19, 2013), for Facebook’s most recent explanation of its privacy restrictions.

19. See Acquisti & Gross, *supra* note 14, at 13 (reporting that nearly half of Facebook users surveyed gave incorrect answers when asked how many people could view their profiles on the site).

20. See Jim Dwyer, *The Officer Who Posted Too Much (Or Maybe Just Too Callously)*, N.Y.

day, or a week, after an accident? How about the moods and postings of an employee weeks after their termination? In addition, an often-overlooked feature, which could also be deemed discoverable evidence in a case, is a user's "friend" list. This list could lead to other potential witnesses that an opposing attorney may seek as discoverable evidence in litigation. Comments by "friends" on a litigant's SNS may also reveal long forgotten communications or other issues in the case.

## II. DISCOVERY OF SOCIAL MEDIA INFORMATION IN FLORIDA

As of the date of this Article, no Florida appellate court has addressed the extent to which an individual's social media information is discoverable.<sup>21</sup> Therefore, it is likely that Florida courts will decide these issues based on other states' and federal courts' analyses. This unfortunately ignores a significant difference in Florida: its citizens' strong push toward individual privacy. Florida courts should take a much more restrictive approach when determining whether the information contained on an individual's SNS is automatically discoverable. In general, United States courts have allowed for discovery of information contained on an individual's social networking profile when the requests for such information are narrowly tailored to what is relevant to the litigation and the requesting party has established a basis for the request.<sup>22</sup>

Several recent courts' permissive approach to allowing broad discovery of SNS has threatened to stretch the intent of the Federal Rules, to allow counsel to tailor their requests in a way that readily permits access to an individual's private thoughts, experiences, and activities, that could

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TIMES, Mar. 11, 2009, at A24 (describing how a police officer's "mood" expressed on MySpace was used against him in a criminal prosecution). Such information has been deemed discoverable and even useful in cross-examination of witnesses. *See id.*

21. *But see* THE SEDONA CONFERENCE, *supra* note 5, at 34 (stating that courts in Connecticut, Colorado, and California have allowed discovery of social media content when relevant to the litigation).

22. *See, e.g.,* Davenport v. State Farm Mut. Auto. Ins. Co., No. 3:11-CV-632-J-JBT, 2012 WL 555759, at \*2 (M.D. Fla. Feb. 21, 2012) (determining that "the potential relevancy of such photographs [depicting the plaintiff] outweighs any burden of production or privacy interest therein"); Mackelprang v. Fidelity Nat'l Title Agency of Nev., Inc., No. 2:06-CV-00788-JCM-GWF, 2007 WL 119149, at \*8 (D. Nev. Jan. 9, 2007) ("The proper method for obtaining such information is to serve . . . properly limited requests for production of *relevant* . . . communications."); McCann v. Harleysville Ins. Co. of N.Y., 910 N.Y.S.2d 614, 615 (App. Div. 2010) (preventing defendant from conducting "fishing expedition" on "mere hope of finding relevant evidence"); Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (Sup. Ct. 2010) (highlighting defendant's need for the information); McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD, 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010) (allowing discovery when "there is an indication that person's social network sites contain information relevant to the prosecution or defense").

not possibly be within the permissible scope of the rules.<sup>23</sup> Although most courts have determined that content displayed on an SNS is “neither privileged nor protected by any right of privacy,”<sup>24</sup> the Federal Rules of Civil Procedure “offer parties a chance to assert privacy rights to limit discovery despite the lack of a privacy privilege.”<sup>25</sup>

Courts have articulated several reasons for rejecting a litigant’s argument that they have a privacy interest in the content of their SNS. The primary reason courts have focused on when dismissing privacy arguments is based on the public nature of sites such as Facebook, MySpace, and Twitter. Because an individual voluntarily discloses information on SNS in order to publicly display it, courts have quickly rejected any argument that a request to produce such information implicates an individual’s privacy right.<sup>26</sup> In addition, courts have found that relevance outweighs any privacy interest that may be implicated when a request for production of SNS is made.<sup>27</sup> Lastly, with minimal analysis, courts have decided that an individual has no reasonable expectation of privacy in the content of SNS.<sup>28</sup>

Florida courts should find that individual privacy rights are implicated in several instances when the content of SNS is requested by either a governmental or private entity: (1) when the producing party can demonstrate a reasonable expectation of privacy in the content being requested; and (2) when it is clear that opposing counsel has no basis for the request of the private portions of the SNS.<sup>29</sup> Once the court finds that a

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23. See *Davenport*, 2012 WL 555759, at \*2. When the content is properly requested—that is, directly from the party and narrowly tailored to only seek information relevant to the claim—it is difficult to argue that SNS are not within the scope of the discovery rules, and a few recent decisions have demonstrated that Florida trial courts are willing to restrict the scope of discovery to only those situations. See *id.*

24. See, e.g., *id.* at \*1 (citing *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012)).

25. Andrew C. Payne, Note, *Twitigation: Old Rules in a New World*, 49 WASHBURN L.J. 841, 854, 861–62 (2010) (arguing that courts should “recognize the uniqueness of social-networking information”).

26. See *id.* at 861 (“[C]ourts are unwilling to give any privacy protection to information deliberately placed in the public sphere.”).

27. See, e.g., *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-CV-01958-WYD-MJW, 2009 WL 1067018, at \*2 (D. Colo. Apr. 21, 2009).

28. See *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 862–63 (Ct. App. 2009); *Keller v. Nat’l Farmers Union Prop. & Cas., Co.*, No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at \*3–4 (D. Mont. Jan. 2, 2013); *Glazer v. Fireman’s Fund Ins. Co.*, No. 11 Civ. 4374(PGG)(FM), 2012 WL 1197167, at \*3 (S.D.N.Y. Apr. 5, 2012); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

29. See *Tompkins*, 278 F.R.D. at 388; *McCann v. Harleysville Ins. Co. of N.Y.*, 910 N.Y.S.2d 614, 615 (App. Div. 2010). Courts will not permit defendants to engage in a “fishing expedition” into a plaintiff’s social networking profile. See *McCann*, 910 N.Y.S.2d at 615; *Tompkins*, 278 F.R.D. at 388.



privacy interest is implicated, it must delve into a proper analysis that enables the court to balance the individual privacy right against the relevance and necessity of the content to the litigation.<sup>30</sup>

#### A. FLORIDA'S LAW: THE EXPLICIT PRIVACY RIGHT

Florida law provides a basis for Florida litigants who are asked to respond to discovery requests for their SNS to argue that such content should fall under the protection of the Florida Constitution's privacy provision. In particular, the Florida Constitution was amended in 1980 to provide an explicit privacy right:

ARTICLE I, SECTION 23. Right of Privacy. Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall be not construed to limit the public's right of access to public records and meetings as provided by law.<sup>31</sup>

Although this provision only protects against "governmental intrusions," it has been argued that it should be extended by way of a constitutional amendment or by legislation to protect against private or commercial intrusions as well.<sup>32</sup> Further, Florida courts have determined that "[c]ourt orders compelling discovery constitute state action that may impinge on constitutional rights, including the constitutional right of privacy."<sup>33</sup> This is clearly important because the litigation process has a strong potential for unfairly invading a person's private affairs.<sup>34</sup> Therefore, Florida courts must apply a privacy analysis before requiring litigants to disclose particular content of their SNS.

It is just within the last fifty years that the "right of privacy" has been deemed protectable under the United States Constitution<sup>35</sup> and has

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30. See, e.g., *Tompkins*, 278 F.R.D. at 388.

31. FLA. CONST. art. I, § 23.

32. Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 53–55 (1997); see also Payne, *supra* note 25, at 867 (arguing "[c]ourts should consider determining whether a social-network user has an expectation of privacy by looking at the type of information and whether it is reasonable to expect that information to remain private").

33. *Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. Dist. Ct. App. 1997); see also *McEnany v. Ryan*, 44 So. 3d 245, 247 (Fla. Dist. Ct. App. 2010); *Killinger v. Guardianship of Grable*, 983 So. 2d 30, 33 (Fla. Dist. Ct. App. 2008).

34. See *Berkeley*, 699 So. 2d at 790.

35. See *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (deciding that substantive due process requires a reading of an implicit right of privacy in order to protect a fundamental right).

subsequently been explicitly written into several states' constitutions.<sup>36</sup> The United States Supreme Court has determined that the Fourth Amendment right to be free from unreasonable government searches and seizures should be distinguished from other privacy rights.<sup>37</sup> Notably, the Court determined that other privacy rights should be left to individual states to protect: "[T]he protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual [s]tates."<sup>38</sup> Thus, the Florida legislature has discretion to determine the scope and nature of its citizens' right to not only be protected from "governmental intrusions,"<sup>39</sup> but "to be let alone by other people."<sup>40</sup> By limiting the right to privacy to only apply to invasions by the government, the Florida Legislature has arguably failed to protect against a commercial entity's ability to legally gain access and intrude into every aspect of an individual's personal life.<sup>41</sup> Absent explicit language to the contrary, it is not surprising that trial courts have interpreted the liberal federal rules of discovery to permit broad acquisition of private and personal information from an individual's SNS. Unfortunately, this ignores Florida's strong right to privacy jurisprudence, as well as the implicit privacy right in the federal rules of discovery to protect against broad, unwarranted discovery into an individual's SNS.<sup>42</sup> The parameters of an individual's privacy are dictated by that individual, and not by others.<sup>43</sup> This is what the Florida Supreme Court has deemed the individual's "inviolability of one's own thought, person, and personal action."<sup>44</sup>

The Florida Supreme Court acted upon the authority ceded to it by the

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36. See *Overton & Giddings*, *supra* note 32, at 34 n.65; *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (acknowledging that the Florida Constitution contains a strong right to privacy provision).

37. *Katz v. United States*, 389 U.S. 347, 350 (1967) (footnote omitted).

38. *Id.* at 350–51.

39. FLA. CONST. art. I, § 23.

40. *Katz*, 389 U.S. at 350.

41. See *Overton & Giddings*, *supra* note 32, at 27–28.

On an almost daily basis, we are confronted with invasions of privacy of which we may be totally unaware. Whenever you use an Automated Teller Machine (ATM) card, purchase something from a store, purchase an airline ticket, rent a movie or hotel room, "surf" the Internet, or simply use a telephone, an electronic record of your activity is generated.

*Id.* at 27.

42. See FED. R. CIV. P. 26(c)(1) (providing discretion to the court to issue a protective order to protect the moving party against "annoyance, embarrassment, oppression, or undue burden or expense").

43. See *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (citing *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989)).

44. *Id.*

U.S. Supreme Court's articulation of individual states' authority to protect its citizens' right "to be let alone by other people"<sup>45</sup> in stating that "the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution."<sup>46</sup> Indeed, when the citizens of Florida approved article I, section 23 of the Florida Constitution, they demanded more protection of their privacy right than that which had been found under the United States Constitution:

This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, *it can only be concluded that the right is much broader in scope than that of the Federal Constitution.*<sup>47</sup>

In *Winfield v. Division of Pari-Mutuel Wagering*,<sup>48</sup> the Florida Supreme Court established the standard to be applied in evaluating an individual's privacy right. The court determined "[t]he right of privacy is a fundamental right which we believe demands the compelling state interest standard."<sup>49</sup> Thus, "once an individual has established that government has intruded into a private aspect of the individual's life, government must show that it has a compelling interest to justify the intrusion, and that it has employed the least intrusive means possible to accomplish its objective."<sup>50</sup> In analyzing whether an individual's privacy right is implicated, Florida courts generally follow the test set forth in *Winfield*:

- 1) The court must determine whether the individual possesses a reasonable expectation of privacy in the information or subject at issue;
- 2) If a reasonable expectation of privacy is found, then the State must demonstrate that it has a compelling interest in the information it is seeking that justifies the intrusion into the individual's privacy;

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45. *Katz*, 389 U.S. at 350.

46. *State v. Sarmiento*, 397 So. 2d 643, 645 (Fla. 1981) (per curiam).

47. *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (emphasis added).

48. *Id.* at 547.

49. *Id.*

50. *Overton & Giddings*, *supra* note 32, at 38.

- 3) The State must demonstrate that it has sought that information in the least intrusive means.<sup>51</sup>

The practical effect of this test in civil discovery involves a framework of judicial analysis that goes beyond merely compelling production of private information.<sup>52</sup> The court must look to whether the discovery also involves an “undue” invasion of privacy.<sup>53</sup> This is a balancing test between the “right to privacy and the right to know.”<sup>54</sup> One way the courts can handle this is in the confines of an in camera inspection prior to disclosure.<sup>55</sup>

#### B. FEDERAL RULES OF DISCOVERY: THE IMPLICIT PRIVACY RIGHT IN SNS

There is an implicit right to privacy under federal law that should: (1) lead courts to take a closer look at this right when determining the scope of discoverable content contained on SNS, and (2) compel courts to not simply discard any right to privacy on the basis that the information contained on SNS is intentionally released for the public’s viewing.<sup>56</sup> In *Griswold v. Connecticut*, the U.S. Supreme Court discussed the Fourteenth Amendment’s creation of “zones” of privacy rights implicit in the First Amendment’s right to privacy in personal associations, the Third Amendment’s prohibition on quartering of soldiers in one’s home, the Fourth Amendment’s protection against unreasonable searches and seizures, and the Fifth Amendment’s privacy right against self-incrimination.<sup>57</sup> Thus, the Court “conclude[d] that, under this collection of rights, there dwells a general right of privacy as well.”<sup>58</sup> In applying this implicit privacy right the Court carved out three types of interests which it protects: “(1) a person’s interest in decisional autonomy on intimate personal matters; (2) an individual’s interest in protecting against the

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51. See *Winfield*, 477 So. 2d at 547; see, e.g., *State v. Tamulonis*, 39 So. 3d 524, 528 (Fla. Dist. Ct. App. 2010) (finding no privacy right in an individual’s prescription records where the statute permitting the State to access the records was narrowly tailored to only allow the State to accomplish its compelling interest of regulating controlled substances).

52. See *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 945 (Fla. 2002).

53. See *id.*

54. *Id.* at 946 (citing *Mont. Human Rights Div. v. City of Billings*, 649 P.2d 1283, 1290 (Mont. 1982)).

55. *Id.* at 945.

56. See Kelly Ann Bub, Comment, *Privacy’s Role in the Discovery of Social Networking Information*, 64 SMU L. REV. 1433, 1439 (2011) (“Even though ‘privacy’ is not specifically mentioned in [Federal Rule of Civil Procedure 26(c)], a protected privacy interest is implied if the release of the private information would result in embarrassment or oppression.”).

57. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); Overton & Giddings, *supra* note 32, at 32.

58. Overton & Giddings, *supra* note 32, at 32.

disclosure of personal matters; and (3) an individual's interest in being secure from unwarranted governmental surveillance and intrusion."<sup>59</sup> The Court has interpreted the right to be protected from the public disclosure of personal matters quite loosely.<sup>60</sup> "In providing somewhat superficial protection against disclosure, the Court has balanced the personal right of privacy against the need for governmental intrusion rather than applying a compelling state interest test."<sup>61</sup>

Pursuant to this loose construction of a right to privacy in the disclosure of personal matters, it comes as no surprise that federal courts have conducted minimal, if any, analysis when determining whether individuals have a right to privacy in the information contained on their SNS. For instance, in *McMillen v. Hummingbird*,<sup>62</sup> the defendant requested discovery of the plaintiff's account names and passwords for all of his SNS profiles.<sup>63</sup> The judge disagreed with the plaintiff's argument that the communications being requested were conducted in private and, therefore, should be protected from disclosure, and ordered the plaintiff to turn over his user names and passwords for his SNS profiles.<sup>64</sup> In rejecting the plaintiff's arguments, the judge determined that no "social network site privilege" exists, and determined that the public nature of websites such as Facebook and MySpace allow users to connect with friends and meet new people and, thus, "it would be unrealistic to expect that such disclosures would be considered confidential."<sup>65</sup> In addition, the judge found that the privacy policies contained on SNS "should dispel any notion that information one chooses to share, even if only with one friend, will not be disclosed to anybody else."<sup>66</sup> In particular, the judge cited Facebook's privacy policy, which explains to users that their content may be viewable by their "friends" even after the information has been removed, and the portion of Facebook's rules which gives its operators permission to disclose information pursuant to subpoenas, court orders, or other civil or criminal requests if they have a good faith belief the law requires them to

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59. *Id.* (footnotes omitted).

60. *See id.* at 33.

61. *Id.* However, the U.S. Supreme Court has only discussed an individual's interest in controlling the disclosure of personal information in the context of the Freedom of Information Act. *Id.* at 33 & n.62 (citing 5 U.S.C. § 552 (1994)).

62. *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010).

63. *Id.*

64. *Id.*

65. *Id.*; *see also* *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 656-57 (Sup. Ct. 2010) (deciding that no legitimate expectation of privacy can exist in social networking communications because their very purpose is to publicly share information).

66. *McMillen*, 2010 WL 4403285.

respond.<sup>67</sup> Thus, the judge decided that no one could reasonably expect communications on SNS to remain private.<sup>68</sup> In addition, the judge determined the benefits of disposing of the litigation in permitting discovery of such content outweighed any right to keep the communications private.<sup>69</sup>

In contradiction to the overly permissive approach of allowing discovery of all private portions of a plaintiff's SNS, the judge in *Tompkins v. Detroit Metropolitan Airport*,<sup>70</sup> determined that the defendant did "not have a generalized right to rummage at will through information that Plaintiff has limited from public view."<sup>71</sup> Instead, the judge determined that the requesting party must make a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence in order to prevent the defendant from engaging in a "fishing expedition, in the hope that there might be something of relevance in Plaintiff's Facebook account."<sup>72</sup> Although he ultimately rejected the argument that the material posted on a Facebook page is private or privileged,<sup>73</sup> this opinion exemplifies a willingness to recognize that some content on an individual's SNS should be guarded from the requesting party, especially where there has been no basis for the overly broad request.<sup>74</sup> In fact, the judge even recognized that such an overly broad request for the plaintiff's entire account may very well contain "voluminous personal material" that is not relevant to the litigation.<sup>75</sup> Several federal courts have followed this "circumspect approach" in determining whether a defendant can probe a plaintiff's SNS.<sup>76</sup>

However, federal courts have consistently rejected any claim of a privacy interest in the contents of SNS despite the noteworthy distinctions between other electronic material and the contents of SNS,<sup>77</sup> and despite the

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67. *Id.*

68. *Id.*

69. *Id.*

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

71. *Id.* at 388.

72. *Id.* (emphasis omitted).

73. *Id.*

74. *See id.* at 387–88. The defendant in *Tompkins* requested the content of the plaintiff's entire Facebook account. *Id.* at 389.

75. *Id.* at 389.

76. *See, e.g., Keller v. Nat'l Farmers Union Prop. & Cas. Co.*, No. CV 12–72–M–DLC–JCL, 2013 WL 27731, at \*4 (D. Mont. Jan. 2, 2013) (citing *Thompson v. Autoliv ASP, Inc.*, No. 2:09–CV–01375–PMP–VCF, 2012 WL 2342928, at \*4 (D. Nev. June 20, 2012), as an example of a court allowing discovery of plaintiff's SNS where the defendant demonstrated that the public portions of plaintiff's Facebook profile negated her claim that her SNS was irrelevant).

77. *See generally Payne, supra* note 25, at 842 (analyzing significant differences between

implicit privacy right that has been read into the Federal Rules.<sup>78</sup> Rather than dismissing any privilege or privacy right in SNS on the basis that such material is deliberately disclosed to the public, courts should analyze the nature of the content being sought through the steps the user has taken to shield it from the public's view. The first step of any analysis should be discovery of the individual user's privacy settings. The SNS user's right to privacy should be analyzed more closely, because in contrast to other Electronically Stored Information ("ESI"), which courts have provided a broad scope of discovery for, "[m]uch of the information located on a social-networking site is personal and, therefore, carries with it implications on privacy rights."<sup>79</sup> The mere fact that the communications sought in discovery took place on a medium that is widely known as a public sharing site should not be dispositive when courts conduct an analysis regarding the scope of discoverable SNS content.<sup>80</sup> An analogy may be drawn to a person having a private discussion with one or two people in a public meeting place. Just because the location of the discussion is a public place, does not mean the speaker intended for the world to hear her conversation.

Rather, unlike the communications that were contemplated by the Advisory Committee when it implemented the liberal 2006 e-discovery amendments, social networking information deserves an extra layer of privacy protection because "it involves the communication of personal information based on individual expression, relationship building, and a sense of community."<sup>81</sup> In addition, unlike the content sought pursuant to the e-discovery rules, users can subjectively form a reasonable expectation of privacy in the portions of their SNS that they choose to shield from the general public's view.<sup>82</sup> Despite some courts' determinations that Facebook's privacy rules must absolve any user's ability to form a reasonable expectation of privacy in his SNS content,<sup>83</sup> provided a user

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Electronically Stored Information and social-networking information).

78. See Bub, *supra* note 56, at 1438–39.

79. Payne, *supra* note 25, at 860–61.

80. See U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 500 (1994) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.").

81. Payne, *supra* note 25, at 864, 868 ("The sharing of intimate knowledge lets a user accomplish three social goals: express users' identity, build relationships, and demonstrate community value.").

82. *Id.* at 864–65, 869–70 (noting that, on Facebook, a user can limit who can see his or her information and limit particular types of information to only be visible to a select group of users).

83. See *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010).

actually reads the rules, he could certainly form a reasonable expectation that at least some of the content on his SNS is private.<sup>84</sup>

In fact, certain information can be further limited within the Facebook format to specific users and friends such as a spouse, therapist, or attorney, which could implicate additional privileges. In addition, Facebook even allows the user to have “private” photo folders that only the user can access. At the very least, courts should address the user’s effort to keep their content private when deciding the scope of discoverable information contained on SNS. As demonstrated above, in limiting the scope of discoverable content on SNS, courts have only looked to whether the requesting party has made a sufficient showing of the potential relevance of the content it is seeking and have wholly failed to consider the subjective steps taken by the user in order to limit the information that is made public. The personal nature of some of the content that is disclosed on SNS, as well as the distinguishing features between SNS and other types of ESI, should compel courts to engage in an analysis of an individual’s privacy right in SNS when determining the scope of discoverable content.

In addition, the implicit right to privacy in Rule 26(c) should lead courts to acknowledge a privacy interest in SNS content when issuing protective orders.<sup>85</sup> The rule gives courts discretion to protect a litigant’s privacy interest when the release of the requested content “would result in embarrassment or oppression.”<sup>86</sup> In applying this rule, courts have used a balancing test to “weigh the hardship of the party seeking to keep the information private against the information’s probative value.”<sup>87</sup> Despite this rule’s implicit protection of an individual’s privacy interest, courts have refused to use the rule to recognize any right to protect the content on SNS. The rule provides litigants the basis for obtaining a protective order to protect the private portions of an individual’s SNS.<sup>88</sup> The content the user is seeking to protect could very likely consist of personal disclosures and communications, that if shared, would result in severe embarrassment, annoyance, or oppression to the user. Thus, courts should not ignore the implicit privacy right that the rule provides when determining the scope of discoverable content contained in a litigant’s SNS.

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84. See *Data Use Policy*, FACEBOOK, [http://www.facebook.com/full\\_data\\_use\\_policy](http://www.facebook.com/full_data_use_policy) (last visited Apr. 15, 2013). Facebook’s privacy statement and policies state numerous times that the user has the choice to make his or her information private or public. See *id.* (including sections titled “Sharing and finding you on Facebook” and “Information we receive and how it is used”).

85. See FED. R. CIV. P. 26(c).

86. See Bub, *supra* note 56, at 1439.

87. Payne, *supra* note 25, at 869.

88. See Bub, *supra* note 56, at 1438–39.



## C. RECOMMENDATION AND ANALYSIS SPECIFIC TO FLORIDA

While it must be conceded that relevance is a more heavily weighed factor when analyzing whether requested information is discoverable,<sup>89</sup> under Florida law, privacy should also be a prominent fact in the analysis when the content of SNS is requested.<sup>90</sup> Courts should not simply discard the privacy right for the reasons that have been proffered and accepted in other federal courts when determining that SNS content is automatically discoverable based on its relevance to the litigation.<sup>91</sup>

The “right of privacy” arises under three different categories of law: (1) tort law, (2) the Federal Constitution, and (3) a state constitution or statute that protects against “either governmental or private intrusion.”<sup>92</sup> An analysis under the third category of law should be conducted when a litigant is asked to divulge the private content on SNS. This right is guaranteed by Florida’s Constitution and judicial decisions interpreting that right.<sup>93</sup> Due to the pervasiveness of SNS and the wide range of personal content contained on a user’s SNS profile, Florida’s privacy right should be interpreted to protect against both governmental and private intrusions into the private portions of an individual’s SNS. This is not to say that the private portions of a user’s SNS can never be discoverable; however, Florida courts should factor in the privacy right to their analyses before granting access to the portions users have taken reasonable steps to protect.

First, Florida courts should determine whether the individual could have a reasonable expectation of privacy in the content of his or her SNS. For example, a court can look to the specific privacy settings utilized by the SNS user. If the user took steps to guard his or her content from the public’s view by enabling the privacy features the site allows, notwithstanding the assumed public nature of these sites, a court should

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89. *Id.* at 1453, 1455; *see also* EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

Although privacy concerns may be germane to the question of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation, a person’s expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery.

EEOC, 270 F.R.D. at 434.

90. *See* discussion *supra* Part II.A. *But see* *Beswick v. N.W. Med. Ctr., Inc.*, No. 07-020592 CACE (03), 2011 WL 7005038 (Fla. Cir. Ct. Nov. 3, 2011) (order granting defendant’s motion to compel discovery) (finding that privacy arguments with respect to social media lack merit).

91. *See, e.g., Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 653–57 (Sup. Ct. 2010).

92. *Forsberg v. Hous. Auth. of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984) (Overton, J., concurring) (*per curiam*).

93. *See Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. Dist. Ct. App. 1997); *Holland v. Barfield*, 35 So. 3d 953, 956 (Fla. Dist. Ct. App. 2010).

find that the user reasonably expected to keep such content private. Next, the court should determine whether the request for the content is narrowly tailored to lead to the discovery of admissible evidence.<sup>94</sup> This approach is not only consistent with the federal rules of discovery, but also shields a litigant from being forced to unnecessarily disclose his or her personal thoughts, experiences, and emotions.

Some Florida trial courts, because of the broad nature of Facebook's social media, have brushed aside the user's argument to privacy.<sup>95</sup> The mere fact that private information can be shared by others who have access to a user's information should not end the privacy analysis. Does the fact that private information shared with a spouse, physician, or accountant *may* be repeated by that third person, automatically defeat the individual's "inviolability" of their right to privacy? The Florida Supreme Court has made clear that its analysis of privacy is not based upon what third parties may, or may not do, with that information.<sup>96</sup> It is based upon the individual's own "expectation" of privacy with respect to their information. As a result, it is incorrect for courts to view Facebook from the standpoint of who may share information; instead, they must look at the individual user's own privacy settings.

In *Rasmussen v. South Florida Blood Services, Inc.*, the Florida Supreme Court set forth the appropriate analysis courts must engage in when deciding whether a protective order is warranted:

In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it. Thus, ***the discovery rules provide a framework for judicial analysis of challenges to discovery on the basis that the discovery will result in undue invasion of privacy.*** This framework allows for broad discovery in order to advance the state's important interest in the fair and efficient resolution

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94. See *Levine v. Culligan of Fla., Inc.*, No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404 (Fla. Cir. Ct. Jan. 29, 2013) (order sustaining plaintiff's objections to discovery) (holding that Defendant should not have the right to rummage at will through social media information limited from public view, and further holding that the first step of the analysis is to make some showing that the "private" information is relevant to the litigation, either by way of circumstantially showing the public information gives one the impression that there is more contained in the private information, or by some other showing).

95. See *Beswick*, 2011 WL 7005038. The court in *Beswick* cites to caselaw regarding both MySpace and Facebook without recognizing the significant differences between these two mediums. See *id.* MySpace created a user page which the entire world could access, while Facebook has detailed privacy settings which can limit not only content, but can even limit who can locate an individual Facebook user online.

96. See *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002).

of disputes while at the same time providing protective measures to minimize the impact of discovery on competing privacy interests.<sup>97</sup>

Pursuant to the framework set forth in *Rasmussen*, when determining the permissible scope of discoverable content, Florida courts have determined that an individual's privacy right can be implicated. For example, in *Holland v. Barfield*, the plaintiff in a wrongful death action requested production of all of the defendant's electronic media, seeking evidence of any communications made through a cell phone, Facebook, and MySpace.<sup>98</sup> The court reversed the trial court's order, which allowed the plaintiff to review all of the information on the defendant's SIM card and computer, "without regard to her constitutional right of privacy and the right against self-incrimination or privileges, including attorney-client, work product."<sup>99</sup> The court acknowledged that the content sought in that case was different than medical records, which typically warrant protection based on the privacy right.<sup>100</sup> However, the court still determined that the defendant's "asserted right against self-incrimination and right of privacy nonetheless enjoy protection."<sup>101</sup>

Therefore, courts in Florida should comport with the analysis set forth in *Rasmussen* when determining the scope of discoverable content on an individual's SNS. Unlike the approach taken by federal courts thus far, which have swiftly discarded any right to privacy in SNS content, Florida courts must approach the question of discoverability of SNS content by: (1) ascertaining the privacy restrictions the user has employed in order to decide whether the user has a reasonable expectation of privacy in the content requested; (2) determining whether the content has been requested by the least intrusive means; and (3) weighing the individual's constitutional right to privacy against the requesting party's interest in obtaining the content.

### III. FLORIDA BAR APPLICANTS

In 2009, the Character and Fitness Commission of the Florida Board of Bar Examiners recommended that access to applicants' personal websites, "such as 'Facebook,'" should be sought from applicants.<sup>102</sup>

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97. *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (emphasis added) (citations omitted).

98. *Holland*, 35 So. 3d at 954.

99. *Id.* at 956.

100. *Id.*

101. *Id.*

102. CHARACTER AND FITNESS COMM'N FLA. BD. OF BAR EXAM'RS, FINAL REPORT TO THE SUPREME COURT OF FLORIDA 16 (2009).

While the Florida Board of Bar Examiners has the authority to review otherwise personal and private information of its applicants, even in light of Florida's constitutional provision, this was the first time that the Florida Board of Bar Examiners and Fitness Commission suggested reviewing applicants' online communications.

The Commission went so far as to recommend that "a question should be added to the Florida Bar Application to require that all such sites be listed and access granted to the Board."<sup>103</sup> This would give the Board of Bar Examiners potentially unlimited access into a user's private, and possibly confidential, information. Furthermore, this recommendation was made without any analysis of the individual applicant's privacy settings or friends. For example, what if there were private chats or emails on Facebook with the applicant's spouse, lawyer, accountant, etc.? It is no coincidence that the first test of Florida's right to privacy actually involved an applicant to the Florida Bar.<sup>104</sup> While the right to privacy does not hold that there will be absolutely no intrusion by the Government, it does provide protection for those areas where an individual has a reasonable expectation of privacy.

Thankfully, in a detailed reply to the Commission's recommendations, the Board of Bar Examiners responded by adopting the policy that "investigation of social networking websites be conducted on a case-by-case basis" for certain applicants.<sup>105</sup> The Executive Director for the Board of Bar Examiners has stated that "the most common requests for social media information pertain to alcohol, drugs, candor, and general professionalism concerns."<sup>106</sup> Similar to a civil court's analysis and broad discovery concepts, this case-by-case analysis allows the Board to properly review the details of each individual circumstance and limit its request to only relevant information for inquiry. Much like a civil litigant, who waives certain privacy protections when bringing a civil lawsuit for money damages, these broad waivers should not completely throw out the individual's continued right to privacy where requests are overbroad or mere fishing expeditions.

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103. *Id.*

104. See Fla. Bd. of Bar Exam'rs Re: Applicant, 443 So. 2d 71, 72 (Fla. 1983) (holding that it did not violate the right to privacy in the Florida Constitution for the Board of Bar Examiners to require that all medical records, including records of psychological treatment, be disclosed).

105. CHARACTER AND FITNESS COMM'N, FLA. BD. OF BAR EXAM'RS, *supra* note 102, at 5.

106. Telephone Interview with Michele Gavagni, Exec. Dir., Fla. Bd. of Bar Exam'rs (Mar. 8, 2013).

## IV. THE JUDICIARY

Civil litigants and bar applicants are not the only individuals who must be concerned about privacy issues and social media. The judiciary has also come under scrutiny. Although some states have concluded that judges' and attorneys' use of social media does not pose a violation to their ethical standards, the Florida Supreme Court Judicial Ethics Advisory Committee has decided otherwise.<sup>107</sup> The Committee determined that allowing judges to be Facebook "friends" with attorneys who may potentially appear in front of the judge would violate the provision of the Code of Judicial Conduct which states, "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."<sup>108</sup> This Committee ultimately determined that the Code of Judicial Conduct seeks to protect the image of the judge in Florida, and that "friending" an attorney that may appear before the judge would create the impression that the attorney has some special influence over that judge.<sup>109</sup>

The subsequent year, the Committee was asked to review its previous decision with the qualification that the judge have a specific disclaimer on their Facebook page which identifies "friends" as merely acquaintances, or alternatively if the judge accepts all lawyers who apply as friends.<sup>110</sup> The Committee that reviewed this issue did carve out certain exceptions to the rule, which allow judges to be "friends" with voluntary bar associations, and do not require judges to "un-friend" all lawyers who may be members of that association.<sup>111</sup> Furthermore, the Committee was focused on friend requests from lawyers who appear before the judge, and not on lawyers who do not appear before that judge.<sup>112</sup>

Interestingly, the Committee was not unanimous on this ruling. The minority view recognized that "social networking is now so ubiquitous that 'friends' in that context are only contacts or acquaintances, and not friends in the traditional sense."<sup>113</sup> In fact, the minority used the analogy of a town

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107. See Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/legalcommunity/legalpractice/opinions/jecopinions/2009/2009-20.html>.

108. *Id.* (quoting FLA. CODE OF JUDICIAL CONDUCT Canon 2B (2008)).

109. See *id.*

110. See Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010), available at <http://www.jud6.org/legalcommunity/legalpractice/opinions/jecopinions/2010/2010-06.html>.

111. See *id.*

112. See *id.*

113. *Id.*

hall meeting, where the judge invites anyone and everyone to attend.<sup>114</sup> While this example appears more analogous to the actual use and practice of Facebook in this day and age, the majority still disagreed and refused to either revise or withdraw its previous decision.<sup>115</sup>

More recently, a Florida court relied on the above opinion when it agreed with a defendant in a criminal case who alleged that he could not receive a fair and impartial trial since the judge presiding over his case was “friends” with the prosecutor on Facebook.<sup>116</sup> There, the Fourth District Court of Appeal determined that the defendant “alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.”<sup>117</sup> The Florida Supreme Court has not yet responded to a certified question for review of this decision, but it is likely given the Committee’s decision that they will affirm the district court’s ruling.<sup>118</sup> Thus, it is quite clear that Florida attorneys and judges should be particularly cautious when engaging in both personal and professional use of social media websites in Florida.

## CONCLUSION

With the advent of any new invention, the tendency is to overuse the media and stretch the boundaries of reasonableness. The growth of Facebook and users sharing, sometimes over-sharing, information has appeared to reach a fulcrum. Intelligent users are more cognizant of their privacy settings and more conscious of what information they share, and with whom. As a result, courts must recognize that not all information shared on Facebook ends up in the same place. Facebook does not create a user page, the entirety of which is viewable to the world. A user may have a real expectation of privacy regarding certain communications and information. As a result, based upon Florida’s constitutional right to privacy, courts must take a closer look at the individual user’s interface with the Facebook medium. If in fact the user has created a private sphere

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114. *See id.*

115. *See id.*

116. *Domville v. State*, 103 So. 3d 184, 185–86 (Fla. Dist. Ct. App. 2012) (per curiam); *see Domville v. State*, No. 4D12-556, 2013 WL 163429, at \*1 (Fla. Dist. Ct. App. Jan. 16, 2013) (Gross, J., concurring) (per curiam) “Judges do not have the unfettered social freedom of teenagers.” *Domville*, 2013 WL 163429, at \*1.

117. *Domville*, 103 So. 3d at 186.

118. *See also* Ed Bean, *Lawyers at Seminar Split on ‘Friending’ Judges on Facebook*, DAILY REPORT (Feb. 28, 2013), [http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202590122803&Lawyers\\_at\\_seminar\\_split\\_on\\_friending\\_judges\\_on\\_Facebook&slreturn=20130128120738](http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202590122803&Lawyers_at_seminar_split_on_friending_judges_on_Facebook&slreturn=20130128120738). A slim majority of attorneys at the Georgia Bar, Media and Judiciary Conference agreed that the judge should be disqualified. *Id.*

of communication, within an otherwise public social media, then those private communications should be protected absent a clear showing of relevance.