

WHAT YOU SAY ON FACEBOOK MAY BE USED AGAINST
YOU IN A COURT OF FAMILY LAW: ANALYSIS OF THIS NEW
FORM OF ELECTRONIC EVIDENCE AND WHY IT SHOULD BE
ON EVERY MATRIMONIAL ATTORNEY’S RADAR

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It is no longer a secret that some of the best evidence a divorce attorney can find is now found on social networking sites such as Facebook, MySpace, and Twitter. The use of electronic evidence on social networking sites has exploded in family law cases during the past decade, and “[d]ivorce lawyers are taking notice . . . mining social media sites for evidence, to contradict financial hardship claims by a spouse or showcase crude behavior by a parent in a custody battle.”¹ The parties involved in these disputes often utilize social networking sites as a means of obtaining support during a highly emotional period of their lives. “Unfortunately, this may be the worst time for them to be venting by making disparaging remarks about soon-to-be-ex-spouses that are publicly accessible.”²

The impact of evidence gathered on social networking sites can be readily seen. According to the American Academy of Matrimonial Lawyers, 81% of its members have seen a rise in the number of divorce cases involving information taken from social networking sites, and 66% cite Facebook as the primary source for online divorce evidence.³ Most recently, mobile social networking has become incredibly popular, allowing users “to create and modify profiles, make friends, chat, share

1. Jack Zemlicka, *High-Tech Hearsay?*, WIS. LAW JOURNAL (Dec. 20, 2010, 11:09 AM), <http://wislawjournal.com/blog/2010/12/20/high-tech-hearsay/>.

2. Mary Kay Kisthardt & Barbara Handschu, *Using Social Network Evidence in Family Court*, LAW TECH. NEWS (Sept. 21, 2010), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472265541>.

3. Lev Grossman, *2010 Person of the Year Mark Zuckerberg*, TIME, Jan. 3, 2011, at 72.

photos and videos, and blog”—all from their mobile phones.⁴ Still, the courts have yet to adequately address this rapidly growing form of electronically stored information and the burdens of admissibility this type of evidence creates.⁵

Part I of this note will discuss social networks in general, describe the valuable nature of information found on social networking sites, and demonstrate why this evidence is so useful for matrimonial attorneys. Part II will explore the background of electronically stored information and the evidentiary hurdles it presents. Part III(A) will dissect the process of obtaining social network evidence as well as the advantages and disadvantages unique to divorce attorneys. Part III(B) will focus on the main evidentiary hurdles presented by this new form of electronic evidence. Finally, Part IV will conclude with a summary of how although evidence found on social networking sites is a relatively new area yet to be fully explored by the court, the same general principals of evidence and discoverability should still apply going forward.

I. SOCIAL NETWORKING AND ITS APPLICATION TO FAMILY LAW

The advent of social networking sites caused one of the most fundamental shifts in human relations of the 21st century.⁶ Social networking websites allow users to upload information about themselves, share similar interests with other users, join networks or groups they find interesting, post pictures and videos, and add “friends.”⁷ Most sites are available to all users, with some age restrictions, and are used primarily for personal and business reasons.⁸ In 2010, Facebook accounted for 12% of all time spent online.⁹ Sites such as Facebook, LinkedIn, MySpace, and Twitter are “increasingly popular vehicles for the dissemination of personal information posted on individualized profiles.”¹⁰ These sites offer users

4. Alyson Gregory Richter, *Social Networking Evidence and Ethical Issues: How To Get It and How to Get It In*, 33 ST. BAR OF TEX. ANN. ADVANCED MARRIAGE DISSOLUTION INST. § 4, at 1 (2010).

5. *Griffin v. State*, 995 A.2d 791, 799 (Md. Ct. Spec. App. 2010) (describing the “scant case law” concerning authentication concerns attendant to the use of evidence printed from social networking sites such as MySpace), *rev'd*, 19 A.3d 415 (Md. 2011).

6. See Richard Stengel, *Only Connect. Mark Zuckerberg and Facebook Are Changing How We Interact—And What We Know About Each Other*, TIME, Jan. 3, 2011, at 43.

7. Steven C. Bennett, *Civil Discovery of Social Networking Information*, 39 SW. L. REV. 413, 414 (2010).

8. *Id.*

9. Clint Boulton, *Facebook Passed Google, Yahoo, Microsoft in User Engagement*, EWEK.COM (Feb. 9, 2011), <http://www.eweek.com/c/a/Web-Services-Web-20-and-SOA/Facebook-Passed-Google-Yahoo-Microsoft-in-User-Engagement-384309/>.

10. *Griffin*, 995 A.2d at 800.

“multi-faceted avenues to ‘network’ with fellow users, along with control over the content of their profiles.”¹¹

“Opposing parties and their attorneys routinely look to Facebook, LinkedIn, Twitter, YouTube, MySpace, and other social media forums to gather evidence to use in court[s]” of family law.¹² Typically, these sites are free and operate as “online newsletter[s] or . . . personal journal[s]—where an individual can post concerns, ideas, opinions, etc.—and . . . can contain links to web sites[,] . . . images[,] or video.”¹³ Three very popular sites that contain much of the evidence used in family law cases are Facebook, MySpace, and Twitter.¹⁴

Facebook is currently the largest and most popular of the social networking sites. Facebook is a social utility network that allows people to communicate with friends, family, and co-workers.¹⁵ It has features like “wall posts,” “status updates,” “tagging” of uploaded pictures, and “friend requests” that are incredibly popular among its users.¹⁶ Once a profile is created, it displays information about the individual that the user chooses to share, including photos, videos, interests, education, relationship status, sexual preference, and contact information.¹⁷ In addition, people can communicate with other users by sending private messages or through posting feeds through “wall posts.”¹⁸ To date, more than 800 million individuals are active users on Facebook, and this trend shows no sign of slowing down.¹⁹ “If Facebook were a country it would be the third largest” in the world behind China and India,²⁰ with arguably more information about its citizens than any government.²¹ “[N]early half of all Americans have a Facebook account,”²² and for divorce attorneys, this means

11. *Id.*

12. Scott Davis Stewart, *Attorneys Collect Evidence from Social Media for Use in Family Law Cases*, LAW OFFICES OF SCOTT DAVIS STEWART BLOG (Nov. 20, 2010), <http://www.azdivorceattorneyblog.com/2010/11/attorneys-collect-evidence-from-social-media-for-use-in-family-law-cases.shtml>.

13. *Griffin*, 995 A.2d at 800 (quoting *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 437–38 (Md. 2009)).

14. *Your Digital Trail and What It Can Mean for Your Divorce or Child Custody Dispute*, ALBUQUERQUE DIVORCE LAWYER BLOG (Mar. 5, 2012), <http://www.albuquerquedivorcelawyerblog.com/2012/03/your-digital-trail-and-what-it.html>.

15. *Fact Sheet*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Feb. 23, 2012) (reporting the most recent statistics).

16. *Id.*

17. *Id.*

18. *Products*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=19> (last visited June 13, 2012).

19. *Fact Sheet*, *supra* note 15.

20. Grossman, *supra* note 3, at 50.

21. Stengel, *supra* note 6, at 43.

22. Grossman, *supra* note 3, at 50 (stating that “[t]his year, Facebook . . . added its 550 millionth member” and one out of every dozen people on the planet had a Facebook account).

information that “was once considered intimate is now shared among millions with a keystroke.”²³

The growth of Facebook has presented matrimonial lawyers with incredible opportunities to seek incriminating and often blatantly forthcoming evidence in family law matters.²⁴ “Relationships on Facebook have a seductive, addictive quality that can erode and even replace real-world relationships.”²⁵ The allure of being connected to so many people is enticing and creates a very real possibility that people will not be able to stop themselves from willingly revealing a substantial amount of personal information.²⁶

MySpace, launched in 2003, is another social networking site that currently has 70 million unique monthly visitors.²⁷ The site focuses on creating a “highly personalized experience for people to discover [relevant] content” and to connect with others who have similar interests.²⁸ MySpace allows members to “[e]xpress, collect, and display their creations and interests on their profiles and through sharing tools.”²⁹ “The primary difference between MySpace and its rival, Facebook, is the user’s ability . . . to uniquely customize . . . [a] profile page with” graphics, photos, colors, and music.³⁰

Twitter is the new kid on the social networking block. As of March 2012, Twitter was ranked second for site popularity.³¹ Twitter number of unique monthly visitors was 250 million at that time.³² Although not nearly as extensive as Facebook or MySpace, Twitter acts as a microblogging service that allows users to “answer the question, ‘What are you doing?’ by sending short text messages [of] 140 characters in length called ‘tweets’ to . . . friends, or ‘followers.’”³³ “The short format of the tweet is a defining characteristic of the service, allowing” quick and

23. Stengel, *supra* note 6, at 43.

24. Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. REV. 1057, 1059 (2009).

25. Grossman, *supra* note 3, at 68.

26. *Id.*

27. *Top 15 Most Popular Social Networking Sites March 2012*, EBIZMBA (March 20, 2012), <http://www.ebizmba.com/articles/social-networking-websites> [Hereinafter *Top 15 Most Popular Social Networking Sites*]; *Meet the New MySpace*, MYSPACE (Oct. 27, 2010), <http://www.myspace.com/pressroom/2010/10/meet-the-new-myspace/>.

28. *Meet the New MySpace*, MYSPACE (Oct. 27, 2010), <http://www.myspace.com/pressroom/2010/10/meet-the-new-myspace/>.

29. *Id.* (emphasis omitted).

30. Richter, *supra* note 4, at 3.

31. *Top 15 Most Popular Social Networking Sites*, *supra* note 27.

32. *Id.*

33. *What is Twitter and Why Does It Keep Following Me Around?*, TWEETERNET, <http://tweeternet.com/> (last visited Mar. 20, 2012) (emphasis omitted).

informal information sharing.”³⁴ Tweets are displayed on a user’s profile page and can be viewed by friends on the homepage of anyone who is “following” the “tweets” and on the Twitter public timeline.³⁵ The service provides the ability to quickly broadcast information about “where you are[,] . . . what you’re up to[,]”³⁶ or how you’re feeling, all of which is evidentiary gold for matrimonial attorneys.

Information that is posted on any social networking site is “considered to be strong evidence in family law courts.”³⁷ When posted, this information can influence child custody, spousal maintenance, alimony, child support, and visitation of the parent. Evidence can be gathered from social networking sites to show that the opposing party is “an excessive spender, an irresponsible parent,” or that the party is “drug or alcohol dependent.”³⁸ Spouses involved in an affair can be exposed to the court using Facebook photos depicting their unfaithful behavior.³⁹ Social networking evidence can be used to show a lack of child supervision in a custody battle by displaying pictures of an intoxicated parent in custody of the children. Pictures of lavish vacations, newly purchased cars, or other expenditures on Facebook may help establish previously unclaimed assets in child support or alimony battles.⁴⁰

With money at the heart of a significant number of divorce cases, websites such as LinkedIn further increase the value of social networking evidence. “LinkedIn is the world’s largest professional network with over 120 million” users.⁴¹ The site proclaims to “connect[] you to your trusted contacts and help[] you exchange knowledge, ideas, and opportunities with a broader network of professionals.”⁴² Evidence that you are “LinkedIn” at work could demonstrate to a judge that you are capable of a certain earning capacity. Consequently, the take away is that social networking sites have rapidly become a matrimonial attorney’s go-to resource for incriminating evidence. As a legal blogger phrased it, “Anything You Post Can Be Used Against You in [the] Court of Family Law.”⁴³

34. *Id.*

35. *Id.* (explaining that followers are people who have signed up to receive your posts or tweets).

36. *Id.*

37. Stewart, *supra* note 12.

38. *See id.* (internal quotation marks omitted); *see also In re T.T.*, 228 S.W.3d 312, 322–23 (Tex. App. 2007) (involving a termination of parental rights proceeding, in which the court considered a father’s statement on his MySpace profile that he did not want children).

39. Kisthardt & Handschu, *supra* note 2.

40. Stewart, *supra* note 12.

41. *What Is LinkedIn?*, LINKEDIN, <http://learn.linkedin.com/what-is-linkedin/> (last viewed Mar. 20, 2012).

42. *Id.*

43. Stewart, *supra* note 12.

“The act of posting information on a social networking site . . . makes whatever is posted available to the world at large.”⁴⁴ However, not everything a user posts can be accessed by others. Many social networking sites provide measures of privacy protection to their users. Parties seeking to access information from a person’s profile to collect “communications, pictures, [or] other information[] may need to request permission from the [actual] account holder” or become a “friend” of the account holder.⁴⁵ Although users of social networking sites often have the ability to adjust who can see their information, the majority of users post freely and willingly. These sites

are sophisticated tools of communication where the user voluntarily provides information that the user wants to share with others. Web sites such as Facebook and MySpace[] allow the user to tightly control the dissemination of that information. The user can choose what information to provide or can choose not to provide information.⁴⁶

II. OVERVIEW OF ELECTRONICALLY STORED INFORMATION

Although the Federal Rules of Evidence do not specifically categorize information found on social networking sites, they are typically included in the standard admissibility procedures as electronic evidence.⁴⁷ Electronically stored information (ESI) is “information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software.”⁴⁸ ESI includes typical electronic mediums such as “emails, voicemails, instant messages, text messages, documents and spreadsheets, file fragments, digital images [such as photographs], and video.”⁴⁹ Technology has caused “a major shift from conventional media to electronic digital media.”⁵⁰ Often, electronic evidence may be the only source of evidence available to matrimonial attorneys, the most valuable source of information, and a way to save time and money. The increasing use of social networking sites has arguably

44. *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 438 n.3 (Md. 2009).

45. *See Bennett*, *supra* note 7, at 422.

46. *Brodie*, 966 A.2d at 438 n.3.

47. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007); *see also* FED. R. EVID. 401, 403, 803, 804, 807, 901(a), 1001–1008.

48. Gaetano Ferro, et al., *Electronically Stored Information: What Matrimonial Lawyers and Computer Forensics Need to Know*, 23 J. AM. ACAD. MATRIMONIAL L. 1, 1 (2010) (quoting Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. OF TECH. & INTELL. PROP. 171, 173 (2006)).

49. Ferro et al., *supra* note 48, at 1.

50. *Id.*

made them the most important source of electronic evidence, even surpassing e-mail.⁵¹ Abundant ways exist to obtain this evidence, the client being a main source.⁵² If the client has the right to access the other spouse's Facebook page, or if the client has already made copies of the electronic files, images, posts, or messages, the information may be very valuable evidence to the court once the attorney proves that the information is admissible.⁵³ In addition, formal discovery is also available to "a lawyer representing a client in a divorce or dissolution of marriage action in a jurisdiction with rules similar to the Federal Rules [of Civil Procedure]," and this may be the only way to obtain the information from social networking sites when informal alternatives are not available.⁵⁴

While there is very limited case law regarding the admissibility of evidence found on social networking web sites, especially in family courts, the federal courts have generally held that the same general laws of evidence apply.⁵⁵ Thus, while the technology is new, the admissibility standards are still the same, and courts will generally apply the Federal Rules of Evidence "to computerized data as they do to other types of evidence."⁵⁶

In 2007, the Maryland District Court case of *Lorraine v. Markel American Insurance Company* set the stage for introducing electronically stored information (ESI) into evidence.⁵⁷ The court held that web site electronically stored information such as email, web postings, "digital photographs, and computer-generated documents" are subject to the standard rules of admissibility, exceptions to hearsay, and exclusions despite relevance.⁵⁸ The court in *Lorraine* identified what it described as a series of "five hurdles that must be cleared in order to introduce electronically stored information":⁵⁹

- (1) is the ESI relevant as determined by Rule 401 . . . ;
- (2) if relevant under 401, is it authentic as required by Rule 901(a) . . . ;
- (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807);
- (4) is the form of the ESI that is being offered as evidence an original or duplicate under the

51. See Kisthardt & Handschu, *supra* note 2.

52. Ferro et al., *supra* note 48, at 3.

53. See *id.*

54. *Id.* at 9.

55. Minotti, *supra* note 24, at 1066.

56. See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 n.5 (D. Md. 2007) (quoting MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004)).

57. See *Lorraine*, 241 F.R.D. at 534.

58. See *id.* at 538.

59. Kisthardt & Handschu, *supra* note 2.

original writing rule, o[r] if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001–1008); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance.⁶⁰

The court reasoned that although the Federal Rules of Evidence do not specifically address the admissibility of electronic data, they “are flexible enough to accommodate future ‘growth and development’ to address technical changes not in existence as of the codification of the rules themselves.”⁶¹ Nowhere is this “growth and development” more readily apparent than in evidence found on social networking sites.

III. ADMISSIBILITY OF SOCIAL NETWORKING EVIDENCE IN FAMILY LAW COURTS

The Internet has revolutionized the way the world communicates, so as this technology and its popularity increase on a daily basis, an abundant amount of powerful evidence for family law cases is being generated. As the National Law Journal noted, “[t]he most striking change in the use of electronically stored information in family law cases has been the proliferation of media accounts relating to evidence found on social networking sites such as Facebook or MySpace.”⁶² Because this information is becoming so prolific in family law cases, matrimonial attorneys need to be aware of the requirements for admissibility and the distinct advantages it offers.⁶³

A. *Obtaining the Information*

Before potentially incriminating evidence found on Facebook or MySpace can be considered for admissibility, the attorney first must obtain it. Under the Federal Rules of Civil Procedure and many state rules as well, “all electronically stored information . . . not just paper documents,” may be obtained informally or subject to discovery⁶⁴ by request or by deposition testimony.⁶⁵ Informal discovery is often the easiest alternative, and accessing most of the social networking sites can be fairly simple. Even Google has recognized the importance of social networking:

60. *Lorraine*, 241 F.R.D. at 538 (emphasis omitted).

61. *Id.* at 538 n.5 (quoting FED. R. EVID. 102 (repealed 2011)).

62. Kisthardt & Handschu, *supra* note 2.

63. *Id.*

64. Bennett, *supra* note 7, at 416.

65. Richter, *supra* note 4, at 4–5.

“Facebook entries are now often among the top search results when a person’s name is searched.”⁶⁶ Additionally, since most social networking sites are free, matrimonial attorneys can create their own account to look for people of interest directly, see who their “friends” are, or scan through “tagged” photos of the subject uploaded by other users.⁶⁷

However, users of social networking sites are becoming increasingly aware of the potential dangers these sites can create. Many social networks offer measures to protect users privacy, which can be invaluable to a party involved in a divorce dispute. For instance, Facebook created privacy settings to permit users to exert control over which of their friends are permitted to see certain details and information posted to their profiles. In reality, much of the information is far from private, and users are often unaware of the privacy controls available. For example, in *Dexter v. Dexter*, the Ohio Court of Appeals reviewed a mother’s MySpace writing stating that “she was on a hiatus from using illicit drugs during the pendency of [the court] proceedings, but that she planned on using drugs in the future.”⁶⁸ The mother admitted in open court that she was the author of the writing and that they were “open to the public to view.”⁶⁹ Thus, her own admission was the nail in the coffin, ultimately resulting in the loss of custody over her child.⁷⁰ These situations can provide great opportunities for matrimonial attorneys, and as shown in *Dexter*, are potentially devastating to their opposing parties.

The Federal Rules of Civil Procedure “do not recognize any ‘privacy’ exception to the requirements of discovery (much less a ‘social networking privacy’ exception).”⁷¹ However, the rules do require that all discovery requests must be in an attempt to retrieve relevant information. As a result, formal discovery is often the only way to obtain electronic information stored on social networking sites when informal methods are not available. The Federal Rules of Civil Procedure were recently updated to reflect this.

Federal Rule 16(b) was amended in 2006 and provides that “disclosure or discovery of electronically stored information” may be addressed as part of the scheduling order. Rule 26(a)[(1)(A)(iii)] provides that “. . . a party must . . . provide to other parties . . . a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the

66. *Id.* at 4.

67. *Id.*

68. *Dexter v. Dexter*, No. 2006-P-0051, 2007 WL 1532084, at *6 (Ohio Ct. App. May 25, 2007).

69. *Id.* at *6 n.4.

70. *See id.* at *7.

71. Bennett, *supra* note 7, at 420.

party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.” Rule 26 was also amended in 2006 to replace reference to “data compilations” with electronically stored information.” Rules 33, 34, 37 and 45 were amended in 2006 to make express reference to “electronically stored information.”

Thus, any issue about whether discovery extends to electronically stored information has been affirmatively decided by the 2006 rules.⁷²

These discovery procedures are further supported by the court’s finding in *Crispin v. Christian Audigier, Inc.*, where social networking web sites were held to be considered electronic communication service providers.⁷³

However, discovery is just the beginning for a matrimonial attorney. Even with formal discovery as a means of obtaining this valuable evidence, “[t]he real issue about electronic evidence is not whether it is discoverable,” but “whether it is affordable.”⁷⁴ Federal Rule 26(b)(2)(B) provides:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.⁷⁵

Avoiding cost prohibitive discovery can be a distinct advantage for matrimonial attorneys who are primarily concerned with specific wall posts, photos, or messages. Where other areas of electronic discovery might contain records in the hundreds of gigabytes and span thousands of pages, evidence taken from social networking sites can potentially be far

72. Ferro et al., *supra* note 48, at 9 (footnote omitted) (citing R. Mayer, *Electronically Stored Information and the Amended Federal Rules of Civil Procedure*, ABA Section of Litigation, 21 TRIAL PRACTICE no. 3, 2007 at 2).

73. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 982 (C.D. Cal. 2010).

74. Ferro et al., *supra* note 48, at 9. Ferro et. al. also cite Federal Rule of Civil Procedure 26(b)(2)(c), saying it “provides that the court may limit discovery if it determines” that it could be obtained in a more convenient way, the opposing party had ample time and opportunity to obtain the information prior to the action, or “if the proposed discovery outweighs its likely benefit.” *Id.* at 10 n.43 (quoting FED. R. CIV. P. 26(b)(2)(C)(iii)).

75. FRCP 26(b)(2)(B).

less voluminous.⁷⁶ However, even when the complexity of attempting to request the history and copies of every page the individual is linked to through social networks is not feasible for economic reasons, other alternatives exist. Matrimonial attorneys are able to obtain social networking evidence, not otherwise publically accessible, during temporary hearings or depositions. This eliminates many economic burdens associated with other forms of electronically stored information.⁷⁷ Judges have also been known to require witnesses to take the stand and provide their log-in names and passwords in order to display evidence contained on their profile.⁷⁸ Additionally, even with these alternative methods, as the money involved in the disputed case increases, the judge will likely lean towards allowing electronic discovery regardless.⁷⁹

Even with formal discovery acting as a back-up defense when informal discovery proves ineffective, it is not without its problems. Information on social networking websites and contained in profiles is dynamic and rapidly changing, sometimes multiple times a day. The information is also easy to delete, which in turn raises issues of evidence spoliation. Social networking sites are aware of how valuable the information on their sites can be, but “the information remains difficult for attorneys to obtain from the provider” directly.⁸⁰ When information is requested, the networks often cite the Stored Communications Act, which “prohibits ‘a person or entity providing an electronic communication service to the public’ from ‘knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service.’”⁸¹ Additionally, the statute provides:

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

- (A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;
- (B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such

76. See Ferro et al., *supra* note 48, at 11.

77. Richter, *supra* note 4, at 4.

78. *Id.* at 5.

79. Ferro et al., *supra* note 48, at 11.

80. Richter, *supra* note 4, at 5.

81. Ferro et al., *supra* note 48, at 7–8 (quoting 18 U.S.C. § 2702(a)(1) (2006)).

communications for purposes of providing services other than storage or computer processing; and
(3) a provider of remote computing service or electronic communications service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service⁸²

The Stored Communications Act gives social networking sites, acting as electronic service providers under the holding in *Crispin v. Christian Audigier, Inc.*, the power to refuse to provide user information, even if a subpoena is issued.⁸³ In fact, Facebook's legal department has repeatedly made public statements that the Electronic Communications Privacy Act protects its users' data.⁸⁴ As a result, matrimonial attorneys are much more likely to obtain the information they need from informal discovery practices rather than deal with this arduous and often fruitless process.

B. Overcoming the Evidentiary "Hurdles"

Electronic evidence found on social networking sites can be time-consuming and expensive to obtain; however, very compelling reasons encourage matrimonial lawyers to seek it out.⁸⁵ Particularly useful in divorce cases, evidence found on sites like Facebook can simplify a lawyer's search for information. In fact, Facebook has become the "unrivaled leader for online divorce evidence."⁸⁶ These sites can provide attorneys with proof of adultery, demonstrate financial misconduct of a party in regard to alimony or child support, or assist the judge in awarding custody to the appropriate parent. Additionally, the same evidence found on these sites "may impeach the credibility of a party, which is often the most important consideration to a trial court."⁸⁷ What makes this form of evidence so appealing to family law is that many of the burdens associated with obtaining, authenticating, and admitting electronic evidence in other civil and criminal courts can potentially be minimized or entirely avoided

82. 18 U.S.C. § 2702(a)(2)–(3) (2006).

83. See *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010). The court found that social networking websites are considered electronic service providers. *Id.* at 982.

84. See, e.g., Amy Miller, "Itching for that Fight": Facebook Won't Just Hand Over User Info, CORPORATE COUNSEL (Feb. 3, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202441887701&Itching_for_That_Fight_Facebook_Wont_Just_Hand_Over_User_Info.

85. Ferro et al., *supra* note 48, at 2.

86. *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers*, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS (Feb. 10, 2010), <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey-> (noting that 66% of those surveyed cited Facebook as a primary source for divorce evidence).

87. Ferro et al., *supra* note 48, at 2–3 (footnote omitted) (citing Brad Stone, *Tell-All PCs and Phones Transforming Divorce*, N.Y. TIMES, Sept. 15, 2007, at A1).

in family law cases. A closer look at the hurdles for electronic evidence identified in *Lorraine* reveals how these burdens of admissibility are minimized in family law cases where social networking evidence can be so incredibly useful.

First, the information obtained must be relevant under Rule 401 of the Federal Rules of Evidence.⁸⁸ The *Lorraine* court discusses in detail the issue of relevancy as it relates to social networking evidence, stating that “[e]stablishing that ESI has some relevance generally is not hard for counsel.”⁸⁹ This burden will typically not pose problems for a family law attorney “since the information they seek to introduce” generally concerns personal conduct, a central concept at the heart of almost all family law cases.⁹⁰ Showing pictures of an adulterous wife kissing another man is clearly relevant to a divorce case assuming the state permits a showing of fault. Facebook pictures of parents using drugs or alcohol in the presence of their children will undoubtedly be considered relevant to determine the parent’s fitness for custody. Additionally, a parent claiming to be unable to pay alimony while his MySpace page shows pictures of his recent vacation to Jamaica will likely also pass the test of relevancy.

However, relevancy is not without limitations. Even when information could be relevant, parties cannot compel requests for overly broad discovery of such information. In *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*, the plaintiff alleged she was the victim of sexual harassment by her employer.⁹¹ In an attempt to reveal that the plaintiff was having an extramarital affair, the employer sought to compel discovery of all records, including private messages from her MySpace page.⁹² The court denied defendant’s motion to compel⁹³ and stated that such a broad request for discovery was nothing more than a “fishing expedition” by the defendant.⁹⁴

Once relevancy is established, the attorney must authenticate the evidence.⁹⁵ Authentication is often the most difficult burden to overcome in family law disputes. Little controlling authority exists on the requirements for authenticating information found on social networking sites. Most cases are “decided on a case by case basis upon standards that may vary

88. See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007).

89. *Id.* at 541.

90. Kisthardt & Handschu, *supra* note 2.

91. *Mackelprang v. Fidelity Nat’l Title Agency of Nev., Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *1 (D. Nev. Jan. 9, 2007).

92. *Id.* at *2.

93. *Id.* at *9.

94. *Id.* at *2.

95. FED. R. EVID. 901.

from jurisdiction to jurisdiction.”⁹⁶ While some courts may require daunting proof to authenticate a subject’s Facebook picture, others may permit the information into evidence after hearing testimony from an expert knowledgeable in how pictures on Facebook are produced.⁹⁷ While “[m]any attorneys report that judges routinely permit the introduction of information based on Facebook in view of the fact that it is frequently used against the very author him or herself who may be required to admit to the authenticity,”⁹⁸ this is not always the case. In the alternative, the attorney attempting to admit the evidence will have the burden of proving its authenticity.⁹⁹

Evidence found on social networking sites can be authenticated in family law courts using a variety of ways, some more useful than others. A user’s Facebook page is becoming the “Internet equivalent of a passport: a tool for verifying your identity.”¹⁰⁰ As Judge Grimm advised in *Lorraine*, “there may be multiple ways to authenticate a particular computerized record, and careful attention to all the possibilities may reveal a method that significantly eases the burden of authentication.”¹⁰¹

At first glance, authentication may seem simple. The attorney must provide “evidence sufficient to support a finding that the item is what the proponent claims.”¹⁰² However, information found on social networking sites can require in-depth proof of the processes used to obtain the purported evidence. While the Federal Rules of Evidence “do[] not specify how to authenticate evidence,” let alone evidence found on social networking sites, “Rule 901(b) provides ten non-exclusive illustrations,” several of which are particularly relevant in family law disputes.¹⁰³ For example, attorneys can authenticate ESI and information found on social networking sites specifically “under Rule 901(b)(1) through the testimony of a witness with knowledge.”¹⁰⁴ Thus, the creator of a Facebook profile page would be able to qualify as a witness. In addition, anyone with knowledge of the profile page would also be sufficient. All the witness must be able to do is (1) establish the creation of the information and (2)

96. Sheldon M. Finkelstein & Evelyn R. Storch, *Admissibility of Electronically Stored Information: It’s Still the Same Old Story*, 23 J. AM. ACAD. MATRIMONIAL L. 45, 47–48 (2010).

97. See *State v. Taylor*, 632 S.E.2d 218, 230 (N.C. Ct. App. 2006) (holding that it was proper to introduce text messages when an expert testified to the mechanics of them at the trial level); see also *State v. Eleck*, 23 A.3d 818 (Conn. App. Ct. 2011) (citing cases that allowed electronic evidence based on varying reasons); Ferro et al., *supra* note 48, at 16; *id.* at 3 (noting the importance of giving information from an iPhone, BlackBerry, or other data storage devices to a computer forensic expert).

98. Kisthardt & Handschu, *supra* note 2.

99. See *id.*

100. Grossman, *supra* note 3, at 63.

101. See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 549 (D. Md. 2007).

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

103. See Finkelstein & Storch, *supra* note 95, at 48 (citing FED. R. EVID. 901(b)).

104. *Id.*

authenticate its “preservation without alteration.”¹⁰⁵ Authentication of a document or a photograph might include testimony from the third party who obtained a copy of pictures or postings found on the subject’s Facebook profile, and as a witness, the third party must indicate how and when it was copied and testify to its accuracy.

Another alternative to authentication is to compare with other authenticated specimens under Rule 901(b)(3).¹⁰⁶ Authentication by comparison is particularly simplified for information found on social networking sites such as Facebook. Where a particular e-mail may not have any identifying information or a screen name that does not directly identify the person (such as golfer73@gmail.com), the information could be “authenticated by an[other] e-mail already in evidence . . . bear[ing] the same characteristics,” but where golfer73@gmail.com has identified himself.¹⁰⁷ On the other hand, a Facebook page, for example, would clearly identify the person in the profile to begin with, making the second step unnecessary. Postings are often date and time stamped as well, which can aid in trying to establish the whereabouts of an individual when their testimony states otherwise, a particularly useful tool for matrimonial attorneys attempting to disprove an opponent’s story.

Perhaps the most directly applicable rule for authenticating evidence found on social networking sites is Rule 901(b)(4) of the Federal Rules of Evidence.¹⁰⁸ This rule allows “authentication by ‘distinctive characteristics,’ including the substance of the evidence.”¹⁰⁹ Similar to the example above, 901(b)(4) would allow a jury or judge to consider all the information contained on the user’s Facebook page, giving divorce attorneys broad corroboration abilities by linking the contents of the page to the profile’s creator.¹¹⁰

In lieu of these authentication methods, “[d]irect printouts of electronic conversations” seem to be easier to authenticate, and courts have previously applied this method for e-mails and text messages.¹¹¹ Although there is no case law to date, it would seem reasonable to extend the same

105. *Id.*

106. *Id.* One court has already approved this method for emails. *See United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006).

107. *See Finkelstein & Storch, supra* note 95, at 48.

108. *See id.* at 48.

109. *Id.*

110. *Id.* (showing how ESI’s built in metadata is something that makes e-mails distinctive, a type of data that “is automatically attached to ESI” upon creation).

111. *Id.* at 52–53 (noting how one court held “that there is no need for new rules regarding admissibility of [new] forms of electronic communication[s] such as e-mail and instant messages, which can be ‘properly authenticated within the existing framework of . . . case law’”) (quoting *In re F.P.*, 878 A.2d 91, 95–96 (Pa. Super. Ct. 2005)).

logic to messages and “wall posts” found on social networking sites, further easing the evidentiary burdens for matrimonial lawyers.

Once the evidence is authenticated, a matrimonial attorney will still have to combat hearsay. Under Federal Rule of Evidence 801, hearsay is defined as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) the party offers in evidence to prove the truth of the matter asserted in the statement.”¹¹² The requirement that hearsay be a statement made by a declarant is particularly important to matrimonial lawyers attempting to admit social networking evidence. A statement under Rule 801(a) is defined as “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion,”¹¹³ meaning that messages, “wall posts,” “tweets,” “tags,” or digital photographs and videos do not constitute hearsay unless they depict an intended message. Because matrimonial attorneys will often introduce these mediums to indeed depict an intended message, hearsay can be a hotly contested defense.

The sheer volume of information on social networking sites “makes . . . hearsay issues inevitable.”¹¹⁴ If the evidence is being offered to prove the substantive truth of the matter asserted, a hearsay exception will need to be proven in order for it to be admitted. Evidence on social networking sites is “rarely introduced to prove the truth of the matter asserted” but is used instead to show a state of mind, to show a relationship between two people, to impeach a witness, or to show inconsistencies “between the subject’s prior statement[] and [the] asserted positions in either the pleadings or in testimony at the hearing.”¹¹⁵ Showing a subject’s state of mind is particularly useful. Like e-mails, the nature of social networking sites “often spurs people to ‘open up’ in ways they would never dream of doing in more formal communications.”¹¹⁶ Facebook “status updates” are even designed to let a user share with the world how they are feeling; some Facebook clubs are even dedicated to peoples’ outlandishly shocking and forthcoming posts.¹¹⁷ This behavior can be especially prevalent in divorce cases where people are highly emotional and often choose social network sites to vent their feelings. For example, emoticons, which are widely used keyboard maneuvers that display faces depicting specific emotions, were developed to “pictorially display precisely the state

112. FED. R. EVID. 801(c).

113. FED. R. EVID. 801(a).

114. Finkelstein & Storch, *supra* note 95, at 57.

115. Kisthardt & Handschu, *supra* note 2.

116. Finkelstein & Storch, *supra* note 95, at 58.

117. *15 Facebook Status Fails (FUNNY!)*, FACEBOOK, <http://www.facebook.com/pages/15-Facebook-Status-Fails-FUNNY/145743805440141> (last visited Mar. 20, 2012).

of mind intended to accompany the words in the document.”¹¹⁸ Moreover, it can be argued that “messages between a husband petitioner and another woman are not hearsay because they are not offered to prove the truth of the substantive content.”¹¹⁹ Instead, they can be offered “to show that a relationship between the parties existed and that it was customary for them to communicate via Facebook or MySpace.”¹²⁰

Notwithstanding issues of hearsay, the proponent of the electronically stored information found on social networking sites must defeat the “original writing” rule, which requires that the original record be produced, if available, unless otherwise permitted.¹²¹ At first glance, this burden may seem difficult to overcome for social networking evidence, but in reality “[m]ost courts, in an attempt to keep up with technology, consider a copy of the original as having the same force and effect as the original.”¹²² “Since a duplicate is any record created by means that accurately reproduce the original, rarely is there a need to obtain a true ‘original.’”¹²³

While the “original writing” rule can be fairly easy to satisfy if the evidence in question is still available on the web page, the constant cycling of information contained on sites like Facebook can create difficulties. To combat this, Rule 1004(a) of the Federal Rules of Evidence allows admission of secondary evidence when an original is destroyed.¹²⁴ Furthermore, even if the evidence has “disappeared,” an additional exception permits secondary evidence when original evidence is either no longer available due to unintentional conduct or spoliation.¹²⁵ This exception allows secondary evidence of the contents of writings when the original is lost or destroyed, such as a “wall post” on a user’s Facebook page that is subsequently deleted prior to a divorce.

Lastly, the probative value of the evidence must be substantially outweighed by the danger of unfair prejudice. This final hurdle is perhaps the easiest to overcome, especially in family law courts. Because a judge hears almost all matters in a family law case and not a jury, it is highly probable that he will find that the information’s probative value substantially outweighs the danger of unfair prejudice.¹²⁶ This distinction

118. Finkelstein & Storch, *supra* note 95, at 58–59.

119. Richter, *supra* note 4, at 10

120. *Id.*

121. FED. R. EVID. 1002.

122. Kisthardt & Handschu, *supra* note 2.

123. Finkelstein & Storch, *supra* note 95, at 62.

124. FED. R. EVID. 1004(a).

125. *Id.*

126. Kisthardt & Handschu, *supra* note 2.

is even more critical in cases involving children, where the best interest of the child standard will trump the Federal Rules of Evidence.¹²⁷

IV. CONCLUSION

While information found on social networking sites may be a new form of ESI, the rules regarding electronic evidence, “written in a time of paper documents and tangible things,” still apply.¹²⁸ Criticism of evidence found on social networking sites often stems from the inability to authenticate the evidence found on these sites, the assertion that the evidence is hearsay in its purest form, and the relative ease in which third parties can fraudulently alter profiles. However, courts have recently dismissed the notion that electronic communications are “inherently unreliable.”¹²⁹ As the court addressed in *Lorraine*, instead of creating a completely “new body of law just to deal with e-mails or instant messages [,] similar forms of electronic communications can be properly authenticated within the existing framework of [the state rules of evidence].”¹³⁰ Following a logical extension of *Lorraine*, the existing rules of evidence are more than adequate to address questions of admissibility for social networking electronic evidence.¹³¹ As such, matrimonial attorneys should pay particular attention to the valuable evidentiary weapons these websites can provide.

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127. See *In re Kaitlyn B.*, 2010 Conn. Super. Lexis 2215, at *69–70 (Conn. Super. Ct. 2010) (“[T]he Appellate Court found that the best interest of the child standard was correctly applied by the trial court in determining whether to transfer guardianship. ‘To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion’”) (quoting *In re Haley B.*, 838 A.2d 1006, 1009 (Conn. App. Ct. 2004)).

128. Finkelstein & Storch, *supra* note 95, at 45.

129. See, e.g., *In re F.P.*, 878 A.2d 91, 95 (Pa. Super. Ct. 2005) (pointing out that written documents involve the same issues of uncertainty as to their creation).

130. *Lorraine v. Maskel Am. Ins. Co.*, 241 F.R.D. 534, 538 n.5 (D. Md. 2007) (quoting *In re F.P.*, 878 A.2d 91, 95 (Pa. Super. Ct. 2005)).

131. See generally Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1, 7 (2009).

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