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# Special Rules for Social Media Discovery?

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## Special Rules for Social Media Discovery?

Steven S. Gensler\*

### I. INTRODUCTION

Social media have become a part of mainstream discovery practice. From family law to employment cases, and from personal injury to commercial litigation, today's lawyers have discovered that social-media sites are a virtual (no pun intended) treasure trove of discoverable information.<sup>1</sup> And we are not just talking about ordinary it's-relevant-to-my-claim-or-defense type information. Some of the information is the stuff of discovery dreams.<sup>2</sup>

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\*Welcome D. & W. DeVier Pierson Professor of Law, University of Oklahoma College of Law. I thank the *Arkansas Law Review* for hosting this Symposium and inviting me to participate. I thank the University of Oklahoma College of Law and Mr. DeVier Pierson for their continuing support. Though I at times refer to rulemaking events during the period when I served as a member of the Civil Rules Advisory Committee (2005-2011), nothing in this article should be attributed to the Committee or its other members, past or present.

1. See John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 465 (2011) (noting "the legal profession's eagerness to exploit the treasure trove of information to be mined from social networking sites"); Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 21 (2009) ("[A] Facebook profile can contain a virtual treasure trove of personal information . . ."); Derek S. Witte, *Your Opponent Does Not Need a Friend Request to See Your Page: Social Networking Sites and Electronic Discovery*, 41 MCGEORGE L. REV. 891, 893 (2010) (social-networking sites "promise to be a treasure trove of evidence and admissions"); Bob E. Lype, *Employment Law and New Technologies*, 47 TENN. B.J. 20, 23 (May 2011) ("Savvy employers' lawyers have begun realizing that . . . employees' social network postings may contain a treasure trove of useful information.").

2. See Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 25 (2011) (discussing case in which workers' compensation plaintiff who claimed she was unemployed had boasted on her Facebook about her job and salary as an apartment-complex manager); Evan E. North, Note, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1279 (2010) (discussing case in which personal-injury plaintiff who claimed neck and back problems had posted on his Facebook page a video of himself going off snowboard jumps); Richard J. Sankovitz et al., *Panning for Gold: Social Networking's Impact on E-Discovery*, WIS. LAW., Feb. 2011, available at <http://www.wisbar.org/am/template>

If you want a more tangible indicator of how social-media discovery has exploded onto the litigation scene, check your local bar journal. Chances are good that it has run a social-media discovery article in the last two years.<sup>3</sup> Social-media discovery has also been prominently featured in the national legal press.<sup>4</sup> When you read those articles, note how often professional ethics is mentioned. Right now, the focus is on deceptive practices. For example, one topic that gets a lot of attention is whether a lawyer can send a “friend” request to an adverse party or a witness to get access to that person’s private Facebook content.<sup>5</sup> It is only a matter of time before the focus turns to competency. For several years, commentators have been warning that discovery competency now requires a basic

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.cfm?section=wisconsin\_lawyer&template=cm/contentdisplay.cfm&contentid=100419 (party’s archived web page located via the “Wayback Machine” directly contradicted assertion that it never claimed expertise in a particular subject area).

3. See, e.g., Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 ILL. B.J. 366, 366 (2010); Nicole D. Galli et al., *Litigation Considerations Involving Social Media*, 81 PA. B. ASS’N Q., Jan. 2010, at 59; Peter S. Kozinets & Aaron J. Lockwood, *Discovery in the Age of Facebook*, 47 ARIZ. ATT’Y., July/Aug. 2011, at 42; Kristen L. Mix, *Discovery of Social Media*, 40 COLO. LAW., June 2011, at 27; Gwynne Monahan, *Social Media and E-Discovery*, 74 TEX. B.J. 280, 280 (2011); Sankovitz, *supra* note 2; Jordan B. Yeager & Ronalyn K. Sisson, *User Beware: Maximizing the Possibilities, Minimizing the Risks of Using Social Media*, 33 PA. LAW., Sept./Oct. 2011, at 26.

4. See, e.g., Christopher J. Akin, *How to Discover and Use Social Media-Related Evidence*, 37 LITIG., Winter 2011, at 32; Alan Klein et al., *Social Networking Sites: Subject to Discovery?*, 32 NAT’L L.J., Aug. 23, 2010, at 15; Christopher E. Parker & Travis B. Swearingen, *“Tweet” Me Your Status: Social Media in Discovery and at Trial*, 59 FED. LAW., Jan./Feb. 2012, at 34; Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It’s Also Dangerous*, ABA J., Feb. 2011, at 50.

5. A discussion of the ethical implications of social-media discovery is beyond the scope of this article. But several articles explore the issue in depth, including commentary on the ethics opinions that have been issued to date. See Browning, *supra* note 1, at 475-77; Hope A. Comisky & William M. Taylor, *Don’t Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 302-08 (2011); Sandra Hornberger, *Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery, and Evidence*, 27 TOURO L. REV. 279, 285-92 (2011); Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 282-86 (2011); 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, 1027-39 (2011).

understanding of electronic discovery generally.<sup>6</sup> Though I do not think we are there yet, the day cannot be far off when a lawyer who does not understand social-media discovery will struggle to achieve discovery competency.<sup>7</sup>

Given how important and prevalent social-media discovery has become, one might expect the Civil Rules Advisory Committee to respond with a new wave of rulemaking to address the myriad of issues that inevitably will arise.<sup>8</sup> According to one commentator, just as the rulemakers responded to the “Web 1.0” phenomenon by creating the “e-discovery” rules, the rulemakers should respond to the “Web 2.0” phenomenon by creating social-media discovery rules.<sup>9</sup> But I suspect that will not happen. I suspect that social-media discovery will be absorbed into the general discovery rules. I think this is in part because the general rules have done a good job of addressing social-media discovery, and I think they will continue to do so. But it is also because the rulemaking process, as it is currently constituted, does not provide an effective

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6. See Debra Lyn Bassett, *E-Pitfalls: Ethics and E-Discovery*, 36 N. KY. L. REV. 449, 459-60 (2009) (discussing e-discovery and lawyer competency); Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery*, 60 MERCER L. REV. 983, 1002-04 (2009) (discussing technical incompetence problem). Among the principal risks are that lawyers uneducated (or unassisted) in the field risk failing to obtain available information from other parties and risk inadvertently disclosing their own clients’ protected information.

7. See Akin, *supra* note 4, at 34 (“The search for relevant social media evidence should be as routine and systematic as your document discovery, your depositions, and your witness interviews.”); Comisky & Taylor, *supra* note 5, at 302 (“[A]n attorney’s ethical obligation to thoroughly research the facts of a case dictates that he should investigate whether a party or witness’s public pages contain useful information.”); Sashe D. Dimitroff, *Social Media and Discovery*, in THE ROLE OF TECHNOLOGY IN EVIDENCE COLLECTION, available at 2011 WL 2941026 (Aspatore 2011) (“Lawyers will be remiss—if they are not so already—who do not consider social media a potential source of discovery.”); Galli et al., *supra* note 3, at 59 (“Litigators today ignore social media outlets at their peril . . . .”); Yeager & Sisson, *supra* note 3, at 28 (emphasizing importance that lawyers update their discovery practices to reach social media).

8. The same question has been raised with respect to the legal ethics rules. See, e.g., Clemency, *supra* note 5, at 1045-46 (proposing development of supplemental rules); Tom Mighell, *Avoiding a Grievance in 140 Characters or Less: Ethical Issues in Social Media and Online Activities*, 52 ADVOC. (TEXAS), Fall 2010, at 8 (raising question of whether special rules are necessary).

9. See, e.g., Andrew C. Payne, Note, *Twitigation: Old Rules in a New World*, 49 WASHBURN L.J. 841, 849-50 (2010).

vehicle for responding to discovery problems that are linked to fast-moving technologies.

The overall thesis of this article is that we are not likely to see the creation of special rules for social-media discovery. Part II of this article discusses why special social-media discovery rules likely will not be needed. Part III discusses why the rulemakers would find it hard to craft special social-media discovery rules even if the need arose. Part IV concludes.

## II. SOCIAL MEDIA CONTENT AND THE EXISTING DISCOVERY SCHEME

In this Part, I examine whether special discovery rules are needed to address discovery of social-media content. The question is really one of adaptation: can the existing discovery scheme adapt to adequately deal with social-media discovery? Some commentators have called for new rules and a new approach, asserting that social-media technology and usage raise issues that the existing discovery scheme is ill-equipped to address.<sup>10</sup> I offer a different view.<sup>11</sup> Not only do I think social-media discovery fits easily into the existing discovery scheme, I think judges have, for the most part, already figured out how to fit it in.

The following sections make three main points. First, if the existing discovery rules can in fact deal with this new source of information, we ought not be surprised. Indeed, it is exactly what we should expect. The Civil Rules in general, and the

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10. See *id.* at 863 (asserting that it is unworkable to broadly apply the existing rules to social-media discovery); John S. Wilson, Comment, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1203 (2007) (asserting that while the existing rules can address some issues they will not be able to address other issues raised by evolving social-media technologies); see also Strutin, *supra* note 5, at 229 (“This new mode of human interaction does not fit neatly into any discovery statutes, case law precedents, or ethics codes.”).

11. See also Hornberger, *supra* note 5, at 299 (“[C]ourts have successfully applied the Federal Rules of Civil Procedure to cases involving social networking websites. The current rules adequately address the issues brought before the court.”); Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. REV. 1057, 1062 (2009) (“Although the Federal Rules Advisory Committee may not have had social networking web sites in mind when drafting the rules on ESI [Electronically Stored Information], courts should apply the Federal Rules to social networking web sites just as other types of ESI.”) (footnote omitted).

discovery rules in particular, are written to give judges flexibility and discretion in their application. In short, the discovery rules are designed to adapt to new circumstances. Second, the caselaw so far shows that judges have been able to fit social-media discovery into the existing scheme without too much trouble. While there have been a few missteps, I am cautiously optimistic that, with more experience and a little guidance, those errors will be corrected. Third, to the extent social-media discovery presents challenges the existing discovery system cannot adequately deal with, my sense is that those challenges will not be unique to the social-media context. The discovery rules rely on several core, functional concepts. Cases involving social-media discovery may yet demonstrate that some of those concepts have become inapt or obsolete in the modern information age. But if that occurs the necessary reforms likely will impact the entire discovery scheme, not just social-media discovery.

#### A. The Value of Flexible Rules

Before talking about the cases involving social-media discovery, it is useful to think about some of the defining characteristics of the Federal Rules. For the most part, we have a single set of rules that applies to all civil cases regardless of subject matter or amount.<sup>12</sup> In other words, we do not have “employment-discrimination rules” or “breach-of-contract rules” or “antitrust-conspiracy rules.” We just have the Federal Rules of Civil Procedure. They are trans-substantive. But employment-discrimination cases, breach-of-contract cases, and antitrust-conspiracy cases are substantively different, present varying factual contexts, involve varying types and amounts of discovery, and in general can have very different procedural needs. How can a single set of rules meet the needs of such a vast range of cases?

The answer is flexibility. The original drafters understood that if the rules were to be applied across a wide range of cases,

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12. See Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 698 (2010) (discussing original drafters’ choice to create a single set of rules generally applicable to all civil actions).

they had to be flexible.<sup>13</sup> The rules achieve flexibility by emphasizing concept and function over form and by relying on wise discretionary application.<sup>14</sup> Rather than impose detailed controls, the rules establish general policies to guide judicial application on a case-by-case basis.<sup>15</sup> This approach is particularly evident in the discovery rules. The scope of discovery is the same in all cases, in the sense that the same concepts of relevance, privilege, and proportionality apply. But *how much* information is discovered in any particular case varies hugely. That is not because the scope standards vary. It is because the application of the scope standards leads to those differences. The rules provide a conceptual framework and guiding standards that judges apply based on the circumstances of the case.<sup>16</sup>

In summary, the Civil Rules scheme is designed to absorb and adapt to a changing docket and changing litigation contexts. I think this is especially true of the discovery rules, where the Advisory Committee has quite deliberately avoided tying the rules to the technology of the day.<sup>17</sup> Our operating assumption, then, should be that judges will fit social-media discovery into the existing scheme and solve emerging problems by reference to core, functional principles.

## B. Adaptation and Application So Far

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13. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943-75 (1987) (detailing the judicial philosophies of the original drafters).

14. See Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1578 (2003) ("Overall, the rules were infused with latitude for judges, perhaps not accidentally given the views of Dean Charles Clark of Yale Law School, the chief drafter.").

15. See Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002) ("The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis."); Gensler, *supra* note 12, at 721.

16. Not everyone applauds the extent to which the rules rely on judicial discretion. See Gensler, *supra* note 12, at 721-22 (discussing critical commentary). The primary criticism is that discretionary rules create an unacceptably high risk that judges will abuse their power in ways that may not be visible to the public and that are effectively unreviewable. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

17. See *infra* notes 102-13 and accompanying text.

This section examines the caselaw to date to see how well the courts have been handling social-media-discovery cases under the existing discovery rules.<sup>18</sup> My assessment of the first wave of caselaw is that social-media discovery has not presented any issues that are not covered by the existing discovery scheme and that cannot be resolved by sound judicial application of the existing discovery scheme to this new technological context.<sup>19</sup> That is not to say that the caselaw has been perfect. I will discuss below what I believe to have been a few false first steps. But, overall, I do not find in the caselaw any reason to think that social-media discovery has revealed any gaps or cracks in the scheme that require patching with new rules.

Viewed in the aggregate, the existing cases can be seen to raise four major questions regarding social-media discovery: (1) Is social-media content generally discoverable?; (2) Is “private” content off-limits from discovery?; (3) What is the correct process for reviewing and producing social-media content?; and (4) To whom should the discovery request be directed? As discussed below, the courts have answered these questions by fitting social-media discovery into the existing discovery scheme. And, for the most part, it has been a good and well-made fit, especially at the federal-court level.

### 1. *Is Social Media Content Generally Discoverable?*

The threshold question presented by social-media discovery is whether materials contained on social-media sites fall within the scope of discovery at all. In analyzing that question, the

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18. Though it may seem an obvious point, it is important to note that much of the *fact investigation* lawyers might profitably conduct by looking at social-media content is not *discovery*. Probably the majority of social-media content is public; that is, it is not placed behind any privacy settings and anyone may view it. No document request, subpoena, or motion to compel is required to view publicly available information on social-media sites. See Browning, *supra* note 1, at 471 (advising lawyers to be sure to look at publicly viewable content); Kozinets & Lockwood, *supra* note 3, at 46 (“There are a number of ways to view social media profiles without engaging in formal discovery.”). Moreover, it is ethically permissible to view an opponent’s or witness’s public social-media content. See Browning, *supra* note 1, at 477-78. Indeed, the failure to do so may raise issues of lawyer competence. See Comisky & Taylor, *supra* note 5, at 302.

19. See, e.g., *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010) (“Discovery of [social networking sites] requires the application of basic discovery principles in a novel context.”).



starting point is to appreciate that the discovery scheme is not tied to specific sources of information. The discovery rules do not say, “you may take discovery of another party’s medical records” or “you may take discovery of another party’s financial records.” Rather, the scope of discovery is defined according to the information at issue, not the source from which it is retrieved.

As a baseline proposition, the scope of discovery is all information that is relevant to a claim or defense.<sup>20</sup> There are exceptions, of course, such as for privileged information and for information protected by the work-product doctrine.<sup>21</sup> And both courts and parties have a duty to ensure that discovery is not disproportionate to the needs of the case.<sup>22</sup> The essential point, however, is that the scope of discovery is defined by the relationship between the information sought and the merits of the case. If the contents of social-media sites are relevant, they are discoverable (subject to applicable limits). If the contents of social-media sites are not relevant, they are not discoverable. The fact that social-media sites offer a new potential source of information does not alter this basic paradigm for discovery.

I think it is fair to say that every U.S. decision so far has recognized that the overriding determinant of social-media discovery is relevance. I am aware of no case that has even so much as suggested that social-media contents are discoverable “just because.” Every decision has made some finding of relevance. And I am aware of no case that has refused discovery of social-media contents shown by the requesting party to be relevant (though a refusal would be proper if based on one of the applicable limits). In short, all of the caselaw appears to be consistent with that particular court’s conclusions about relevance. That being said, the courts have sometimes struggled

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20. FED. R. CIV. P. 26(b)(1) (expandable to subject-matter relevance upon a showing of good cause).

21. FED. R. CIV. P. 26(b)(1) (privilege); FED. R. CIV. P. 26(b)(3) (work-product doctrine).

22. See FED. R. CIV. P. 26(b)(2)(C) (court must limit disproportionate discovery); FED. R. CIV. P. 26(g)(1)(B)(iii) (duty of lawyer or party signing discovery request to ensure that it is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action”).

to define the contours of the relevance inquiry, especially in cases where the requesting party has sought production of the entire contents of a user's social-media account as opposed to specific contents.

The broadest requests are those that seek production of (or direct access to<sup>23</sup>) a user's entire social-media account. While that type of request is not inherently improper, judges ought to approach them with due skepticism. That is not because of any special legal principle saying that an entire account is somehow inherently outside the scope of discovery. Rather, it is because the social-media context does not eliminate or lessen the requesting party's need to show that the materials to be produced are relevant. Sometimes the whole contents of a particular source of information are relevant. If a party's financial status needed to be determined, for example, that party's "bank records" might be relevant on a categorical basis. But most of the time relevancy is addressed on a content-specific basis. Thus, if it were relevant whether a party had a financial relationship with some other person, any information in that party's bank records that showed a possible relationship with that other person would be discoverable, but the inquiry would stop there. There would be no warrant to see that party's "bank records" as a whole. To give another example, parties often seek and receive discovery of emails and letters that are relevant to the claims and defenses in a case, but how often would it be appropriate for a court to simply order the production of "all correspondence" without regard to the contents?

Thus, while a party may request a Facebook account holder to produce the entire contents of his or her account, the requesting party would have to show the relevance of the entire account. The fact that some of the contents may be relevant—or even have been shown to be relevant—is not enough.<sup>24</sup> As one

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23. By direct access I mean situations where the requesting party obtains the user's log-in information and passwords so that he can access the user's contents as if he were the user.

24. See *Tompkins v. Detroit Metro. Airport*, No. 10-10413, 2012 WL 179320, at \*2 (E.D. Mich. Jan. 18, 2012) (denying access to the plaintiff's entire Facebook account because the defendant had failed to show that all information was relevant); *Simply*

of the earliest decisions very astutely observed, even if a social-media account had some relevant content, granting access to the entire account would “cast too wide a net” and would very likely lead to the production of irrelevant personal information.<sup>25</sup> Other courts have expressed this sentiment by likening a request for production of an entire account to a “fishing expedition.”<sup>26</sup> In most cases, there will be no serious basis to argue that the entire account is relevant. Thus, in most cases, the proper approach is to serve document requests that ask for production of specific items of information that are relevant to the claims and defenses in the case.<sup>27</sup> The existing caselaw shows that courts have not had difficulty responding to these types of targeted requests. When parties have propounded targeted requests seeking relevant information, those requests have been routinely granted.<sup>28</sup>

It is true that determining the boundaries of relevance is not always easy. Consider the facts in *EEOC v. Simply Storage Management, LLC*,<sup>29</sup> for example. The two relevant plaintiffs in that case alleged sexual harassment at their workplace and claimed emotional-distress damages.<sup>30</sup> The defendant employer argued that the entire contents of their social-media accounts were relevant, both in terms of the communications that were

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*Storage*, 270 F.R.D. at 434-35; *Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 618 (N.Y. App. Div. 2011).

25. See *Mackelprang v. Fid. Nat'l. Title Agency of Nev., Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at \*7 (D. Nev. Jan. 9, 2007).

26. See *Tompkins*, 2012 WL 179320, at \*2; *Offenback v. L.M. Bowman, Inc.*, Civil Action No. 1:10-CV-1789, 2011 WL 2491371, at \*3 n.3 (M.D. Pa. June 22, 2011); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525 (N.Y. App. Div. 2010).

27. See *Simply Storage*, 270 F.R.D. at 435; *Patterson*, 88 A.D.3d at 618; see also *Browning*, *supra* note 1, at 473-74 (emphasizing that discovery requests should be specific and “well-tailored”).

28. See *Held v. Ferrellgas, Inc.*, No. 10-2393-EFM, 2011 WL 3896513, at \*1 (D. Kan. Aug. 31, 2011); *Offenback*, 2011 WL 2491371, at \*1-3 (asking court to determine relevance in the first instance); *Simply Storage*, 270 F.R.D. at 435-36; *Bass ex rel. Bass v. Miss Porter's Sch. (Bass I)*, Civil No. 3:08CV1807 (JBA), 2009 WL 3724968, at \*1 (D. Conn. Oct. 27, 2009) (plaintiff initially ordered to produce “responsive” Facebook documents); *Mackelprang*, 2007 WL 119149, at \*8 (defendant entitled to particular relevant content upon request).

29. See *Simply Storage*, 270 F.R.D. at 432-33.

30. *Id.*

made but also in terms of communications that were not made.<sup>31</sup> In other words, the defendant alleged that the *absence* of certain communications was itself relevant to the claims and defenses in the case.<sup>32</sup> The court rejected the parties' proposed positions on relevance and forged what might be seen as a middle ground: it ordered the plaintiffs to produce any actual entries that related to their mental states and to produce any "communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state."<sup>33</sup> Effectively, the court defined as relevant all entries where it might have been expected that responsive content *would have appeared*.<sup>34</sup> The court's solution strikes me as a perfectly defensible approach. But the larger point, for our purposes, is to recognize that the problem the court faced was not unique to social-media discovery. The court would have had to make exactly the same decision if it were a diary in question. Moreover, while the decision was perhaps difficult, it required only the application of existing principles to a new context.<sup>35</sup>

As noted earlier, the courts have taken a few missteps so far, and two of them relate to the required showing of relevance. In one well-known case from a New York state court, the court found grounds to believe that a user's Facebook and MySpace

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31. *Id.* at 434-35; see also *Held*, 2011 WL 3896513, at \*1 (Facebook communications during period when plaintiff claimed he was subject to a hostile work environment may be relevant to the case).

32. *Simply Storage*, 270 F.R.D. at 435.

33. See *id.* at 434-36 (ordering production of entries that relate to mental state, emotions, or feelings).

34. See *id.* at 436. I also find evidence of this approach in *Bass I*. See 2009 WL 3724968 at \*1. While the court in *Simply Storage* distinguished *Bass I*, it did so to the extent the defendant mis-cited it as a case ordering production of the user's entire account. See *Simply Storage*, 270 F.R.D. at 434. The court in *Bass I* nonetheless had to determine which entries were relevant to the plaintiff's liability and damages claims, which were based on her allegedly improper expulsion from her private school. 2009 WL 3724968, at \*1; see *Bass ex rel. Bass v. Miss Porter's Sch. (Bass II)*, 783 F. Supp. 2d 307, 331 (D. Conn. 2010). In this respect, the court in *Bass I* noted that the student's Facebook usage "depicts a snapshot of the user's relationships and state of mind" at the relevant time that was arguably relevant both to liability and damages. *Bass I*, 2009 WL 3724968, at \*1. For a discussion of the facts and claims in this case, see *Bass II*, 738 F. Supp. 2d at 313-19 (setting forth plaintiff's version of the events leading up to her expulsion).

35. See *Simply Storage*, 270 F.R.D. at 436 ("[T]he difficulty of drawing sharp lines of relevance is not a difficulty unique to the subject matter of this litigation or to social networking communications.").

accounts contained relevant information and therefore granted the requesting party direct access to those accounts in their entirety.<sup>36</sup> The court was clearly correct to permit discovery of the social-media accounts insofar as that entailed ordering the production of *relevant* contents. But by granting direct access to the accounts in full—without any discussion of why the *whole* contents might be relevant—the court effectively ordered the production of irrelevant information.<sup>37</sup> Two Pennsylvania state courts have made the same error.<sup>38</sup>

The other issue that concerns me may be more of a dangerous ambiguity than an overt error. In determining whether to permit access to a user's private content, a few of the cases have placed weight on whether there was relevant information in the user's public content.<sup>39</sup> Some commentators have construed these cases as suggesting that a party who wants to discover private content should be prepared to show the court that the public content provides some indicator that relevant information is lurking in the private content.<sup>40</sup>

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36. See *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 654-55 (Sup. Ct. 2010).

37. See Ryan A. Ward, Note, *Discovering Facebook: Social Network Subpoenas and the Stored Communications Act*, 24 HARV. J.L. & TECH. 563, 580 (2011) (criticizing *Romano* on the grounds that the court's order granted the defendant access to irrelevant content of the plaintiff's social-media accounts). This result highlights one of the problems inherent with decisions that grant a requesting party direct access to a user's account—the risk of extending discovery beyond the boundaries of relevance. As I discuss later, “direct access” orders are also inconsistent with our general rules regarding how responsive information is reviewed and produced. See *infra* Part II.B.3.

38. See Opinion & Order at 2, 8, *Largent v. Reed*, No. 2009-1823 (Pa. Ct. Com. Pl. Nov. 8, 2011), 2011 WL 5632688; Opinion on Defendant's Motion to Compel Discovery at 6-7, *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD (Pa. Ct. Com. Pl. Sept. 9, 2010), 2010 WL 4403285.

39. See *Tompkins v. Detroit Metro. Airport*, No. 10-10413, 2012 WL 179320, at \*2 (E.D. Mich. Jan. 18, 2012); *Romano*, 907 N.Y.S.2d at 654; Opinion on Defendant's Motion to Compel Discovery, *supra* note 38, at 6-7.

40. See Comisky & Taylor, *supra* note 5, at 301 (“[C]ourts have granted access to the private portions of the sites based on what the opposing party found during its review of the portions of the site that were accessible to the public.”); Jonathan E. DeMay, *The Implications of the Social Media Revolution on Discovery in U.S. Litigation*, 40 BRIEF 55, 63 (2011) (“[A] court is more likely to find the social media relevant and properly discoverable if publicly accessible portions of the party's social media accounts are inconsistent with its allegations in the complaint or in its discovery responses or testimony.”); John M. Miller, *Is MySpace Really My Space? Examining the Discoverability of the Contents of Social Media Accounts*, 30 TRIAL ADVOC. Q., Spring 2011, at 32 (Spring 2011) (“[I]n many cases, the party seeking the discovery must produce some evidence

I hope that courts in the future will disavow any such proposition. To start, it is not at all clear to me that those cases actually stand for that proposition. I am inclined to read those cases more narrowly and to limit them to situations where the requesting party is seeking access to the user's entire account.<sup>41</sup> But if courts were to start requiring a predicate showing of relevance before allowing a party to seek discovery of *specific* content from social-media sites, that would constitute a barrier to discovery that does not exist in other contexts. In general, a party does not need to make a *prima facie* showing before it can propound discovery requests.<sup>42</sup> For example, a discrimination plaintiff does not need to make any *prima facie* showing that there likely are emails disparaging her before she can serve a document request asking that any such emails be produced. I can think of no reason why a party should have to make any showing whatsoever as a predicate to asking a party to search for and produce relevant information from the private areas of that party's social-media account.<sup>43</sup>

## 2. Is "Private" Content Off Limits?

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establishing that there is likely additional relevant evidence contained within the social media profiles.").

41. Both *Tompkins* and *Romano* involved requests for access to the user's entire account. See *Tompkins*, 2012 WL 179320, at \*1; *Romano*, 907 N.Y.S.2d at 653. As discussed earlier, a categorical request like that requires a showing that the entire source is relevant. See *supra* notes 24-25 and accompanying text. I think *Tompkins* and *Romano* are best read as speaking to the showing required to obtain access to an entire account, not to whether a party must make a *prima facie* showing before it can make specific, targeted requests.

42. See generally 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2007 (3d ed. 2010).

43. Another case that is sometimes cited for that proposition is a case from the Superior Court of Justice (Ontario), *Leduc v. Roman*. 2009 CanLII 6838, at para. 32 (Can. Ont. Super. Ct. J.). It is important to understand the context of that decision. In the Canadian system, a party must automatically disclose all relevant documents. See Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.02(1)-(2). If one party thinks another party has failed to fully discharge that obligation, it may seek relief from the court. See Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.06. As the court in *Leduc* explained, "a motion under Rule 30.06 requires evidence, as opposed to mere speculation, that potentially relevant undisclosed documents exist." 2009 CanLII 6838, at para. 14. Thus, *Leduc* is not a case about whether a party may take discovery; it is a case about how courts resolve claims that relevant information has not been produced. See *id.* at para. 36. I discuss that topic *infra* at note 72 and the accompanying text.

Another recurring question in social-media discovery is whether civil discovery extends to information that the user has restricted access to via the social-media site's privacy settings. Social-media sites typically allow users to define who can have access to particular content. Users are free to make all of their content available to the public, and some do. But most users also want the ability to post some content that is available to some people but not to others. Social-media sites facilitate that by having different privacy settings that allow the user to restrict access to a defined universe of people.<sup>44</sup> A Facebook account user, for example, can make his or her content available to the public, but also can restrict access to his or her "Facebook Friends" or even to a customized access group.<sup>45</sup>

Researchers have found that users of social-media sites have strong views about being able to "compartmentalize" information sharing. Social-media users think it is important that they be able to share information with one group (e.g., their friends) and yet keep that information private with respect to others (e.g., their families or their employers).<sup>46</sup> While social-media users seem to recognize that the privacy settings do not guarantee that the information will remain within the selected compartment, they nonetheless tend to hold a subjective expectation of privacy in their restricted content.<sup>47</sup> In short,

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44. See Comisky & Taylor, *supra* note 5, at 299 (discussing privacy settings available on various popular social-media sites).

45. See *Choose Who You Share With*, FACEBOOK.COM, <http://www.facebook.com/help/?page=119870658103124> (last visited Feb. 17, 2012); see also North, *supra* note 2, at 1297-98 (discussing operation of Facebook's privacy settings); Payne, *supra* note 9, at 847 (discussing operation of Facebook's privacy settings); Lisa Thomas, Comment, *Social Networking in the Workplace: Are Private Employers Prepared to Comply with Discovery Requests for Posts and Tweets?*, 63 SMU L. REV. 1373, 1380-81 (2010) (discussing Facebook profiles and privacy settings).

46. See Avner Levin & Patricia Sanchez Abril, *Two Notions of Privacy*, 11 VAND. J. ENT. & TECH. L. 1001, 1043 (2009).

47. See *id.* at 1004. The existence of these privacy settings probably encourages social-media users to hold this expectation. *Id.* at 1005 ("Leading [online social networks], such as Facebook and MySpace, propagate a notion of privacy as user control."); North, *supra* note 2, at 1296 ("By limiting access to selected content, Facebook users may subjectively expect this content not to be shared beyond their group of friends. The sophisticated technical controls on Facebook likely encourage this privacy expectation.").

many social-media users believe that “private” means “not discoverable.”<sup>48</sup>

Does restricting public access by using privacy settings shield the content from discovery? In a word, no.<sup>49</sup> There is simply no discovery rule that excludes information from discovery based on the fact that the person being asked has kept the information a secret, wishes to keep it a secret, or has restricted access to the information to a select group. Discovery often inquires into matters that are “private” or “secret” in the sense that the information has not been shared with the public. Indeed, one of the primary purposes of court-supervised discovery is to compel persons to provide information they do not want to share and would not willingly provide. Discovery is a powerful—and also often intrusive—litigation tool precisely because of its power to penetrate walls of privacy and demand the telling of secrets.<sup>50</sup>

Discovery is limited, of course, by the law of evidentiary privileges. The scope of discovery extends to information that is relevant *but not privileged*.<sup>51</sup> So if a jurisdiction were to recognize a “social-media privilege,” the Federal Rules would honor it and render that content off limits from discovery. But I am aware of no court or jurisdiction that has recognized such a privilege,<sup>52</sup> and I find the prospect of any jurisdiction doing so rather unlikely. Accordingly, courts have consistently and

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48. See Joseph Cucco, *Electronic Discovery of Social Networking Sites*, ALB. GOV. L. REV. FIREPLACE (June 20, 2011, 2:52 PM), <http://aglr.wordpress.com/2011/06/20/electronic-discovery-of-social-networking-sites/>.

49. See Witte, *supra* note 1, at 895 (“Facebook’s privacy settings cannot protect you from a valid discovery request seeking the contents of your Facebook page if your page is potentially relevant to the allegations in the lawsuit.”).

50. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984) (“The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. . . . Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.”).

51. FED. R. CIV. P. 26(b)(1).

52. See Opinion & Order at 2, 8, *supra* note 38 (“There is no confidential social networking privilege under existing Pennsylvania law.”); Opinion on Defendant’s Motion to Compel Discovery, *supra* note 38, at 5 (rejecting privilege claim); see also Steven C. Bennett, *Civil Discovery of Social Networking Information*, 39 SW. L. REV. 413, 420 (2010) (“The Federal Rules, and equivalent state rules, do not recognize any ‘privacy’ exception to the requirements of discovery (much less a ‘social networking privacy’ exception).”).



correctly rejected claims that information located behind privacy settings on Facebook or other social-media services is rendered non-discoverable.<sup>53</sup> A person who uses privacy settings on Facebook is no different than a person who shares letters only with his or her closest friends. If the information in those letters is relevant, it must be produced. The person with custody of the letters cannot refuse to provide them on the grounds that they were meant to be a secret.

As should be evident at this point, it is inevitable that some social-media discovery will extend to very private, personal, and sensitive matters. While privacy settings may have prevented the dissemination of that information to the general public, they do not shield it from discovery. That raises the fear that some of this private, personal, and sensitive information may become public through or as a result of the discovery process. Here too, the discovery scheme has mechanisms to deal with that concern.

Under Rule 26(c), the court can enter protective orders restricting discovery “to protect a party or person from annoyance, embarrassment, oppression,” and similar harm.<sup>54</sup> Though Rule 26(c) does not explicitly mention privacy, the Supreme Court has held that the protection of privacy is implicit in the rule.<sup>55</sup> If a discovery request seeks private information that is irrelevant, the court can enter an order forbidding discovery into that matter.<sup>56</sup> Rule 26(c) also authorizes the court to regulate the use and disclosure of information after it has been produced in discovery. Courts commonly enter protective orders protecting private or sensitive information produced in discovery from further disclosure. In appropriate cases, the court could order that the information be marked “attorneys’ eyes only,” such that it was available only to the attorneys (and

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53. See *Tompkins v. Detroit Metro. Airport*, No. 10-10413, 2012 WL 179320, at \*2 (E.D. Mich. Jan. 18, 2012); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010); see also *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (App. Div. 2011) (“The postings on plaintiff’s online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access . . . .”); *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 655-57 (Sup. Ct. 2010) (rejecting privacy arguments).

54. FED. R. CIV. P. 26(c).

55. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n.21 (1984).

56. FED. R. CIV. P. 26(c)(1)(A).

not the clients). In appropriate cases, the court could also order that any court filings containing the information be filed under seal.<sup>57</sup> Courts are already well aware both of their powers to regulate the disclosure of private and sensitive information and of how those powers might be used in cases involving social-media content.<sup>58</sup>

### *3. What Is the Correct Process for Reviewing and Producing Social Media Content?*

What we have established so far is that the contents of social media, regardless of the privacy settings selected, are discoverable if they are relevant and not privileged (setting aside the possibility of proportionality objections). We can now turn to an important practical question: what is the process for determining whether discoverable social-media content exists? To be precise, who reviews the social-media content to determine if any of it is responsive to a proper discovery request?

Experienced litigators will recognize immediately that this is hardly a new phenomenon or one unique to social media. Rule 34 allows parties to request documents and electronically stored information (ESI) either by identifying specific items by describing categories of items.<sup>59</sup> “Category” requests allow a party to request documents and ESI by describing contents or characteristics, like “Please produce all documents that relate to Topic X.”<sup>60</sup> While parties who serve category requests may sometimes know in advance what items are responsive, in most cases the purpose of sending a category request is to find out what items exist. Someone has to look at the potentially

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57. See *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1358 (Fed. Cir. 2011) (discussing standard required for filing materials with the court under seal); *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120-24 (2d Cir. 2006).

58. See *Simply Storage*, 270 F.R.D. at 434 (discussing availability of protective orders to address privacy concerns); *Ledbetter v. Wal-Mart Stores, Inc.*, Civil Action No. 06-cv-01958-WYD-MJW, 2009 WL 1067018, at \*2 (D. Colo. 2009) (noting that existing stipulated protective order already protects the plaintiffs’ privacy interests).

59. FED. R. CIV. P. 34(a)(1)(A).

60. See generally 1 STEVEN S. GENSLE, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 650 (2011) (describing Rule 34 practices for identifying items being requested).

responsive materials and see which ones, if any, are actually responsive. Who? And should it be any different for social-media discovery?

The longstanding general rule is that people review their own records when responding to discovery requests. After a request is made, the person to whom the request is sent reviews his or her own records, determines which items are responsive (and screens for privilege), and then arranges for them to be made available for inspection. Requests for direct access to another person's records are the rare exception.<sup>61</sup> Courts will grant direct access only upon a finding that the responding party has failed to properly or adequately review its own records.<sup>62</sup> This scheme applies equally to requests for ESI.<sup>63</sup> When it crafted the 2006 e-discovery amendments, the Civil Rules Advisory Committee took special care to say in the Committee Notes that it was not altering the general rule against direct access.<sup>64</sup> Thus, a straightforward application of the general rule dictates that the account user—to whom the production request is directed—reviews his or her own entries and makes the “first instance” determination of which of the entries, if any, are responsive.

In fact, that process has been followed in most of the federal-court cases.<sup>65</sup> Indeed, in one of the earliest cases the

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61. See *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (“Like the other discovery rules, Rule 34(a) allows the responding party to search his records to produce the required, relevant data.”); *U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 674 (M.D. Fla. 2008).

62. See *In re Ford Motor Co.*, 345 F.3d at 1317.

63. See *Covad Commc'ns Co. v. Revonet, Inc.*, 258 F.R.D. 5, 13-14 (D.D.C. 2009) (discussing the showing required before a court will order a forensic search of a party's ESI in response to an alleged deficiency in the party's response); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 427 (D.N.J. 2009) (parties are in the best position to determine how to search their own records).

64. See FED. R. CIV. P. 34 advisory committee's note (2006) (“The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances.”).

65. See *Held v. Ferrellgas, Inc.*, No. 10-2393-EFM, 2011 WL 3896513, at \*1 (D. Kan. 2011) (granting motion to compel ordering plaintiff to download and produce information rather than granting login access to the defendant); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (noting general practice that lawyers make sometimes difficult “first instance” determinations of what information is responsive to another party's discovery requests); *Mackelprang v. Fid. Nat'l Title Agency of Nevada*,

court made the point that the producing party is the one to judge relevance in the first instance.<sup>66</sup> So in general the courts do not seem to be having too much difficulty with this issue. Moreover, I see no reason why the process of having the producing party conduct first-instance review would not be suitable in the social-media context.

A handful of state-court cases, however, have ordered the account holder to provide his or her account number and login information so that the requesting party could access the account directly.<sup>67</sup> Because I do not find in these cases any showing that the usual criteria for granting direct access had been met, I think these cases took a step in the wrong direction. I can understand, given the nature of the technology in question, why these courts might have thought that ordering the production of login information would be a good, practical solution. Nonetheless, it is a form of direct access that is inconsistent with our general discovery scheme.

As a variation on the theme, one federal court has asked a third-party account holder to send him a friend request so the judge could review the contents of the account.<sup>68</sup> It is perhaps less of an intrusion to grant the *court* direct access than to grant another party access, and it appears that the judge in that case sought the account owner's consent for access via a friend request.<sup>69</sup> Nonetheless, the process used still interjected the court into first-instance review, departing from the general rule

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Inc., No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at \*8 (D. Nev. Jan. 9, 2007) (holding that defendant could serve requests that plaintiff produce MySpace contents that were relevant to her claims).

66. See *Mackelprang*, 2007 WL 119149, at \*8.

67. See *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 655 (Sup. Ct. 2010); Opinion and Order, *supra* note 38; Opinion on Defendant's Motion to Compel Discovery, *supra* note 38.

68. See *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-00764, 2010 WL 2265668, at \*1 (M.D. Tenn. June 3, 2010). The Facebook accounts in that case belonged to two friends of the plaintiff, who had fallen and hit her head while dancing on the bar at the Coyote Ugly Saloon in Nashville. See *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-0764, 2011 WL 1627333, at \*1 (M.D. Tenn. Apr. 29, 2011) (describing facts of the case); *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-0764, 2010 WL 2196591, at \*1 (M.D. Tenn. May 27, 2010) (discussing subpoena served directly on Facebook for production from Ms. Knudsen's account). At issue in the discovery dispute were various photographs of the plaintiff taken during the night of the accident. See *Barnes*, 2010 WL 2265668, at \*1.

69. See *Barnes*, 2012 WL 2265668, at \*1.

that information holders review their own information in the first instance.

So if courts should not conduct first-instance review, when, if ever, should they get involved in reviewing Facebook pages or other social-media accounts? Under standard discovery practice, a court generally should wait until the information holder makes his or her response after the initial review, and then get involved only if there is a dispute regarding objections to the request or the sufficiency of the production.<sup>70</sup> In that context, the court could properly conduct an *in camera* review of the contents of the account to see if the account holder's response to the request was sufficient.<sup>71</sup>

Even so, it is important to recognize that courts generally have been very reluctant to get directly involved in assessing the sufficiency of a production, and for good reason. The last thing courts want—or have the practical ability to do—is to undertake their own search or review whenever the requesting party suspects the response might not be complete. Accordingly, courts usually will accept a responding party's representation that its response was correct and complete absent some evidence to the contrary.<sup>72</sup> Applying that standard to the social-media context, courts would have no reason to undertake an *in camera*

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70. See *Tompkins v. Detroit Metro. Airport*, No. 10-10413, 2012 WL 179320, at \*3 n.4 (E.D. Mich. Jan. 18, 2012) (rejecting parties' request that court conduct *in camera* review to assess relevance); *Offenback v. L.M. Bowman, Inc.*, Civil Action No. 1:10-CV-1789, 2011 WL 2491371, at \*3 n.3 (M.D. Penn. June 22, 2011) (“[I]t would have been appropriate and substantially more efficient for Plaintiff to have conducted this initial review and then, if he deemed it warranted, to object to disclosure of some or all of the potentially responsive information included in his account.”); see also *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 435 (S.D. Ind. 2010) (*in camera* review of entire account not appropriate “in the first instance” but could be appropriate to resolve a post-production dispute).

71. See *Bass I*, Civil No. 3:08cv1807(JBA), 2009 WL 3724968, at \*1-2 (D. Conn. Oct. 27, 2009) (*in camera* review comparing what the user produced with complete set and ordering full production after finding no basis for the selections made).

72. See *Averill v. Gleaner Life Ins. Soc’y*, 626 F. Supp. 2d 756, 766 (N.D. Ohio 2009) (suspicion is insufficient); *Hubbard v. Potter*, 247 F.R.D. 27, 29 (D.D.C. 2008) (“Courts supervising discovery are often confronted by the claim that the production made is so paltry that there must be more that has not been produced . . . . Speculation that there is more will not suffice; if the theoretical possibility that more documents exist sufficed to justify additional discovery, discovery would never end.”); *In re Application for an Order for Judicial Assistance in the Labor Court of Brazil*, 244 F.R.D. 434, 438 (N.D. Ill. 2007) (classifying a concern that responsive documents were being withheld as speculation).

review of a party's social-media content unless the requesting party had some specific, non-speculative grounds to argue that the account contained responsive materials that the account holder had failed to disclose.

#### 4. To Whom Should the Request Be Directed?

A final practical question that arises in social-media discovery is determining to whom the discovery request should be directed. Social-media sites typically store user content on their own servers.<sup>73</sup> Thus, one might think that the proper process would be to serve a subpoena on Facebook or whichever social-media provider is involved.

But that path appears to be closed. Courts have interpreted the Stored Communications Act as applying to social-media sites and as prohibiting the sites from disclosing nonpublic contents without the user's consent.<sup>74</sup> Moreover, a civil-court subpoena does not override that protection.<sup>75</sup> Thus, assuming the caselaw stands, parties will not be able to subpoena private content from social-media providers unless they have the user's consent. In other words, if you want access to Johnny's private Facebook content, and Johnny is not cooperating, you can't get it from Facebook.

No problem. You can get it from Johnny. Under Rule 34, a party must produce information that is within its possession, custody, or control.<sup>76</sup> At the very least, "control" under Rule 34 exists when a person has a right to access materials even if they are not in that person's possession or custody.<sup>77</sup> Whatever one might think about who has possession or custody of the content on Johnny's Facebook page, it is beyond dispute that Johnny has

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73. See Minotti, *supra* note 11, at 1064; Payne, *supra* note 9, at 848.

74. See Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 988-91 (C.D. Cal. 2010).

75. See *id.* at 975-76 (discussing cases that support this proposition); Flagg v. City of Detroit, 252 F.R.D. 346, 350 (E.D. Mich. 2008); *In re Subpoena Duces Tecum to AOL, LLC.*, 550 F. Supp. 2d 606, 610-12 (E.D. Va. 2008).

76. FED. R. CIV. P. 34(a)(1).

77. See GENSLER, *supra* note 60, at 654 (discussing cases establishing "legal control" test). Some courts extend the concept of "control" to circumstances where a party has a practical ability to obtain the information, even if it does not have a legal right to demand it. See, e.g., Safeco Ins. Co. of Am. v. Vecsey, 259 F.R.D. 23, 28-29 (D. Conn. 2009); Huggins v. Fed. Express Corp., 250 F.R.D. 404, 408 (E.D. Mo. 2008).

control over it as that term is used in Rule 34.<sup>78</sup> In particular, Facebook policies make it patently clear that account holders “own” the contents of their pages.<sup>79</sup> Thus, a routine application of existing discovery principles under Rule 34 leads to the result that if you want to take discovery of a party’s social-media content, the proper process is to serve a Rule 34 request on that party asking the party to produce the responsive materials.<sup>80</sup> The user then must take reasonable steps to obtain whatever information exists—in whatever format it now exists—from the social-media service.<sup>81</sup>

It is important to note that nothing precludes a requesting party from *asking* the account owner for direct access, either by asking for login information or by asking the owner to sign a waiver allowing the service provider to disclose the information.<sup>82</sup> That would be no different, and no less

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78. See Bennett, *supra* note 52, at 417-18 (explaining that users “generally have access to at least some of the social networking information they create and exchange”); Browning, *supra* note 1, at 473 (“Almost without exception, the information sought by parties to civil litigation is in the possession of, and readily accessible to, a party to the litigation.”); Minotti, *supra* note 11, at 1064 (discussing user’s access as form of “control” under Rule 34); North, *supra* note 2, at 1303 (discussing “legal right to obtain test” in the context of social media).

79. See *Facebook Principles*, FACEBOOK.COM, <http://www.facebook.com/principles.php> (last visited Feb. 20, 2012); *Statement of Rights and Responsibilities*, FACEBOOK.COM, <http://www.facebook.com/legal/terms> (last visited Feb. 20, 2012) (“You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings.”).

80. See FED. R. CIV. P. 34(a)(1).

81. Facebook currently allows users to download their entire Facebook account. See *Download Your Information*, FACEBOOK.COM, <http://www.facebook.com/help/?page=116481065103985> (last visited Feb. 20, 2012). But some experts caution that this feature may not be sufficient for discovery purposes because critical metadata fields may not be included. See *Limitations of Facebook “Download Your Information” Feature for eDiscovery Preservation*, EDISCOVERY LAW & TECH BLOG (Oct. 25, 2011, 7:25 PM), <http://blog.x1discovery.com/2011/10/25/limitations-of-facebook-%E2%80%9Cdownload-your-information%E2%80%9D-feature-for-ediscovery-preservation/>.

82. See Browning, *supra* note 1, at 475 (discussing tactic of asking the party to execute a consent form and filing a motion to compel the party to execute the consent form if the party refuses to do so). A number of the existing cases address motions asking the court to compel the account user to execute a waiver or otherwise permit direct access. See, e.g., *Tompkins v. Detroit Metro. Airport*, No. 10-10413, 2012 WL 179320, at \*1 (E.D. Mich. Jan. 18, 2012) (motion to compel plaintiff to execute authorization); *Mackelprang v. Fid. Nat’l Title Agency of Nevada, Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at \*1 (D. Nev. Jan. 9, 2007) (motion to compel plaintiff to execute consent form); *McCann*

permissible, than *asking* another party for the keys to its file cabinets. Some lawyers recommend pairing discovery requests with access requests or waiver requests.<sup>83</sup> Just remember that the account owner, like the owner of the file cabinet, is free to decline and insist on searching its own records.<sup>84</sup>

### C. What Would Signal the Need for New Rules?

The central purpose of this article has been to examine whether new rules are needed for social-media discovery. As discussed above, I have not seen anything yet to persuade me that the existing rules—applied flexibly and discretionarily—are not up to the task. Social-media sites are an important new *source* of discoverable information, but the principles that govern discovery from other sources, both paper and electronic, amply guide the process of taking discovery from this newest source. That being said, it is worth taking a moment to think about what circumstances or conditions would justify cranking up the rulemaking process. What *would* signal the need for new rules?

One reason the Civil Rules Advisory Committee might propose a package of “social-media” amendments would be if, over time, the social-media-discovery caselaw coalesced around bad practices, especially if those bad practices started to distort the application of the discovery rules in non-social-media

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v. Harleysville Ins. Co. of N.Y., 910 N.Y.S.2d 614, 615 (App. Div. 2010) (motion to compel plaintiff to execute authorization); Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (Sup. Ct. 2010) (ordering plaintiff to execute authorization).

83. See Parker & Swearingen, *supra* note 4, at 36-37 (providing instructions on how to subpoena information from social-media sites with an executed authorization); DeMay, *supra* note 40, at 3.

84. An interesting parallel exists in the caselaw governing medical-records releases. Most courts that have addressed the issue have held that they do not have any power under Rule 34 to compel a party to sign a release so that the requesting party may obtain direct access of the records from the medical provider. See *Fields v. W. Va. State Police*, 264 F.R.D. 260, 263 (S.D. W. Va. 2010); *Mills v. East Gulf Coal Preparation Co.*, 259 F.R.D. 118, 133 (S.D. W. Va. 2009); *Klugel v. Clough*, 252 F.R.D. 53, 55 (D.D.C. 2008); *Clark v. Vega Wholesale Inc.*, 181 F.R.D. 470, 472 (D. Nev. 1998). But see *Doe v. Dist. of Columbia*, 231 F.R.D. 27, 35 (D.D.C. 2005); *Williams v. NPC Int’l, Inc.*, 224 F.R.D. 612, 613 (N.D. Miss. 2004).



contexts.<sup>85</sup> This is an obvious point, but rule amendments sometimes are offered simply to correct the results of bad caselaw. On this point, however, I'm more optimistic than pessimistic. Though as discussed above, some decisions have taken what I consider to be missteps, those missteps do not seem to have taken root in the developing national caselaw. For every court that has taken a wrong turn, there has been at least one other court that has steered the right path. That could change. And new problems could arise. But overall I think the errors that have been made so far are readily fixable and, in time, will be fixed either at the trial-court level or on appeal.

What seems to be a more likely prospect for the initiating rulemaking is that future caselaw involving social-media discovery might reveal that one or more of our foundational discovery concepts has become obsolete or unusable. And in that regard, the most likely candidate is the notion of "possession, custody, or control." So far, courts have been able to resolve production requests involving social media by recognizing that account users have control over their data.<sup>86</sup> But who knows what the future of information storage will look like. It is worth reflecting for a moment that the trend in information storage is away from entities hosting their own data on their own servers to utilizing "cloud" services where the user's information is stored on a third party's servers.<sup>87</sup> As the technology of remote-information processing and storage evolves, will the concept of "control" be able to adapt?<sup>88</sup> Or will the concept reach its functional breaking point, requiring new thinking and new concepts?<sup>89</sup>

We are already seeing significant strain on the concept of "control" in the preservation context. For example, one court

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85. At the risk of drawing too fine a distinction, though, if social-media-discovery cases led to distortions of the discovery scheme generally, then any responsive amendments might more accurately be called general amendments rather than "social-media" amendments.

86. See *supra* note 78 and accompanying text.

87. See Alberto G. Araiza, Comment, *Electronic Discovery in the Cloud*, 2011 DUKE L. & TECH. REV. 008, at ¶ 7-10 (describing what cloud computing is and how it works).

88. See Payne, *supra* note 9, at 863-64.

89. See Araiza, *supra* note 87, at ¶ 43-44 (calling for new rules to address cloud discovery).

has already recognized that a party's duty to preserve potentially discoverable information extends to social-media content that is within the party's possession, custody, or control.<sup>90</sup> As in other contexts where digital information is in the custody of a third party, there are serious practical issues regarding a party's ability to exercise control over this data.<sup>91</sup> In addition, some commentators assert that ordinary social-media users should not have a duty to preserve their social-media content because, while they may be adept at using social media, they are not likely to understand their preservation duties and are generally ill-equipped to comply with them even when understood.<sup>92</sup>

My purpose here is not to speculate about the durability of the concept of "control"—or any other functional concept—in the face of a rapidly evolving information technology landscape. That would require some crystal ball into the future of information technology, and I am the last person to play the role of fortune teller in that regard. My point, rather, is that if cracks appear in the core functional concepts underlying our discovery scheme, that will not require new rules just for the cases where those cracks happen to show first. If the cracks are real, we will probably need to rethink major aspects of the discovery scheme on a much wider scale.

### III. THE LIMITS OF RULEMAKING

In Part II, I explained why I do not think social-media discovery presents any issues that require a new round of rulemaking. In this Part, I turn to the rulemaking process and

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90. See *Katiroll Co. v. Kati Roll & Platters, Inc.*, No. 10-3620 (GEB), 2011 WL 3583408, at \*4 (D.N.J. Aug. 3, 2011) (finding that user had control over his Facebook page and committed technical spoliation when he changed his profile picture).

91. See *Araiza*, *supra* note 87, at ¶ 27-33 (discussing control issues with cloud services); *Bennett*, *supra* note 52, at 418 (noting that users "have no assurance that their information will be preserved indefinitely by the service, or any practical ability to impose a 'litigation hold' on such information, once litigation arises"); *Witte*, *supra* note 1, at 896-97 (noting that users do not know what information the site has retained and may not be receptive to preservation requests by the user); *Kozinets & Lockwood*, *supra* note 3, at 47 (noting practical problems with preserving social media).

92. See *Payne*, *supra* note 9, at 866-67 (arguing that only parties who are sophisticated in litigation should have a duty to preserve their social-media content); *Witte*, *supra* note 1, at 903 (proposing that social-networking sites be required to offer "litigation hold" mechanisms to make it feasible for users to meet their preservation duties).

consider the prospects for making discovery rules targeted at social-media discovery. In my view, the rulemaking process would struggle to produce social-media discovery rules that would provide useful guidance and stand the test of time.

The problem is not lack of expertise. Admittedly, the members of the Advisory Committee usually are not experts in information technology or likely to be experienced users of the latest social-media platforms. But the rulemakers have many resources to draw upon, including getting assistance from the Federal Judicial Center, hiring consultants, or seeking input from interested parties with the needed expertise.<sup>93</sup> And on a comparative basis, the resources available to the Advisory Committee vastly exceed those that an individual judge confronting a particular issue likely can command. If the only question were expertise—or access to people with it—then the Advisory Committee might be in the best position to take action.

The problem is one of timing. The rulemaking process is slow. At a minimum, it takes three years for a proposal to travel the full process and become a new rule. To illustrate, imagine you were to submit a rulemaking proposal this summer, say on June 1, 2012. The process, if it proceeded without any controversy or delay, would follow this schedule<sup>94</sup>:

Fall 2012: Advisory Committee considers the proposal and asks the Reporter to prepare draft rule text and a draft Committee Note.

Spring 2013: Advisory Committee votes to seek permission from the Standing Committee on Rules of Practice and Procedure to publish the proposal for public comment.

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93. See *infra* notes 99-100 and accompanying text (discussing recent practice of holding miniconferences to obtain input, including technical expertise, from the bar and other interested parties).

94. See ADMIN. OFFICE OF THE U.S. COURTS, THE RULEMAKING PROCESS: A SUMMARY FOR THE BENCH AND BAR (Oct. 2011); see also Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1672-73 (1995) (providing overview of the rulemaking process).

June 2013: Standing Committee grants permission to publish.

August 2013: Proposal published for comment.

February 2014: Comment period closes.<sup>95</sup>

Spring 2014: Advisory Committee considers comments and votes to approve the proposal and recommend it to the Standing Committee.

June 2014: Standing Committee approves the proposal and recommends it to the Judicial Conference.<sup>96</sup>

September 2014: Judicial Conference approves the proposal and forwards it to the U.S. Supreme Court.

May 1, 2015: Supreme Court forwards the amendment to Congress.<sup>97</sup>

December 1, 2015: Absent contrary action by Congress, the rule change takes effect.<sup>98</sup>

As you can see, under that schedule, the proposal would not take effect for more than three years. But the rulemaking process typically takes between four to six years, especially for major amendments. It has become increasingly common for the Advisory Committee to refer matters to subcommittees for

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95. The standard period for notice and comment is six months. *See* 1 GUIDE TO JUDICIARY POLICY § 440.20.40(b) (Oct. 12, 2011), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures\\_for\\_Rules\\_Cmtes.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures_for_Rules_Cmtes.pdf) (“A public comment period on the proposed change must extend for at least six months after notice is published . . .”).

96. *See* 28 U.S.C. § 2073(b) (2006) (discussing relationship between advisory committees, standing committee, and Judicial Conference).

97. *See* 28 U.S.C. § 2074(a) (2006) (setting May 1st as the deadline to transmit proposed change to Congress).

98. *See* 28 U.S.C. § 2074(a) (setting December 1st as the effective date absent contrary action by Congress).

detailed study. While it is possible that a subcommittee will present a fully prepared proposal at the next scheduled committee meeting, it is probably more common that the subcommittee will make one or more progress reports to the full committee, seek guidance from the full committee on how best to address a few critical issues that need resolution, and then continue its work. That can easily add a year or more to the rulemaking process. In addition, during the last twenty years, the Advisory Committee (and its subcommittees) have increasingly sought input from interested parties by holding “miniconferences” prior to making proposed rule changes.<sup>99</sup> During my six years on the Advisory Committee, most of the major rule projects included one or more miniconferences.<sup>100</sup> These miniconferences have proven to be extraordinarily valuable in helping the committee members understand the issues and sort through potential solutions, but they cannot help but add length to the rulemaking process.

The length of the rulemaking process affects the substance of the product. As discussed in Part II, the Civil Rules are the same for all types of cases, and flexibility is provided by focusing on functional concepts and by giving judges discretion.<sup>101</sup> Similar concerns require that the Civil Rules—especially the discovery rules—be technology neutral. The Advisory Committee simply cannot write rules to govern the technology of the day. Technology moves too fast. Technology-driven rules often would be obsolete before they took effect.

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99. See Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 9-10 (2004) (discussing the “‘new prototype’ of rulemaking” in which “the Advisory Committee has made it a practice to inform itself about rules issues by seeking input from the bar”). Professor Marcus’s article is based on the e-discovery miniconference held at Fordham University Law School in February 2004. *Id.* at 1.

100. To give just a few examples, the Rule 56 Subcommittee held two miniconferences prior to making its published proposals. See *Minutes*, CIVIL RULES ADVISORY COMMITTEE 19 (Nov. 8-9, 2007), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2007-min.pdf> (referencing miniconferences). Similarly, the Discovery Subcommittee held two miniconferences prior to making its published proposals regarding expert discovery under Rule 26. See *id.* at 3 (referencing miniconferences).

101. See *supra* notes 13-16 and accompanying text.

This is a lesson the Advisory Committee took to heart when developing the e-discovery amendments. Consider this anecdote from one of the participants:

Meetings were devoted to the question of whether we should expand Rule 34's "laundry list" of objects subject to production to include tapes, floppy disks, and hard drives. While members of the Advisory Committee were discussing this question, I-Pods and thumb drives came on the market and floppy disks virtually disappeared. It became apparent that by the time the committee finished any such list, it would have to amend it to keep up with ever-changing digital technology.<sup>102</sup>

The decision to have Rule 34 refer specifically to "electronically stored information" but also include the phrase "stored in any medium from which information can be obtained" was a deliberate effort to draft as broadly as possible to capture changing technologies.<sup>103</sup>

A similar story unfolded with respect to another problem that loomed large at the time—whether parties had to search their back-up tapes for archived emails and the like. Eventually, the Advisory Committee realized that any rule targeted at back-up tapes would not survive the test of time because it was too technology-specific. Experienced e-discovery litigators already know the end of the story. The Advisory Committee dissected the problem, looked for the underlying functional concepts, and then wrote Rule 26(b)(2)(B), creating a second, semi-protected tier of discovery when the source of electronically stored information is not reasonably accessible because of undue burden or cost.<sup>104</sup> That rule, of course, speaks to the back-up

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102. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 194 (2006).

103. See Richard L. Marcus, *E-Discovery and Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633, 655-56 (2006); see also FED. R. CIV. P. 34 advisory committee's note (2006) ("The rule covers—either as documents or as electronically stored information—information 'stored in any medium,' to encompass future developments in computer technology.").

104. FED. R. CIV. P. 26(b)(2)(B).

tape problem, but in a way that is functional and not tied to any particular technology.<sup>105</sup>

The same story may again be unfolding with respect to possible rules governing preservation and spoliation. In September 2011, the Discovery Subcommittee held a miniconference in Dallas to seek input on whether rules were needed and, if so, what those rules might look like.<sup>106</sup> Some of the participants urged the Subcommittee to write a detailed rule specifying when the duty to preserve is triggered and what must be preserved.<sup>107</sup> The problem, of course, is that the more detailed and specific rule text becomes, the less suited the provisions are to all-purpose solutions and the less likely they are to adapt to new circumstances.<sup>108</sup> More specifically, the suggestion that a preservation rule identify particular types of information that presumptively need not be preserved (e.g., cache files) “seems very problematical . . . [since] technological change might quickly make the list obsolete.”<sup>109</sup>

Professor Rick Marcus, currently the co-Reporter for the Advisory Committee and the longstanding Reporter to the Discovery Subcommittee, has on several occasions noted the difficulty of trying to use rulemaking to solve problems that arise from the circumstances of the day.<sup>110</sup> Oftentimes, the better course is to leave the matter to the common-law process—

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105. See FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006) (“It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information.”); see also Marcus, *supra* note 103, at 666 (noting that “inaccessibility” was designed to adapt to changing technological capabilities).

106. See ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 53-54 (Nov. 7-8, 2011), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf> (discussing Dallas miniconference).

107. *Id.* at 60-61.

108. See *id.* at 61 (“The Subcommittee’s tentative conclusion is that devising a very specific preservation rule is not workable because the questions it would address seem too fact-specific and are unsuited to all-purpose solutions.”).

109. *Id.* at 65.

110. See Marcus, *supra* note 99, at 17; Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 286 (2001).

that is to say, to let the judges figure it out.<sup>111</sup> As Professor Marcus explained:

Inaction may be all the more attractive in an area where change occurs so quickly. Under the present rule amendment process, the minimum time from initiation of a rule change to completion is about four years. That can be a lifetime in computer developments, so that a change devised now might be irrelevant, and might even be harmful, four years from now.<sup>112</sup>

But even where some rulemaking might be warranted in areas where technology changes quickly, the pace of technological change is “a reason to avoid specifics and particulars (and thus to disappoint those who covet the certitude of specificity).”<sup>113</sup>

Discovery rules for social media would present an almost impossible situation for the Advisory Committee. As much as any aspect of modern information technology, social media are fast-moving and fast-evolving targets. When the Advisory Committee held its e-discovery miniconference in February 2004, Facebook was less than three weeks old and still limited to Harvard students.<sup>114</sup> When the e-discovery rules took effect on December 1, 2006, MySpace was still the dominant player in social media<sup>115</sup> and Twitter, though hatched earlier that summer, had barely left the nest.<sup>116</sup> If someone proposed a social-media

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111. See Marcus, *supra* note 99, at 17 (discussing advantages of common-law process in areas where the problems are relatively new).

112. See Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, *supra* note 110, at 280; see also Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 343 (2008) (noting that the e-discovery amendments avoided detailed directives “[s]o the application of the rules can evolve as technology evolves”).

113. Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, *supra* note 99, at 18.

114. See Alan J. Tabak, *Hundreds Register for New Facebook Website*, HARVARD CRIMSON (Feb. 9, 2004), <http://www.thecrimson.com/article/2004/2/9/hundreds-register-for-new-facebook-website/>.

115. See Pete Cashmore, *MySpace, America's Number One*, MASHABLE (July 11, 2006), <http://mashable.com/2006/07/11/myspace-americas-number-one/>; see also Julia Angwin & Jeremy Singer-Vine, *The Selling of You*, WALL ST. J., April 7-8, 2012, at C1 (noting how MySpace lost its market dominance to Facebook and attributing that in part to Facebook's strategy of encouraging third-parties to develop “apps”).

116. See Stephanie Buck, *A Visual History of Twitter*, MASHABLE (Sept. 30, 2011), <http://mashable.com/2011/09/30/twitter-history-infographic/>.



rule this summer, it probably would not take effect until December 1, 2017. Who among us is brave enough to predict what social media will look like then? Not me. As one commentator recently noted, “even as I write this, I fear that by the time the law has caught up with social networking sites, Facebook will be yesterday’s news. By then, we will already be reacting to the next technological advancement and struggling with unforeseen sources of ESI and evidence.”<sup>117</sup>

In short, the likelihood that the Advisory Committee could develop a meaningful proposal to address a specific problem in social-media discovery, and have that proposal stand the test of time, seems to be vanishingly small. That is not to say that social-media discovery will not influence the evolution of the Civil Rules. As discussed earlier, social-media discovery stands as much of a chance as anything of revealing aspects of the discovery scheme where foundational concepts (e.g., custodianship) may prove to be insufficient or unworkable.<sup>118</sup> In that event, foundational changes may be needed. But changes of that type would transcend the specific problem of social media.

#### IV. CONCLUSION

There is no doubt that the social-media phenomenon has had an enormous impact on civil discovery. And in all likelihood, that impact will only increase as lawyers become more experienced in seeking discovery from social-media sites. More disputes will arise. More answers will be needed.

Though it may be tempting to seek those answers in special rules governing social-media discovery, I think that outcome is unlikely. Based on the caselaw so far, I do not think special rules are needed. Properly applied, the functional, flexible, and discretionary discovery rules seem well-equipped to accommodate discovery from this new “treasure trove” of information. Although some courts have taken a few false first steps, I am optimistic (I hope not naively) that with more experience and further reflection the courts will correct those missteps and the caselaw will fall in line with the decisions that

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117. Witte, *supra* note 1, at 892.

118. See *supra* note 86-92 and accompanying text.

better follow and better apply the existing discovery scheme. Moreover, any effort to draft special rules for social-media discovery would probably ask more of the current rulemaking process than it can deliver. Time and again, the rulemakers have heeded the lesson that they cannot make special rules to solve the “problems of the day,” especially when those problems are tied to technologies that evolve faster than the rulemaking process can act. “Facebook” discovery rules written today would probably look archaic, if not silly, ten years from now. Young lawyers then might even laugh at them—probably using some new mode of communication that I cannot now fathom and will likely never learn to use.