THE IMPACT OF ONLINE SOCIAL MEDIA AND NETWORKING IN JUVENILE LAW: ADMISSIBILITY AND DISCOVERABILITY

ROBERT O. DAWSON JUVENILE LAW INSTITUTE
24TH ANNUAL JUVENILE LAW CONFERENCE

FEBRUARY 21-23, 2011
CORPUS CHRISTI, TX

John G. Browning, Esq.
Thompson, Coe, Cousins & Irons, L.L.P.
700 N. Pearl Street
Dallas, Texas 75201
Telephone: 214-871-8215
jbrowning@thompsoncoe.com

1595266v1
09998-590

I. Introduction

Given the prevalence of social media, the lawyer who overlooks evidence to be mined from social networking sites like Facebook, MySpace, and Twitter may very well be committing malpractice. Nearly 60% of adult Internet users in the U.S. have a profile on a social networking site. According to a recent Nielsen survey, individuals devote 22.7% of their online time to social networking sites (an increase of 43% over the previous year); social media usage is growing at a rate of three times that of overall Internet usage. MySpace, founded in 2003, peaked at over 250 million users. Facebook, founded in 2004, boasts over 600 million users, and they are loyal: Roughly half of Facebook users visit the site on at least a daily basis. In December 2010 alone, Americans spent 49.3 billion minutes on Facebook. "Facebook Nation" enabled Facebook to surpass Google in March 2010 as the most-visited website in the world. And if it were indeed a nation, Facebook would be the 4th most populous on Earth. Needless to say, the figures for those under 18 are even higher.

Twitter, founded in 2006, is a social networking/micro-blogging site. Posts, or "tweets," cannot exceed 140 characters. Twitterers "tweet" news at it happens directly from their cell phones to followers that can number in the thousands - or even millions, in the case of celebrities like Oprah Winfrey or Ashton Kutcher. Such tweets may share observations or news, with links to more in-depth articles or blogs. Twitterers may also "re-Tweet" to their followers' tweets that they find informative or interesting. There are over 100 million Twitter users. To put the meteoric growth of social sites such as Twitter in perspective, consider that 3 years ago, Twitter handled 5,000 tweets a day. By 2010, the site was handling a staggering 65 million per day!

When it comes to children, the statistics are even more staggering and, in many ways, troubling. According to Nielsen surveys, the amount children and teens spend on the computer has tripled between 1999 and 2009. An April 2010 Pew and the Internet Study revealed that the typical American teen sends and receives 50 or more text messages a day (1,500 per month), while 15% send and receive over 6,000 texts each month. 23% of these youths report regularly accessing social networking sites on their cell phones as well.

An August, 2009 Common Sense Media Poll showed that 51% of teens check their social networking sites more than once a day. 39% have posted something they later regretted, while 37% have used social networking sites to make fun of others. An astonishing 25% have created a social networking profile with a false identity, and 24% admit hacking into someone else's social networking account. And equally troubling is the fact that 13% of teens acknowledge posting nude or seminude pictures or videos of themselves or others online.

If it seems like all young people have a presence on at least one social networking site, that's not far from the truth. According to an August 2009 poll by Forrester Research, only 3% of U.S. youths aged 18-24 are considered "inactive" when it comes to social media.

With such an abundance of statements, photos, videos, and other potential evidence appearing on social networking sites every day, it's no wonder that lawyers from all areas of practice are digging in this digital goldmine. A February 2010 study by the American Academy of Matrimonial Lawyers revealed that 81% of the attorneys responding reported they found and used evidence from social networking sites. The most popular source for such evidence was Facebook; 66% of the respondents indicated they used the site for information. From prosecutors and criminal defense attorneys to personal injury litigators and employment lawyers, attorneys around the country are making use of evidence from social networking sites. For example, a chemical exposure/manganese poisoning case brought in federal court in Cleveland, Ohio against several welding equipment companies was recently dismissed due to what defense lawyers discovered on social networking sites. Welder Ernest Ray had claimed serious personal injuries, including permanent neurological damage, as a result of manganese exposure. But defense attorneys introduced evidence from Ray's Facebook page, including photos of the supposedly disabled plaintiff competing in high speed boat races and other rigorous physical activities. While all of the methods to obtain such evidence and its potential applications in various types of cases are beyond the scope of this paper, I encourage readers to explore my new book from Thomson Reuters/West Publishing, The

Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law. (West Publishing, 2010)

This article will examine discoverability and evidentiary issues associated with social networking evidence, (including authentication) as well as some of the privacy concerns that been raised in response to efforts to obtain and use this evidence. But first, let's look at the various ways that social media can play a pivotal role in juvenile law matters.

II. Social Media and Juvenile Law

The benefits of potential applications of social media in juvenile proceedings are many and varied. In many jurisdictions, law enforcement has monitored social media sites like Facebook and MySpace for advance word of parties where underage drinking and/or drug use may be a factor. In addition, police have mined social networking sites for evidence of gang-related activity and related criminal conduct. In Austin, a notorious graffiti artist or "tagger" unwittingly aided in his identification, apprehension, and conviction because of his predilection for posting photos of his "artwork" and distinctive signature on Facebook (genius that he was, he also left additional evidence on the walls of his cell at the Travis County Jail).

A number of judges use social media to keep the minors appearing before them on the straight and narrow. Michigan Judge A. T. Frank uses social networking sites to monitor offenders on probation under his jurisdiction, occasionally finding photos on MySpace or Facebook pages in which the defendants are engaging in drug use or other prohibited behavior. Galveston Juvenile Court Judge Kathryn Lanan employs a similar tactic, requiring all juveniles under her jurisdiction to "friend" her on Facebook or MySpace so she can review their postings for any signs of inappropriate conduct that might warrant a return visit to her court.

Some judges have even gone so far as to limit or ban social media use by juveniles as a condition of probation. Generally, juvenile court judges have broad latitude in crafting

conditions of probation. But, in In re J.J., a California appellate court struck down probation restrictions that included no Facebook use as a violation of the youth's First Amendment rights. In re J.J., Case. No. D055603 (Cal. Ct. App. Oct. 15, 2010). J.J., a 15 year-old boy placed on probation for the alleged theft of a motorcycle, was ordered by the court not to use a computer for any purpose other than school-related work (and then only under supervision). The judge specifically prohibited J.J. from using instant messaging services through MySpace, Facebook, and others, and in fact decreed that J.J. "shall not have a MySpace page, a Facebook page, or any other similar page and shall delete any existing page. [He] shall not use MySpace, Facebook, or any other similar program."

The appellate court observed that such restrictions bore no relationship to J.J.'s criminal history, and that the ban was so overly broad that it "forecloses access to countless benign and protected uses." More importantly the Court of Appeals upheld that J.J.'s challenge to the restrictions on First Amendment grounds, noting the importance of Internet access to the exercise of free speech:

> "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. . . Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means."

Given the frequency with which social media evidence and issues can come up in juvenile proceedings, it is useful to have an understanding of what kind of social networking evidence issues that come up with the use of content from sites like MySpace, Facebook, Twitter, LinkedIn, and others.

III. What's Out There? More Than You Think There Is

Scholars of Native American history often point out that the Lakota Sioux used virtually all of the buffalo after a hunt: meat for sustenance, hide for clothing and shelter, bone and sinew for tools, etc. Lawyers considering options for using evidence from social networking sites would be well advised to take a similar approach. While photos, video, or statements posted on a social networking site are most frequently used for their evidentiary value, don't overlook other features associated with social networking sites.

Mood Indicator

Sites like MySpace and Facebook have a feature, a "mood indicator" where the user can share what kind of mood he or she happens to be in that day. Such information was put to good use by a public defender in New York in 2009. Gary Walters, a paroled burglar, faced changes of carrying a loaded weapon following an altercation with New York police officer Vaughn Ettienne. Officer Ettienne claimed that when he arrested Walters in 2006, the defendant had been carrying a loaded 9mm pistol. But Walter's attorney, Adrian Lesher, sought to convince the jury that the gun had been planted on his client as an excuse for breaking Walter's ribs during the arrest. Lesher wanted to portray Officer Ettienne, a bodybuilder who'd been disciplined in 2007 after testing positive for steroids, as a cop filled with "roid rage," trying to emulate Denzel Washington's corrupt narcotics officer character in the movie "Training Day."

Lesher had some help, courtesy of Ettienne's own social networking profile. On the day before the arrest, Ettienne's mood on the page was set to "devious," complete with an angry red emoticon being licked by flames. And in the days leading up to the trial, the hulking policeman had even set his status to read, "Vaughn is watching 'Training Day' to brush up on proper police procedure." Lesher's digital sleuthing also turned up incriminating comments Ettienne had made on the Useless Junk video sharing site, under his screen name "Blakryno." These included

comments supportive of police who had beaten a handcuffed suspect (and then videotaped doing it), saying, "If you were going to hit a cuffed suspect, at least get your money's worth 'cause now he's going to get disciplined for a … love tap."

In the end, the defense worked, and Waters was acquitted of the more serious charges and his conviction was downgraded to resisting arrest – all because the jury was convinced by the evidence of Ettienne's social networking activities. Ettienne himself, while denying that his Internet self reflected his true character as a police officer, recognized the permanence of online miscues. "You have your Internet persona, and you have what you actually do on the street . . . what you say on the Internet is all bravado talk, like what you say in a locker room. I'm not going to say it was the best of things to do in retrospect . . . stupidity on the Internet is there for everyone to see for all times in perpetuity. That's the case for me."

Status Updates

The Missouri Court of Appeals recently affirmed a case in which the trial judge properly excluded evidence of a sexual assault victim's Facebook status update in a criminal case. State v. Corwin, Case No. SD29422, Southern District, Division One, August 20, 2009. In this alleged date rape case, the defendant maintained that he and complainant had been out for drinks before returning to his dorm room (where the alleged assault took place), and the defendant's main argument was that the victim's recollection of events that night were unreliable. His counsel tried to introduce status updates from the Facebook page describing her lifestyle, purportedly describing nights of binge drinking followed by mornings where she couldn't remember what happened the night before. At least one update referenced being out on one occasion (after the alleged assault) and not realizing how she had gotten several bruises.

The trial court, over the defense's objections, excluded this evidence – none of which related to the night in question. The appellate court affirmed nothing that "the complaining witness in a sex offense case may be impeached by evidence that her general reputation for truth and veracity is bad but ordinarily

by proof of specific acts of misconduct." The status updates in question, the court noted, included references to "partying, sex, drinking, schoolwork, and at least one sexually suggestive photograph" but "went beyond any evidence even tangentially related to events of the night in question." Accordingly, the court held the status updates were irrelevant and were properly excluded.

In October 2009 Facebook status updates were used as alibi evidence for the first time.

19 year-old Rodney Bradford of Brooklyn, New York was arrested in connection with a robbery. On paper, he might have made a plausible suspect, given the fact that he was already facing charges in connection with another robbery. But Bradford had an unusual alibi for his whereabouts at 11:49 a.m. on October 17, 2009, and it was one that could be verified. You see, Bradford was on Facebook at the time, updating his status to read "on the phone with this fat chick . . . wherer my i hop [sic]" (a reference to talking with his pregnant girlfriend and a trip to get some pancakes).

Proving the alibi wasn't simply a matter of taking Rodney Bradford's word for it, thanks to the electronic trail he'd left. Although eyewitnesses identified him in a lineup, Bradford's father and stepmother confirmed the fact that the youth was at his father's Manhattan apartment using the computer. Corroborating his story further was evidence from Facebook itself. A Brooklyn district attorney subpoenaed Facebook's records and verified that the server log on/log off records matched Bradford's time on the social networking site, and that the status update was posted from an Internet protocol (IP) address that matched the one registered to Bradford's father. The district attorney dropped the charges.

Robert Reuland, Bradford's defense attorney, says that Facebook verification "made the day." "What we had in hand was irrefutable proof," he said. "And that's really where it turned the trick." Legal observers hailed this as the first known instance in which social networking evidence – often used to impeach or help convict a criminal defendant – has been used as alibi

evidence. Some of those commenting on the case were more skeptical, however. Joseph Pollini, who teaches at John Jay College of Criminal Justice in New York, maintains "With a user name and password, anyone can input data in a Facebook page."

What Mr. Pollini and other skeptics overlook, however, is the fact that there was more than just a Facebook update operating in Rodney Bradford's favor. Besides the testimony from corroborating witnesses like Bradford's father and stepmother who were with him at he same residence, the matching IP address and Facebook server records would be pretty difficult for even an accomplished hacker to fake. Although one can update a Facebook page with someone's user name and password from a remote location, the use of proxy servers, a public terminal, or any number of other techniques to hide the sender's physical location would still leave a trail more likely to disprove an alibi, not create one. As defense counsel, Reuland was quick to point out, "This is a 19 year-old kid. He's not a criminal genius setting up an elaborate alibi for himself."

Ultimately, no one was more relieved than Rodney Bradford and his family. "If it weren't for Facebook, I'd still be on Riker's Island," says the teenager. Ernestine Bradford, Rodney's stepmother agreed. "Facebook saved my son . . . Normally, we yell at our kids. 'Oh, you're on the computer.' It's completely different. If it weren't for Facebook, my son wouldn't be here." A Facebook representative said that the social networking giant was "pleased" to be "able to serve as a constructive part of the judicial process."

With the prevalence of social networking, and an apparent willingness of people to reveal more of themselves online, there is a greater cybertrail to follow than ever before. For many, those digital footprints have led to criminal convictions. For Rodney Bradford, they led to

exoneration. Bradford's case may have been the first "Facebook alibi," but it isn't likely to be the last.

In a recent unpublished opinion, a California appellate court acknowledged the viability of a social media alibi. In People v. Calderon, the appellate court found nothing "implausible or bizarre" about the criminal defendant's alibi that he was playing poker on MySpace at the time of the crime. 2010 Cal. App. Unpub. 2010 WL 3505971 (Cal. App. 2d Dist. Sept. 9, 2010). While the court ultimately didn't reverse the conviction – ruling that a disputed jury instruction was harmless, and that the defendant could have logged into MySpace from another location – the language of the opinion seems to indicate that under the right circumstances and with the right evidence, a social media alibi would work.

Log On/Log Off Records

Sometimes, the amount of time spent on a social networking site can become an evidentiary focal point. In a Canadian case, a British Columbia court found that a plaintiff's late night computer usage on Facebook – as demonstrated by the server log on/log off records – was evidence relevant to his personal injury claim against his employer. Bishop v. Minichiello, B.C.J. No. 692 (S. C.J.) (2009).

"Random Things About Me"

Social networking sites like MySpace often have a section for the user to share "random facts" about himself/herself, including likes and dislikes, career goals, etc. In at least one vehicular homicide case in a jurisdiction that allowed "victim statements" or "impact statements" from a crime victim or her family, the prosecutor chose (in lieu of submitting letters from family members) to read something the victim had written prior to her death; in this instance, an excerpt from her MySpace page devoted to "Random Facts About Me." During the penalty phase, to help the court in deciding on sentencing, the prosecutor read about such "random facts" as the victim's love of chocolate milkshakes, visiting Disneyland, and of goals that would remain unfulfilled, like learning to play the piano.

The overall point? Don't think that photos or statements are the only evidentiary nuggets to be gleaned from a social networking site.

IV. The Federal Rules and Authentication of Electronic Communications

To be admissible, online digital information such as a MySpace or Facebook profile (or statements contained in such profile) must be relevant, authentic, and not excluded as hearsay. The relevancy issue is one that will vary according to the facts of the case. For example, in the Mackelprang sexual harassment case, the court ruled that the defendant was entitled to discovery information from the plaintiff's MySpace pages and instant messages relevant to her sexual harassment allegations, alleged emotional distress, and her mental state. However, to the extent that the defendant sought to learn about Mackelprang's private sexual conduct on the theory that she was voluntarily pursuing or engaging in extra-marital relationships through MySpace, the court was less tolerant. Questioning the relevance of such non-work related sexual conduct since "what a person views as acceptable or welcomed sexual activity or solicitation in his or per private life, may not be acceptable or welcomed from a fellow employee or a supervisor," the court concluded that the defendant failed to demonstrate a relevant basis for obtaining production of that MySpace information. Mackelprang v. Fidelity National Title Agency of Nevada, Inc., 2007 WL 119149 (D. Nev. 2007).

With regard to the authenticity requirement, courts have been reluctant to come up with unique rules for authenticating electronic data. In dispensing with an appellant's argument that emails and text messages are "inherently unreliable" and would have to be the subject of a "whole new body of law," one court noted that electronic communications could be properly authenticated within the existing legal framework, since "the same uncertainties exist with traditional documents. A signature can be forged, a letter can be typed on another's typewriter; distinct letterhead stationery can be copied or stolen." In re F.P., 878 A. 2d 91, 95 (Pa. Super. Ct. 2005) Once a court determines that information is relevant and can be heard by the jury, the attorney presenting such evidence has to make a prima facie showing of genuineness. Fed. R. Evid. 901.It will be the jury's responsibility to decide authenticity. For example, in a commercial litigation/defamation case involving two providers of satellite TV programming, the

plaintiff challenged archived pages of its own web site as not properly authenticated and coming from an unreliable source. The court rejected that argument, noting that F.R.E. 901 requires only a prima facie showing of genuineness. It further concluded that while the plaintiff was free to raise its reliability concerns with the jury, the fact that an affidavit attested to the fact that these were copies of the website as it appeared on the dates in question, and that plaintiff failed to deny or challenge the archived pages' veracity were sufficient to meet the authentication threshold. Telewizja Polska USA, Inc. v. Echostar Satellite, 2004 WL 2367740 (N.D. Ill., Oct. 15, 2004).

Authentication of digital information can be accomplished either by direct proof, circumstantial evidence, or a combination of both. In the F.P. case, for example, the instant messages that were at issue were authenticated by direct proof – the person in question acknowledged his screen name, admitted authorship, and admitted to printing the instant messages of his computer. In a case involving printouts of chat room logs, they were authenticated by not only the appellant and other witnesses confirming his screen name, but also by the fact that when a meeting was arranged with that screen name user, the appellant showed up. United States v. Tank, 220 F.3d 627 (9th Cir. 2000).

Of course, sometimes that proof isn't so convincing. In a recent shareholder class-action case against a drug manufacturer, for example, the plaintiffs tried to bolster their claims of fraud by showing that the pharmaceutical company was warned internally that the cholesterol drug in question had various shortcomings. In re Pfizer, Inc. Securities Litigation, 2008 WL 540120 (S.D.N.Y., Feb. 28, 2008). The basis for this contention came from an anonymous blog posting by someone known only by the screen name RADmanZulu, who the plaintiffs asserted was "a former Pfizer Vice President…who also acted as medical director of Pfizer's Cardiovascular Risk Factors Group." However, the court observed that the post contained neither any information about RADmanZulu's identity nor was the allegation claimed to be based on personal knowledge. In fact, the posting didn't even describe "when, how, on what basis, by whom, or to whom the alleged warning was communicated." Accordingly, the court ruled that the source of the purported statement was not sufficient, and granted a motion to dismiss the case.

To authenticate a webpage, you should obtain testimony from the person who obtained the copy of the webpage. In addition having the person who performed the Internet research describe when and how the page was found, the declaration should also sate that the copy accurately reflects what was viewed on the web. The webpage itself should be printed out, with the URL listed, and it would be advisable to print any page on the site reflecting the ownership of the site. In the case of a MySpace or Facebook profile, the homepage itself should be sufficient; for other types of website evidence, this can usually be found on the "About Us" page. Be aware that searching domain registries to verify ownership won't necessarily divulge the true owner of the website, since domain registries don't guarantee that real names are used.

In addition, be prepared to offer evidence that the author of the webpage actually wrote it. This can consist of an admission by the author, a stipulation entered into by the parties, the testimony of a witness who assisted in or observed the creation of the webpage, or content on the webpage itself that connects it to the author. You could also use evidence of similarities between the webpage at issue and an already authenticated webpage as circumstantial evidence of authorship. MySpace and Facebook profiles usually feature photos of the author, background information about him/her, (such as hobbies or preferences), as well as commentary by the author. If such circumstantial evidence supports the person identified with the page as being the true author, a reasonable argument exists under Fed. R. Evid. 901(b)(4)that the distinctive characteristics are enough for a jury to find that the purported author is indeed the one responsible for the webpage's content.

In order to make the process of proving authorship as simple and direct as possible, consider asking the witness about his/her online social networking during a deposition. Bring a laptop with Internet access to the deposition, and have the deponent log into his/her space on the web, and have him/her navigate through the site and its features. Other than the difference in media, this is no different from having a deponent produce and go through a written diary.

The most common objections to printouts from a webpage are hearsay objections. Typically, however, courts follow the reasoning that such printouts are not "statements" at all, but rather merely

images and text found on the websites. Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1155 (C.D. Cal. 2002). Telewizja Polska USA, Inc. v. Echostar Satellite, 2004 WL 2367740 (N.D. Ill., Oct. 15, 2004). Serv. 673. In addition, printouts should be admissible pursuant to the best evidence rule, and/or as admissions of a party opponent. Id. In the Perfect 10 case, the court noted that the pictures and webpages printed off the Internet had sufficient circumstantial indicia of authenticity, such as dates and web addresses, to support a reasonable juror in the belief that the documents were as they purported to be. Id. At 1154; Fed. R. Evid. 901(a).

While statements on websites that were made by a party opponent would be admissible under Federal Rule of Evidence 801(d)(2), be wary of postings made by third parties. Such postings would be considered out of court statements, and if offered for the truth of the matter asserted, they are hearsay. Online pictures and video can be authenticated in the same manner as any other picture or video — through witness testimony that it is a fair and accurate representation of an event. However, beware of the "Photoshopping" allegation if a photo looks enhanced. Also, in light of the fact that MySpace and Facebook profiles can be created by third parties, be careful to elicit testimony or introduce other evidence of authorship. For example, there are a number of reported cases of "cyberbullying" where individuals have maintained that a fake social networking site profile was created in order to make fun of, harass, or humiliate a person. This is becoming more prevalent in the case of Internet-savvy students creating fake MySpace profiles of teachers or school administrators. See, for example, A.B. v. State, 863 N.E. 2d 1212 (Ind. Ct. App. 2007), and Layschock v. Hermitage School District, 412 F. Supp. 2d 502 (W.D. Pa. 2006).

Those seeking a useful primer on the admissibility of online information (including social networking sites) should familiarize themselves with Lorraine v. Markel American Insurance Company, 241 F. R. D. 534 (D. Md. 2007). Although this case revolved around the enforcement of an arbitration award and didn't deal specifically with social networking sites, it contains a very useful discussion of the admissibility of electronically stored information, which the court notes came in "multiple evidentiary 'flavors' including email, website ESI, Internet postings, digital photographs, and computer-generated

documents and data files." Id. At 538. The opinion analyzes not only authentication issues and hearsay concerns, but also examines particular types of digital evidence, including email, Internet website postings, text messages, and chat room content.

V. Other States and Admission of Social Networking Evidence

Sometimes, in criminal cases, defendant's own statements make it easy for the prosecution. Consider, for example, bank robber Joseph Northington of Roanoke, Virginia. After robbing a bank in North Augusta, South Carolina, Northington rather helpfully changed his status update to read "Wanted" and posted the statement "On the run for robbin a bank. Love all of y'all." His online confession was used against him.

The following is a sampling of the kind of cases and uses for social networking evidence:

People v. Liceaga – In this 2009 Michigan murder case, the prosecutor sought to admit photos from the defendant's MySpace page (which showed the defendant holding the gun allegedly used in the crime, and in which he was displaying a gang sign) as evidence of intent and planning. Michigan Rule of Evidence 404(b)(1) allows evidence for the limited purpose of proving intent and showing a characteristic plan or scheme in committing the offense. The appellate court upheld the admission, finding that its probative value exceeded any danger of unfair prejudice. 2009 Mich. App. LEXIS 160 (Mich. Ct. App. January 27, 2009.

In the Matter of K.W. – In this North Carolina case, the trial court admitted into evidence on an alleged child abuse victim's MySpace page as impeachment evidence. The court held that the victim's positing of suggestive photographs along with provocative language could be used to impeach inconsistent statements made to the police about her sexual history.

Similarly, in Ohio v. Gaskins, the trial court permitted in a statutory rape case defendant to introduce evidence that the victim had held herself as on her MySpace page as an 18 year-old. Photos of the girl that she had posted were admitted, along with witness testimony about their authenticity. State of Ohio v Gaskins, 2007 – Ohio – 4103.

In October 2007, the Indiana Supreme Court upheld the use of statements made by a murder defendant on his MySpace page. Ian Clark was convicted of beating his girlfriend's 2 year-old daughter to death in 2007. He argued that the prosecutor shouldn't have been allowed to introduce the social networking evidence. Clark had taken the stand himself and testified about his character as a reckless drunk in an attempt to show that reckless homicide, a lesser charge, would be more appropriate. But according to the Indiana Supreme Court, this opened the door for the prosecution "to confront Clark with his own seemingly prideful declarations that rebutted his defense," noting that "Clark's MySpace declarations shared much with his boast to the police after he killed Samantha: 'It's only a C Felony. I can beat this.'"

Courts are taking note not just of the admissibility of social networking evidence, but the very nature of it that renders it valuable. In considering a case involving the taunting and cyberbullying of a private school student, one court observed that "Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting. Therefore, relevance of the content of the plaintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations." Bass ex rel Bass v. Miss Porter's School, 2009 WL 3724968 at 1-2 (D. Conn. 2009). In that case, the plaintiff had initially turned over to the defense only a fraction of the hundreds of pages of content from her social media sites, contending she was only going to produce what she deemed relevant. The court disagreed.

How closely are courts paying attention to social media evidence? Consider the "Findings of Fact and Conclusions of Law" in Sedie v. United States, No. C-08-04417, 2010 WL 1644252 (N.D. Cal. April 21, 2010). In this bench trial of a 2006 car accident brought under the Federal Tort Claims Act, U.S. Magistrate Judge Elizabeth LaPorte found for the plaintiff, but noted how social media evidence undermined the extent of plaintiff's damages claims:

> "For example, plaintiff's online writings show that his hip was not constantly 'hell on earth' as he claimed. Plaintiff maintained his pages on MySpace and Facebook since the accident, and as of January 12, 2010, his MySpace page listed various activities and hobbies, and friends of plaintiff. Plaintiff wrote entries on

> his MySpace page, including one on June 3, 2007, in which he described painting as a frustrating activity when his arm hairs would get caught in paint. Yet painting was on the list of activities that plaintiff claims were adversely affected by the accident. Plaintiff also testified that he had not done any painting since the accident, but the MySpace entry was written in the present tense at a time just prior to his microdiscectomy. Plaintiff testified that the MySpace entry was a joke, but the court did not find the testimony credible." (citations omitted)

However, some judges view social media evidence in certain contexts with a more jaundiced eye. Unlike the courts in Liceanaga and Munoz, the 11th Circuit recently disapproved of the admission of certain MySpace evidence at trial, although the appellate court ruled it constituted harmless and allowed the conviction to stand. U.S. v. Phaknikone, No. 09-10084 (11th Cir. May 10, 2010). Souksakhone Phaknikone (who called himself "Trigga Fully Loaded" on his MySpace page) was convicted in federal court in Georgia of 15 armed robberies and sentenced to 167 years in prison. Over objection, the trial court allowed prosecutors to admit Phaknikone's MySpace profile (listing his name as "Trigga") as well as various photographs from defendant's MySpace page depicting him brandishing a gun and bearing gang tattoos. The court had problems with the prosecution's earlier efforts to admit this evidence to show that the defendant "behaves like a gangster" and robbed the banks "gangster style," but ultimately allowed the evidence with a limiting instruction that it could be considered to prove only intent or absence of mistake or accident. The 11th Circuit disagreed, holding that the photographs were inadmissible character evidence offered for no purpose other than "to show action in conformity therewith," under F.R.C.P. 404(b).

When considering the admissibility of social media evidence, courts in Texas and around the country have examined the authentication requirement with varying degrees of scrutiny. In In re T.T., an appeal from a proceeding involving the termination of parental rights, the court upheld the admission of a father's statement on his MySpace profile that he did not want children. 228 S.W.3d 312, 322-23 (Tex. App. – 2007). In reviewing the appeal of a minor's conviction for vandalism, the Waco Court of Appeals was satisfied with a minimal level of authentication - what a victim reportedly read on a defendant's

MySpace page, without any personal knowledge that the defendant herself had typed that admission. In re J.W., 2009 WL 5155784 at 1-4 (Tex. App. – Waco, December 30, 2009). Usually courts in Texas have examined the degree of individualization of social media site's content in considering whether or not there is sufficient indicia to meet the authentication requirement. In Mann v Dept. of Family and Protective Services, the appellate court upheld the trial court's admission of several photos and their captions from the appellant mother's MySpace page as proof of her underage drinking in violation of a court order to refrain from such activity for the welfare of the child. 2009 WL 2961369 (Tex. App. – Houston [1st Dist.], Sept. 17, 2009). In Hall v. State, the prosecutor introduced statements from Hall's Facebook page in convincing her of taking part in a murder. One such incriminating statement was "I should really be more of a horrific person. Its [sic] in the works." The court of appeals affirmed admission of such statements, as well as her screen name, her favorite quite, and a list of her favorite films (all of which were notable for their violence) as proper evidence of motive. Hall v. State, 283 S.W.3d 137 (Tex. App. – Austin 2009, pet. denied).

In Ohio v. Bell, the appellate court affirmed the trial court's denial of a defense motion to exclude printouts of MySpace instant messages alleged to have been sent to a victim by the defendant under his MySpace screen name. 882 N.E .2d 502, 511 (Ohio Ct. App. 2009). Noting that the evidence required to meet the authentication threshold for admissibility is "quite low," and that other jurisdictions characterize documentary evidence as properly authenticated if a reasonable juror could find in favor of authenticity, the court was unpersuaded by defense arguments that "MySpace chats can be readily edited after the fact from a user's homepage.

In Griffin v. Maryland, the Maryland Court of Appeals considered appellant's contention that the trial court in a murder case had erred in admitting a MySpace printout that was not properly authenticated. The printout was a redacted page from a MySpace profile belonging to the appellant's girlfriend; she had allegedly threatened an eyewitness via MySpace, writing "JUST REMEMBER, SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!" The printout in question came from a profile bearing the girlfriend's username ("SistaSouljah"), listing her birthdate, featuring her photo and a photo of her and

appellant embracing, references to her children with the appellant, and the blurb "FREE BOOZY" (appellant's nickname). The court held that such individualization was more than enough to authenticate that the MySpace profile was hers. Griffin v. Maryland, 995 A.2d 791, 806, cert. granted, 415 Md. 607 (Sept. 17, 2010).

In a recent Texas case, the Dallas Court of Appeals applied a similar rationale in upholding the admission of MySpace pages into evidence over the defense argument that they were not properly authenticated. Tienda v. State, No. 05-09-00553-CR (Tex. App. – Dallas, Dec. 17, 2010). In Tienda, a jury convicted Ronnie Tienda, Jr. of murder after an altercation with the victim, David Valadez, at a nightclub. On the appellant's MySpace pages (found and testified to by the victim's sister), there was a photograph of the appellant with the caption "If you ain't blasting, you ain't lasting" and the notation "Rest in peace, David Valadez." There was an embedded link to an audio recording of a song played at the victim's memorial service; statements referring to people "snitching on me" and "it's cool if I get off;" as well as photos of the appellant's electronic monitor and the fact that he was "str8 outta jail and n da club." The court of appeals was persuaded by all of these (and more) indications of authenticity, observing that "The inherent nature of social networking websites encourages members who choose to use pseudonyms to identify themselves by posting profile pictures or descriptions of their physical appearances, personal backgrounds, and lifestyles." This type of individualization, the court went on, "is significant in authenticating a particular profile page as having been created by the person depicted in it. The more particular and individualized the information, the greater the support for a reasonable juror's finding that the person depicted supplied the information."

VI. Discoverability Issues

Certain recent decisions have raised interesting questions about the discoverability of social media evidence, particularly in light of concerns over privacy. In Moreno v. Hartford Sentinel, Inc., a MySpace user who posted an article on the social networking site later claimed invasion of privacy when a newspaper subsequently published it. 91 Cal. Reptr. 3d 858 (Cal. Ct. App. Apr. 2, 2009). The appellate court observed that the facts contained in the article, once posted on MySpace, were not private at all. In

contrast, a court in Puerto Rico considering First Amendment implications in an alleged witness tampering case (where the defendant sent a Facebook message to the prosecution's witness in a related case), noted that messages sent to a user's Facebook inbox were not publicly viewable. Therefore, they were not considered to be in the public domain where First Amendment rights might attach. Maldonado v. Municipality of Barceloneta, No. 07-1992 (JAG) (JA), 2009 WL 636016 (D.P.R. March 11, 2009).

Meanwhile, other courts have considered the discoverability of private social networking messages. In Barnes v. CUS Nashville, LLC d/b/a Coyote Ugly Saloon, plaintiff was a patron of the well-known establishment who was – in typical Coyote Ugly fashion – encouraged to climb onto the bar and dance. No. 3:09-cv-00764 (U.S. D. Ct. – M.D. Tenn., June 3, 2010). Plaintiff slipped and fell, striking the back of her head. The defendant subpoenaed Facebook for Plaintiff's Facebook information, including photos of Ms. Barnes and her friends dancing on the bar. The court quashed the subpoena; the defendant the issued subpoenas to the plaintiff's friends. The magistrate judge found that these subpoenas (issued out of Colorado and Kentucky, where the witness lived) couldn't be enforced by the district court in Nashville. Magistrate Judge Brown crafted a novel solution to the discovery dilemma. He offered to create his own Facebook account "for the sole purpose of reviewing photographs and related comments in camera . . . and disseminat[ing] any relevant information to the parties." The court would then close the Facebook account.

In Crispin v. Audigier, the subpoena of someone's Facebook page in a civil lawsuit (this time a copyright infringement case) was also at issue, but for the first time a court considered the implications of the federal Stored Communications Act. Case No. CV-09-09509 MMM (JEMx) (U.S. Dist. Ct., Central Dist. Of Ca., May 26, 2010). Audigier, a garment manufacturer sued over alleged use of Crispin's copyrighted work, subpoenaed third party businesses – including Facebook and MySpace – seeking communications referencing Audigier between Crispin and a tattoo artist. Crispin moved to quash the subpoenas. The magistrate denied the motion, stating that the Stored Communications Act didn't apply. The district judge largely reversed that ruling, finding that since there were actual messages and wall posts involved on Facebook and MySpace, the Stored Communications Act would apply since the social

networking sites could properly be considered providers of electronic communications services. The court also found that since "a Facebook wall positing or a MySpace comment is not protectable as a form of temporary, intermediate storage," the social media sites would also fall under the Stored Communication Act under that standard as well. In short, the court quashed those portions of the subpoenas that sought "private messaging," and remanded for an evidentiary hearing on the allegedly private nature of the wall postings and comments.

The privacy argument is one frequently raised by parties resisting discovery of social networking content, and one just as frequently rejected by courts. For example, in EEOC v. Simply Storage Mgmt. LLC, No. 09-1223 (S.D. Ind. May 11, 2010), the Equal Employment Opportunity Commission brought an action on behalf of two female employees of a self-storage firm. The employees, a property manager and an assistant manager, alleged that they and other female employees had been subject to groping, sexual assault, sexual commentary, and other harassment by a male manager, resulting in extreme emotional distress. Counsel for the self-storage company defendants sought discovery from the plaintiffs that included information from their MySpace and Facebook accounts, including profiles, status updates, photos, wall posts, and so on that "reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state."

The Equal Employment Opportunity Commission objected, claiming that the requests were harassing, would embarrass the plaintiffs, and would improperly infringe on their privacy. Magistrate Judge Lynch, however, overruled these objections and ordered the production. In doing so, he reminded the claimants that just because social networking profiles are private or "locked" doesn't shield them from discovery. And while the social networking cortex sought would have to be relevant to a claim or defense in the case, the plaintiff's allegations of depression and stress disorders were likely to be discussed extensively within the social networking content sought. Everything from when stress purportedly occurred, to what degree, and what factors contributed to or caused it was likely to be among the topics covered by the plaintiffs online. As to the plaintiffs' privacy concerns, Judge Lynch disposed of that

argument by pointing out that "the production here would be of information that the claimants have already shared with at least one other person through private messages or a large number of people through postings." EEOC, No. 09-1223 (S.D. Ind. May 11, 2010).

The moral of the story: if your client feels the information was good enough to share with his or her Facebook friends, it is good enough to produce in discovery to the other side.

The recent personal injury case Romano v. Steelcase, Inc. (which involved claims brought by an injured individual against a maker of office chairs and other furniture) from New York illustrates this "nothing is ever really private on the Internet" approach. The defendant sought access to the private portions of the plaintiff's social networking sites (including information she had deleted), contending that this information would contradict the plaintiff's claims about the severity of her injuries. Rejecting the plaintiff's privacy arguments, the court noted that she had voluntarily posted the very information she was how seeking to protect. Since the plaintiff "knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy," the court ruled.

In September, 2010, a Pennsylvania court went so far as to hold that the defendant was entitled not just to relevant information from the plaintiff's social networking profile, but to the plaintiff's passwords for the accounts as well. McMillen v. Hummingbird Speedway, Inc., et al., Case No. 113-2010 (Pa. Ct. of Common Pleas) (Sept. 9, 2010). In McMillen, plaintiff alleged that he suffered personal injuries while participating in a stock car race at the defendant's track. Sometime after the injury and filing of suit, plaintiff posted materials on his social networking site about such recreational activities as a fishing trip and going to see the Daytona 500 race. In an effort to get this information and more to refute the plaintiff's claims of being unable to enjoy life, defense counsel wanted the login names and passwords for all of the plaintiff's social networking accounts.

Rejecting the plaintiff's privacy argument and rather far-fetched claim of a "social network privilege," the court concluded that "no person choosing MySpace or Facebook as a communications forum could reasonably expect that his communications would remain confidential, as both sites clearly express the possibility of disclosure. Confidentiality is not essential to maintain the relationships between

and among social network users, either. The relationships to be fostered through those media are basic friendships, not attorney-client, physician-patient, or psychologist-patient types of relationships, and while one may expect that his or her friend will hold certain information in confidence, the maintenance of one's friendships typically does not depend on confidentiality."

In Ledbetter v. Wal-Mart Stores, Inc., the repairman plaintiffs alleged person injuries resulting from an electrical accident at Wal-Mart store. These injuries reportedly included bilateral hearing impairment, skin burns, headaches, fatigue, chronic neck and wrist pain, sleep disturbance and anxiety, as well as "cognitive inefficiencies and depression." The wife of one plaintiff also asserted a loss of consortium claim. Plaintiff's counsel objected to the defense's subpoenas seeking the claimants' records from Facebook, MySpace, and Meetup.com on privacy grounds, and claimed that both physician – patient and spousal privileges applied. The lawyers asked the court to conduct an *in camera* inspection of the information requested. The court found that the plaintiffs had waived any physician – patient privilege by virtue of brining the lawsuit, and that asserting a loss of consortium claim "injected the issue" of the marital relationship into the case. It rejected the applicability of either privilege, and ruled that the social networking evidence was reasonably calculated to lead to the discovery of admissible evidence. An already in-place protective order, the court held, was sufficient to protect any privacy interests. Ledbetter, et al. v. Wal-Mart Stores, Inc., 2009 WL 1067018 (D. Colorado, April 21, 2009).

Not every court, however, has been so quick to reject the privacy argument. In a 2007 New Jersey Superior Court case involving a teenager sexually assaulted by a fellow middle school student, the privacy concerns were heightened by the plaintiff's status as a minor. In T.V. v. Union Township Board of Education, the plaintiff sued the school, alleging that its failure to supervise contributed to the attack, resulting in severe emotional distress for the young victim. The defense counsel sought the contents of T.V.'s privacy-restricted MySpace and Facebook profiles (both via subpoena to the sites and through discovery directed toward the plaintiff herself), arguing that such information was highly relevant on emotional distress issues since it would "shed light on the plaintiff's credibility by finding out what she wrote on social networking sites in unguarded moments." The defense also argued that the plaintiff had

waived privacy rights on issues that could lead to evidence of her mental state, and that its request was akin to viewing diaries, emails, or other discoverable writings. The plaintiff's attorney argued in favor of a broad prohibition against the discoverability of social networking evidence in such cases, particularly where minors were concerned. He said, "In our society, minors now communicate by computer far more often than they do by telephone, and the minor plaintiff has relied on the ability to communicate confidentially with her friends via the Internet , just as she would have by telephone prior to the advent of the Internet ." The court declined to permit the discovery, and issued a protective order against releasing the social media evidence, saying "it seemed like a big step" to order the turnover of the plaintiff's private communications. A key issue for the judge was that the defense hadn't yet conducted more traditional discovery before showing that the information couldn't be obtained through other means, such as finding out who the plaintiff's testifying witnesses would be and then interviewing or deposing them.

VII. Is a "Tweet" or a "Poke" a Statement or Communication at All?

Courts have recognized that communications made via social networking sites are statements, no less than a written letter.

In October 2009, Shannon Jackson was charged with violating a Summer County (Tennessee) General Sessions Court protective order to refrain from "telephoning, contacting, or otherwise communicating" with the petitioner when she "poked" the woman on Facebook (a "poke" is a quick message sent by one Facebook user to another).[xiv] In July 2009, a Providence, Rhode Island judge imposed a gag order ordering Michelle Langlois not to post comments about a bitter child custody case involving her brother and his ex-wife (the complaint that prompted the order was later dismissed after the ACLU contested it on free speech grounds.) [xv]

And in a case of first impression, a Staten Island (New York) family court judge ruled that a MySpace "friend request" can constitute a violation of a temporary order of protection. Judge Matthew Sciarrino, Jr. noted that "While it is true that the person who received the "'friend request' could simply deny the request to become 'friends,' that request was still a contact," and that using MySpace as a

"conduit for communication" was prohibited by the court's mandate that "Respondent shall have 'no contact' with Sandra Delgrosso."

Contrast this with the Bonner case from Illinois. In May 2009, Amanda Bonner was a tenant of Horizon Realty Group's apartments in Chicago. Bonner tweeted "who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's ok." The tweet went to her (then) 20 followers. In July, Horizon Realty sued Bonner for libel, arguing that the allegedly defamatory statement hurt its reputation as a landlord. A motion to dismiss was filed in November, arguing that the statement was made in a context in which the average reader would understand that it was merely opinion and not an objectively verifiable fact. Furthermore, Bonner's attorneys argued that it was rhetorical hyperbole and akin to the findings of a 2009 study that concluded 40% of tweets are "pointless babble."

Horizon Realty, on the other hand, argued that Twitter is a "legitimate medium used by reporters to report up-to-the-minute updates on legal actions, by rabbis, by people to support specific causes or engage in a certain activity and as a marketing tool." Ultimately, the court ruled on the side of babble, and granted Bonner's motion to dismiss on January 20, 2010.

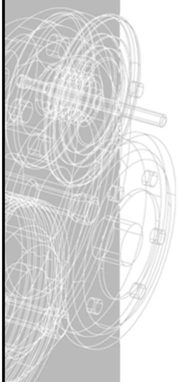
VIII. Facebook is Great, But Don't Overlook Other Sites

Evidence from other sites, like LinkedIn, are becoming more widely used. They can be instrumental in cases involving non-compete and non-solicitation agreements, as well as workplace discrimination suits and other litigation from the employment arena. And as one recent federal court case reminds us, words can come back to haunt you. In Blayde v. Harrah's Entertainment, (W.D. Tenn., Dec. 17, 2010), Blayde brought age-discrimination claims against gaming giant Harrah's. Among its defenses, Harrah's argued that it wasn't even Blade's employer, the plaintiff had started working for another casino later acquired by Harrah's as his employer on his LinkedIn profile. That same witness had his credibility called into doubt when he awkwardly tried to argue on the witness stand that it wasn't his LinkedIn profile, after verifying all the other information on that page.

IX. Conclusion

Increasingly, lawyers nationwide are seeking to plunder the digital treasure troves of information that social networking sites like Facebook, MySpace, Twitter, and LinkedIn represent. And increasingly, judges are allowing access to the plethora of photos, comments, status updates, and other postings that many social media users might have considered (at least in their own minds) as off-limited. In the context of juvenile law, the astronomical popularity of social networking among those under 18 means an ever greater likelihood that such evidence will continue to be an issue in juvenile law proceedings.

THOMPSON
COE



Authenticating Tweets:

Use and Admission of
Social Networking
Evidence

John G. Browning

John Browning is a partner in the Dallas, Texas office of Thompson, Coe, Cousins & Irons, L.L.P. where he handles civil litigation in state and federal courts, in areas ranging from employment and intellectual property to commercial cases and defense of products liability, professional liability, media law, and general negligence matters. Mr. Browning has extensive trial, arbitration, and summary judgment experience and has represented companies in a wide variety of industries throughout Texas and on a pro hac vice basis in other jurisdictions. Mr. Browning received his B.A. with general and departmental honors from Rutgers University in 1986, where he was a National Merit Scholar and member of Phi Beta Kappa. He received his J.D. from the University of Texas School of Law in 1989. Some of his honors include being a 2009 recipient of the prestigious Burton Award for Achievement in Legal Writing; rated "AV," the highest commendation issued by Martindale-Hubbell for legal ability, ethics, and professionalism; selected as a "Super Lawyer" in the field of Civil Litigation Defense (2005-2009, Law & Politics); inducted as a charter fellow of the Litigation Counsel of America, a trial lawyer honorary society limited to 3,500 fellows, representing less than one-half of one percent of American lawyers; and elected to the American Law Institute (one of only seven lawyers in Texas elected in 2009). Mr. Browning is a noted legal writer, and is a frequent contributor to national and regional legal publications on a wide variety of subjects. His weekly syndicated newspaper column "Legally Speaking" has garnered numerous journalism awards. His book, *The Lawyer's Guide to Social Networking*, is due out in 2010.

Too Prevalent to Ignore

- Facebook – over 400 million users worldwide
- MySpace – over 250 million users
- Twitter – Over 75 million users

Use of Social Networking Evidence Becoming More Common

- American Academy of Matrimonial Lawyers – Feb. 2010 Survey – 81% reported using social media evidence
- Increasing use in everything from personal injury & products cases to employment law, criminal law, and commercial litigation

THOMPSON COE

Be Creative – It's Not Just Photos and Statements

- Status Updates
- Mood Indicators
- Logon/off Records

THOMPSON COE

Authentication

- Fed. R. Evidence 901(b)(4) and T.R.E. 901(b)(4)
  - Questions to ask:
    1. Do you have a social networking profile/page?
    2. When was it created?
    3. Is it password protected?
    4. Does anyone else have access to the password?
    5. Is the password necessary to post to your page?
    6. Does anyone have unauthorized access to your page?

THOMPSON COE

Authenticating Content

- Testimony from the person who copied the webpage (when, where copied; circumstances; accuracy of the copy)
- Subpoena documentation directly from the social networking provider

1527591

THOMPSON COE

Evidence of Authorship

- Admission from the author;
- Testimony of a witness who assisted/observed creation of the webpage; and
- Similarities between the disputed webpage and one that has been authenticated;
- Content of the webpage tying it to the author; and
- Stipulation.

1527591

THOMPSON COE

Useful Case Law

- *Lorraine v. Markel American Ins. Co.*, 241 FORD. 534 (D. Md. 2007)
- Privacy Issues: *Moreno v. Hartford Sentinel, Inc.*, 91 Cal. Reporter 3d, 858 (Cal. Ct. App., April 2, 2009)
- *Bass ex re/ Bass v. Miss Porter's School*, 2009 WL 3724968 (D. Conn. 2009)

1527591

THOMPSON COE

Texas Cases

- *Munoz v. State*, 2009 WL 695462 (Tex. App. – Corpus Christi 2009)
- *Hall v. State*, 283 S.W. 3d 137 (Tex. App. – Austin 2009)
- *Mann v. Dept. of Family and Protective Services*, 209 WL 2961396 (Tex. App. – Houston (1st Dist. 2009)
- *In Re J.W.*, 2009 WL 5155784

1527591

THOMPSON COE

Is A "Tweet" or a "Poke" A Statement At All?

- Tennessee – "Poke" violated protective order
- New York – "Friend Request" violated protective order
- Chicago – "Tweet" was pointless babble, not a defamatory statement

1527591

THOMPSON COE