The Proof Is in the Posting
How Social Media Is Changing the Law

By Kendall Kirko

[Image of a computer screen with a search result, possibly showing a social media profile or legal document]
A man and a lion were arguing about who was best, each one seeking evidence in support of his claim. They came to a tombstone on which a man was shown in the act of strangling a lion, and the man offered this picture as evidence. The lion replied, “It was a man who painted this; if a lion had painted it, you would instead see a lion strangling a man. But let’s look at some real evidence instead.” The lion then brought the man to the amphitheater and showed him so he could see with his own eyes just how a lion strangles a man. The lion then concluded, “A pretty picture is not proof: Facts are the only real evidence!”

The moral of the story has indeed changed since the times of Aesop, at least in today’s courtroom. Social networking websites such as Facebook, MySpace, and Twitter invite attorneys and their clients into a lion’s den of pictures and postings, creating a haven for evidentiary consequences that can be unexpected obstacles if attorneys are unprepared to counter them.

**INTRODUCTION**

With claims such as “Facebook is a great place to keep in touch with friends,” “Using Twitter is going to change the way you [stay] in touch,” and “MySpace lets you meet your friends’ friends,” social networking websites are, admittedly, enticing. This article surveys recent evidentiary issues involving these sites across multiple practice areas and counsels how to avoid some of the adverse rulings discussed herein.

**CRIMINAL LAW**

It used to be that only a picture was worth a thousand words. Now, so are Tweets, Facebook comments, and MySpace postings. In fact, photographs on these websites are litigated as frequently as the posted messages themselves. In Muñoz v. State, Muñoz appealed his conviction of aggravated assault and engagement in deadly conduct by contending that the evidence was insufficient to show he was a member of a criminal street gang. In affirming
the judgment of the trial court, the court of appeals cited to the
proper admission of several pictures of Muñoz posted on his
MySpace page, which depicted Muñoz throwing gang signs,
associating with known gang members, and wearing the colors of
the gang. Similarly, in State v. Soza, a witness who saw a photo-
graph of Soza on MySpace identified Soza as the shooter. In
identifying Soza, the witness testified he had relied on the fact
that the shooter had tattoos on his arms and Soza was the only
person in the MySpace photograph with visible tattoos. The
court of appeals found that this evidence was sufficient to uphold
Soza's murder conviction. Finally, in State v. Green, the court of
appeals upheld the trial court's admission of a picture of Green,
taken from his own MySpace page, with the handle of the mur-
der weapon, a gun, sticking out of the waistband of his pants.

Justin Wood, a felony district court chief for the Harris
County District Attorney's Office, says, "Oftentimes, I am able
to gather good information on a defendant or a defense witness
by browsing through social networking sites. Even if the use of
the person's profile or picture is technically not admissible
under the rules of evidence, many times I am able to gather
good information that I can use in the cross examination of the
witness." The prosecution employed this tactic in Hall v. State
by introducing Hall's Facebook page, which claimed, "I should
really be more of a horrific person. Its [sic] in the works." The
court of appeals affirmed the trial court's admission of Hall's
screen name, her favorite quote, and a list of her favorite films,
all of which contained extreme violence, as proper evidence of
Hall's motive. Similarly, in State v. Fletcher, the court of
appeals upheld a conviction for assault and aggravated menac-
ing, based in part on testimony from the victim that Fletcher
sent a message to her MySpace page.

"How do you know I posted that?" This question, often
raised by a criminal defendant, demonstrates the authentication
issues that arise in evidentiary disputes surrounding social net-
working sites. Handwriting experts are of no use in determining
who wrote what on whose profile. Some courts require multiple
factors to be present prior to determining if evidence from a
social networking site is authentic, while others require much
less. In People v. Clevesntine, the appellate court held that the
combination of testimony from a MySpace representative and
the defendant's wife's recall of the sexually explicit conver-
sations she viewed on the defendant's MySpace account pro-
vided ample authentication for admission of evidence that the
victims had engaged in instant messaging about sexual activities
with the defendant through MySpace and that it was unlikely
that someone else accessed the defendant's MySpace account
and sent messages under his username. By contrast, in the case
of In re J.W., the court affirmed the trial court's decision to
allow into evidence what a victim read on the defendant's
MySpace page — a conversation in which the defendant stated
that he had "keyed" the victim's car — even though the victim
admitted that she had no personal knowledge that the defen-
dant typed that admission onto his MySpace page.

FAMILY LAW

Similar authentication issues arise in the practice of family
law. In Dockery v. Dockery, Mrs. Dockery testified that her
husband rammed her car numerous times and used his car to
try to push her car into oncoming traffic. Pictures of the prop-
erty damage to Mrs. Dockery's car, printouts of conversations
on MySpace, and her testimony that the pictures accurately
depicted the damage done to her vehicle by her husband were
admitted into evidence. On appeal, Mr. Dockery argued that
the printouts of the conversations could be authenticated only
by a representative of MySpace because there was no testimony
as to who took the pictures or where or when they were taken.
The court disagreed, accepting a third party's authentication of
the pictures in lieu of testimony from a MySpace representative.

While social networking sites can present danger to practi-
tioners and their clients, the evidence they produce actually
proves beneficial to some victims, especially children. In In re
K.E.L., content on the father's MySpace page was admitted as
evidence, which the court of appeals held could have properly
led the trial court to believe that the mother would be more
responsible than the father in serving as the person with the
right to designate the child's primary residence. In Mann v.
Department of Family and Protective Services, the court upheld
the decision of the trial court to admit several pictures from the
appellant's MySpace page showing the appellant mother's
underage drinking and intoxication to prove the appellant viol-
ated the court's order to refrain from criminal activity for the
benefit of her child. In Dexter v. Dexter, the court of appeals
upheld the trial court's decision to admit the appellant's
MySpace postings in order to consider the probable effect some
of the appellant's personal choices would have on her daughter.
The appellant's admission in blogs that she practiced sadomas-
ichism, was bisexual, a pagan, and used drugs led the trial
court to find that the daughter's best interests could be adverse-
ly affected by this lifestyle.

CONSTITUTIONAL LAW

For those of us who haven't analyzed constitutional law since
we were a 1L, social networking has brought an onslaught of
sexy First Amendment issues. While Maldonado v. Municipali-
ty of Barceloneta held that messages sent to a user's Facebook
inbox were not publicly viewable and thus not in the "public
domain," where First Amendment rights might apply, the
result is different for messages exchanged on a MySpace page.
For example, in Wolfe v. Fayetteville, Arkansas School Dist.,
the court of appeals upheld the denial of the defendant's motion to
dismiss the plaintiff's claim for First Amendment retaliation,
noting that the evidence showed that the plaintiff, a teacher,
communicated with a student on MySpace using slang, curse
words, and sexual innuendo. Testimony from students indicated
that some of them felt "uncomfortable" with these communi-
cations. The trial court held it was not unreasonable for the
defendants to find that the plaintiff's conduct on MySpace was

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disruptive to school activities because it was reasonable for the defendants to expect the plaintiff, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students.26 The court held that the plaintiff communicating with students as if he were their peer, instead of their teacher, could very well disrupt the learning atmosphere of a school, which sufficiently outweighed the value of the plaintiff’s First Amendment rights on MySpace.27

Finally, although Twitter has not been litigated nearly as often as its older cousins MySpace and Facebook, a Tweet also affects First Amendment rights. In U.S. v. Shelnutt,28 a reporter requested to send electronic messages from the courtroom to his newspaper’s Twitter account so that the Tweets would be available to any member of the general public who accessed the newspaper’s Twitter account. In citing Federal Rule of Criminal Procedure 53, the court noted that the Rule prohibited the broadcasting of judicial proceedings from the courtroom and that “broadcasting” within the meaning of the Rule included sending electronic messages from the courtroom that contemporaneously described the trial proceedings and were instantaneously available for public viewing.29 Thus, the court denied the request to Tweet from the courtroom, holding its ruling did not unconstitutionally restrict the freedom of the press under the First Amendment.

HOW TO AVOID THE PITFALLS OF THE LION’S DEN

With profiles, pictures, and posts from social networking sites gliding their way into the courtroom faster than you can Tweet, courts, in admitting this evidence, acknowledge that these sites depict a snapshot of the user’s relationships and state of mind at the time of the content’s posting.30 It seems then that the lion may be the one strangled by the technological developments of man. A “pretty picture” may, in fact, constitute proof.

As Chief Prosecutor Justin Wood wisely recommends: “I am always aware of what social networking sites my victims or witnesses belong to. I make it a practice to discuss and examine the contents of their profiles before trial. If it is something that I feel is irrelevant or inadmissible, I can oftentimes address the topic pre-trial with a motion in limine before the judge.” And if you find yourself addressing these very issues before a judge, remember that Judge James M. Stanton of the 134th District Court in Dallas County acknowledges, “In many ways, the Internet has become the best way to find out information that a person doesn’t want to reveal.” Stanton admits he has “observed some embarrassing moments at hearings and trials by information and pictures opposing counsel has found on Facebook and MySpace” and that “civil trial practice now requires attorneys to ask their clients and witnesses about what has been posted online and, more important, verify what they are told.”

Heed the advice of Wood and Stanton: and you may well avoid one of these embarrassing moments. Whether you practice civil law, criminal law, family law, or you are one of the lucky ones who practice constitutional law, step slowly into the world of social networking sites and advise your clients to think before they post to avoid being surprised by the lion of dangerous evidence that can emerge from the Internet. Tame the evidence before it catches you and your client, and you — and not the lion — will be the ones LOLing in the end.

NOTES
3. Id. at n.3.
4. Id.
5. Id.
8. Id. at n.3
11. Id. (Internal citations omitted).
18. Id. (Internal citations omitted).
20. Id. at 312.

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