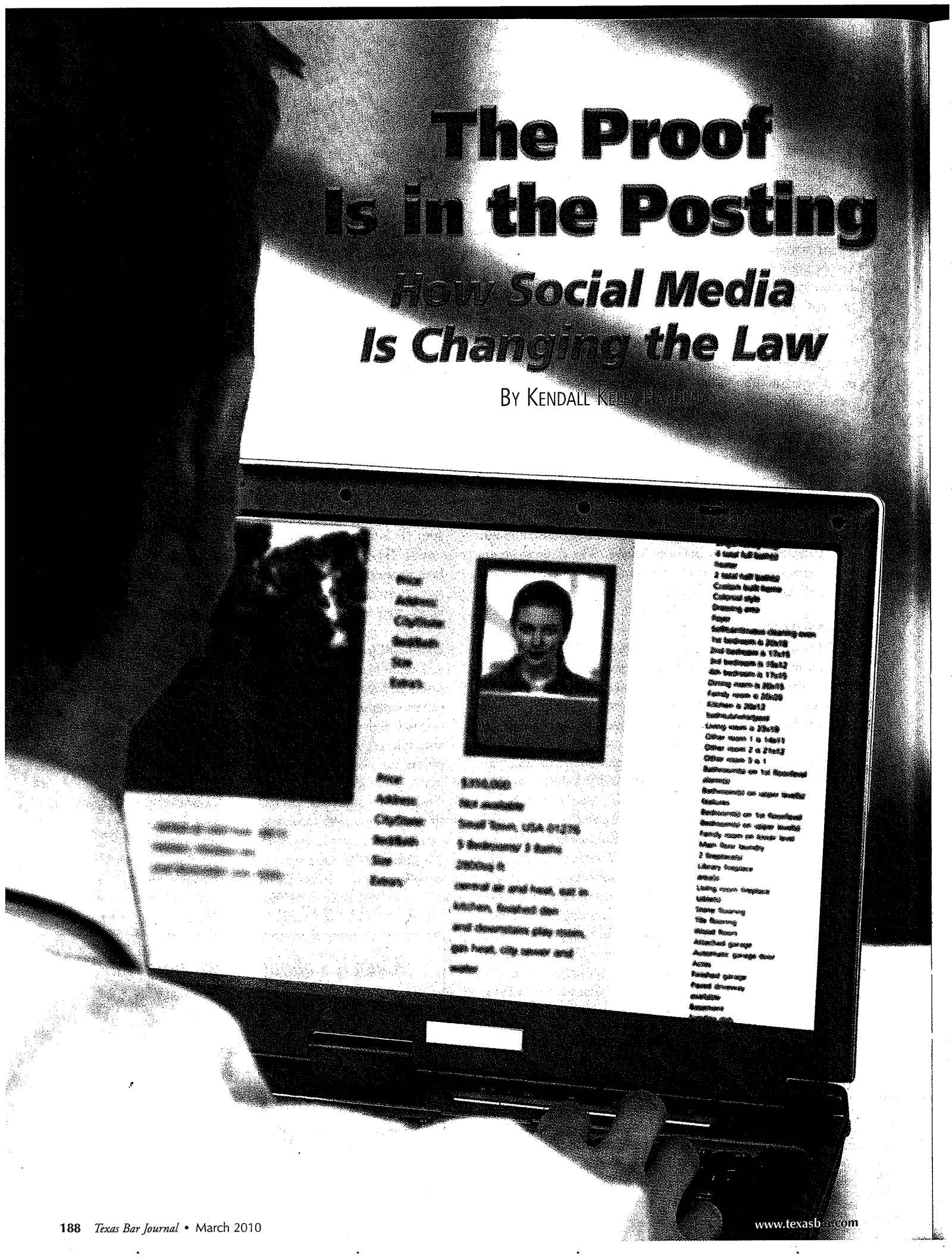
The Proof Is in the Posting

How Social Media Is Changing the Law

By Kendall Kelly Hayden



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*,[1] 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*,[2] a witness who saw a photograph of Soza on MySpace identified Soza as the shooter.[3] 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.[4] The court of appeals found that this evidence was sufficient to uphold Soza's murder conviction.[5] Finally, in *State v. Greer*,[6] the court of appeals upheld the trial court's admission of a picture of Greer, taken from his own MySpace page, with the handle of the murder 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*[7] 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.[8] Similarly, in *State v. Fletcher*,[9] the court of appeals upheld a conviction for assault and aggravated menacing, 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 networking 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. Clevenstine*,[10] the appellate court held that the combination of testimony from a MySpace representative and the defendant's wife's recollection of the sexually explicit conversations she viewed on the defendant's MySpace account provided 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.[11] By contrast, in the case of *In re J.W.*,[12] 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 defendant typed that admission onto his MySpace page.

FAMILY LAW

Similar authentication issues arise in the practice of family law. In *Dockery v. Dockery*,[13] 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 property 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 practitioners and their clients, the evidence they produce actually proves beneficial to some victims, especially children. In *In re K.E.L.*,[14] 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*,[15] 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 violated the court's order to refrain from criminal activity for the benefit of her child. In *Dexter v. Dexter*,[16] 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 sadomasochism, was bisexual, a pagan, and used drugs led the trial court to find that the daughter's best interests could be adversely 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. Municipality of Barceloneta*[17] 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,[18] the result is different for messages exchanged on a MySpace page. For example, in *Wolfe v. Fayetteville, Arkansas School Dist.*,[19] 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 communications. The trial court held it was not unreasonable for the defendants to find that the plaintiff's conduct on MySpace was

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.[20] 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.[21]

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*,[22] 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.[23] 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 postings 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.[24] 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

1. *Muñoz v. State*, 2009 WL 695462 at * 3 (Tex. App. — Corpus Christi 2009, no pet. h.).
2. *State v. Soza*, 2008 WL 4455613 at * 2 (Ariz. App. Div. 2, 2008).
3. *Id.* at n.3.
4. *Id.*
5. *Id.*
6. *State v. Greer*, 2009 WL 2574160 at * 5 (Ohio App. 8th Dist. 2009).
7. In *Hall v. State*, 283 S.W.3d 137, 148–49 (Tex. App. — Austin 2009, pet. denied).
8. *Id.* at n.3
9. *State v. Fletcher*, 2009 WL 1914396 at *1 (Ohio App. 4th Dist. 2009).
10. *People v. Clevenstine*, 2009 WL 4981296 at * 2 (N.Y.A.D. 3d Dept. 2009).
11. *Id.* (internal citations omitted).
12. *In re J.W.*, 2009 WL 5155784 at * 1–4 (Tex. App. — Waco, Dec. 30, 2009, no pet. h.).
13. *Dockery v. Dockery*, 2009 WL 3486662 at * 6 (Tenn. Ct. App. 2009).
14. *In re K.E.L.*, 2008 WL 5671873 at * 5 (Tex. App. — Beaumont, Feb. 26, 2009, no pet.).
15. *Mann v. Department of Family and Protective Services*, 2009 WL 2961396 at * 2 (Tex. App. — Houston [1st Dist.], Sept. 17, 2009, no pet h.).
16. *Dexter v. Dexter*, 2007 WL 1532084 at * 6 (Ohio App. 11th Dist. 2007).
17. *Maldonado v. Municipality of Barceloneta*, 2009 WL 636016 at *2 (D. Puerto Rico 2009).18. Dexter v. Dexter, 2007 WL 1532084 at *6 (Ohio App. 11th Dist. 2007).
18. *Id.* (internal citations omitted).
19. *Wolfe v. Fayetteville, Arkansas School Dist.*, 600 F. Supp.2d 1011, 1021 (W.D. Ark. 2009).
20. *Id.* at 312.
21. *Accord Spanierman v. Hughes*, 576 F. Supp. 2d 292, 312–13 (D. Conn. 2008).
22. *U.S. v. Shelnutt*, 2009 WL 3681827 at *1–2 (M.D. Ga. 2009).
23. Fed. R. Crim. P. 53.
24. *Bass ex rel. Bass v. Miss Porter's School*, 2009 WL 3724968 at *1–2 (D. Conn. 2009).

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