



Features

| | |
|---|----|
| Admissibility of Social Media | 1 |
| Appointment of Counsel in Prosecutor's Parole Appeal | 10 |
| Exonerations Study | 12 |
| Juvenile Life Without Parole Unconstitutional | 11 |
| Pew Report - Costs of Prison Length | 11 |
| Trial College | 7 |

Departments

| | |
|-------------------------------------|----|
| From Other States | 15 |
| Public Defense Updates | 14 |
| Spotlight On: Thomas J. Tomko | 8 |
| Surveillance News | 7 |
| Training Calendar | 28 |
| Training Events | 16 |
| Trial Court Successes | 10 |

Appellate Courts

| | |
|-------------------------------------|----|
| Michigan Court of Appeals | |
| Order Summary | 20 |
| Published Opinion Summaries | 20 |
| Unpublished Opinion Summaries | 25 |
| Michigan Supreme Court | |
| Opinion Summaries | 19 |
| Order Summary | 19 |
| United States Court of Appeals | |
| Opinion Summary | 18 |
| United States Supreme Court | |
| Opinion Summaries | 17 |

The Admissibility of Social Media Evidence

Lately practitioners have a lot of questions about the admissibility of social media evidence, in terms of how to challenge evidence offered by the prosecution, and how to admit evidence when it is necessary to support the defendant's right to present a defense or right to confront witnesses. Many cases discuss a variety of forms of social media; the focus of this article is a description of cases challenging the admissibility of such evidence, with the hope of providing litigants ideas about how information derived from social media outlets can be used at trial.

The Editor.

With the number of Facebook users estimated to reach 1 billion¹ this year and MySpace reporting over 25 million² users, social media evidence³ is becoming more prevalent in a variety of legal disputes. Social media evidence has been admitted in divorce, juvenile, criminal, employment, defamation, patent, and bankruptcy proceedings. In criminal proceedings, social media evidence has been offered as evidence of other acts (including proof of intent and motive) impeachment, as general-character evidence, and in support of an alibi defense. Some judges and probation officers are reported to have checked on their probationers, especially juvenile offenders, *via* Facebook and MySpace.

Attorneys risk facing ineffective assistance of counsel claims for not properly addressing the admissibility issues that are associated with social media evidence. For the most part, admitting or objecting to social media evidence is no different than any other written document admitted as evidence. There are no specific rules for social media evidence; the existing rules of evidence provide the framework for the admissibility of such evidence.⁴ In general, the evidence must be relevant to the proceedings, and it must be properly authenticated.⁵

In Michigan, “Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁶ The rules for the authentication of evidence are provided by MRE 901:

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

* * *

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

* * *

Because of the potential for other users to access and abuse or manipulate social networking accounts, courts tend to require additional corroboration that connects the evidence with the alleged creator or author. A printout from a Facebook page, a copy of an email, or photos from a MySpace page are generally not admissible without additional corroboration.

A recent article in the New York Law Journal provides a list of potential methods used to authenticate social media evidence:

- Testimony from the purported creator of the social network profile and related postings;
- Testimony about the contextual clues and distinctive aspects in the messages

themselves tending to reveal the identity of the sender;

- Testimony regarding the account holder’s exclusive access to the originating computer and social media account;
- Expert testimony concerning the results of a search of the social media account holder’s computer hard drive;
- Testimony directly from the social networking website that connects the establishment of the profile to the person who allegedly created it and also connects the posting sought to be introduced to the person who initiated it; and
- Expert testimony regarding how social network accounts are accessed and what methods are used to prevent unauthorized access.⁷

The following case summaries provide a look at how courts are applying the rules of evidence to Facebook postings, MySpace pages, text messages and other social media evidence. In comparing the cases, the results are mixed depending largely on the facts of the case.

Michigan Cases

People v. Orlewicz⁸

In *Orlewicz*, the defendant appealed his conviction of first-degree murder claiming, in part, that he was deprived of his right to present a defense because the court refused to allow evidence of the victim’s MySpace page that showed his aggressive and violent nature. The defendant claimed self defense and alleged that the victim was the initial aggressor. The court found that the evidence on the MySpace page should have been admitted as general-character evidence.⁹

The court stated that “social-networking and personal websites constitute general reputational evidence rather than evidence concerning specific instances of conduct, and so the victim’s MySpace page should have been admissible.”¹⁰ The court, however, found the error harmless, concluding that it would have been cumulative because the defendant testified about what was on the MySpace page, and the victim’s violent behavior was not in question.¹¹

People v. Mills¹²

Shortly prior to the *Orlewicz* decision, the Michigan Court of Appeals issued an unpublished decision in *Mills* finding that photographs of the

victim on his MySpace page depicting him holding various guns was *not* admissible to show his character trait for aggression in this homicide case, where the photographs were considered specific acts and not character evidence. Here, the Court found no evidence suggesting that the defendant was aware of the photographs at the time of the incident for which he claimed self defense, or that the photographs attributed to the defendant's state of mind. Further, the photographs of the victim were not properly authenticated and may not have even depicted real guns. The trial court did not abuse its discretion in refusing to admit the evidence.

People v. Liceaga¹³

In this unpublished opinion, the Michigan Court of Appeals held that the trial court did not abuse its discretion when it allowed a photograph of the defendant from his MySpace page as evidence of other improper acts under MRE 404(b)(1). The photograph showed the defendant holding the gun that was used to shoot the victim and displaying a gang sign.

The issue in this case was the defendant's state of mind – the defendant admitted shooting the victim but claimed that it was an accident. The photograph was introduced to show intent and a characteristic plan or scheme. Witnesses testified that the defendant had pointed the same loaded gun at them and asked them if they wanted to play, the same words that he used before shooting the victim. The witnesses used the photograph to identify the defendant and the gun. The Court found that “the photograph was also relevant to defendant's familiarity with the weapon used in this offense.”¹⁴

People v. Oyerinde¹⁵

In *Oyerinde*, the prosecution admitted electronic messages from the defendant's Facebook page as other acts evidence. In a bench trial, the trial court considered and admitted three categories of Facebook messages. In this unpublished opinion, the Michigan Court of Appeals found that the first category of messages – those that the defendant sent to the victim – were admissible as non-hearsay because they were the defendant's own statements.¹⁶

The next two categories – messages from the victim to the defendant and messages from the victim to her sister – were admitted under the state of mind exception to the hearsay rule. The Court of Appeals noted that while statements by murder victims can be admitted to show motive and fear of

the killer, statements of memory and belief and statements that described a defendant's actions are not admissible.¹⁷

The messages admitted described prior events between the defendant and the victim. The trial court noted that while it did rely on the defendant's statements concerning his actions, it only viewed the other messages for context of the relationship between the defendant and the victim – it did not consider the messages as proof that the events occurred.¹⁸ The Court of Appeals found no error even though some of the messages were not admissible under the state of mind exception to the hearsay rule because the trial court did not rely on the content of the messages.¹⁹

People v. Goins²⁰

In *Goins*, the defendant claimed that he was deprived of his right to present a defense when the court refused to allow admission of a MySpace entry allegedly written by the victim. The defendant testified that he met the victim through MySpace, the statement came from her account, and he was familiar with her MySpace account. The defendant argued that the MySpace entry should have been admissible under M.R.E. 901(b)(4) because of the distinctive nature of the entry.²¹ The court found that there was a lack of evidence verifying that the account belonged to the victim.

In an unpublished opinion, the Michigan Court of Appeals found that the trial court erred, explaining that:

[h]ere, provided in what certainly appears to be [the victim's] MySpace page are descriptive details of the assault that fit within what a reasonable person would consider to be “distinctive content” not generally known to anyone other than [the victim], defendant, or someone in whom one or the other confided. Given the content of the entry itself, which is only slightly less inculpatory than [the victim's] testimony, and the unlikelihood that [the victim] would have given her account password to a third party so that that person could write the entry, the jury reasonably could have found that [the victim] authored the content in the MySpace account. The trial court should have found that the evidence was properly authenticated under M.R.E. 901.²²

Even though the evidence was properly authenticated, the Court of Appeals held that the MySpace page would have been excluded under M.R.E. 613(b) because a proper foundation was not laid before the defendant moved for admission of the evidence. Further, on the facts of the case, the error was harmless and the right result was reached. The Court affirmed the defendant's conviction.²³

People v. Martin²⁴

In a recent unpublished opinion, the Michigan Court of Appeals held that text messages from the defendant were properly authenticated.²⁵ In *Martin*, the defendant claimed that the trial court erred by admitting text messages from her cellular phone because the messages were not proven to have been sent by her and, therefore, could not be used as an admission of a party opponent.

The Court of Appeals found that the testimony of a witness (a friend of the defendant) stating that the defendant told him that she had exchanged text messages with the victim, along with the defendant's own testimony that she had sent text messages to the victim, provided sufficient proof that the messages were sent by the defendant from the defendant's phone.²⁶ The Court also noted that soon after the text messages were sent, there were calls between the defendant and the codefendant, reasoning that the defendant was in possession of the cellular phone at the time.²⁷

The trial court held that the telephone records of the text messages were not business records under MRE 803(6). The Court of Appeals disagreed, stating that a Sprint employee testified as to the procedure for receiving, storing, and printing out the telephone records and that the "purpose of the telephone records of text messages is not to convey the text messages for the truth of the matters asserted in the messages. Under the circumstances, the telephone records were admissible under M.R.E. 803(6)."²⁸

People v. Al-Shimary²⁹

In this unpublished opinion, the Michigan Court of Appeals found that the defendant was not denied his constitutional right to present a defense when the trial court refused to allow a MySpace posting into evidence because the defendant had not properly authenticated it. The MySpace page was used in an attempt to impeach the victim's son by showing that he lacked sincerity in making the allegations because of a failed extortion attempt. The witness

was asked if he wrote the message, and the witness denied authoring the message. The defendant offered no other proof that the message came from the witness.

The Court found that the defendant was not prohibited from presenting a defense because the defendant was allowed to question the witness regarding the attempted extortion.³⁰ The Court also found that the trial court did not abuse its discretion by refusing to allow the MySpace page into evidence because it was not properly authenticated.³¹

Federal Cases

Tompkins v. Detroit Metro Airport³²

In this slip-and-fall case, the airline requested a signed authorization from the victim granting the release of records from her Facebook account. The court denied the motion to compel stating that "there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence. Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there *might* be something of relevance in Plaintiff's Facebook account."³³ The court noted that the pictures on the Facebook page were not inconsistent with the claimed injuries of the victim.³⁴

Osborn v. Butler³⁵

In this civil rights case from Idaho against employees of a state police officer and Attorney General Investigator, the plaintiff objected to the admissibility of an exhibit and affidavit that contained a website printout allegedly prepared by him. The district court first considered whether the website was properly authenticated. The court found that it was properly authenticated because the affiant explained that he "printed the website, gave the website address, and represented that it had not been altered or changed from the form maintained at the website address."³⁶

The court, however, found that the website printout was not admissible as an admission of a party opponent because the verification came from a third party, not the plaintiff, and "the statements made therein are not sufficiently identified as [the plaintiff's] statements."³⁷ The website did not identify the plaintiff as the author of the material. Though the plaintiff's motion to strike was granted, ultimately so was the defendants' motion for summary judgment.

Other State Cases

*Tienda v. Texas*³⁸

The Court of Criminal Appeals of Texas affirmed the admission of MySpace pages despite the prosecutor's failure to prove through technological or expert evidence (such as tracing the IP address found in the subscriber's report to the defendant's computer) that the accounts had been created by the defendant.³⁹ The court found that even without the evidence linking the account to the defendant's computer, there was "sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be – MySpace pages the contents of which the [defendant] was responsible for"⁴⁰

The prosecutor offered the following evidence in support of the admission of the MySpace profile pages and images:

- The victim's sister testified that she found the pages on MySpace and believed that they were created by the defendant. She also was able to identify the defendant in the MySpace photographs;
- Subpoenaed subscriber reports, with affidavits, for each profile account from MySpace.com that included the user name, email address, age, and hometown of the user. This information was also confirmed by witnesses who verified the defendant's unique nickname, hometown of Dallas, gang affiliation (due to several gang-related tattoos and gang signs), and multiple pictures of the defendant from the MySpace pages;
- Testimony from a gang unit police officer who testified regarding gang usage of social media pages to stay in touch and promote the gangs. The officer was also able to identify the defendant as the individual in the photos from the MySpace pages;
- The person in the MySpace photos had very distinctive features and tattoos on his arms, neck, and body. The defendant had identical features and tattoos on his body;
- The defendant wore the same unique glasses and a square earring in the pictures on the MySpace page that he wore to court;
- There were references to the victim's death on the MySpace page and a downloaded song that was played at his funeral.

The court concluded that there was "ample circumstantial evidence – taken as a whole with all

of the individual, particular details considered in combination – to support a finding that the MySpace pages belonged to the defendant and that he created and maintained them."⁴¹

*Griffin v. Maryland*⁴²

In *Griffin*, the defendant was granted a new trial after the Maryland Court of Appeals found that the admitted MySpace profile was not properly authenticated. The trial court allowed into evidence the defendant's girlfriend's MySpace profile to show that the girlfriend had threatened a state witness. The profile included a picture of a couple, a date of birth, and the statement that "snitches get stitches." In this case, the prosecution did not question the girlfriend about the profile pages; instead, the prosecution attempted to authenticate the profile through the lead investigator.

The Court of Appeals found that the trial court "failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the 'snitches get stitches' posting."⁴³ In its reasoning, the Court noted that "the picture of [the girlfriend], coupled with her birth date and location, were not sufficient 'distinctive characteristics' on a MySpace profile to authenticate its printout given the prospect that someone other than [the girlfriend] could have not only created the site, but also posted the 'snitches get stitches' comment."⁴⁴

The Court of Appeals noted that anyone can create a profile on MySpace, at no cost, if they have an email address and claim to be over 14 years of age.⁴⁵ The court also expressed concern that "anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password."⁴⁶

Due to the potential for abuse of a social networking website, the Court of Appeals held that "a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that [the girlfriend] was the creator and the author of the 'snitches get stitches' language."⁴⁷

Final Thoughts

In some cases, counsel has made a decision not to challenge the admissibility of the evidence directly, which deems the issue unpreserved for appeal. For example, in the unpublished case of *People v. Nickleberry*⁴⁸ the defendant was identified first by way of a MySpace photograph, then participated in a police-administered photographic line up. The

defense challenged the initial (MySpace) identification as being impermissibly suggestive, but not specifically on admissibility grounds. On appeal, any claim relating to the admissibility of the evidence was reviewed for plain error, and the Court found none. When appropriate, challenges to the admissibility of the evidence should always be made.

When the evidence comes to light post-trial, it may also be admissible. In this month's appellate summaries, we include the unpublished case of *People v. Prentice*,⁴⁹ in which the Michigan Court of Appeals remanded the case back to the trial court for a determination of whether newly discovered evidence of perjury as discovered on a MySpace page warranted a new trial.

In any case, where social media evidence is critical to support the defendant's right to present a defense, and right to confront witnesses, efforts to authenticate and admit evidence should be undertaken to the extent possible. Where the evidence is not properly authenticated, or if is more prejudicial than probative, the evidence is not admissible and the appropriate objections must be made.

by Kelly McDoniel

Ms. McDoniel is an Adjunct Professor of Law at Thomas M. Cooley School of Law and Criminal Defense Resource Center Research Attorney. As a research attorney, Ms. McDoniel spends time each week at the Frank Murphy Hall of Justice in Detroit, Michigan, where she regularly fields numerous questions from practitioners about a variety of evidentiary issues.

Endnotes

1. http://www.purdueexponent.org/features/article_8815d757-8b7c-566f-8fbe-49528d4d8037.html.
2. <http://www.guardian.co.uk/technology/2012/feb/14/myspace-one-million-users>.
3. Social media is a broad term that includes: Facebook, MySpace, email, text messages, instant messages, Twitter accounts and other types of public information placed on the Internet or sent to other users.
4. *In re F.P.*, 878 A. 2d 91, 95-96; 2005 PA. Super. 220 (2005).
5. M.R.E. 401, M.R.E. 901.
6. M.R.E. 401.
7. www.newyorklawjournal.com/PubArticleNY.jsp?id=1202528306317 (citations omitted).
8. *People v. Orlewicz*, 293 Mich. App. 96; 809 N.W. 2d 194 (2011).

9. *Id.* at 105.
10. *Id.*
11. *Id.*
12. *People v. Mills*, unpublished opinion of March 24, 2011 (Court of Appeals #293378)].
13. *People v. Liceaga*, unpublished per curiam opinion of January 27, 2009 (Court of Appeals #280726).
14. *Id.* Slip Op. at p. 4.
15. *People v. Oyerinde*, unpublished per curiam opinion of November 29, 2011 (Court of Appeals #298199).
16. *Id.* Slip Op. at p. 12.
17. *Id.* citing *People v. Moorner*, 262 Mich. App. 64, 73; 683 N.W. 2d 736 (2004).
18. *Id.* Slip Op. at p. 12-13
19. *Id.* Slip Op. at p. 13.
20. *People v. Goins*, unpublished per curiam opinion of January 21, 2010 (Court of Appeals #289039).
21. *Id.* Slip Op. at p. 1.
22. *Id.* Slip Op. at p. 2.
23. *Id.*
24. *People v. Martin*, unpublished per curiam opinion of May 17, 2012 (Court of Appeals #302071).
25. *Id.* Slip Op. at p. 4.
26. *Id.*
27. *Id.*
28. *Id.* Slip Op. at p. 6.
29. *People v. Al-Shimary*, unpublished per curiam opinion of December 28, 2010 (Court of Appeals #293096).
30. *Id.* Slip Op. at p. 2.
31. *Id.*
32. *Tompkins v. Detroit Metro Airport*, 278 F.R.D. 387 (ED Mich, 2012).
33. *Id.* at 388.
34. *Id.* at 389.
35. *Osborn v. Butler*, 712 F. Supp. 2d 1134 (D Idaho, 2010).
36. *Id.* at 1146.
37. *Id.* at 1147.
38. *Tienda v. Texas*, 358 S.W. 3d 633 (Tx App, 2012).
39. *Id.* at 637.
40. *Id.* at 645.
41. *Id.*
42. *Griffin v. Maryland*, 19 A. 3d 415 (Md App, 2011).
43. *Id.* at 423.
44. *Id.* at 424.
45. *Id.* at 420.
46. *Id.* at 421.
47. *Id.* at 424.
48. *People v. Nickleberry*, unpublished opinion of April 19, 2012 (Court of Appeals #303475)].
49. *People v. Prentice*, unpublished opinion of May 1, 2012 (Court of Appeals #303602)].