



# SOCIAL MEDIA EVIDENCE UPDATE

CAP Seminar, February 2017

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Kelly McDaniel

Michigan Indigent Defense Commission

## Social Media Evidence Handout Contents:

- Social Media Checklist/Inventory – New Client Interview
  - MRPC – Relevant Ethical Provisions
  - Consent Form – Cell Phone
  - DOJ Report Link - *Obtaining and Admitting Electronic Evidence*
  - Duke Law and Technology Review Article Link – *Authenticity and Admissibility of Social Media Website Printouts*
  - Admissibility of Social Media Evidence – 2016 Case Law Update
  - *Admissibility of Social Media Evidence* – Rules of Evidence and Case Law
-

# Social Media Inventory:

## *Interviewing New Clients*



**Client's Name:**

**Date:**

**What social media accounts are used?**

For a complete list of major active networking sites, visit:

[https://en.wikipedia.org/wiki/List\\_of\\_social\\_networking\\_websites](https://en.wikipedia.org/wiki/List_of_social_networking_websites)

*Note: this list excludes dating websites, which may also be relevant to your inquiry.*

**What are the privacy settings on the accounts?**

Are they "open" or "public", for anyone to see content?

If not, what are the restrictions? (i.e., friends only, etc.)

**What email address(es) are associated with the account(s)?**

**What name(s) does client use on the account(s)?**

Include all usernames/screen names/nicknames, etc.

**Where have these accounts been used?**

Home computer, public/shared computer, work computer, tablet, smartphone, other:

**Are passwords stored?**

**Who has access to the passwords?**

**Is client incarcerated?**

**Is anyone authorized to access the sites on client's behalf?**

**Is anyone authorized to post or use the social media accounts on your client's behalf?**

If so, who and how often?

Does the "use" include making/accepting friend requests?

**Client (and/or authorized agent) should be advised not to:**

- ✓ Post updates about the case while it is pending, without consulting counsel.
  - ✓ Respond to or solicit media coverage, without consulting counsel.
  - ✓ Seek or make connections (i.e., "friend requests") with any parties involved in the case including any witnesses, the judge, opposing counsel, or jurors.
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# Relevant Ethical Provisions

## Michigan Rule of Professional Conduct: 1.1 Competence

A lawyer shall provide competent representation to a client. A lawyer shall not:

- (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;
- (b) handle a legal matter without preparation adequate in the circumstances; or
- (c) neglect a legal matter entrusted to the lawyer.

*Note that in 2012, the American Bar Association approved a change to the Model Rules of Professional Conduct ("Model Rules") to state that lawyers have a duty to maintain competency in technology:*

*"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."*

*MRPC 1.1 Comment 8 (emphasis added).*

## Michigan Rule of Professional Conduct: 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Note: The New York State Bar Association's Social Media Ethics Guideline No. 3.C addresses "Retention of Social Media Communications with Clients":

*"If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper."*

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## Sample Consent Form to Release Confidential Information - Cell Phone

I [INSERT NAME] hereby authorize and request,

Name: [INSERT NAME OF CELL PHONE CARRIER] to release confidential information, to wit records of my cell phone use for phone number during the period [INSERT] through [INSERT], to:

Name: [INSERT NAME] Title/Functions: Attorney at Law

Address: [INSERT ADDRESS]

I understand that any cancellation or modifications of this authorization must be in writing, and that I have a right to receive a copy of this authorization. A photocopy of this authorization shall be as effective and valid as the original.

This authorization shall remain valid until: [DATE]

I furthermore release all parties stated here within from any legal liability resulting from the release of this information, with the understanding that all parties involved will exercise appropriate safeguards while using this information.

---

Signature

Date

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Link to this article:

<https://www.justice.gov/sites/default/files/usao/legacy/2011/11/30/usab5906.pdf>

# Training and Admitting Electronic Evidence

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# AUTHENTICITY AND ADMISSIBILITY OF SOCIAL MEDIA WEBSITE PRINTOUTS

WENDY ANGUS-ANDERSON<sup>1</sup>

## ABSTRACT

*Social media posts and photographs are increasingly denied admission as evidence in criminal trials. Courts often cite issues with authentication when refusing to admit social media evidence. Cases and academic writings separate recent case law into two approaches: The Maryland Approach and the Texas Approach. The first method is often seen as overly skeptical of social media evidence, setting the bar too high for admissibility. The second approach is viewed as more lenient, declaring that any reasonable evidence should be admitted in order for a jury to weigh its sufficiency. This Brief addresses the supposed differences between the two sets of cases and suggests that courts are not actually employing two distinct approaches. The Maryland Approach courts are not holding social media content to a higher standard than the Texas Approach courts, but are merely responding to a lack of evidence connecting the proffered content to the purported author.*

## INTRODUCTION

Sarah and Megan, both thirteen years old, had been friends for most of their lives. They went to the same school, were always spending time at the other's house, and even traveled with each other's family for vacations. As sometimes happens when getting older, however, Megan transferred from the public school to a Catholic school and the two girls had a "falling out." Sometime thereafter, Sarah became worried that Megan might be spreading rumors about her old friend to her new social group. Sarah's mother shared her daughter's concerns, and conceived of a scheme to humiliate Megan.

Sarah's mother set up a fictitious Myspace account under the name "Josh Evans." "Josh" was sixteen years old, attractive, and new to the neighborhood. She then used the new account to draw Megan into conversation online. About two weeks later, Sarah's mother had Josh tell Megan that he no longer liked her and that the world would be a better place without Megan in it. Distraught, the thirteen-year-old hung herself in her bedroom closet that night.<sup>2</sup>

Link to this article from the *Duke Law and Technology Review*, Vol. 14:  
<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1282&context=dltr>

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<sup>1</sup> Duke University School of Law, J.D. expected 2016; B.A. in Anthropology, 2008, Franklin & Marshall College.

<sup>2</sup> All background information comes from *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

# Admissibility of Social Media Evidence in Criminal Cases – 2016 Update

## Relevance

No error in admitting a Facebook picture from the defendant's Facebook page of the decedent, marked "RIP", which included a post reading, "Shuldd I let em kill me or turn myself nnd. I'm facing life nd da gtt dam pin ... rest in peace [decedent], catch me nd traffic." The post was relevant because it was made shortly after the shooting occurred. *People v Thomas*, Michigan Court of Appeals Docket No. 323358 (September 6, 2016).

Counsel was not ineffective for failing to challenge content of post on relevance grounds, where posts were made shortly before crime and were "highly illustrative of defendant's state of mind just prior to the killing." *People v Dunn*, Michigan Court of Appeals Docket No. 323403 (May 12, 2016).

Photograph of defendant from Facebook was relevant "to show that defendant had access to, or was known to wear, bulletproof vests", and the perpetrator (identified as the defendant), was wearing a bulletproof vest during the offense. *People v Al-Yasiry*, Michigan Court of Appeals Docket No. 326677 (August 25, 2016).

Defendants sought admission of an Instagram picture of the victim with a gun in his waistband to support theory that the victim was shot during a drug deal. However, there was no error by the trial court in refusing to allow the photograph in the absence of evidence that the victim was armed at the time he was shot, or that he was shot in self-defense, or that it established evidence of a drug deal. Further, no error in refusing to allow the photograph to impeach other witnesses where there was no testimony that they had seen the victim with a gun. *People v Carter*, Michigan Court of Appeals Docket No. 322875 (December 10, 2015).

## Prejudicial vs Probative

No error in finding Facebook posts relevant and more probative than prejudicial where posts demonstrated motive and state of mind. "Defendant made statements about murdering people, about dragging a dead body through the woods, about burying a dead body in his backyard, and he updated his status to show he was single. In addition, defendant made derogatory statements about women including a statement wherein he indicated he was single and stated "can't stand unfaithful lying bi—s." *People v McMahan*, Michigan Court of Appeals Docket No. 324423 (March 29, 2016).

Evidence was properly admitted where Facebook photographs established defendant's possession of a handgun similar to one used in the crime and defendant's identity as the shooter was at issue



in the case. “Thus, the photographs had the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” *People v Johnson*, Michigan Court of Appeals Docket No. 325456 (June 28, 2016).

### **Proof of Other Crimes, Wrongs, Acts**

Trial court erred in allowing a photograph of defendant holding a handgun taken several years before the crimes charged. There was no “temporal proximity” between the evidence and the offense, and there was no other similarity to the murder weapon whatsoever; the photograph was irrelevant and unduly prejudicial. However, the error was harmless in light of the other evidence at trial. *People v Franklin*, Michigan Court of Appeals Docket No. 325551 (April 7, 2016).

No error in references to defendant’s Facebook nickname (“Momma Ice”) where a nickname is not evidence of another crime, wrong, or act; where defendant voluntarily identified herself, and where identity is an essential element of any criminal prosecution. *People v Castillo*, Michigan Court of Appeals Docket No. 317345 (November 25, 2014).

### **Inconsistent Statements**

No error in allowing impeachment evidence of Facebook conversations where a witness testified that he did not want a relationship with the victim, but those conversations demonstrated otherwise. “The value of the Facebook statements did not depend on whether the victim and the student did, or did not, engage in a relationship. The prosecutor offered the statements to show that the student was less than truthful on the witness stand about whether he ever wanted a relationship with the victim and whether the victim denied his request, and the trial court limited the purpose of the evidence to impeachment.” *People v Algra*, Michigan Court of Appeals Docket No. 321374, (September 8, 2015).

### **Hearsay**

Statements made on defendant’s Facebook page are properly admitted as “admissions” by the prosecution and not hearsay in the absence of evidence that someone other than defendant posted the statements. *People v McMahan*, Michigan Court of Appeals Docket No. 324423 (March 29, 2016).

### **Authentication**

No error in admitting evidence of screenshots of Facebook postings where officer reviewed defendant’s Facebook page, confirmed that they were taken from a page assigned to an alias that

defendant routinely employed, and there was no assertion made at trial that the Facebook page did not belong to defendant. *People v McMahan*, Michigan Court of Appeals Docket No. 324423 (March 29, 2016).

No error in establishing authentication where posts are identified on defendant's page and there is no evidence that the page was hacked. *People v Thomas*, Michigan Court of Appeals Docket No. 323358 (September 6, 2016).

Even though officer did not specifically state that Facebook photographs were an "accurate representation" of defendant, his testimony that they were of defendant was sufficient to establish a proper foundation for the admission of the photographs." *People v Johnson*, Michigan Court of Appeals Docket No. 325456 (June 28, 2016).

Counsel not ineffective for failing to object to authentication of Facebook posts where friends of defendant and witnesses with knowledge confirmed defendant's alias and defendant's Facebook account. *People v Dunn*, Michigan Court of Appeals Docket No. 323403 (May 12, 2016).

### **Original Writings**

Where the contents of Facebook messages were not in issue and were not an operative fact, the best evidence rule did not apply. *People v Vilton*, Michigan Court of Appeals Docket No. 318626, (February 3, 2015).

A computer hard drive and/or an electronic copy of Facebook postings is not required, particularly where authentication of evidence is not validly challenged. *People v Dunn*, Michigan Court of Appeals Docket No. 323403 (May 12, 2016).

### **Testimony "interpreting" Social Media**

No error for counsel's failure to challenge detective's testimony that portions of defendant's Facebook content must have been deleted, based upon review of dates of messages and subsequent absence of messages in defendant's accounts on those dates. *People v Holwerda*, Michigan Court of Appeals Docket No. 323100 (Dec. 10, 2015).

### **Disclosure of Evidence**

No violation of MCR 6.201 where the challenged photograph was taken from the defendant's own Facebook profile and where defense counsel agreed that there was no intent to hide or surprise defendant with the evidence. *People v Al-Yasiry*, Michigan Court of Appeals Docket No. 326677 (August 25, 2016).

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### **Right to Present a Defense**

Trial court did not err by refusing to allow defendant to introduce Facebook-based photograph posts where the defendant did not provide the evidence to the prosecutor consistent with the pretrial discovery order and where the defendant was able to introduce the evidence through other photographs. *People v Johnson*, Michigan Court of Appeals Docket No. 323312 (January 14, 2016).

### **Sentencing**

Defendant's use of Twitter to communicate with victim, including telling the victim to take steps to stop the investigation, could be used to support a score for OV 19. *People v Simon*, Michigan Court of Appeals Docket No. 326149 (June 16, 2016).

### **Jurors Using Social Media**

No evidence that foreperson was dishonest during jury selection when indicating that she "read things" about the case on Facebook; trial court's refusal to allow further inquiry into truthfulness of this statement – while technically permissible pursuant to MRE 606(b) – was not error. *People v Brown*, Michigan Court of Appeals Docket No. 323887 (May 10, 2016).

Foreperson's posts, either generic or expressing internal thought processes during trial and deliberations, do not constitute juror misconduct and cannot be used to impeach a verdict. *People v. Smith*, Michigan Court of Appeals Docket No. 322283 (Oct. 13, 2015).

Facebook conversations about a case – while possibly extraneous – will not alone substantiate a claim for misconduct in the absence of evidence that the extraneous influence "created a real and substantial possibility that [it] could have affected the jury's verdict." Juror's comments revealing that murder case was significant in terms of facts and consequences did not warrant a new trial. *People v Wilson*, Michigan Court of Appeals Docket No. 323200 (Feb. 23, 2016).

### **Post-Conviction Motions**

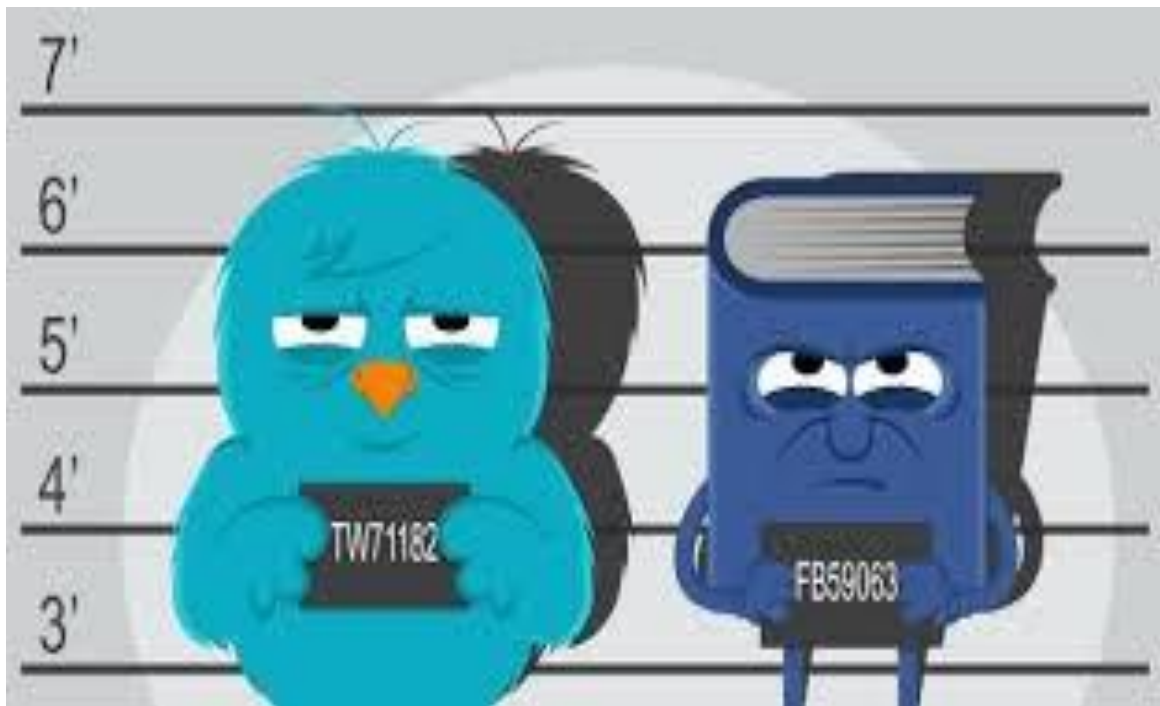
Evidence of juror bias and concealment of that bias during voir dire, discovered via Facebook after conviction, was not "plainly meritless" and federal habeas petition would be held in abeyance to

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allow petitioner to litigate issue in state court. *Abratis v Woods*, E.D. Mich. Docket No. 14-cv-14434 (April 7, 2015).

# ***Law and Social Media***

*August 21, 2015*



## ***The Admissibility of Social Media Evidence***

With the number of Facebook users estimated to reach 1 billion<sup>1</sup> this year and Myspace reporting over 25 million<sup>2</sup> users, social media evidence<sup>3</sup> is becoming more prevalent in all types 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 admittance of such evidence.<sup>4</sup> In general, the evidence must be relevant to the proceedings, and it must be properly authenticated.<sup>5</sup>

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."<sup>6</sup> 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 these types of 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.<sup>7</sup>

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.

### **Michigan Cases**

#### ***People v Orlewicz***<sup>8</sup>

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.<sup>9</sup>

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."<sup>10</sup> The court, however, found no error in its exclusion finding 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.<sup>11</sup>

#### ***People v Liceaga***<sup>12</sup>

In this unpublished opinion, the court of appeals held that the trial court did not abuse its discretion when it allowed into evidence a photo of the defendant from his Myspace page as

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evidence of other improper acts under MRE 404(b)(1). The photo 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 photo 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 photo 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.”<sup>13</sup>

### ***People v Oyerinde***<sup>14</sup>

In *Oyerinde*, the prosecution entered into evidence 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 court of appeals found that the first category of messages, those that the defendant sent to the victim, were properly admitted as admissible non-hearsay because they were the defendant's own statements.<sup>15</sup>

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.<sup>16</sup>

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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.<sup>17</sup> 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.<sup>18</sup>

***People v Goins***<sup>19</sup>

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 MRE 901(b)(4) because of the distinctive nature of the entry.<sup>20</sup> The court refused to allow the evidence due to the lack of evidence verifying that the account belonged to the victim.

In an unpublished opinion, the 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

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account. The trial court should have found that the evidence was properly authenticated under MRE 901.<sup>21</sup>

Even though the evidence was properly authenticated, the court of appeals held that the Myspace page would have been excluded under MRE 613(b) because a proper foundation was not laid before the defendant moved for admission of the evidence; therefore, the right result was reached, and it affirmed the decision of the trial court.<sup>22</sup>

### ***People v Martin***<sup>23</sup>

In a recent unpublished opinion, the court of appeals held that text messages from the defendant were properly authenticated.<sup>24</sup> In *Martin*, the defendant claimed that the trial court erred by admitting text messages from her cellular phone because the messages were not proved to be 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 and 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.<sup>25</sup> The court also noted that soon after the text messages were sent, there were phone calls between the defendant and the codefendant, reasoning that the defendant was in possession of the cellular phone at the time.<sup>26</sup>

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 MRE 803(6).”<sup>27</sup>

***People v Al-Shimary***<sup>28</sup>

In this unpublished opinion, the 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.<sup>29</sup> The court also found that the trial court did not abuse its discretion by not allowing the Myspace page into evidence because it was not properly authenticated.<sup>30</sup>

**Federal Cases**

***Tompkins v Detroit Metro Airport***<sup>31</sup>

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

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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."<sup>32</sup> The court noted that the pictures on the Facebook page were not inconsistent with the claimed injuries of the victim.<sup>33</sup>

### ***Osborn v Butler***<sup>34</sup>

In this case, 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."<sup>35</sup>

The court, however, found that the website 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."<sup>36</sup> The website did not identify the plaintiff as the author of the material.

### **Other State Cases**

### ***Tienda v Texas***<sup>37</sup>

The Court of Criminal Appeals of Texas affirmed the admittance 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.<sup>38</sup> The court found that even without the evidence linking the account to

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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 ...."<sup>39</sup>

The prosecutor offered the following evidence in support of the admittance 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.
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- 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.”<sup>40</sup>

### ***Griffin v Maryland***<sup>41</sup>

In *Griffin*, the defendant was granted a new trial after the 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.”<sup>42</sup> 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.”<sup>43</sup>

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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.<sup>44</sup> 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.”<sup>45</sup>

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.”<sup>46</sup>

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<sup>1</sup> [http://www.purdueexponent.org/features/article\\_8815d757-8b7c-566f-8fbe-49528d4d8037.html](http://www.purdueexponent.org/features/article_8815d757-8b7c-566f-8fbe-49528d4d8037.html).

<sup>2</sup> <http://www.guardian.co.uk/technology/2012/feb/14/myspace-one-million-users>.

<sup>3</sup> 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.

<sup>4</sup> *In re F.P.*, 878 A. 2d 91, 95-96; 2005 PA Super 220 (2005).

<sup>5</sup> MRE 401, MRE 901.

<sup>6</sup> MRE 401.

<sup>7</sup> [www.newyorklawjournal.com/PubArticleNY.jsp?id=1202528306317](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202528306317) (citations omitted).

<sup>8</sup> *People v Orlewicz*, 293 Mich App 96; 809 NW2d 194 (2011).

<sup>9</sup> *Id.* at 105.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *People v Liceaga*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2009 (Docket No. 280726).

<sup>13</sup> *Id.* at 4.

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<sup>14</sup> *People v Oyerinde*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2011 (Docket No. 298199).

<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.*, citing *People v Moorner*, 262 Mich App 64, 73; 683 NW2d 736 (2004).

<sup>17</sup> *Id.* at 10-11.

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *People v Goins*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 289039).

<sup>20</sup> *Id.* at 1.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> *Id.*

<sup>23</sup> *People v Martin*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2012 (Docket No. 302071).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *People v Al-Shimary*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2010 (Docket No. 293096).

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Tompkins v Detroit Metro Airport*, 278 FRD 387 (ED Mich, 2012).

<sup>32</sup> *Id.* at 388.

<sup>33</sup> *Id.* at 389.

<sup>34</sup> *Osborn v Butler*, 712 F Supp 2d 1134 (D Idaho, 2010).

<sup>35</sup> *Id.* at 1146.

<sup>36</sup> *Id.* at 1147.

<sup>37</sup> *Tienda v Texas*, 358 SW 3d 633 (Tx App, 2012).

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<sup>38</sup> *Id.* at 637.

<sup>39</sup> *Id.* at 645.

<sup>40</sup> *Id.*

<sup>41</sup> *Griffin v Maryland*, 19 A3d 415 (Md App, 2011).

<sup>42</sup> *Id.* at 423.

<sup>43</sup> *Id.* at 424.

<sup>44</sup> *Id.* at 420.

<sup>45</sup> *Id.* at 421.

<sup>46</sup> *Id.* at 424.

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