SOCIAL MEDIA: CUTTING EDGE EVIDENCE QUESTIONS

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Lawrence Morales is certified by the Texas Board of Legal Specialization as a labor and employment law specialist. He has represented clients in jury trials, bench trials, and injunction hearings involving complex employment law issues, including non-competition agreements, breach of fiduciary duty, theft of trade secrets, unfair competition, hostile work environment, retaliation, and breach of contract.

In addition, Mr. Morales has represented companies in lawsuits and administrative proceedings involving: (1) alleged race, gender, national origin, and disability discrimination; (2) alleged overtime violations of the Fair Labor Standards Act; and (3) alleged unfair labor practices under the National Labor Relations Act. Mr. Morales also represents companies when their wage and hour practices are audited by the Department of Labor.

Prior to attending law school, Mr. Morales was a financial analyst for Kimberly-Clark. Mr. Morales graduated at the top of his July 2005 Baylor Law School class, and was a member of Baylor's Moot Court and Mock Trial Teams. After law school, Mr. Morales served as a law clerk to the Honorable Priscilla R. Owen of the United States Court of Appeals for the Fifth Circuit.

Mr. Morales is a frequent speaker and author on employment law and litigation topics, and is the 2010-2011 Vice-Chair of the Labor and Employment Committee of the Young Lawyers Division of the American Bar Association.

Selected Client Representations

Hostile Work Environment/Discrimination Litigation

- Obtained a defense jury verdict on behalf of a national retailer on an employment retaliation claim.

- Obtained a reversal of a sexual harassment jury verdict. See *Twigland Fashions, Ltd. v. Miller,* ___ S.W.3d ___, 2010 WL 850170 (Tex. App.-Austin, no pet.).

- Obtained summary judgment for a health-care company, resulting in complete dismissal of former employee's claims that she was terminated because of her race and gender.

- Obtained summary judgment for a construction company, resulting in complete dismissal of former employee's claim that he was terminated because of his race.

Unfair Competition, Restrictive Covenants, and Fiduciary Litigation

- U.S. District Court for the Southern District of Texas
- U.S. District Court for the Northern District of Texas
- U.S. District Court for the Western District of Texas

Judicial Clerkships
The Honorable Priscilla R. Owen, United States Court of Appeals for the Fifth Circuit

- Obtained a temporary injunction against a construction company preventing it from soliciting or hiring client's employees that had non-competition agreements.

- Obtained a dissolution of a temporary restraining order that prevented an oil and gas company from contacting a competitor's customers, former customers, and prospective customers.

- Obtained summary judgment for construction company, resulting in complete dismissal of competitor's anti-trust, tortious interference, and unfair competition claims.

Business Litigation

- Represented energy company in $36 billion tortious interference lawsuit concerning expansion of a nuclear energy plant.

- Obtained summary judgment for oil and gas company, resulting in complete dismissal of former employee's claim that the company breached a Stock Option Agreement.

- Obtained a dismissal of a breach of contract and fraud claim asserted against a major motion picture company by an Academy Award-winning actor.

Labor Law

- Represented construction company in unfair labor practice charge, claiming interrogation and discrimination of union members.

- Authored *Brief of Amicus Curiae* Texas Association of Business In Support of Respondents Arkema, Inc., et. al, concerning electronic posting of remedial notices.

Selected Professional Activities and Honors

- Selected for inclusion in Texas Super Lawyers - Rising Stars Edition (2011)
- Recognized in *Scene in S.A.'s 2010 San Antonio's Best Lawyers Edition* (Business Litigation)
- American Bar Association, Young Lawyers' Division, 2010 Vice-Chair of Labor and Employment Section
- North Chamber of Commerce's Lead SA, 2010 Board of Directors
- San Antonio Young Lawyers Association, Board of Directors 2007-2009

Selected Publications

- "Evidence in a Bench Trial, Do the Rules Really Matter?" February 2010, *Texas Bar Journal.*
- "The 'Effect on the Listener' Response to a Hearsay Objection That

Every Young Lawyer Should Know," October 2007, San Antonio Young Lawyers Association *Docket Call.*

- "September 11, 2001 and Hostile Work Environment," September 2007, San Antonio Young Lawyers Association *Docket Call.*
- "Isn't That Convenient? Texas Motions to Transfer Venue Based on Convenience after *Garza v. Garcia*?" 58 Baylor L. Rev. 720 (2005).

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Abstract

The prevalent use of social media websites has created new evidence that is certain to be useful to trial lawyers. The following article discusses the major hurdles to getting this type of evidence admitted and how to overcome those hurdles.

I. INTRODUCTION

If a picture is worth a thousand words, a witness's social media profile is priceless to a trial lawyer. With just a few clicks, a trial lawyer can obtain evidence of an opposing party's or witness's daily activities, mood, interests, relationships, and thoughts. This invaluable information is not hidden in some undisclosed location or locked securely in some personal safe, but rather is posted on the internet for the world to see. For example, over 600 million people have profiles on Facebook, which contain personal photographs, a list of friends, conversations between these friends, and information detailing where the person lives, socializes, works, and went to school. These profiles may even include time-stamped entries of precisely where the person was at any given moment.

With this treasure trove of social media data, trial lawyers have access to more information about witnesses than ever before, which enables them to portray witnesses as the persons they are in real life, rather than the characters they may be playing on the witness stand. *See* Seth P. Berman et al., *Web 2.0: What's Evidence Between "Friends"?*, 53 Bos. B.J. 5, 6 (Jan./Feb. 2009) (stating that social networking sites "may record people's thought processes and impressions in unguarded moments, exactly the sort of evidence that can be invaluable during litigation"). However, all of this information is only helpful if the attorney can get it admitted into evidence. The rules of evidence apply equally to social media and other electronic evidence, but present novel issues. For example, how do you authenticate a Facebook status update or a Tweet, especially when the witness denies authoring it? Or when are pictures discovered on an adverse party's Facebook profile inadmissible as improper character evidence? This paper discusses these and similar issues, and provides guidance for trial lawyers attempting to introduce and exclude social media evidence.

II. THE HURDLES TO ADMITTING SOCIAL MEDIA EVIDENCE

There are three primary hurdles to getting any object or document (including information discovered on social media websites) into evidence:

- First, the evidence must be relevant, which means it must have a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *See* TEX. R. EVID. 401–402 ; FED. R. EVID. 401–402 .

- Second, the evidence must be authentic—that is, it must be what the proponent claims it to be. *See* TEX. R. EVID. 901(a); FED. R. EVID. 901(a).

- Third, the evidence must not be subject to an exclusionary rule, including, for example, the character evidence rule stated in Rule 404(a) or the hearsay rule stated in Rule 802.

"Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible." *Lorraine v. Markel Am. Ins. Co*., 241 F.R.D. 534, 538 (D.Md. 2007).

A. Hurdle #1: Establishing Relevance of Social Media Evidence

Rule 401 defines "relevant evidence" as "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." TEX. R. EVID. 401; FED. R. EVID. 401. "In deciding whether evidence is relevant, a trial court should ask whether a reasonable person, with some experience in the real world, would believe the evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit." *Hernandez v. State*, 327 S.W.3d 200, 206 (Tex.App.—San Antonio 2010, pet. ref'd) (citations omitted). Therefore, in determining relevancy, courts look to the purpose for offering the evidence—the material fact to be proved—and whether there is a direct or logical connection between the offered evidence and the proposition to be proved. *See e.g.*, *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009). If there is any reasonable logical nexus, the evidence will survive the relevancy test. *See Reed v. State*, 59 S.W.3d 278, 281 (Tex.App.—Fort Worth 2001, pet. ref'd).

Social media evidence may be relevant to nearly every type of legal dispute primarily because, with 600 million people using just Facebook, there is a strong likelihood that the litigants in your case have social media profiles. In addition, approximately 50% of Facebook users log in to their accounts every day, and Facebook users in the United States spend 12.7% of their internet time on Facebook. And remember, these statistics do not include the other popular social media websites like Linkedin, Twitter, and MySpace, which also have millions of users. Therefore, it is quite

likely, if not certain, that individuals connected to your lawsuit are doing, saying, and taking pictures of themselves doing things that "have a tendency to make the existence of" material facts in your case "more or less probable," and are publicizing it all online.

1. Social Media Evidence for Defense Attorneys

In personal injury cases, defendants frequently attempt to discover and admit evidence from social media sites that undermine the plaintiff's allegations of mental anguish, depression, or significant injuries. This is precisely what happened in *Romano v. Steeelcase, Inc*., 907 N.Y.S.2d 650 (2010). There, the defendant sought access to the plaintiff's current and historical Facebook and MySpace accounts (including all deleted pages and related information) because the accounts allegedly contained information that was inconsistent with the extent and nature of her alleged injuries, especially her claims for loss of enjoyment of life. *Id.* at 653. The plaintiff refused to produce this information, arguing that it was private and was not relevant to her case. *Id.*

First, the court easily rejected the plaintiff's privacy argument. The court noted, "[b]oth Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking." *Id.* "Indeed, Facebook policy states that 'it helps you share information with your friends around you,' and that 'Facebook is about sharing information with others.'" *Id.* Likewise, MySpace is a "social networking service that allows Members to create unique personal profiles online in order to find and communicate with old and new 'friends.'" *Id.* MySpace is "self-described as an 'online community' where 'you can share photos, journals and interests with your growing network of mutual friends,' and as a 'global lifestyle portal that reaches millions of people around the world.'" *Id.* at 653–54. Therefore, the court was not persuaded by the plaintiff's argument that she had an expectation of privacy in the past and present content on her Facebook and MySpace pages. *Id.* at 654.

Second, the court concluded that "[t]he information sought by Defendant regarding Plaintiff's Facebook and MySpace accounts is both material and necessary to the defense of this action and/or could lead to admissible evidence." *Id.* The court noted that "Plaintiff's public profile page on Facebook shows her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed." *Id.* The court continued, "[i]n light of the fact that the public portions of Plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action." *Id.* Therefore, the court ordered that the defendant be given access to the present and historical content on the plaintiff's Facebook and MySpace profiles. *Id.* at 655.

While the *Romano* case deals with the discoverability of social media evidence, it provides a good example of how such evidence can be relevant to personal injury actions. *See also Bass ex. rel. Bass v. Miss Porter's School*, No. 3:08-CV-1807(JBA), 2009 WL 3724968, at *1 (D. Conn. Oct. 27, 2009) ("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 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, and production should not be limited to plaintiff's own determinations of what may be 'reasonably' calculated to lead to the discovery of admissible evidence."); *Ledbetter v. Wal-Mart Stores, Inc*., No. 06-CV-01958-WYD-MJW, 2009 WL 1067018, at *2 (D. Colo. April 21, 2009) (concluding that social media evidence was reasonably calculated to lead to the discovery of admissible evidence in a personal injury case).

In addition to being found discoverable in personal injury cases, social media evidence has also impacted recoveries in personal injury actions. For example, a California court awarded less damages than sought by the plaintiff because of evidence discovered on the plaintiff's social media profiles. *See Sedie v. United States*, No. C-08-04417, 2010 WL 1644252, at *23 (N.D. Cal. April 21, 2010). In its findings of fact and conclusions of law, the court provided a thorough discussion of how the evidence affected the plaintiff's recovery:

Other evidence also undermines the extent of Plaintiff's general damages. . . . For example, Plaintiff's online writings show that his life 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 microdisectomy. Plaintiff testified that the MySpace entry was a joke, but the Court did not find the testimony credible.

Id. Cases like these provide a strong incentive for plaintiffs' counsel to instruct their clients to limit their social media use during the litigation, and may even warrant plaintiffs deactivating their social media profiles until the litigation has concluded.

2. Social Media Evidence for Plaintiffs' Attorneys

In addition to providing defense counsel with potential ammunition to undermine a plaintiff's alleged injuries, social media evidence may also be helpful to attorneys representing plaintiffs in personal injury cases. For example, Attorney John G. Browning in Dallas, Texas suggests that plaintiffs' attorneys in wrongful death cases look to their deceased clients' social media profiles when trying to find an effective way to communicate the impact the deceased plaintiff had on people, the plaintiff's aspirations that would remain unfilled, and describing the void left in his absence. JOHN G. BROWNING, THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW 71 (2010). These profiles may include: (1) grieving and loving messages from family and friends, (2) photos of the decedent with friends and family, (3) discussions about the decedent's character, attributes, and interests, and (4) may also contain anecdotes that perfectly describe the type of person the decedent was and what he meant to others.

Browning provides the following account of how he used such evidence in a wrongful death case:

> As I read the posting [on my deceased client's MySpace profile] from a former girlfriend about how it helps her to 'talk' to him this way, together with the reminiscing of friends about milestones reached that Tommy would never share except in spirit, it struck me that the photos and comments on this young man's MySpace page could paint a far richer, more complete picture for the jury of who this young man was and where he was going in his life before tragedy interrupted.

Id.

> In addition to Browning's helpful suggestion, plaintiffs' counsel should also monitor the social media profiles of the defendants in their cases. According to Facebook, "[t]here are more than 250 million active users currently accessing Facebook through their mobile devices." STATISTICS, http://www.facebook.com/press /info.php?statististics (last visited May 17, 2011).Many of these individuals Facebook or Tweet about every significant (and often times, not-so-significant) event in their daily routine. Therefore, it is possible that defendants in your lawsuits have contemporaneously commented on the event that gave rise to your lawsuit, or made insensitive comments about the plaintiffs shortly after learning of their claims. Because these statements are frequently made before the defendant has consulted with an attorney, they can be particularly prejudicial.

The burden of demonstrating relevance is low. *See* 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, § 401.02[1] ("To be relevant it is enough that the evidence has a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence."). However, just because evidence is relevant does not mean that it is admissible. *See Lorraine v. Markel Am. Ins. Co*., 241 F.R.D. 534, 541 (D.Md. 2007) ("[T]he function of all the rules of evidence other than Rule 401 is to help determine whether evidence which in fact is relevant should nonetheless be excluded."). As discussed below, the remaining evidentiary hurdles present more difficult challenges to getting that persuasive social media evidence in front of the jury.

B. Hurdle #2: Authenticating Social Media Evidence

Under Rule 901, before an item may be admitted, the proponent must offer "evidence sufficient to support a finding that the matter in question is what its proponent claims." TEX. R. EVID. 901(a); FED. R. EVID. 901(a). The authentication requirement is intended to address three related concerns: (1) preventing a fraud on the court; (2) preventing innocent mistakes; and (3) guarding against "jury credulity," the natural tendency to take matters at face value. 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 9:2, at 325–26 (3d ed. 2007). However, Rule 901 "does not erect a particularly high hurdle, and that hurdle may be cleared by circumstantial evidence." *United States v. Chin*, 371 F.3d 31, 37 (2d Cir. 2004) (citations and internal quotations omitted). Moreover, the proponent of the evidence does not need "to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be." *Id.* (citations omitted).

One of the unique issues raised by social media evidence is the difficulty of authenticating evidence that is constantly being revised. With traditional non-electronic evidence, this is not a problem—an individual writes a letter to another person, and either person can state whether it is a true and accurate copy

of the letter. Even in the absence of direct evidence, the handwritten letter can be authenticated by expert or lay opinions tying the handwriting to the suspected author. *See* TEX. R. EVID. 901(b)(2)–(3); FED. R. EVID. 901(b)(2)–(3). However, these traditional tools are not entirely helpful when attempting to authenticate evidence found on social media websites. For example, the appearance and contents of an individual's Facebook or MySpace profile may look completely different than they did the day or even an hour before, simply because the user and his contacts have the ability to revise, delete, and add content. *See* STATISTICS, http://www.facebook.com/press/info.php?statististics (last visited May 17, 2011) ("More than 30 billion pieces of content (web links, news stories, blog posts, notes, photo albums, etc.) are shared each month.").

Moreover, it is entirely possible that statements that were ostensibly authored by the profile owner were in fact written by someone else posing as the user. It is common for witnesses faced with an incriminating statement on their social media profile to claim that it must have been written by someone else, which they claim is possible because other people know their social media password or use their computer. *See e.g.*, *In re K.W.*, 666 S.E.2d 490, 494 (2008) (describing that although the victim admitted that the proffered MySpace page was hers, she claimed that her friend posted the answers to the survey questions that defendant sought to introduce as impeachment evidence with respect to her claims of rape). These unique characteristics of social media websites present authentication challenges for courts and litigants. *See, e.g.*, *Griffin v. Maryland*, 995 A.2d 791 (2010) ("The anonymity features of social networking sites may present an obstacle to litigants seeking to authenticate messages posted on them.").

1. Using Rule 104 to Admit Social Media Evidence

For illustration purposes, let's assume that an attorney representing a plaintiff in a car accident case discovers a status update on the defendant's Facebook profile, which attaches a picture of the car accident and states, "I guess I shouldn't have been Facebooking while I was driving . . ." Obviously, the plaintiff's attorney wants this status update admitted into evidence to support his negligence claim. When taking the defendant's deposition, the attorney presents the defendant with the Facebook evidence, and she completely denies that she authored the status update or took the picture. The attorney is surprised. The attorney continues by confirming that the defendant has a Facebook profile and that the status update appears to be on her profile; yet, the defendant still denies authoring the status update. Instead, the defendant claims that someone must have hacked into her account or maybe her little brother used her computer to post the status update. At trial, the plaintiff's attorney offers the status update into evidence, and the defendant objects under Rule 901, claiming that the status update is not authentic. What does the court do? On the one hand, the court recognizes that if the defendant authored the status update, it is clearly relevant to show that she was negligent in Facebooking while driving. On the other hand, the evidence is only relevant if the defendant actually authored the update.

In addressing this evidentiary issue, the court should begin with Rule 104, which explains the relationship between the judge and the jury with regard to preliminary fact finding associated with the admissibility of evidence. Rule 104(b) states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." TEX. R. EVID. 104(b); FED. R. EVID. 104(b). Therefore, "[a] party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 541. "This is not a particularly high barrier to overcome." *Id.* For example, in *United States v. Safavian*, the court analyzed the admissibility of e-mail, noting:

> The question for the court under Rule 901 is whether the proponent of the evidence has "offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is." The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.

United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006) (citations omitted). Therefore, determining whether our hypothetical status update is authentic, and therefore relevant, involves a two-step process. First, the district court must determine whether the plaintiff has offered "a satisfactory foundation" from which the jury could reasonably find that the status update was authored by the defendant. *See United States v. Branch*, 970 F.2d 1368, 1370 (4th Cir. 1992). If the plaintiff meets this burden, the district court will allow the jury to evaluate the status update and the surrounding evidence, and make a determination of whether it is authentic. *Id.* at 1370–71.

2. Authenticating Electronic Communications

A proponent may satisfy his initial burden of offering "a satisfactory foundation" by relying on Rule 901(b), which provides a non-exhaustive list of the

methods to authenticate evidence. TEX. R. EVID. 901(b)(1),(4); FED. R. EVID. 901(b)(1),(4). Although the authentication framework was not designed with social media evidence in mind, it is flexible enough to accommodate it. Indeed, courts have rejected arguments that the authentication framework is not workable in the context of electronic evidence. *See e.g.*, *In re F.P.*, 878 A.2d 91, 95 (2005) ("Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. . . . We believe that e-mail messages and similar forms of electronic communications can be properly authenticated within the existing framework of [the rules of evidence].").

Of the ten authentication methods provided in Rule 901(b), there are two that are particularly helpful for authenticating social media evidence. First, Rule 901(b)(1) permits authentication through the testimony of a witness with knowledge that the evidence is what it is claimed to be. For electronic evidence, the witness providing such testimony may be the person who created the electronic document or maintains the evidence in its electronic form. Therefore, an electronic communication—including an e-mail, text message, or a social media message—can be authenticated through the testimony of the author, stating that he drafted or sent the communication. *See United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (holding that a chat log was properly authenticated by the testimony of a witness who participated in, and thus created, the chat). Additionally, a recipient of the communication may also authenticate the message. For example, in *Talada v. City of Martinez*, the court found that e-mails had been properly authenticated through a declaration from the recipient that they were true and correct copies. *See Talada v. City of Martinez*, 656 F. Supp. 2d 1147, 1158 (N.D. Cal. 2009).

The second method that is particularly helpful when authenticating social media evidence is through circumstantial evidence. Rule 901(b)(4) permits a party to authenticate evidence using circumstantial evidence in conjunction with the "[a]pperance, contents, substance, internal patterns, or other distinctive characteristics" of the evidence. TEX. R. EVID. 901(b)(4); FED. R. EVID. 901(b)(4). For example, where a witness testifies that an e-mail or text message originated from the known e-mail address or screen name of another person, courts will generally find that the e-mail or text message is an authentic communication from the purported sender. In *People v. Pierre*, the court held that an instant message was properly authenticated as a communication from the defendant after "[t]he accomplice witness . . . testified to defendant's [instant messenger] screen name. *People v. Pierre*, 838 N.Y.S.2d 546, 548–49 (2007). Additionally, "[Another witness] testified that she sent an instant message to that same screen name, and received a reply, the content of which made no sense unless it was sent by defendant [and] there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name." *People v. Pierre*, 838 N.Y.S.2d 546, 549 (2007).

As another example, in *Dickens v. State*, a Maryland court upheld a decision to admit text messages proffered for the purpose of showing that the sender threatened his estranged wife over a period of time before he murdered her. *Dickens v. State*, 927 A.2d 32, (2007). Applying Rule 901(b)(4) of Maryland's Rules of Evidence, the court held that the messages sent to the victim's cell phone, one without a return phone number and two sent by a person identified only as "Doll/M," were sufficiently authenticated as having been sent by the defendant. *Id.* at 37–38. In reaching that conclusion, the court relied on circumstantial evidence that two of the messages were sent during a period of time consistent with the time line of criminal events, and that the substantive content of all three messages pointed to the defendant's authorship. *Id.* at 36–37. Specifically, the court pointed to references in the individual text messages to the defendant, his wife, their son, and their wedding vows, which indicated that they were sent by the defendant. *Id.*; *see also State v. Thompson*, 777 N.W.2d 617, 623 (N.D. 2010) (holding that evidence that recipient of threatening text messages was familiar with the defendant's phone number and distinctive electronic signature was sufficient to authenticate messages as having been sent by the defendant).

Similarly, in *Ohio v. Bell*, the trial court denied 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, 511–12 (2008), *aff'd*, No. CA2008-05-044, 2009 Ohio App. LEXIS 2112 (Ohio Ct. App. May 18, 2009). In reaching its conclusion, the court pointed to the dearth of authority on the "important issue" of authenticating printouts of electronic communications. *Id.* at 512. Moreover, the court was not persuaded by the defense complaints "that MySpace chats can be readily edited after the fact from a user's homepage" and that, "while his name may appear on e-mails to T.W., the possibility that someone else used his account to send the messages cannot be foreclosed." *See id.* at 511–12. After reviewing the evidentiary proffers, the court concluded that the MySpace chat logs could be authenticated "through [the alleged victim's] testimony that (1) he has knowledge of defendant's . . . MySpace user name; (2) the printouts appear to be accurate records of his electronic conversations with defendant, and (3) the communications contain code words known only to defendant and his alleged victims." *Id.* at 512.

Notably, the court's analysis in *Bell* is consistent with other decisions affirming the admission of transcripts of chat room conversations on the basis of similar authenticating testimony by the other party to the online conversation. *See e.g.*, *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (holding that internet chat logs of correspondence between defendant and police contractor posing as minor were adequately authenticated through contractor's testimony); *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007) (concluding that chat room logs were authenticated as having been sent by defendant through testimony of persons who participated in the online conversations); *United States v. Tank*, 200 F.3d 627, 630–31 (9th Cir. 2000) (concluding that content of conversation was sufficient to link defendant to user name on chat room log printouts); *State v. Glass*, 190 P.3d 896, 901 (2008) (finding that chat room statements were adequately linked to the defendant by evidence that he arrived for a meeting as arranged in that private correspondence); *In re F.P.*, 878 A.2d 91, 95–96 (2005) (holding that evidence regarding content and timing of threatening instant messages was sufficient to authenticate them, and rejecting the argument that anonymity of electronic messages makes them inherently unreliable).

3. Authenticating Printouts of Social Media Websites

Rule 901(b)(1) and (4) can similarly be used to authenticate printouts of social media websites. However, the authentication of websites raises three separate issues: (1) What was actually on the website? (2) Does the exhibit or testimony accurately reflect it? (3) If so, is it attributable to the owner of the site? *See* Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1, 2 (2009). A proponent may adequately address these issues under Rule 901(b)(1) by providing testimony from "a witness with personal knowledge of the website at issue stating that the printout accurately reflects the content of the website and the image of the page on the computer at which the printout was made." *Toytrackerz LLC v. Koehler*, No. 08-2297-GLR, 2009 WL 2591329, at *6 (D. Kan. Aug. 21, 2009); *See also Nightlight Sys., Inc. v. Nitelites Franchise Sys., Inc.*, No. 1:04-CV-2112-CAP, 2007 WL 4563875, at *5–6 (N.D. Ga. May 11, 2007); *In re Homestore.com, Inc. Sec. Litig.*, 347 F.Supp.2d 769, 782 (C.D. Cal. 2004) ("Printouts from a web site do not bear the indicia of reliability demanded for other self-authenticating documents under FED. R. EVID. 902. To be authenticated, some statement or affidavit from someone with knowledge is required[.]").

For example, in *kSolo, Inc. v. Catona*, the court admitted screenshots from a website that were accompanied by a declaration from the individual who created the screenshots attesting that the "screenshots are an accurate representation of what he encountered upon visiting the website." *kSolo, Inc. v. Catona*, Nos. 07-5213, 08-1801, 2008 WL 4906115, n.5 (C.D. Cal. Nov. 10, 2008). In contrast, in *Toytrackerz LLC v. Koehler*, the plaintiffs offered a printout of the defendant's website to show unauthorized use of the plaintiffs' trademarks. *Toytrackerz*, 2009 WL 2591329, at *6. The court held that the plaintiffs failed to properly authenticate the printout, noting: "While Plaintiffs' Application does refer to and identify the exhibit as the website maintained by Defendant . . . it fails to identify who retrieved the website printout, when and how the pages were printed, or on what basis the printouts accurately reflect the contents of the website on a certain date." *Id.*

Griffin v. Maryland provides a helpful example of how to authenticate social media evidence through circumstantial evidence. *Griffin v. Maryland*, 995 A.2d 791 (2010). There, a defendant was charged with murdering someone in a bar bathroom. *Id.* at 794. At the defendant's first trial, a bar patron testified that the defendant was not in the bathroom when he heard gunshots. *Id.* However, at the second trial, the witness changed his testimony, and testified that just before he heard the gunshots fired, he saw the defendant walk into the bathroom with a gun. *Id.* at 794–95. When asked why he changed his testimony, the witness testified that just before the first trial, the defendant's girlfriend threatened him. *Id.* at 795.

To support this theory, the prosecution offered a printout from the defendant's girlfriend's MySpace profile, which stated "I HAVE 2 BEAUTIFUL KIDS . . . . FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!" *Id.* at 796. The defendant objected to the admission of the MySpace evidence, claiming that the prosecution had failed to properly authenticate it. *Id.* In response, the government argued that it met its authentication burden because the MySpace profile included a picture of the girlfriend with the defendant, included her accurate date of birth, correctly noted she had two children, and used the term "Boozy," which was the defendant's nickname. *Id.* at 796–97. The trial court admitted the MySpace evidence with the following limiting instruction:

> [The MySpace profile is] being offered for the proposition that this corroborates what [the witness] said about being threatened by the defendant's girlfriend. Now you can decide whether it corroborates that or not. You can decide what that means in the context of [the witness's] testimony. That's completely up to you. I'm not implying anything in that regard. But that's the limited purpose for which this evidence is being

> offered. It should be considered for nothing but that purpose. Now you may decide that it corroborates [the witness]. You may decide it does not corroborate [the witness]. If you find that it corroborates [the witness], then you still have to evaluate the rest of [the witness's] testimony. That's completely up to you.

Id. at 797–98. The defendant was convicted of murder, and argued on appeal that the trial court erred in admitting the MySpace evidence.
Id. at 799.

On appeal, the court began by noting that "the burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Id.* at 800 (citations and internal quotations omitted). The court then proceeded to discuss the growing popularity and uses of social media sites: "[Social media] sites, which include Facebook, LinkedIn, Plaxo, and Twitter, are increasingly popular vehicles for the dissemination of personal information posted on individualized profiles." *Id.* Furthermore, "such online networking communities have led to an expanding universe of shared information, and have been aptly characterized as 'soda fountains for the twenty-first century.'" *Id.* at 801 (citing John S. Wilson, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1219–24 (2007)). "The design and purpose of social media sites make them especially fertile ground for 'statements involving observations of events surrounding us, statements regarding how we feel, our plans and motives, and our feelings (emotional and physical).'" *Id.* (quoting *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 569 (D.Md. 2007)).

After explaining the growing popularity of social media sites, the *Griffin* Court then explained how circumstantial evidence can be used to authenticate messages sent through social media sites: "[T]he characteristics of the offered item itself, considered in light of circumstances, afford authentication techniques in great variety, including authenticating an exhibit by showing that it came from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him." *Id.* at 803 (citations omitted). The court accordingly saw "no reason why social media profiles may not be circumstantially authenticated in the same manner as other forms of electronic communication—by their content and context." *Id.* at 806. The court then noted that the "inherent nature of social networking Web sites encourages members who choose to use pseudonyms to identify themselves by posting profile pictures or descriptions of their physical appearances, personal background information, and lifestyles." *Id.* Therefore, "[t]his type of individualization may lend itself to authentication of a particular profile page as having been created by the person depicted in it." *Id.*

The court then analyzed the information provided in the MySpace profile of the defendant's girlfriend. *Id.* For example, the profile had a picture of her with the defendant, contained her accurate birth date, and identified her boyfriend as "Boozy," which was the defendant's nickname. *Id.* Therefore, the court "ha[d] no trouble concluding that the evidence was sufficient to authenticate the MySpace profile printout." *Id.* at 807.

4. Authenticating Photos from Social Media Websites

"An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 561 (D.Md. 2007). "There is no requirement that the witness took the photo, saw it taken or was present when it was taken. Any witness who observed the object or scene depicted in the photograph may lay the predicate." *Kelly v. State*, 22 S.W.3d 642, 644 (Tex.App.—Waco 2000, pet. ref'd). For example, in *Almond v. State*, the court admitted digital photographs, stating: "the pictures were introduced only after the prosecution properly authenticated them as fair and truthful representations of what they purported to depict. . . . We are aware of no authority . . . for the proposition that the procedure for admitting pictures should be any different when they were taken by a digital camera." *Almond v. State*, 553 S.E.2d 803, 805 (2001).

Similarly, in *Tienda v. State*, the Dallas Court of Appeals applied a relatively lenient standard for admitting photographs found on a defendant's MySpace profile. *Tienda v. State*, No. 05-09-00553-CR, 2010 Tex. App. LEXIS 10031 (Tex.App.—Dallas Dec. 17, 2010, pet. granted). In that case, a defendant was charged with murder in a gang-related drive-by shooting. *Id.* at *1. The prosecution introduced several photographs that were allegedly found on the defendant's MySpace profile, with the caption, "If you ain't blasting, you ain't lasting," and the notation, "Rest in peace, David Valadez," which was the name of the deceased victim. *Id.* at *8. Another photograph offered by the prosecution was of the defendant displaying his electronic monitor (which he was required to wear as a condition of bond), stating "str8 outta jail and n da club." *Id.* at *8–9. The prosecution laid the foundation for these pictures through the testimony of the victim's sister, who testified that she found them on MySpace. *Id.* at *7. The trial court admitted the evidence over the defendant's objection

that the prosecution had failed to authenticate the profile. *Id*. at *7–8.

On appeal, the Dallas Court of Appeals looked at all of the characteristics of the MySpace profile and concluded that there was enough circumstantial evidence to tie the profile to the defendant. *Id.* at *11–13. For example, the MySpace evidence was registered to a person with the defendant's nickname and legal name, the photographs on the profiles were clearly of the defendant, and the profile referenced the victim's murder and the defendant being arrested and placed on electronic monitoring. Id. at *12. The court noted, "[t]his type of individualization 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." *Id.* at *13 (citations omitted). Based on all the identifying characteristics, the Dallas Court of Appeals concluded that the trial court did not abuse its discretion in admitting the MySpace evidence. *Id.*

In contrast, the New York Supreme Court recently applied a more demanding standard for authenticating digital photographs. In *People v. Lenihan*, the court held that pictures found on MySpace were inadmissible because the proponent failed to authenticate them. *People v. Lenihan*, 911 N.Y.S.2d 588, 593 (2010). In that case, Lenihan was convicted of murder for shooting Patrick Hernandez. *Id.* at 590. Before trial, Lenihan's attorney requested an *in limine* ruling as to whether he could cross-examine two of the government's witnesses about their alleged gang membership by using pictures that Lenihan's mother had downloaded from MySpace four days after the shooting. *Id.* at 591. Lenihan alleged that the photographs showed the witnesses making hand signs and wearing clothing that signified an affiliation with the Crips gang, and that the witnesses' gang affiliation was a possible motive for them to fabricate their story and frame Lenihan. *Id.*

The court denied Lenihan's request, setting forth several grounds for barring the MySpace pictures including questions regarding authenticity. *Id.* at 592. The Court held, "[i]n light of the ability to 'photo shop,' edit photographs on the computer, defendant could not authenticate the photographs." *Id.* The court also noted that Lenihan did not know who took the photographs or who posted them to MySpace. *Id.* at 591. Thus, litigants who intend to use pictures from social media websites should be mindful that case law regarding the authentication of social media images is not settled and continues to evolve.

C. Hurdle #3: Overcoming Exclusionary Rules of Evidence

1. Whether Social Media Evidence Is Improper Character Evidence

Under Rule 404(a) of both the Texas and Federal Rules of Evidence, evidence of a person's character or character trait "is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." TEX. R. EVID. 404(a); FED. R. EVID. 404(a). Simply stated, this provision prohibits a person from admitting evidence that a party is a bad person to show that party probably acted like a bad person on a particular occasion. Rule 404(b) also prohibits a party from introducing evidence of a person's other crimes, wrongs, or acts to prove the person has a propensity to commit these types of acts, and that therefore, it is more likely he committed the particular bad act at issue. TEX. R. EVID. 404(b); FED. R. EVID. 404(b). Of course, this propensity rule is not without exception: Rule 404(b) goes on to identify certain instances when a person's prior bad acts are admissible, including to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

Courts have recently been forced to apply Rule 404 in the context of social media evidence. For example, in *United States v. Phaknikone*, the government charged a defendant with robbing seven banks at gunpoint with the assistance of several accomplices. *United States v. Phaknikone*, 605 F.3d 1099, 1103 (11th Cir. 2010). At trial, the prosecution argued that all the bank robberies shared signature traits, a modus operandi, that linked them to the same robber. *Id.* According to the prosecution, "one of the signature traits of the common culprit in all seven robberies was to rob the banks like a gangster," which included holding a handgun "gangster-style." *Id.*

In an effort to prove its "gangster-style" robbery theory, the government moved to admit evidence obtained from the defendant's MySpace account, including the a profile page and photographs of the defendant. *Id.* The profile page showed that the defendant registered his MySpace account under the name "Trigga FullyLoaded" and was linked to the e-mail address "gansta_trigga@yahoo.com." *Id.* at 1103–04. The photographs contained an image of the defendant in a vehicle holding a handgun with a young child in the backseat. *Id.* at 1104. The government argued that the photographs were admissible to prove the defendant was "an individual who has access to having a gun, as shown and as evidenced by the brazen nature with which he publishes it to every single person on the internet through a MySpace account[.]" *Id.* The government also argued that the picture bolstered its theory that "the guy who robbed the bank . . . was the same one who robbed the six other banks previous to that; and that individual is somebody who,

like the defendant, would put a picture of himself on his MySpace account." *Id.* The defendant argued that the MySpace profile and pictures were not admissible because they were improper character evidence, and "unduly prejudicial in light of the child in the car." *Id.* at 1105. The trial court overruled the defendant's objections, and admitted a redacted version of the subscriber report, which included the profile pictures. *Id.* at 1106.

On appeal, the Eleventh Circuit addressed whether the district court abused its discretion by admitting the MySpace evidence to prove the defendant committed a string of bank robberies "like a gangster." *Id.* at 1101. In addressing this question, the court set out a three-part test, analyzing: (1) whether the evidence is relevant to an issue other than the defendant's character; (2) whether there is sufficient proof so that a jury could find that the defendant committed the extrinsic act; and (3) whether the probative value of the evidence is substantially outweighed by its undue prejudice. *Id.* at 1107–08. The court applies this test "whenever the extrinsic activity reflects adversely on the character of the defendant, regardless of whether that activity might give rise to criminal liability." *Id.* (citations omitted).

Concerning the first part of the test, the government argued that the MySpace evidence was relevant to identity, which is an exception to the propensity rule under Rule 404(b). *Id.* at 1108. Specifically, the government argued that the MySpace evidence was necessary to prove that "someone who shows off a gun in his car would commit the seven bank robberies[.]" *Id.* The court noted that when other bad acts are offered to prove identity, the other act "must be a 'signature' crime, and the defendant must have used a modus operandi that is uniquely his." *Id.* (citations omitted). In other words, "[e]vidence cannot be used to prove identity simply because the defendant has at other times committed the same commonplace variety of criminal act." *Id.* (citations omitted). Based on these principles, the court rejected the government's argument, concluding that "[a]lthough the photograph may portray a 'gangster-type personality,' the photograph does not evidence the modus operandi of a bank robber who commits his crimes with a signature trait." *Id.* at 1108–09. The court characterized the MySpace evidence as "classic evidence of bad character," which the government used to persuade the jury that, "because [the defendant] is willing to publish these kinds of photographs online, under an incendiary alias, he is a gangster who is likely to rob banks." *Id.* at 1109. Therefore, the court concluded that the trial court abused its discretion by admitting the MySpace evidence. *Id.*

It may be an effective strategy for counsel to display to the jury unflattering photographs or statements from an adverse party's social media profile. These images have a strong likelihood of damaging the party's image and creditability. To survive a Rule 404 challenge when applying this strategy, it is important that counsel find an applicable exception in Rule 404(b), such as motive, intent, or identity. Even then, a Rule 403 "unduly prejudicial" objection may keep the photos or statements out of evidence.

2. Whether Social Media Evidence is Inadmissible Hearsay

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(c); FED. R. EVID. 801(c). The hearsay rule "arises out of the factfinder's need to assess the credibility of the person who made a statement offered for its truth." JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.11[1] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 199). Most of the information attorneys will seek to admit from social media websites (other than photographs) will qualify as "out-of-court" statements potentially subject to the hearsay rule. However, because these statements are typically admissions by a party opponent, are not offered for their truth, or fall within a hearsay exception, they are typically not excluded under the hearsay rule.

A. Social Media Statements As Admissions By A Party Opponent

Both the Federal and Texas Rules of Evidence provide that a statement is not hearsay if it is offered against and a party and is the party's own statement, in either an individual or representative capacity. TEX. R. EVID. 801(e)(2); FED. R. EVID. 801(d)(2). To qualify as an admission, the party's out-of-court statement must be offered against that party; a party cannot offer its own out-of-court statements as admissions. WEINSTEIN at 801.30[1]. "Given the near universal use of electronic means of communication, it is not surprising that statements contained in electronically made or stored evidence often have been found to qualify as admissions by a party opponent if offered against that party." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 564–65 (D.MD. 2007)(citations omitted); *see also United States v. Siddiqui*, 235 F.3d 1318, 1323 (11th Cir. 2000) (ruling that e-mail authored by defendant was not hearsay because it was an admission by a party opponent); *United States v. Safavian*, 435 F.Supp.2d 36, 43 (D.D.C. 2006) (holding that e-mail sent by defendant was admissible as non-hearsay because it constituted an admission by a party opponent).

B. Social Media Statements Offered For A Non-Hearsay Purpose

Even if a statement from a social media website is not an admission by a party opponent, it may very well be admissible because it is not offered for the truth of the matter asserted. Social media evidence is often admitted to prove something other than the truth of the statements contained therein. Examples of when statements may be relevant for some purpose other than to prove the truth of the matter asserted include: "those offered to prove the communicative or comprehensive capacity of the declarant; those offered as circumstantial evidence of the state of mind of the declarant; those offered to show the conduct of someone who heard them (to prove that they had knowledge of the information, or to explain what they did after having heard it); statements that constitute 'verbal acts' or parts of acts; and statements that have relevance even if not true." *See generally Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 565–67 (D.MD. 2007); *See also United States v. Hanson*, 994 F.2d 403, 406 (7th Cir. 1993) ("An out of court statement that is offered to show its effect on the hearer's state of mind is not hearsay.").

Similarly, courts will admit statements from social media websites for impeachment purposes as prior inconsistent statements. *See e.g., In re K.W.*, 666 S.E.2d 490, 494 (2008) (holding that a victim's statements on her MySpace profile were admissible as prior inconsistent statements to impeach her testimony and should have been admitted by the trial court).

C. Social Media Evidence Falling Within Hearsay Exceptions

Of the over two dozen hearsay exceptions, several have particular significance to social media evidence. For example, the "present sense impression," "then existing mental, emotional, or physical condition," and "excited utterance" exceptions may be useful when attempting to admit Facebook status updates and Tweets. Under these exceptions, the following statements are not excluded by the hearsay rule:

(1) "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." TEX. R. EVID. 803(1); FED. R. EVID. 803(1);

(2) "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." TEX. R. EVID. 803(2); FED. R. EVID. 803(2); and

(3) "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed . . . ." TEX. R. EVID. 803(3); FED. R. EVID. 803(3).

As the *Lorraine* court noted: "[t]he prevalence of electronic communication devices, and the fact that many are portable and small, means that people always seem to have their laptops, PDA's, and cell phones with them, and available for use to send e-mails or text messages describing events as they are happening." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 569 (D.MD. 2007). Therefore, many of the statements made via Facebook and Twitter will be authored and posted either as the events are occurring or immediately thereafter. This temporal proximity will make these hearsay exceptions available to litigants. *See generally 1.70 Acres v. State*, 935 S.W.2d 480, 488 (Tex.App—Beaumont 1996, no writ) ("Present sense impressions are those comments made at the time the declarant is receiving the impression or immediately thereafter."); *Volkswagen v. Ramirez*, 159 S.W.3d 897, 908 (Tex. 2004) ("To be admissible as an excited utterance, a statement must be (1) a spontaneous reaction (2) to a personal observance of (3) a startling event (4) made while the declarant was still under the stress of excitement caused by the event." (citations omitted)); *Power v. Kelly*, 70 S.W.3d 137, 141 (Tex.App.—San Antonio 2001, pet. denied) ("Statements admitted under [Rule 803(3)] are usually spontaneous remarks about pain or some other sensation, made by the declarant while the sensation, not readily observable by a third party, is being experienced."(citations omitted)).

III. CONCLUSION

Approximately one in every thirteen people on Earth are Facebook users. Fifty percent of users access their profiles everyday. More than 110 million tweets are sent everyday, and more than 30 billion pieces of content are uploaded to Facebook every month. With these staggering statistics, it is inevitable that users are making statements and capturing events that are relevant to issues in your lawsuits.

Although certain issues, such as authentication, are more complicated in the context of social media evidence, traditional evidentiary principles can be adapted to address issues regarding the admissibility of social media evidence. By following the paths cleared by the courts discussed in this paper, and by analogizing social media evidence to traditional evidence, attorneys can persuade courts to admit information discovered on social media websites into evidence.