Evidentiary Implications of Social Media

An Examination of the Admissibility of Facebook, MySpace and Twitter Postings in Louisiana Courts

By Grant J. Guillot

The social networking revolution has forever altered the ease by which an attorney can obtain vital evidence that may be dispositive of the entire case before him. By March 2010, 450 million people had Facebook profiles and 27 million tweets were posted every 24 hours.[1] Given the ease of access social networking websites provide to an individual's personal information, photographs and videos, attorneys are using these websites to informally and inexpensively obtain evidence concerning jurors, potential witnesses and adverse parties.[2] Because social networking websites are broadly considered to be discoverable, most evidentiary disputes concerning social media content take place at the admissibility stage.[3] As demonstrated below, all five of the state appellate circuit courts have been required to determine the admissibility of social networking website content, an issue the courts will increasingly be forced to consider as the population of social media users continues to escalate.

1st Circuit

In *Boudwin v. General Ins. Co. of America*,[4] the Louisiana 1st Circuit Court of Appeal affirmed the jury award of damages issued to the plaintiffs, who were allegedly injured in an automobile accident but who posted incriminating photographs on their respective Facebook profiles. The plaintiffs appealed the jury award, contending the jury erred in failing to award them damages for past and future mental pain and suffering, physical disability or loss of enjoyment of life, and future medical expenses. At trial, one plaintiff was questioned regarding entries she made on her Facebook account, which revealed that she jogged regularly to stay in shape and engaged in the strenuous P90X exercise program. Another plaintiff was asked about his Facebook postings, which revealed that he frequently worked out, engaged in several sporting activities (sometimes multiple times in a single day), and participated in a softball tournament the month before trial. The 1st Circuit upheld the jury award, noting that "[t]he record clearly shows that neither [plaintiffs] have experienced any significant limitations or impairments as a result of the injuries they sustained in the . . . accident."[5]

On the other hand, in the companion cases of *State v. Robertson*[6] and *State v. Payton*,[7] the 1st Circuit affirmed the trial court's ruling declaring inadmissible a rape victim's blog, which was accessible through the victim's Facebook page. The defendants sought to admit the blog, which was entitled "I Was a Liar," as impeachment evidence to show the victim was a compulsive liar. In particular, the defendants suggested that the victim in her blog described her history as a child of lying compulsively and creating fictitious stories. The trial court found that while La. C.E. art. 608 allows a party to challenge the credibility of a witness as to her general reputation in the community, the victim's blog, in addition to being a fictional account, was a particular course of conduct. Thus, the 1st Circuit determined that the trial court did not abuse its discretion in ruling the blog inadmissible.

Nevertheless, in *State in Interest of B.S.*,[8] the 1st Circuit affirmed the lower court's admittance into evidence of a copy of the victim's Facebook postings, which "displayed a history of sexually explicit language and innuendoes."[9] The victim, a minor, alleged she was sexually assaulted by her stepmother's 16-year-old nephew, who was ultimately adjudicated a delinquent by the Juvenile Court for the 32nd Judicial District and committed to State custody for three years. In his appeal, the defendant contended the juvenile court judge erred in not giving due consideration to the victim's Facebook postings, which allegedly demonstrated the victim's propensity to lie. Indeed, during her cross-examination, the victim admitted that she lied about her age while using a Facebook account in order to obtain more friends. Regardless, the juvenile court judge stated that the evidence presented by the defendant did not persuade him to question the victim's credibility, and the 1st Circuit affirmed the juvenile court's ruling.

2nd Circuit

In *Janway v. Jones*,[10] the Louisiana 2nd Circuit Court of Appeal affirmed the 4th Judicial District Court's judgment denying a child's grandparents visitation rights because the evidence, which included an email sent via Facebook by the child's grandmother to the child's teacher in which the grandmother made derogatory statements about the child's father, demonstrated that visitation with the grandparents would not be in the child's best interests.

Likewise, in *Shipp v. Callahan*,[11] the 2nd Circuit affirmed the 1st Judicial District Court's granting of the plaintiff's petition for protection from abuse under the Domestic Abuse Assistance Law due in part to the defendant's salacious Facebook postings. At the hearing, the plaintiff offered into evidence a printout of the defendant's Facebook wall, which contained vulgar comments about the plaintiff written by the defendant, his grandmother and his cousin. The trial court found that the defendant

violated the Domestic Abuse Assistance Law as evidenced, among other things, by the defendant's offensive comments posted on his Facebook page.

Furthermore, in *Bowden v. Brown*,[12] the 2nd Circuit affirmed the ruling of the 26th Judicial District Court that modified the custody arrangement between the children's father and maternal grandmother. The father and mother of the children, along with the maternal grandmother, had originally filed a pleading requesting that custody be awarded to the grandmother subject to liberal visitation rights by the mother and father. One month later, the father filed a rule for contempt against the grandmother contending that she had refused to allow him to visit with the children and, thus, violated the visitation schedule. Two months after that, he filed a motion to modify custody in which he alleged significant changes in circumstances since the rendering of the original custody judgment. At the custody hearing, the father introduced into evidence incriminating postings taken from the grandmother's Facebook account, which demonstrated that nearly every person involved with the grandmother and the children was in an adulterous relationship. When the 2nd Circuit considered the Facebook postings along with the other evidence showing the grandmother had not provided a stable environment for the children, it determined the trial court committed no error and, thus, it affirmed the trial court's ruling.

3rd Circuit

The Louisiana 3rd Circuit Court of Appeal in *State v. Wood*[13] affirmed the decision of the 7th Judicial District Court, which determined there was no conspiracy between the defendant and his alleged co-conspirator based on a review of, among other things, the men's MySpace and Facebook accounts.

In addition, in *Preuett v. Preuett*,[14] the 3rd Circuit reversed the 35th Judicial District Court's judgment awarding a mother, the plaintiff, primary domiciliary custody of four of her six children, noting that Facebook messages sent by the children to their father, the defendant, demonstrated that the children were frightened due to the fighting

between the plaintiff and her new husband, the children's stepfather. The father had filed a rule for child support and to clarify a stipulated judgment for joint custody, urging that the original custody judgment caused a hardship between the parties because the mother moved to Oregon to reside with her new husband. The 3rd Circuit determined that the trial court erred in awarding the mother primary domiciliary custody because the father's reasons for inhibiting the mother's visitation rights, including his receipt of the Facebook messages from his children, were justified.

However, in *Mouton v. Old Republic Ins. Co.*,[15] the 3rd Circuit affirmed the ruling of the 15th Judicial District Court denying the defendants' request to admit into evidence the plaintiff's Facebook page. The defendants sought to introduce the Facebook page as impeachment evidence against the plaintiff, who alleged that he sustained injuries as a result of a vehicular accident caused by the defendants. The 3rd Circuit explained that the trial court has the discretion to determine whether to admit impeachment evidence and, thus, the 3rd Circuit found no reason to disturb that determination.

4th Circuit

In *Harris v. Department of Police*,[16] the Louisiana 4th Circuit Court of Appeal considered a case that centered on the use of social media. The defendant police department sent the plaintiff, a police officer, a disciplinary letter in which it alleged the plaintiff violated workplace rules pertaining to professionalism and social networking websites. The police department's accusations arose from the plaintiff's comments written on a fellow officer's Facebook page, upon which the plaintiff made sexual and derogatory comments about lesbians. Allegedly unbeknownst to the plaintiff, the fellow officer's original Facebook posting was referring to another fellow officer, an openly gay female. The female officer notified her supervisors of the Facebook comments and informed them that she was uncomfortable returning to work until the police department addressed the plaintiff's actions. The police department suspended the plaintiff without pay for four days. The plaintiff appealed to the Orleans Parish Civil Service Commission, which, after a disciplinary hearing, issued a decision denying the plaintiff's appeal. However, the 4th Circuit vacated the Commission's decision, finding that the police department violated the plaintiff's due process rights and its own internal rules by providing the plaintiff with notice of the disciplinary hearing on the day of the hearing. Nevertheless, the 4th Circuit noted that its decision did not preclude the police department and the Commission from reconsidering the matter after the plaintiff has been provided with meaningful notice and the opportunity to respond.

On Nov. 20, 2013, the 4th Circuit ren-

dered a decision in a criminal case, *State v. Dominick*,[17] wherein the Orleans Parish Criminal District Court allowed the defendant to proffer certain documents, including messages between the defendant and the victims taken from social media websites. The defendant sought to introduce the social media content into evidence in support of his motion to withdraw his guilty plea to multiple offenses, including forcible rape, second-degree kidnapping, stalking and extortion. The 4th Circuit affirmed the part of the trial court's holding that denied the defendant's motion to withdraw his guilty plea, noting that the defendant has no right to appeal on the merits of the case due to his entry of a guilty plea.

5th Circuit

In *State v. Wiley*,[18] the Louisiana 5th Circuit Court of Appeal affirmed the jury's verdict after hearing testimony regarding the co-defendants' MySpace pages, which proved that the co-defendants were all friends with each other. The jury found the defendant guilty as a principal to second-degree murder after the State presented evidence, including the MySpace pages, that demonstrated the co-defendants had a history of communicating with one another.

Furthermore, in *Hernandez v. Hernandez*,[19] the 5th Circuit affirmed the 40th Judicial District Court's order granting the plaintiff ex-husband's motion to decrease and modify child support, finding that the evidence presented by the plaintiff of the defendant ex-wife's income and employment, including pictures taken from her Facebook page depicting the activities of her personally-owned cake business, demonstrated a change in circumstances warranting a modification of the plaintiff's child support obligation.

Moreover, in *State v. Richoux*,[20] the 5th Circuit upheld the 24th Judicial District Court's ruling denying the defendant's motion for new trial based on newly discovered evidence — a witness's Facebook page — which the defendant alleged proved that the witness is an activist against sex offenders. The defendant, who was accused of aggravated rape, sexual battery of a victim under 13 years of age, and indecent behavior with a juvenile under 13 years of

age, argued that the content taken from the witness's Facebook page would have been critical in impeaching her testimony. The trial judge noted that the Facebook page was not newly discovered evidence because it pre-existed the trial and "was out there for everybody to see."[21] The judge also stated that the Facebook profile did not prove she was an activist against sex offenders before trial because her interest in sex offender cases may have been ignited by her participation in the case.

Conclusion

The use of social networking websites among the general population continues to increase, thus providing an attorney with a potential jackpot of personal information about jurors, witnesses and adverse parties. While social media content is widely considered discoverable by the courts, the admissibility of such content appears to turn on the same criteria courts consider when determining the admissibility of traditional forms of evidence. The cases above demonstrate that whether a court will find social media content to be relevant, competent, authentic and credible — and, therefore, admissible — is largely dependent upon the specific facts of each case. As more and more people place their lives on display for the world to see through their use of social media, the courts will increasingly be required to determine the admissibility of content extracted from social networking websites.

FOOTNOTES

1. Randy L. Dryer, "Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, Youtube & Wikis," Utah B.J., May/June 2010, at 16, 20 (citation omitted).
2. Michelle D. Craig, "Did You Twitter My Facebook Wall? Social Networking, Privacy and Employment Law Issues," 58 La. B.J. 26, 28 (2010).
3. Kathryn R. Brown, "The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs," 14 Vand. J. Ent. & Tech. L. 357, 378 (2012) (citation omitted).
4. 2011-0270, 2011 WL 4433578 (La. App. 1 Cir. 9/14/11).
5. *Id.* at *3.
6. 2012-0743, 2012 WL 6681830 (La. App. 1 Cir. 12/21/12).
7. 2012-0716, 2012 WL 6760055 (La. App. 1 Cir. 12/31/12).
8. 2012-0105, 2012 WL 3340701 (La. App. 1 Cir. 8/15/12).
9. *Id.* at *1.
10. 47,203 (La. App. 2 Cir. 3/30/12), 88 So.3d 713.
11. 47,928 (La. App. 2 Cir. 4/10/13), 113 So.3d 454.
12. 48,268 (La. App. 2 Cir. 5/15/13), 114 So.3d 1194.
13. 08-1511 (La. App. 3 Cir. 6/3/09), 11 So.3d 701.
14. 09-1489 (La. App. 3 Cir. 5/5/10), 38 So.3d 551.
15. 11-458 (La. App. 3 Cir. 10/5/11), 74 So.3d 1245.
16. 2012-0701, 2012 WL 4054872 (La. App. 4 Cir. 9/14/12).
17. 2013-0121, 2013 WL 6115141 (La. App. 4 Cir. 11/20/13).
18. 10-811 (La. App. 5 Cir. 4/26/11), 68 So.3d 583.
19. 11-526 (La. App. 5 Cir. 12/28/11), 83 So.3d 168.
20. 11-1112 (La. App. 5 Cir. 9/11/12), 101 So.3d 483.
21. *Id.* at 488.

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