

Social Media - Evidentiary Considerations

James C. Adkins, Jr. – American Inn of Court
Group 5 Presentation
February 16, 2012

Social Media

- Replacing the telephone for communicating ideas.
- In many cases, replaces the once “private” diary.
- Websites for Dummies, or the non-computer literate.
- LinkedIn, Twitter, Myspace, Facebook.

LinkedIn

- LinkedIn is a business-related social networking site,
- Launched in May 2003,
- Mainly used for professional networking,
- More than 135 million registered users,
- In June 2011, LinkedIn had 33.9 million unique visitors, up 63 percent from a year earlier, surpassing Myspace.

[Join Today](#) - [Sign In](#)

John Smith

Founder / President - Colleagues of Executive Officers
Orlando, Florida Area | Professional Training & Coaching

Join LinkedIn and access John Smith's full profile.

As a LinkedIn member, you'll join 150 million other professionals who are sharing connections, ideas, and opportunities. And it's free! You'll also be able to:

- See who you and **John Smith** know in common
- Get introduced to **John Smith**
- Contact **John Smith** directly

[View Full Profile](#)

John Smith's Overview

Current	Founder / President at Colleagues of Executive Officers Founder / Trustee at International Leadership
Past	Founding Trustee at Florida Fellowship Foundation Area Director at Young Life
Education	College of Executive Officers
Recommendations	13 people have recommended John
Connections	500+ connections
Websites	Company Website Personal Website

John Smith's Summary

As Senior Executive Coach / Protégé Coach with 35+ years experience, John Smith provides wisdom, encouragement, mentoring, executive training, and resourcing through coaching, collaborating, and connecting like-minded faith-based senior executives with one another.

Do you need a Senior Executive Coach? Are you satisfied with your personal, professional, and spiritual progress? Senior Executive Coaching can be a compelling solution. Likewise, our Protégé Coaching is designed for those in their mid-twenties or thirties. They are faith oriented professionals with confirmed leadership potential in the developmental stages of their careers.

Also, with our Social Media Affiliate, we are now succeeding in bringing the world together by forever changing the way people communicate. We encourage you to take time to learn how others like yourself are seizing the moment and how you can too! Why not leverage the most

Name Search:

Search for people you know from over 150 million professionals already on LinkedIn.



Example: **John Smith**

Viewers of this profile also viewed...

[Chelsea Eubank](#)

Inspired Entrepreneur - ...

[Mikka Mabius](#)

Director of Marketing, Truth@Work

[John E. Smith Esq. Smith Search.](#)

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Founder, Follow Your Calling & Author...

[Kenneth Manesse Sr.](#)

Micro-Entrepreneur Specialist -...

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[Visionet Systems Inc.](#)
Greater New York City Area

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Mexico City Area, Mexico

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Twitter

- **Twitter** is an online social networking and microblogging service that enables its users to send and read text-based posts of up to 140 characters, known as "tweets,"
- Launched in July 2006,
- Over 300 million users as of 2011, generating over 300 million tweets per day.

Tim Tebow (timtebow) on Twitter - Windows Internet Explorer


http://twitter.com/TimTebow

File Edit View Favorites Tools Help

★ Favorites Tim Tebow (timtebow) on Twitter

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Have an account? Sign in




Tim Tebow


@TimTebow Denver, CO


The Official Twitter of NFL Quarterback Tim Tebow
<http://www.timtebow.com>


+ Follow Text follow TimTebow to 40404 in the United States


Tweets Favorites Following Followers Lists

 **bookitprogram** The BOOK IT! Program 13 by TimTebow
Join @TimTebow reading Green Eggs & Ham during the @bookitprogram & @pizzahut America's Biggest Storytime TOMORROW at: bookitprogram.com/biggeststoryti...
12 hours ago

 **Tim Tebow** Tim Tebow
Just watched @ActOfValorFilm... Truly inspiring. So thankful for everything the Seals & all of our men & women in uniform do for us.
14 Feb

 **Tim Tebow** Tim Tebow
Nothing beats some good ol' breakfast food! @BluJamCafe in LA is awesome!
12 Feb

 **Tim Tebow** Tim Tebow
Thanks for all the help @lexgon28! RT @GQfashion: See the best-dressed at NFL's awards ceremony. @TimTebow killed it gqm.ag/Atly6w
7 Feb

 **Tim Tebow** Tim Tebow
Great day w/ all the kids at Sunrise Children's Hospital & @zanebeadles @OFranklin74 @RyanClady @ryanharris74, Kuper, JD & Clark #Broncos
7 Feb

Stay in touch with Tim Tebow

Join Twitter right now:

Full name

Email

Password

Sign up





Curious how Tim Tebow uses Twitter?

Discover who @TimTebow follows

About @TimTebow

519	61	1,209,698	7,674
Tweets	Following	Followers	Listed

Recent images - view all



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Myspace

- Myspace is a social networking service,
- Launched in August 2003,
- From 2005 until early 2008, Myspace was the most visited social networking site in the world,
- In April 2008, Myspace was overtaken by Facebook
- Since then, the number of Myspace users has declined steadily
- Remains popular with younger users and entertainers.

Will on Myspace - Windows Internet Explorer

http://www.myspace.com/willmuschamp

myspace

File

Edit

View

Favorites

Tools

Help

★ Favorites

Will on Myspace

myspace

Sign up

Login


Search People

Music

Video

Games

Browse People



Profile

Photos

Playlists

Stream

Friends

Comments

Badges

Will

Sign up

Stream


All Music Videos Photos Topics Status More

No recent updates in this category.

Why not...
Find new friends to get more updates
Check out what's new on Myspace

Comments

Post a comment...




Auburn Fan

I WANT TO HERE FROM YOU! MY AUBURN FAMILY! PLEASE ADD GENE CHIZIK HE HAS STARTED A NEW MYSPACE SO HE COULD HERE FROM THE FANS!

MYSPACE.COM/GENECHIZIK

WAR EAGLE!

2 years ago




Jerry Watkins

Come back to Auburn we need you to take Tubbs place!!!

WAR DAMN EAGLE!!!

3 years ago



Marie Morris

MyHotComments.com


MyHotComments

INTERNATIONAL MASTER'S DEGREE


your career advantage

Top Friends (33)


Will has 68 friends. View: All Online New




Tom Ande...




Coach Wi...




Stephen




Coach Do...




Clint




Jeff Wells




CHAPPY



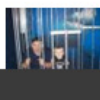
Dr. Gonzo




BigBlueGirl



LYWI





Open Player

Internet

100%

Facebook

- **Facebook** is a social networking service
- Launched in February 2004,
- As of February 2012 more than 845 million active users
- An average Facebook user spends about 55 minutes a day on the site, adding 90 pieces of content each month.
- In a sample survey of 2884 people across 14 countries, The top 3 sites include Facebook (51%), MySpace (20%), and Twitter (17%).

Relevance?

- Profiles can include a person's relationship status, income, education, associations, "likes," and a limitless array of comments, messages, photographs, and videos that reside in the "public" domain, not likely to be filtered by opposing counsel.
- Anecdotal evidence suggests that a *user's* social filter often stops working the moment a person sits down in front of a computer screen without the surrounding social constraints experienced in everyday life.



Issues

- Courtroom intrusion
 - Jurors “tweeting” thoughts during trial.
 - Jury Instructions (multiple times).
- Ethical issues
 - Judges “friending” counsel
 - Judicial Ethics Advisory Commission Opinions
- Use of Social Media as Evidence (our focus today).
 - Authentication
 - Admissibility

Limited Florida Case Law

- *Holland v. Barfield*, 35 So. 3d 953 (Fla. 5th DCA 2010).
 - Order compelling production of hard drive quashed. Right of privacy issues.
- *Green v. State*, 56 So. 3d 134 (Fla. 5th DCA 2011).
 - Myspace photos to rebut testimony were inadmissible as irrelevant ,
 - No testimony proffered regarding the timing of when the photos were taken.

Authentication

- The main question:
 - whether an item is what it purports to be (Fl. Stat. 90.901);
 - not where it was previously located.
 - Whether found on a hard drive or in a file cabinet, authenticity is still the preliminary question.
- The Florida Rules on authentication are similar to the Federal rules (and other state rules).
- *State v. Lumarque*, 44 So.3d 171 (Fla. 3rd DCA 2010).
- Counsel should present evidence that is “sufficient to support a finding that the matter is what its proponent claims.”
- *Sunbelt Health Care v. Galva*, 7 So.3d 556 (Fla. 1st DCA 2009).
- With the lack of case law in Florida, it is instructive to analyze what Courts in other states have ruled regarding authenticating postings on social media websites.



Circumstantial or Direct

- Defendant, Mick Vegas, released 1/1/12 after a short stint for DUI manslaughter, is out on probation. The victim's sister claims she saw a photograph of the Defendant with a beer in his hand on Facebook.
- Sister believes the photograph was taken at the Florida/Tennessee basketball game on 2/11/12.
- Under the terms of Defendant's probation, possessing or consuming alcohol is a violation of probation.

Circumstantial or Direct

- Photo was located on Bob Reno's Facebook page, open to the public. Sister says a post listed as being from Defendant on 2/12/12, commented on the photo, "Had an awesome time last night, let's do it again soon."
- However, Reno has since made his profile private and the photograph is no longer viewable by the public.
- The prosecutor sets a violation of probation hearing.
- What must the prosecuting attorney do to get the photo before the Court?

Authenticate?

- Must the prosecution call the photographer to authenticate the photo, or may another witness be called to authenticate?
- What witness will suffice?"

Photograph Admissible?

- General rule is that counsel should present evidence to establish that the item is what it purports to be.
- Can be done through witness with personal knowledge, expert testimony to prove authorship or lack of alteration, or circumstantial evidence. See § 90.901.

Photograph Admissible ?

- Photographs off of a MySpace page excluded where proponent could not show who took it, who posted it, whether it had been altered or whether the guns in the picture were real.
 - *People v. Mills*, 2011 WL 1086559, Mich.App., March 24, 2011
- Appellate court affirmed trial court's exclusion of photos posted on victim's MySpace page to impeach her testimony where defense never proffered relevance of photos, in particular when they were taken, which was critical to their impeachment value.
 - *Green v. State*, 56 So. 2d 134 (Fla. 5th DCA 2011)

Photograph Admissible ?

- Evidence of Defendant's girlfriend's MySpace page excluded where the state did not lay an adequate foundation that the girlfriend was the creator and user of the profile or the author of the post in question. The Court held "there may be confounding evidence as to who generated the profile and person viewing the profile cannot tell whether it is legitimate."
- In other words, someone could create a fictitious account or gain access to another's account using the username and password.
 - *Griffin v. State*, 18 A.2d 415 (2011)

Objections?

- What objections would you make as the defense attorney?
- To the Photo?
 - Hearsay?
 - What hearsay exceptions might be argued?
 - What other objections might be argued?
- To the Comment?

Objections?

- Regarding contents of Photo?
 - “Best Evidence Rule:” Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph. § 90.952, Florida Statutes.
 - Duplicates are admissible if it accurately reproduces the original (§§ 90.951, 90.953)
 - Electronic record treated same way as a writing,
 - § 668.50(7)(c)
 - But also see § 90.954, Admissibility of Other Evidence Contents

Objections?

- Regarding “Comments” post by Defendant?
 - Electronically-stored evidence must be relevant, authentic, not hearsay or qualify under a hearsay exception, have original or duplicate or qualified secondary source, and probative value must outweigh prejudicial effect.
 - *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, Md 2007.

Subpoena Photograph from Facebook?

- Courts are allowing parties to access and introduce information found on social media sites where the information is material or reasonably calculated to lead to admissible evidence (rather than a fishing expedition).
 - *Romano v. Still*, 907 N.Y.S. 2d 650 (N.Y. Sup. Ct. 2010)
- Stored Communications Act, 18 U.S.C. § 2701: Requires a signed authorization from the user to access photographs, messages, and other account content. Without the user's authorization, social media sites have been hesitant to provide account specific information.
- **Can the Court order an authorization to be signed (Civil vs. Criminal)?**

Content of Subpoena

- Subpoena should include the user's full name, the full URL to the page, the school or network to which the user belongs, the user's date of birth, known e-mail addresses, account number, telephone numbers, mailing address and expected period activity.
- Facebook cannot provide previously deleted content, but where a user has terminated the account the companies can restore access to allow the user to gather information to the extent possible.
 - **So, if Bob deletes the picture, prosecution may be out of luck.**



Hacking Away at Privacy

- You receive a call from a married acquaintance, She tells you she is suspicious Husband may be having an affair. You know the couple, married eighteen years with three children, ages 13, 11, and 7, Husband and Wife are both well educated. Wife asks to set up a meeting with you. 5 days later, Wife calls you and asks for an emergency meeting at your office tonight, expresses concern for absolute confidentiality. You agree to meet at 6:00 pm in your office. At meeting, Wife states that she thinks Husband is ill, but doesn't want him to go to prison. She places large envelope on your desk that partially reveals photos, videos, and price information related to children and obvious child pornography

Hacking Away at Privacy

- She doesn't want her husband to go to prison for fear of what it will do to her children, but she does want to use the material to seek an emergency hearing for divorce and to change hers and the childrens' names.
- She indicates that she may have used Anonymous hackers to help get the documents off of Husband's computer.
- You are the attorney, what do you do, and why?

Hacking Away at Privacy

- The privileged nature of the letter, the fact that the officer's counsel never explicitly notified defense counsel that they were in possession of it, the significance of it, and the lack of prejudice to officer all supported disqualifying his counsel.
 - *Maldonado v. New Jersey*, 225 F.R.D. 120 (D.N.J. 2004)

Rule 4.1-2

- d) **Criminal or Fraudulent Conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Hacking Away at Privacy

- Husband becomes suspicious that he was possible hacked, he sets up an appointment with another attorney. He attempts to transfer all his files to another location and attempts to destroy any evidence of the files on his home computer. Prior to the meeting, he discloses to you the contents of his computer, and what files he fears may have been hacked.
- You are the Husband's attorney, how do you start the meeting?

Rule 4.1-2

- d) **Criminal or Fraudulent Conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.





Civil Conspiracy

- Fozzie Bear is the recently terminated Marketing Director of Mupp-Tech Inc., a medical IT company that developed and patented an electrical device used to monitor and maintain the heartbeat of Muppets placed under anesthesia during Mastic surgery. Dr. Bunsen Honeydew is the original inventor of the company's product who was recently laid off.
- Mupp-Tech is suing the pair for civil conspiracy based upon a 3-page transcript of an online instant message chat on Fozzie's computer, which was copied and saved in a Microsoft Word document, 10 text messages, and 5 e-mails exchanged between their cell phones and personal email accounts.

Civil Conspiracy

- The messages and e-mails reveal a plan (and action in furtherance of the plan) to hack into Mupp-Tech's social media accounts and remove client information from the company's database.
- It's well known that Fozzie always refers to Dr. Honeydew as "Bun."

Texts

- Testimony from forensic expert revealed Fozzie's home computer contained the texts, and his roommate, Kermit, identified the messages as having been shown to him by Fozzie,
- **Defense Counsel Objects for lack of Foundation, How should you rule?**
- Trial court found to have abused discretion by concluding images and text messages found on defendant's cell phone were not admissible, where State forensic expert testified to the same having been seized in defendant's home and the testimony of the defendant's wife identified the messages and texts as images shown to her by defendant.
 - State v. Lumarque, 44 So. 3d 171 (Fla. 3rd DCA 2010).

Emails

- Same expert testifies that the emails contained Fozzie's email address, and referred to Dr. Bunsen as "Bun."
- **Defense Counsel Objects for lack of Foundation, How should you rule?**
- Email containing Defendant's email address, reply dialed email address, messages containing factual details known to Defendant, nickname and topical phone conversations were enough to authenticate.
 - *U.S. v. Siddiqui*, 235 F. 3d 1318 (11th Cir. 2000).

Transcript of IM Chat

- Defense expert testifies that the original IMs were not saved to the hard drive, and therefore there was no original metadata to determine if the transcript was accurate.
- Transcribing officer testifies that the department's standard preservation methods were used when he copied the original online instant message conversations, saved the transcripts as a Microsoft Word text document, and compared the instant message chat screens to the Word document to ensure accuracy and completeness.

Transcript of IM Chat

- Attorneys for the Defendants object to admission of the transcript of online instant messages based on violation of the Best Evidence Rule.
- How should the judge rule?

Transcript of IMs

- Sect. 90.951, Fla. Stat: (1) “Writings” and “recordings” include...electronic recording,...If data are stored in a computer, any printout or other output readable by sight and shown to reflect the data accurately is an ‘original.’
- (4) “Duplicate” includes: (a) A counterpart produced by the same impression as the original, from the same matrix;...by mechanical or electronic rerecording;...or by other equivalent technique that accurately reproduces the original.
- Sect. 90.953, Fla. Stat.: A duplicate is admissible to the same extent as an original, unless: ...(2) A genuine question is raised about the authenticity of the original or any other document or writing. (3) It is unfair, under the circumstance, to admit the duplicate in lieu of the original.”

Transcript of IMs

- Admissibility of such transcripts has been upheld where a Detective testified that the police department's standard preservation methods were used when he copied the original online instant message conversations generated at the time of messaging, saved the transcripts as a Microsoft Word text document, and compared the instant message chat screens to the Word document to ensure accuracy and completeness. This was upheld even though a forensic expert testified that the failure to save the original form of the messages directly on the hard drive resulted in no original metadata available to determine whether the Detective altered the messages.
 - *U.S. v. Lanzon*, 639 F. 3d 1293 (11th Cir. Fla. 2011).



Other Issues

- Spoliation
 - Deleted photos which would rebut Plaintiff's testimony regarding her mental anguish after alleged sexual assault.
 - Court sanctioned Plaintiff by striking claim for mental anguish.
 - *Torres v. Lexington Ins. Co.*, 237 F.R.D. 533 (D.P.R. 2006)
- Facebook consistently states that once information is deleted it cannot be retrieved.

Credits

- *The Federal Lawyer, “Tweet” Me Your Status, Social Media in Discovery and at Trial, by Parker and Swearingen, January/February 2012,*
 - Pointers on subpoena, discovery, and authentication.
- Honorable Jenifer M. Davis of the Ninth Judicial Circuit Court of Florida for use of her outline titled: *Facebook and Other Electronic Social Networks: The Latest Minefield of Evidence Issues.* 2011.