

Social Media Evidence Problems
By Hon. Joan N. Feeney

The problems are based on the following hypothetical.

A. Background Facts

Legal Consulting Group, Inc. (“LCG”) was formed in Massachusetts by Dewie Cheatham to provide legal and marketing advice to the legal profession, including arranging for financing of contingency fee cases. It rapidly grew to a large firm across the U.S., but its profits were minimal due to excessive expenses, including funding the lavish lifestyle of its principal, Cheatham. One of its major investors, Money Pit Funding, a California corporation, provided numerous advances to finance LCG’s operations, some of which were recorded as loans and evidenced by Promissory Notes, but other advances were not documented. Money Pit’s principal, Ron Burgundy was a close friend of Cheatham, sharing his passion for fine wine, and therefore he was not too concerned when LCG defaulted on making installment payments on several of the notes. When Burgundy discovered that Cheatham had used the loan proceeds for the purchase of a vineyard in his own name, Money Pit sued LCG in United States District Court seeking to collect the monies loaned, for breach of contract, fraud, negligent misrepresentations, civil RICO violations and unfair and deceptive acts and practices. In the answer, LCG asserted a number of defenses to the action, including waiver, estoppel, unclean hands, and further asserting that the advances were not loans but were capital investments or gifts. Shortly thereafter, Cheatham was also indicted for stealing money from investors, for criminal RICO violations and the FBI raided the business early one morning. During discovery, a number of Twitter “tweets”, direct messages, Facebook status updates, comments and messages, posted by employees for both parties were produced.

B. Evidentiary Problems

1. Admissibility of a “Tweet” a/k/a Twitter post by one of Money Pit’s employees (hearsay issue)

Kim Clever, often had drinks with her boss, Ron Burgundy, after work. During cross examination by LCG’s counsel, she admitted that she knew that Ron and Cheatham were acquainted but denied any knowledge of their business dealings. LCG’s counsel asked her whether she sent a Tweet about Cheatham’s indictment while she and Ron were having drinks one evening. She stated that she did not believe she had sent any Tweets about Cheatham. Counsel to LCG then presented her with a copy of a Tweet and asked if it refreshed her recollection. She said that it did and she now remembered that she and Ron were at a bar when a report came on the news that Cheatham had been indicted and his business shut

down and that she tweeted about the newsflash. He then asked her: “What was your Tweet?” Money Pit’s counsel objected to the question. The Court asked for a copy of the Tweet which read: “OMG Newsflash! Cheatham indicted and business shut down. @RonBurg screamed ‘I’ll never get my money back now. Why did I give that jerk so much money and not do the paperwork?’”

Is the Tweet admissible? Issues presented: refreshing recollection; totem pole hearsay; exception to hearsay rule for excited utterance.

See Fed. R. Evid., Rule 401, 803(1), 803(2), 612.

Social media and other electronic evidence present the same evidentiary problems, including hearsay and relevance issues, as any other type of evidence. See *U.S.v.Ferber*, 996 F. Supp. 90 (D. Mass. 1997) (email from an employee to boss discussing phone call qualified as a present sense impression as it was written shortly after the call took place). See also *State v. Corwin*, 295 S.W. 3d 572 (Missouri Court of Appeals 2009) (rape victim’s Facebook posts and photos were not related to events on the night in question and were not relevant).

2. Admissibility of a blog post (authentication issue)

LCG’s counsel questioned Kim Clever about her knowledge of Ron Burgundy’s business dealings with Cheatham. She denied any knowledge of any partnership between them, denied visiting Cheatham in Napa, and denied posting on a blog about a visit. He then questioned her about a blog she posts on – “Business Gossip.” She testified that she created a secure user name and protected password, which she kept confidential.

LCG’s counsel proffered a copy of her comment on the blog:

Ron Burgundy and I had a marvelous tour of his newest venture with pal Dewey Cheatham – Chateau Tonneau ! The terroir of this beautiful vineyard and its old vines will result in a huge market for their cult wines! Jeroboams away!”

LCG’s counsel objected on the grounds of lack of authentication.

See Fed. R. Evid. 901, 902. See also *Commonwealth v. Foster F.*, a Juvenile, 20 N.E. 3d 967 (Mass. App. 2014) (social networking website messages were adequately authenticated for admissibility in light of a preponderance of evidence that the juvenile was the author); *Commonwealth v. Purdy*, 459 Mass. 442 (2011) (There must be “confirming circumstances” sufficient for a reasonable jury to find by a preponderance of the evidence that the individual authored the post); *Commonwealth v. Williams*, 456 Mass. 857, 868-69 (2010) (SJC found insufficient evidence to authenticate social media messages on a MySpace page, as there was no evidence on how secure the web page was, who could access the

page, and whether codes were necessary). See generally 5 Federal Evidence § 9.9 (4th ed. 2015) (discussion of authentication issues in introduction of social media evidence).

3. Admissibility of a “Like/Thumbs Up” post on Facebook (hearsay issue)

At the trial, Tammy Diamond, a former girlfriend of Cheatham and a bookkeeper for the Money Pit, was called as a witness for the Money Pit. On cross examination by LCG’s counsel, she testified that she was Facebook friends with both Cheatham and Ron Burgundy. She denied giving a thumbs up to posts by Cheatham on Facebook and expressly denied that she gave a thumbs up to one of Cheatham’s status updates. Counsel to LCG introduced copies of three pages of status updates and likes from Cheatham’s Facebook page. One of Cheatham’s status updates contained a picture of him in a vineyard holding a wine glass with the following post: “Amazing day at my new property in Napa! Thank you to Ron Burgundy!” The pages contained likes by both Tammy and Ron. Money Pit’s counsel objected on the ground that liking a Facebook post is inadmissible hearsay.

See Fed. R. Evid. 801(d)(2). Courts have yet to determine if a Facebook “like” is an adoptive admission but have conducted such an evaluation in the context of forwarded emails. See *Sealand Land Service, Inc. v. Lozen Intern., LLC*, 285 F. 3d 808 (9th Cir. 2002) (court of appeals ruled that the forwarding of a memo from one employee to another with a notice prefacing the message manifested an adoption or belief in the truth of the information contained in the original email).

4. Admissibility of a message on a Facebook wall (privacy expectation issue)

LCG’s counsel proffered a post by Ron on Cheatham’s Facebook wall with a privacy setting. In reply to the status update, Ron posted on the wall: “Good luck my friend now that you are no longer a corporate robot – enjoy life away from this rat race and hope you can put it behind you!” Counsel to Money Pit objected to the proffer of the wall post and as grounds argued that this was a private message between them as the wall was accessible only between approved friends and admitting it violates his reasonable expectation of privacy.

There is no general exclusionary rule with respect to communications on the grounds of privacy or confidentiality. See Fed. R. Evid. 501 (common law governs a claim of privilege; in a civil case, state law governs privilege assertions).

See *U.S. v. Tsarnaev*, 53 F. Supp. 3d 450 (D. Mass. 2014) (district court found that social media and email accounts contained relevant evidence to support probable cause for issuance of search warrant).

Chaney v. Fayette County Public School District, 977 F. Supp. 2d 1308 (N.D. Ga. 2013) (in a school's presentation on internet safety presenter showed a photograph of a high school student in a bikini in Snoop Dog which had been obtained from the Facebook account; in student's civil rights and action against the school system, the court ruled that she had no expectation of privacy in the photo because she had a setting in which she shared it with her Facebook friends and their friends).

See also *Nucci v. Target Corp.*, 162 So. 3d 146 (2015) (Fla. District Court of Appeal) (petition for certiorari was denied with respect to a discovery order to produce postings on Facebook account as such postings are not shielded from discovery merely because privacy settings were established).