

## Facebook Messages Admissible under Traditional Evidence Rules

By [Lisa R. Hasday](#), *Litigation News* Associate Editor – August 19, 2013

A witness may authenticate Facebook messages through testimony alone that the messages are what they purport to be, the Mississippi Court of Appeals held in a [recent decision](#) [PDF]. The court also found that the Facebook messages that are automatically generated are not hearsay because they are not statements made by a person. The ruling continues the trend toward subjecting social media posts to traditional evidentiary principles.

### **Three Messages at Issue**

In *Smith v. State*, a capital murder case, the prosecution sought to introduce three Facebook messages, which appeared to be exchanged between the defendant and the 17-month-old victim's mother, whom the defendant had recently married. The prosecution contended that two of the three messages were sent by the defendant, who was not the child's father, and demonstrated his anger about caring for the child while the mother worked and expressed his feeling that he "will hurt someone."

The first two messages were printed from the mother's Facebook page. The third message was contained in a printed email notification from Facebook. The Facebook-related evidence was admitted over objection, and the defendant appealed the ruling and argued that the trial court erred because the messages were not authenticated and were hearsay.

### **Witness Testimony Sufficient for Authentication**

The Mississippi Court of Appeals found that the mother's testimony that she sent and received the messages was sufficient to authenticate them. The court relied on [Mississippi Rule of Evidence 901\(a\)](#) [PDF], which provides that "authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims," and Mississippi Rule of Evidence 901(b)(1), which specifies that authentication is proper through witness testimony. The Mississippi rules mirror the [Federal Rules of Evidence](#) [PDF].

"The sufficient evidence phrase is important," remarks David M. Conner, Savannah, GA, cochair of the Substantive Federal Rules of Evidence Subcommittee of the ABA Section of Litigation's [Trial Evidence Committee](#), referring to Rule 901(a). "Lawyers do not have to conclusively authenticate or prove authenticity beyond a reasonable doubt. The sufficiency standard recognizes that lawyers have other ways of attacking evidence, through cross-examination or argument. Ultimately, the jury decides whether the evidence is authentic."

Without Mississippi case law precisely on point, the court looked to a Connecticut decision, [State v. Eleck](#) [PDF], discussing authentication of social media. The appellate court there upheld the trial court's decision *not* to admit Facebook messages, finding that testimony from the alleged recipient of the messages was not sufficient. The Connecticut court noted that testimony from the sender would be one method by which to authenticate the messages but was not available because the alleged sender claimed that her Facebook account had been "hacked."

The Mississippi appellate court agreed with the Connecticut court that a sender's testimony would be sufficient but, unlike the Connecticut opinion, ruled that sufficient testimony from a message's recipient warranted authentication as well. In holding that a recipient's testimony was sufficient, the Mississippi court cited a [Mississippi case](#) [PDF] that relied on testimony from the recipient of email messages for authentication.

### **Automated Messages Are Not Hearsay**

After resolving the authentication issue, the court considered whether the printed Facebook messages were hearsay. It found that they were not, because "Facebook's automatic notification features, which cause the messages to be sent within Facebook and sent via email notification, are not statements." The court cited Mississippi Rule of Evidence 801(a), which defines "statement" as an assertion of a person.

The court distinguished the facts at issue from those of a Louisiana case in which a person forwarded an email message, explaining that there a person had made an out-of-court assertion as to someone else's statement. "Here, an automatic process sent each message," the court declared.

Examining the actual message content beyond the automated language, the court found that the defendant's messages were not hearsay under Mississippi Rule of Evidence 801(d)(2)(A), because they were admissions by a party-opponent. The mother's message could be hearsay, the court held, but any error in its admission was harmless given her testimony on the same matters.

"In terms of making the story complete, you have to have that middle email," Conner says, referring to the mother's message. "The court could have gone on a different track to get to where it needed to be. It would be improper to admit the response without admitting the message to which he was responding. The so-called 'rule of completeness' applies."

### **Other Issues Implicated**

The case presents unusual facts, says Darryl A. Goldberg, Chicago, chair of the Trial/Evidence Subcommittee of the Section of Litigation's [Criminal Litigation Committee](#). "In my experience, most criminal defendants are not sending horribly incriminating messages on Facebook. More often you see victims posting information relevant to their allegations or credibility." He mentions that it is often difficult for criminal defense lawyers to obtain such information from Facebook and similar companies due to restrictions contained in the [Electronic Communications Privacy Act](#).

Assuming access to electronic information, authentication may be achieved in various ways, including one mentioned but not relied on in the Mississippi court's opinion, Conner adds. Federal Rule of Evidence 901(b)(4), and the corresponding Mississippi rule, allow authentication through "distinctive characteristics of the item, taken together with all the circumstances." The messages contained details such as the names of specific daycare centers in which the defendant hoped the child would enroll.

In addition, other facts corroborated the Facebook information, Conner notes. The mother's friend testified that the defendant had complained about the child before her death. A forensic pathologist testified that the child's injuries appeared intentional and could not have been inflicted by her three-year-old brother, as the defendant claimed. Other witnesses testified that the child had bruises on her body previously and that the defendant had alcohol in his blood soon after the child died.

"The Facebook posts fit seamlessly into the story," Conner concludes. "We don't need a whole new series of rules to address the issue of electronic posts. The basic question is whether the evidence is reliable. The current rules are well suited to help judges and attorneys answer that question."

This article presents the views of the author alone and not necessarily those of her employer, the U.S. Department of Justice.

### **Related Resources**

- » [\*Smith v. State\*](#), 2013 Miss. App. LEXIS 318 (Miss. App. June 4, 2013).
- » [\*State v. Eleck\*](#), 130 Conn. App. 632 (2011).
- » [\*Commonwealth v. Purdy\*](#), 459 Mass. 442 (2011) (admissibility of email messages).
- » [\*Commonwealth v. Williams\*](#), 456 Mass. 857 (2010) (admissibility of MySpace messages).
- » [\*Kearley v. State\*](#), 843 So. 2d 66 (Miss. App. 2002) (admissibility of email messages).
- » Sara E. Costello, "[Establishing That Text Messages Are Admissible](#)," *Litigation News* (Apr. 1, 2013).