**T.A.D.C. Construction Law Newsletter**

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## *FROM THE EDITOR: Announcing the Construction Law Section of T.A.D.C.*

At this year's Annual Meeting in Santa Fe, New Mexico, TADC President Chantel Crews gave me the opportunity to announce the formation of the Construction Law Section of the Texas Association of Defense Counsel. Thanks to the first twelve lawyers who signed up as members in Santa Fe. Along with J.P. Vogel of Gray Reed & McGraw, I have been working to get this group started and this newsletter will be one of our focal points.

Our focus is not to directly compete with the many great organizations out there which also focus on construction law. However, we feel there is a unique opportunity to focus on the defense of our clients in construction cases in the specific environment of Texas. National groups and groups with membership including members of the Plaintiff's bar by definition cannot have this focus. While we are not necessarily limited to that focus, we are committed to meeting the needs for education, networking, and programming in that area.

To that end, our Section will be providing a program looking back at the six years of the Texas Anti-Indemnity Act during the T.A.D.C. Winter Seminar taking place in Steamboat Springs, Colorado from January 31-February 3, 2019.

Please contact J.P. or myself to join our group. Please send articles for this newsletter. One opportunity to get involved in leadership right away is to take over editing this newsletter, which appears twice a year. If you have ideas for programming, please let us know. If you have partners or associates who would be interested, send them our way. We are excited about the possibilities.

## *CASE NOTE: First Court of Appeals Clarifies the Standard for Conditions Precedent.*

In *Tabe v. Texas Impatient Consultants, LLC*, No. 01-16-00971-CV (Tex. App.— Houston [1st Dist.] July 26, 2018), the First Court of Appeals addressed when a party can successfully assert the defense of a failure of conditions precedent. In that case, a physician agreed to work for a hospitalist partnership, but before the partnership is obtained his necessary credentials, the physician terminated the contract. When the partnership sued the physician for breach of contract, it sought summary judgment based upon the liquidated damages clause of the contract. The trial court granted summary judgment to the partnership on liability and awarded the liquidated damages. A subsequent jury trial resulted in an additional attorney's fees award to the partnership of $ 58,775.00. On appeal, the physician challenged the summary judgment on liability, contending that fact issues existed as to whether there was a failure of a condition precedent to his obligation to perform under the contract.

In reviewing the trial court's final judgment, the court of appeals analyzed the "Employment Agreement" between the physician and the hospitalist partnership.

The contract did not contain a starting date for the physician's employment, but provided that the partnership "will commence payment of salary/benefits *only after* the credentialing at all the facilities and orientation is completed and the supervising MDs believe that the employee is ready for commencement of duties" (emphasis added). Likewise, the physician's start date would commence "only after" credentialing, a process which would take 90 to100 days. After signing the contract, the physician decided he could not work for the partnership due to changes in his family circumstances, notifying the hospitalist/partnership's manager that he was withdrawing his position.

The appellate court analyzed the physician's contention that the credentialing requirement was a condition precedent to his duty to perform under the contract. The physician argued that the hospitalist partnership was required to prove that all conditions precedent to the agreement's employment obligations had been met. The partnership argued that the physician failed to raise a fact issue to rebut its assertion that all conditions precedent had been met.

In resolving the issue, the court of appeals looked at the language in the agreement, particularly the steps taking place "only after" credentialing had taken place. Texas law has long stated that a condition precedent is an event that must happen or be performed before a right accrues to enforce an obligation. *Solar Applications Engineering, Inc., v. T.A. Operating Corp.,* 327 S.W.3d 104, 108 (Tex. 2010). Because the employment was not to commence until after the credentialing process was complete, the credentialing process itself was a condition precedent under the plain language of the contract, according to the court of appeals. Importantly, other courts of appeals have treated conditional phrases such as "provided that" or "if" as successfully creating conditions precedent. The phrase in the employment agreement, "only after", was no different. Accordingly, the court of appeals reversed the final judgment, and remanded the case to the trial court for further proceedings.

## *ARTICLE: The Hearsay Rule and Authentication as Applied to Social Media*

### I. Introduction

Jurors have posted in public social media forums about their confidential deliberations. Allegedly disabled personal injury plaintiffs have posted photos of themselves on Facebook as they hike mountains. Businesses find themselves the subject of damaging, or even defamatory, client reviews on Yelp. In ways that Mark Zuckerberg never imagined, social media has impacted the fundamental nature of the traditional trial process. Specifically, it has altered what types of evidence are admitted in a lawsuit, and has created new concepts to apply to the time-honored definitions of what is hearsay and what is admissible. In recent years, it has become problematic for attorneys attempting to admit images and content displayed on social media websites into evidence, because there is the threshold hurdle as to whether those social media exhibits have been authenticated. As a result, the question many trial lawyers must explore is: how does one take advantage of relevant admissions, images and other content on social media in such a way that they can be used in court?

### II. Social Media and Hearsay

As with any legal issue, the answer begins with the applicable rule. The rule

against hearsay is regarded as "the most characteristic rule of the Anglo-American Law of Evidence- a rule which may be esteemed, next to jury trial, as the greatest contribution of that eminently practical legal system to the world's methods of procedure."[1] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.[2] Put another way, it is an out-of-court assertion offered to prove the truth of the matter stated.[3]

The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them.[4] Generally, hearsay is not admissible unless any of the following provide otherwise: a statute, the applicable Rules of Evidence, or other rules prescribed under statutory authority.

What is and what is not regarded as hearsay has become a gray and blurred issue. If the statement is not an assertion, or if a statement is not offered to prove the facts asserted, it is not hearsay. Under Federal Rule of Evidence 801 (a)-(c), the word assertion simply means "to say something is so."[5] Additionally, prior statements made by a witness are regarded as hearsay, but they can be admissible under an exception to the rule under certain circumstances. By contrast, admissions by a party opponent are, by definition, not hearsay.

The Federal Rules of Evidence have listed a number of exceptions to the rule. Under Rule 803(6), a notable exception includes: when (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge; when (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; when (C) making the record was a regular practice of that activity. Regarding the "business record exception" listed above, the justification for this [business records] exception is that business records have a high degree of accuracy because the nation's business demands it, because the records are customarily checked for correctness, and because recordkeepers are trained in habits of precision.[6]

However, if the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have. Thus, if one were to obtain testimony from a custodian of records for a social media provider proving up that the exception in Rule 803(6) applied to social media posts by a declarant, this does not necessarily establish the exception to the hearsay rule applies to those posts.

As stated above, the eruption of social media has made the determination of admissible and inadmissible hearsay much more difficult. One of the foremost difficulties it has presented is whether or not social media is authenticated- as it must be in order to be admitted into evidence. To satisfy the requirement under Rule 901(a) of the Federal Rules of Evidence that all evidence be authenticated or identified prior to admission, the proponent of the evidence

[1] John William Strong, *McCormick on Evidence*, 4th Edition, Volume 2 (West Publishing Co. St. Paul, Minn. 1992).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] Fed. R. Ev. 801 (a)-(c).
[6] McCormick, *Evidence* § 306, at 720 (2d ed.1972).

must offer "evidence sufficient to support a finding that the item is what the proponent claims it is."[7]

A list of appropriate methods of authentication include, but are not limited to, testimony that an item is what it is claimed to be, appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.[8]

The central issue here is more complicated. Some practitioners have argued that Facebook (and other social media websites) may be authenticated by way of Rule 902, under which extrinsic evidence is not required for certain documents that bear sufficient "indicia" of reliability to be "self-authenticating."[9] The issue here becomes whether Facebook chat logs, for instance, are the kinds of documents that are properly understood as records of a regularly conducted activity under Rule 803(6), such that they would qualify for self-authentication under Rule 902(11).[10] A review of the case law says they are not.

In *U.S. v. Browne*, the 3rd Circuit concluded that Facebook chat logs are not self-authenticated, and that any argument to the contrary misconceives the relationship between authentication and relevance, as well as the purpose of the business records exception to the hearsay rule.[11] The court held that this is because in order to be admissible, evidence must be relevant, which means that "its existence simply has some '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.' "[12]

Furthermore, the court determined that evidence must adhere to Rule 104(b), which states that the proponent of the evidence must show that the jury could reasonable find those facts by a preponderance of the evidence.[13] In *Brown*, just as at issue here, the relevance of Facebook records relies on authorship.[14] To authenticate the records, a party must therefore introduce enough evidence such that the jury could reasonably find, by a preponderance of the evidence, that the person at issue actually authored the Facebook message.[15]

The problem with social media messages is that they are often not verified, by a preponderance of the evidence, that the person authored the messages. At most, the records custodian employed by the social media enterprise can attest to the accuracy of only certain aspects of the communications exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts on particular dates or at particular times.[16] Unfortunately, this does not reach far enough to authorize the accuracy or reliability of the contents of the Facebook chats, as this is no more sufficient to confirm "than a postal receipt would be to attest to the accuracy or reliability of the contents of an enclosed mailed letter."[17] Moreover, social media messages are difficult to be admitted into evidence, and

[7] *U.S. v. Brown*, 834 F.3d 403, 408 (3rd Cir. 2016).
[8] *Id*.
[9] *Id*. at 408-09; Fed. R. Evid. 902(11).
[10] *Brown*, 834 F.3d at 409.
[11] *Id*.
[12] *Brown, 834 F.3d* at *409.*
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id.* at 411.

many hurdles must be crossed in order to admit them into evidence.[18]

## III. The Hurdle to Get Social Media Authenticated

Generally, the authentication of electronically stored information requires consideration of the ways in which such data can be manipulated or corrupted. For instance, the authentication of social media evidence presents special challenges because of the great ease with which a social media account may be falsified or a legitimate account may be accessed by an "imposter."[19]

This leads us to a central question- how to get over this hurdle and get social media posts and messages admitted into evidence? The answer is rather simple-- start early in discovery. Authorship may be established for authentication purposes by a wide range of extrinsic evidence.[20] Therefore, practitioners should crash each case's discovery plan with an eye towards finding social media evidence and overcoming the authentication hurdle. This involves a discovery plan including: depositions, requests for admission, written interrogatories, and various other forms of discovery that are directed at attacking the obstacle of authenticating social media. One can also seek guidance from the way more analog evidence arising from older technology such as handwriting and telegrams has been authenticated over the years.

In *United States v. McGlory*, the Third Circuit rejected a defendant's challenge to the authentication of notes that he had allegedly handwritten because, despite being unable to fully establish authorship through a handwritten expert , the prosecution had provided "sufficient evidence from which the jury could find that the defendant authored the notes."[21]

Similarly, in *United States v. Reilly*, when considering whether the government's evidence supported the conclusions that the radiotelegrams were what the government claimed they were, the Third Circuit Court of Appeals determined that the government had met its authentication burden by way of not only direct testimony from individuals who identified the radiotelegrams but also multiple different pieces of circumstantial evidence.[22] This included testimony explaining how the witness who produced the radiotelgrams had come to possess them, the physical appearance of the radiotelegrams, and evidence that the radiotelegrams were sent to the defendant's office or telex number. [23]

Moreover, the Court in *Reilly* relied heavily on direct testimony from individuals to say that the evidence had been authenticated. This is most commonly done through depositions during the pretrial process. In a deposition, when trying to get a social media post by the deponent authenticated the first and probably the simplest thing to do is simply ask the person being deposed if he or she posted the message. If the deponent is a party, the content would then qualify as an "admission", which is by definition not hearsay, and which has just been authenticated by the deponent.

[18] *See id.*
[19] *See Brown,* 834 F.3d at 412.
[20] *Brown,* 834 F.3d at 411.
[21] *Id.* at 412 (Citing *United States v. McGlory*, 968 F.2d 309, 329 (3d Cir. 1992)).
[22] *Browne,* 834 F.3d at 412 (Citing *United States v. Reilly*, 33 F.3d 1396, 1405-06 (3d Cir. 1994)).
[23] *Id.*

Of course, there are other ways to lay such a foundation if the poster of the social media content is unavailable, or uncooperative. In *United States v. Barnes*, the Fifth Circuit held that the government laid a sufficient foundation to support the admission of the defendant's Facebook messages where a witness testified under oath that she had seen the defendant using Facebook and that she recognized his Facebook account as well as his style of communicating as reflected in the disputed message.[24]

Additionally, as most notably held in *McQueeney v. Wilmington Trust Co.*, circumstantial evidence can suffice to authenticate a social media document.[25] In *McQueeney*, the court held that a witness with personal knowledge of an existing fact may authenticate a social media document by testifying that the document is what the evidence proponent claims it to be. [26]

Another method for getting social media posts authenticated is through requests for admission. Rule 169 of the Texas Rules of Civil Procedure states that at any time after the defendant has made appearance in the cause, or time therefor has elapsed, a party may deliver or cause to be delivered to any other party or his attorney of record a written request for the admission by such party of ... the truth of any relevant matters of fact set forth by the request. [27]. Additionally, where a party fails to answer a request for admissions within the period set by the court, the facts stated therein will be taken as true, and the courts will not allow evidence to refute or controvert these facts.[28]

The different forms of discovery methods used to get social media posts admitted into evidence must be made during and in furtherance of the case. Evidence that is properly authenticated may nonetheless be inadmissible hearsay if it contains out-of-court statements, written or oral, that are offered for the truth of the matter asserted and do not fall under any exception enumerated under Federal Rule of Evidence 802.[29] In *Browne*, the one Facebook post that was not admitted was the one in which Browne did not participate, and which took place between two different people regarding an act that Browne "almost" committed.[30] Furthermore, the Court rejected the proffer that the statement was not technically being presented for the truth of the matter asserted; because the matter being asserted implied that the defendant was guilty of the crime charged.[31] The later point illustrates that traditional evidentiary analysis applies once the unique challenges of social media have been addressed.

## IV. Avoiding Privilege Pitfalls

A communication is confidential and therefore privileged if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.[32] Typically, the issue of privilege is unlikely to come up in social media because of the word "social", meaning the content is

[24] *Id* (Citing *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015)).
[25] *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985).
[26] *McQueeney*, 779 F.2d at 928.
[27] Tex. R. Civ. P. 169.
[28] *Id*.
[29] *Browne*, F.3d 403 at 415.
[30] *Id*.
[31] *Brown,* F.3d 403 at 416.
[32] Tex. R. Evid. 503 (a)(5).

typically being shared to a large group.[33] Due to social media, almost by definition privileges will not attach because privileges are usually applied to private communications between discrete groups.[34] For instance, privileges exist in an attorney/client relationship, doctor/patient relationship, and a clergy/penitent relationship.[35] In all these relationships, when one tells confidential information to a priest, doctor, or attorney, the information is typically barred from getting into evidence due to the privilege, absent some exception.[36] However, once information is posted on social media most aspects of confidentiality are completely abandoned, and a privilege is unlikely to exist (if there ever was one).[37] Moreover, social media and privilege are often not coexistent.

E mail, one of the oldest forms of electronic, web-based media does present some privilege pitfalls. At least one source suggests that public/non-secure e mail provider domains such as "@gmail.com," "@aol.com," or "@yahoo.com," carry a greater risk of data mining and hacking.[38] For example, the Office of Bar Counsel of the State Bar of Nevada suggests that these domains are less secure, meaning that client communication conducted within that particular domain is also less secure.[39] Moreover, a private email domain, e.g. "@lawfirmname.com" will help your firm protect client confidentiality.[40] At least in that jurisdiction, suffering a data loss that involves communications with clients from a "@gmail" or other such account could expose a practitioner to an investigation by bar regulators

## V. Conclusion

The upsurge of social media has the potential to make a trial much more complicated. Much that takes place on social media platforms is often regarded as inadmissible hearsay, and getting it admitted into evidence takes planning. As stated above, the key to unlocking the many pieces of evidence that likely exist within social media is to begin early in discovery.[41] Lawyers should gear the process of discovery toward overcoming the hurdle of inadmissible hearsay.[42] Furthermore, lawyers face the obstacle of ensuring that social media has been authenticated.[43] They can accomplish this through depositions, testimonies, written interrogatories, requests for admission, and other methods of pre-trial discovery.[44] The social media issue must be raised during this stage because the tools available once trial commences are incomplete, particularly if the party posting the information denies doing so.

In summation, social media may and often should be used in the courtroom. It can help to determine the outcome of a case. However, in order for it to be utilized in the way it should be, lawyers must plan early on getting it authenticated and into evidence.

[33] *See id*.
[34] *See id*.
[35] *See id*. at 503 (c).
[36] *Id*.
[37] *See id*. at 503(a)(5).
[38] *Tips From the Office of Bar Counsel*, 25, Nevada Lawyer, July 2017, at 42.
[39] *Id*.
[40] *Id*.
[41] *See Brown,* 834 F.3d at 411.
[42] *See id*.
[43] *See id*. at 408.
[44] *See id*.