

Posted & Roasted:
**How to Introduce Information Posted on
Internet Sites to 'Burn' the Opposing Party or
Witness**

**TOP TRIAL LAWYERS TACKLE EVIDENCE
SOUTH CAROLINA BAR CLE
FEBRUARY 5, 2010
COLUMBIA, SC**

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**Is searching the internet for evidence
worth my time?**

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Is searching the internet for evidence worth my time?

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<http://www.youtube.com/watch?v=MmIECZZ6fbM>

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Recent Case in Greenville, SC

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MySpace.com Survey:

In the past month have you drank alcohol? Yup
In the past month have you smoked? Yup
Number of drugs taken? A lot
Even Shoplifted? Yup, in High School.

MySpace.com Survey:

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Intoxicated Husband



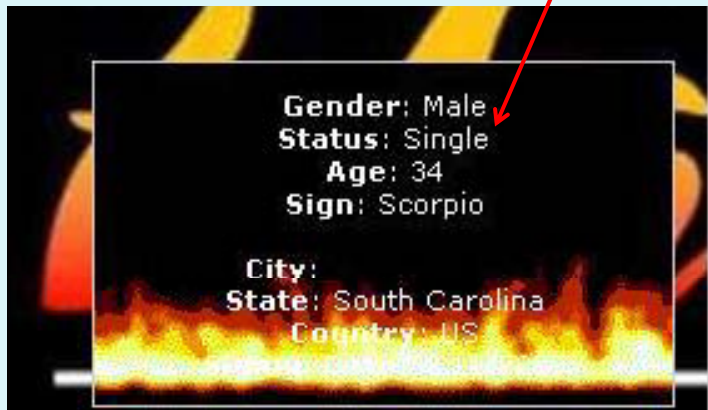
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Husband's Marital Status

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Found on **twitter**

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- This Tweet was the subject of a 2009 Illinois libel suit by a landlord against a tenant:

@JessB123 You should just come anyway. Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's okay.
11:08 AM May 12th from web in reply to JessBergman

Horizon Group v. Bonnen

<http://www.chicagonow.com/blogs/chicago-bar-tender/Twitter%20lawsuit.pdf>

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Found on **twitter**

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- Courtney Love's defamation, libel & slander suit.

stay away well well away, and etsy cant wait to see the back of her, so goodbye asswipe nasty lying hosebag thief, now for pleasant things,

8:28 PM Mar 17th from web

austin police are more than ecstatic to pick her up she has a history of dealing cocaine, lost all custody of her child, assault and burglary

8:27 PM Mar 17th from web

Simorangkir v. Love

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What is Social Media???

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Social media is a public or semi-public means of interacting with friends, family, colleagues and others through the Internet for free!



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EXAMPLES OF SOCIAL MEDIA

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www.youtube.com



Website allows anyone to watch videos uploaded by another or uploaded themselves and to share with others.

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What's on YouTube™?

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- Videos
- Comments about videos
- Ability to Share the video, in fact, some people have been ***discovered*** on You Tube.



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What is YouTube™?

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- Every **minute**, 20 hours of video is uploaded to YouTube.
- Every **hour**, 1,200 hours of video is uploaded to YouTube.
- Every **day**, 28,800 hours of video is uploaded to YouTube.



http://www.youtube.com/t/fact_sheet

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What is **twitter**™ ?

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www.twitter.com



Twitter is a service for friends, family, and co-workers to communicate and stay connected through the exchange of quick, frequent answers to one simple question: **What are you doing?**

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What is **twitter**™ ?

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In a fall 2009 study by Pew Internet and American Life Project, researchers concluded that **nearly 1 in 5 internet users use Twitter.**



<http://www.pewinternet.org/Reports/2009/17-Twitter-and-Status-Updating-Fall-2009.aspx?r=1#>

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What is **facebook** ?

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www.facebook.com

Facebook: a “social utility that helps people communicate more efficiently with their friends, family and coworkers.”

<http://www.facebook.com/press/info.php?factsheet>

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What is **facebook** ?

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- According to Facebook’s Press Room Stats:
 - More than **350 million** active users on FB
 - More than **2.5 billion photos** uploaded to FB **each month!**
 - The average user spends more than **55 minutes per day** on Facebook.

<http://www.facebook.com/press/info.php?statistics>

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What is myspace.™?

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www.myspace.com

Similar to FB, but it has a heavy emphasis on music and has **“the world's largest music community.”**

<http://www.myspace.com/pressroom?url=/fact+sheet/>

- In fact, a very, very, famous, young female singer was discovered on MySpace.

Guess Who???????



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Discovered on myspace.™

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How Do I “Find” Evidence on the Internet About Parties & Witnesses?

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- Through your own independent investigation:
 - Search with Google
 - Search each of the actual social networking websites for peoples’ names.
 - Don’t limit the search terms to individuals’ formal name. Also, search nicknames, businesses, etc.



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Other Ways to “Find” Evidence On the Internet

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- Through paid services:
 - Spokeo: Consider paying for search engines that do the searching for you at minimal cost.
www.spokeo.com
 - Licensed Private Detectives



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How do I “find” evidence?

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- Search on your own or with your experts
- Add Social Networking participation questions to Discovery requests

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Interrogatories

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- “Name & Address of every Social Networking Website (SNW) used by Plaintiff.”
- “Each & every user name, screen name, IM name, e-mail address or alias used by Plaintiff w/ ea. SNW.”
- “Every password & login name for each SNW. URL for each SNW.”
- “Last time Plaintiff accessed each SNW.”
- “Date Plaintiff last changed his security settings on his SNW.”

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Ethics Rules Cover These Online Searches!

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- **North Carolina Judicial Standards Commission Inquiry No. 08-234**

<http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>



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Ethics Rules Cover These Online Searches!

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- **2009 Philadelphia Bar Association Ethics Ruling Op. No. 2009-02**

http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf



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Ethics Rules Cover These Online Searches!

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- **South Carolina Advisory Committee on Standards of Judicial Conduct Opinion No. 17-2009**

<http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>



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Ethics Rules Cover These Online Searches!

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- **South Carolina Bar Ethics Advisory Opinion 09-10**

http://www.scbare.org/member_resources/ethics_advisory_opinions/&id=678



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Wise Ethics Tips for Tech Savvy

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- Avoid using third parties to contact counsel, parties, or witnesses without expressly disclosing that the communication is on behalf of the attorney, law firm, or client.
- Never use deception or misrepresentation in communications—including use of aliases and screen names that do not clearly identify you.
- Always clearly identify yourself and the purpose of your communications.

Tiffany M. Williams, Facebook: Ethics, Traps, and Reminders, ABA, Section of Litigation News, August 27, 2009.

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Wise Ethics Tips for Tech Savvy

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- Understand and follow user rules associated with sites.
- Check with your state and local ethics boards for recent decisions to stay updated.
- If it feels wrong, don't do it!!!!

Tiffany M. Williams, Facebook: Ethics, Traps, and Reminders, ABA, Section of Litigation News, August 27, 2009.

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I've found some information on the internet.
How do I introduce it into evidence?

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- Time to start roasting!



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Leading case to introduce Electronic Evidence

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Lorraine v. Markel American Insurance Co.,
241 F.R.D. 534 (D. Md. 2007)

<http://tinyurl.com/yesc55p>

This blog site bookmarked all of the
evidentiary rules and is a great additional
resource for this material.

Properly Downloading Evidence from the Internet

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- Create a PDF file that creates a record and preserves the appearance of the evidence including the URL where webpage is located (i.e. webpage address) & date evidence was obtained.
- My office uses Adobe Acrobat (not Adobe Reader) to create PDF files.



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Why is it important to properly download the evidence?

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- **Important Tip** - Once you find the evidence, immediately preserve it as if you were a police detective because the author might remove it from the Internet or block you from seeing it.



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Steps to Properly Download Evidence From the Internet.

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- **Step 1: Pull up the Internet Evidence.**

(ie. Go to the website or pull up the social networking page.)

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Example of Internet Webpage

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Home | The Firm | Resources | FAQ | Blog | Contact Us

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Helping Individuals Cross Thresholds to New Lives
Fellow, American Academy of Matrimonial Lawyers

Melissa F. Brown, LLC, is committed to providing superior legal services to each client and helping each cross the threshold to a new life.

Melissa Brown represents clients exclusively in family law matters. As an experienced South Carolina divorce and custody attorney and Certified Family Court mediator, she understands the impact divorce can have on clients and their families.

Our firm strives to minimize conflict and amicably resolve each case. While our goal is to help clients reach an agreement, we still zealously advocate for each client.

Our firm typically handles high asset and high-income divorce cases across the state of South Carolina, including Charleston, Mount Pleasant, Hilton Head, Beaufort, Pawley's Island, and Myrtle Beach. These cases involve complex issues: financial, tax, business valuation, and custody disputes including interstate and international ones.

Our Approach to Family Law

"Marriage is not easy, and no marriage is perfect, but divorce is painful and expensive. So, until all efforts to remain married fail, find a caring, experienced, knowledgeable family law attorney who complements your personality, is instinctively trustworthy, and gives valuable advice, even when you may not like hearing it!"
By Melissa F. Brown

Firm News

- Upcoming Speaking Engagements
- Announcements
- Recent Family Law Articles for

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Steps to Properly Download Evidence From the Internet.

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- **Step 2: Convert page or screen image to a PDF file.**

There are 3 options to accomplish this task.

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Option 1: Print to Adobe

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The screenshot shows a web browser window displaying a website for a law firm. A print dialog box is open, showing the 'Print' window. The 'Print' window has a 'General' tab selected. Under 'Selected Printer', 'Adobe PDF' is chosen. The 'Page Range' section shows 'Pages: 1'. The 'Print' button is highlighted with a red arrow. Another red arrow points to the printer selection area. The background website content includes a photo of a woman and text about family law services.

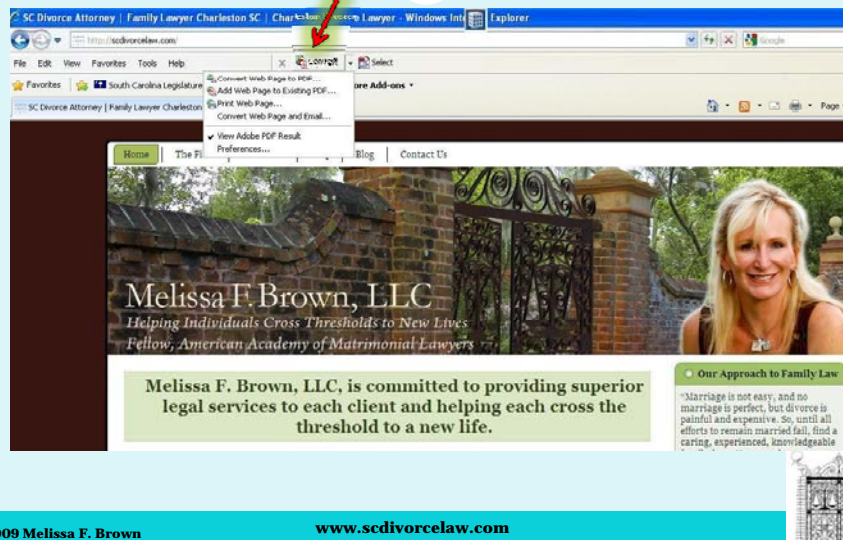
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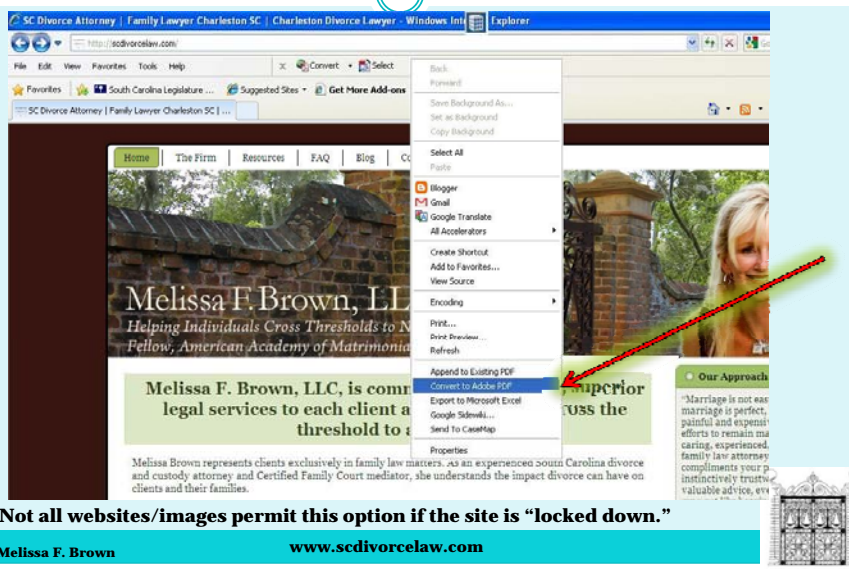
Option 2: Use the “convert” toolbar option

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Option 3: **Right click** anywhere on the page*

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Steps to Properly Download Evidence from the Internet.

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Step 3: Choose a safe & secure location for the PDF file to be saved.

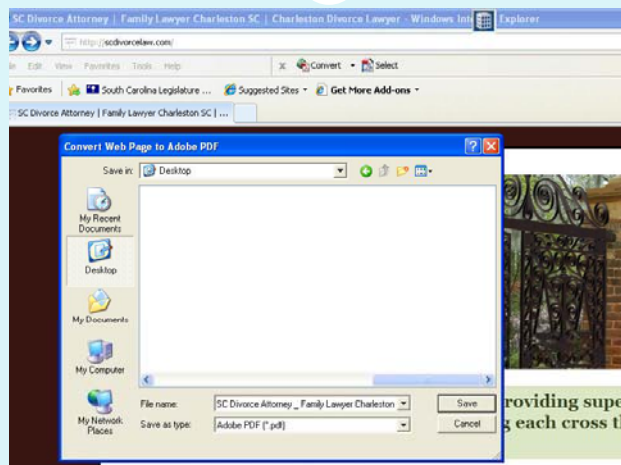
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Choose Location on your Computer to Save Evidence

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End Product: A Converted PDF File.

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Ask These Questions:

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1. Is the evidence ***relevant***?
2. Is the evidence ***authentic***?
3. Is there a ***hearsay*** issue?
4. Are there ***any other*** evidentiary rule concerns?

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Evidentiary Concerns for Electronic Evidence

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- Is the Electronic Evidence **Relevant**?
(SCRE 401)

Does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be?



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Evidentiary Concerns for Electronic Evidence

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- Is the Electronic evidence **authentic**?
(SCRE 901 & 902)

Can the proponent show that the evidence is what it purports to be?



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Authentication Standards

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3 Questions:

1. What was actually on the website?
2. Does the exhibit or testimony accurately reflect it?
3. If so, is it attributable to the owner of the site?

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Authentication Strengthened By....

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Website tag/name.

SC Divorce Attorney | Family Lawyer Charleston SC | Charleston Divorce Lawyer

Website URL & date accessed.

<http://scdivorcelaw.com/>[1/4/2010 11:43:15 AM]



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Other Examples of Authentication

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- **SCRE 901(b)**

Testimony of Witness with Knowledge- (b)(1)



Comparison by Trier or Expert Witness- (b)(3)

Distinctive Characteristics and the Like- (b)(4)

Public Records or Reports- (b)(7)

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Other Examples of Authentication

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- **SCRE 902 (Self-Authentication)**

Official Publications- (5)

Trade Inscriptions and the Like- (7)

Commercial Paper and Related Documents- (9)

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Easy Ways to Authenticate

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INTERROGATORIES

- Responses providing the SNW info will either help authenticate the SNW evidence or it will provide you with information to locate the SNW evidence and gather actual material from the party through a request for production.



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Easy Ways to Authenticate

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REQUESTS FOR PRODUCTION

- Provide copies of each page of Plaintiff's personal Social Networking Website (SNW).
- Provide copies of all posts made by Plaintiff on each SNW.
- Provide copies of all posts by others on each of Plaintiff's SNW.
- Provide copies of every photograph downloaded/uploaded to each of Plaintiff's SNW.
- Provide copies of all direct messages sent & recd by Plaintiff on each of his SNWs.



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Easy Ways to Authenticate

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Requests to Admit

- “Defendant maintains a MySpace account.”
- “Defendant’s MySpace user name is XXX”
- “On July 1, 2009, Defendant posted a comment on her MySpace page stating ‘can’t wait to quit my job tomorrow so I can head to the beach early for July 4th!!!’”



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Easy Ways to Authenticate

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Depositions

- Authenticate evidence found online about a witness or party, through a deposition, prior to trial.



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Application of Hearsay Rules to Electronic Evidence

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5 Questions:

1. Does the evidence constitute a **statement**, as defined by Rule 801(a)?
2. Was the statement made by a “**declarant**,” as defined by Rule 801(b)?
3. Is the statement being offered to prove the truth of its contents, as provided by Rule 801(c)?
4. Is the statement **excluded** from the definition of hearsay by rule 801(1)?
5. If the statement is hearsay, is it covered by one of the exceptions identified at Rules 803, 804, or 807?

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Available Hearsay Exceptions?

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COMMON HEARSAY EXCEPTIONS WHEN DEALING WITH ELECTRONIC EVIDENCE

- ✦ Present Sense Impression- SCRE 803(1)
- ✦ Excited Utterance- SCRE 803(2)
- ✦ Then Existing Mental, Emotional, or Physical Condition- SCRE 803(3)

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Other Evidentiary Concerns for Electronic Evidence

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- Best Evidence Rule
(SCRE 1001-1008)
- SCRE 1001(3)
 - Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. **If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".**

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Evidentiary Concerns for Electronic Evidence

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The final consideration....

- Probative Value Balancing Test
(SCRE 403):

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of *unfair prejudice*, *confusion of the issues*, or *misleading the jury*, or by considerations of *undue delay*, *waste of time*, or *needless presentation of cumulative evidence*.” (emphasis added)

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How to Introduce a Website or Website Posting

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MySpace Profile Page

- Is it relevant?
- Is it authentic?
- Is there a hearsay issue?
- Any other evidentiary concerns?

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How to Introduce a Photograph

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Photograph of Drunk H from Facebook

Authenticity:

1. The Witness is familiar with object or scene;
2. The witness explains the basis for his or her familiarity;
3. The witness recognizes the object or scene in the photo; &
4. The photograph is a “fair”, “accurate”, “true”, or “good” depiction of the object or scene at the relevant time.

Edward J. Imwinkelried, Evidentiary Foundations, 134 (5th ed. 2005).

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How to Introduce a Video

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“The Fabulous Bus Ride” YouTube Video

Authenticity:



1. Has not been altered;
2. Accurately depicts event; and
3. Can location, date, time be proven?

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KEEPING ELECTRONIC EVIDENCE OUT

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KEEPING THE BUS VIDEO OUT

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- Improper Preservation of Chain of Custody
- No Information Regarding Date of Video
- Quality of Video is Questionable
- Contains irrelevant and immaterial portions that may be prejudicial
- Has been selectively edited

Ashley S. Lipson, *Is it Admissible?*, 44-25 (2009).

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KEEPING THE DRUNK PHOTO OUT

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- Husband denies that this is a photo of him
- Witness can identify him but cannot identify location, other individuals pictured, or other identifying characteristics
- Witness cannot identify date the photograph was taken- what if it was taken fifteen years ago when husband was in college?
- On the date the photo was posted, Husband argues he was deployed overseas without access to a computer.
- Photo appears to be altered or manipulated

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KEEPING THE MYSPACE PROFILE OUT

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- Individual claims he does not have a MySpace account
- The MySpace profile was merely printed out without any further steps to preserve. There is no information pertaining to the URL or the date the evidence was obtained.
- The evidence is irrelevant- the date the profile status was set was before the parties were married.

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facebook as an Alibi!?!?

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- Facebook status update serves as an alibi.

Rodney Bradford CALL ME FACEBOOK KID...
October 31 at 12:17am

Rodney Bradford ON THE PHONE WITH THIS FAT CHICK.....WHERE MY I HOP
October 17 at 11:49am

Rodney Bradford Harlem flow tonight holla at me gees
October 16 at 7:36pm

Rodney Bradford Hood flow ...tryin too get back in the stuido in harlem too make them hits...
October 16 at 2:48pm

<http://gothamist.com/attachments/bmuessig/facebook.png>

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The Other Side of the Coin....



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- Advising your own clients:
 - Assume opposing party can obtain clients' internet activity.
 - Advise clients to close their Twitter accounts and put security settings on Facebook and any other sites so no one, except a limited few, can see it!

BE CAREFUL BECAUSE...

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The Other Side of the Coin....



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Important Rules Pertaining to Electronic Discovery

- **Federal Rules:** Electronic Discovery Amendments for the Federal Rules of Civil Procedure took effect December 2006.
- **State Rules:** As of September 2009, 25 states have adopted e-discovery rules-
 - South Carolina is ***not*** one of them.

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The Other Side of the Coin....



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Important Rules Pertaining to Electronic Discovery

However, SC Rules of Prof. Conduct 3.4 states
“A Lawyer shall not unlawfully obstruct another
parties access to evidence...”

So... do **NOT** advise your client to destroy
their social media site!



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The Other Side of the Coin....



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- Review Your Clients:
 - Social media privacy settings
 - Current content posted on their profile pages.
 - And, once retained, immediately send a spoliation letter to the opposing counsel.



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Is One's Privacy Violated When Another Searches His Social Media Site?

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“As for concerns that the research [on social media networking sites] may invade people's privacy, analysts note that those with social networking sites control their own content....” and where the content is obtainable through public means, people's privacy is not violated.

Carol J. Williams, “Jury Duty? May Want to Edit Online Profile” Los Angeles Times, September 29, 2008

<http://articles.latimes.com/2008/sep/29/nation/na-jury29?pg=3>
(last accessed January 4, 2010).



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SUMMARY: YOU WANT TO BE ON YOUR TOES

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- EVIDENCE CAN BE FABRICATED!
- KNOW YOUR PREDICATES FOR VARIOUS TYPES OF EVIDENCE AND MAKE THE OPPOSING COUNSEL EARN THEIR FEES BY PROPERLY INTRODUCING THEIR MATERIAL.



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Additional Resources

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For a list of additional recommended websites to find valuable information, please see the handout at the end of my materials.

