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Plaintiff Posted *What?* Ensuring That Social Media Diamonds Are Admissible by Addressing the Foundational Requirements for Social Media Evidence

by Michael Reda and Michael Harriss



Every litigation associate's dream is to proudly walk into a partner's office armed with a color photograph of a personal-injury plaintiff skydiving, white-water rafting, or—if you're in Missouri—floatin'. Expecting a "Plaintiff posted *what?*" from the partner, it becomes every associate's nightmare when, instead, the partner

responds: "Okay, but how are you going to admit this into evidence?" While there are many issues to consider when confronting whether a given piece of evidence is admissible, this Article focuses on what is often the most challenging issue with social media evidence: authentication. With the ever-increasing pervasiveness of social media evidence in litigation, this Article provides an informative overview of the typical foundational requirements for such evidence and outlines authentication tips and techniques to ensure those social media diamonds can actually be admitted into evidence.

I. Background: Federal Rules of Evidence

While it is important, as always, to understand and rely upon the local rules of evidence of the particular state in which you are practicing, this Article provides a brief overview of the Federal Rules of Evidence and the typical foundational requirements for social media evidence according to those rules. As many of us know, however, these principles are often similarly adopted in the state counterparts, so these points are easily transferable from one jurisdiction to another.

Federal Rule of Evidence 901 addresses authentication, and it provides generally that there must be sufficient evidence to support a finding that the piece of evidence is what the proponent of that evidence claims it is. Rule 901(b) outlines a list of ten examples of how a litigator can sufficiently authenticate his or her evidence. (See Fed. R. Evid. 901(b)(1)-(10)). A few of these examples identified in Rule 901(b)—e.g., distinctive characteristics or testimony of a witness with knowledge—are particularly useful in authenticating social media evidence and are, therefore, addressed at length below.

Rule 901 is not the only Federal Rule of Evidence that plays a role in evidence authentication, however. As many courts are beginning to recognize, both Rule 104(a) and 104(b) can be hugely important in determining whether a particular piece of social media evidence is admissible. Stated simply, under Rule 104(a)

"Every contact leaves a trace"
-Dr. Edmond Locard

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the court determines admissibility as a threshold matter. In the most common evidentiary scenario, the court will determine whether the proffered evidence is authentic under Rule 104(a) because the objecting party either does not have facts to challenge the authentication or offers nothing more than speculation to contest the authentication of the evidence. Assuming that the proponent has sufficient facts to satisfy the general requirements of Rule 901(a), the trial court in these scenario issues the decision as to whether the evidence is authentic and may be presented to the jury. (See Fed. R. Evid. 104(a)).

There are situations, however, in which the objecting party presents facts to the court that would suggest that the evidence is *not* authentic. In these instances, Rule 104(b) should control because the court is presented with a conditional relevance issue. Rule 104(b) contemplates that in this scenario, the trial court may conditionally admit the evidence, as well as the facts the parties have presented to support and challenge the authenticity of the evidence, without making a final determination of admissibility. Instead, it is left, ultimately, to the fact finder—*i.e.*, the jury in most trucking cases—to determine whether the facts presented indicate that the evidence is what its proponent claims it to be. (See Fed. R. Evid. 104(b)). If the overview of these rules brings up memories, and memories alone, of an evidence exam in law school, you are not alone. The court's approaches to applying these rules, however, helps shed light on the operation of these rules in practice.

II. The Rules of Evidence in Practice: Court Approaches to Authentication

Judge Paul W. Grimm, who is a well-respected judge in the area of digital evidence, published a very informative and detailed article addressing the approaches taken by courts when presented with authentication issues of digital evidence, such as social media evidence. He identifies two broad approaches that courts have taken to the authentication of digital evidence. (See Honorable Paul W. Grimm et. al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433 (2013)). In the first approach—disfavored by Judge Grimm, and these authors—courts express skepticism about admitting social media evidence or a website printout of a social media profile because the proponent failed to introduce evidence that affirmatively disproved the possibility that someone other than the alleged creator of the evidence created or manipulated it. As many of us have likely seen in practice, it was the mere possibility that the evidence may have been created by someone other than its putative creator that provided a sufficient reason to exclude the evidence for these courts. (See, e.g., *United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000); *State v. Eleck*, 23 A.3d 818 (Conn. App. Ct. 2011); *People v. Beckley*, 110 Cal. Rptr. 3d 362 (Ct. App. 2010); *Commonwealth v. Williams*, 926 N.E.2d 1162 (Mass. 2010); *People v. Lenihan*, 911 N.Y.S.2d 588 (N.Y. Sup. Ct. 2010)). At times, authentication can be defeated by courts utilizing this approach by a witness simply denying that the account is their account (irrespective of the credibility of such a denial), or merely suggesting that someone other than the witness also has access to the account.

On the other hand, Judge Grimm identified a second category of cases, in which courts have adopted his favored approach and concluded that in order to authenticate social media evidence, one only must introduce sufficient facts to persuade a reasonable juror that the evidence was created by the person who the proponent alleged created the evidence. (See, e.g., *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 539 (D. Md. 2007); *State v. Gibson*, 2015 -Ohio- 1679, ¶ 70, 2015 WL 1962850, at *16 (Ohio App. 6 Dist. 2015); *State v. Assi*, No. 1 CA-CR 10-0900, 2012 WL 3580488 (Ariz. Ct. App. Aug. 21, 2012); *People v. Valdez*, 135 Cal. Rptr. 3d 628 (Ct. App. 2011); *People v. Clevens*, 891 N.Y.S.2d 511 (N.Y. App. Div. 2009); *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012);



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Manuel v. State, 357 S.W.3d 66 (Tex. Ct. App. 2011); *In re T.T.*, 228 S.W.3d 312 (Tex. Ct. App. 2007)). Once those facts—typically in line with one of the identified methods in Rule 901(b)—are presented, “the burden of production shifts to the party objecting to the introduction of the evidence as inauthentic to prove facts demonstrating that the putative creator did not create the evidence.” (See Honorable Paul W. Grimm et. al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433, 456 (2013)). If counter facts are presented, the court is faced with the conditional relevancy issue contemplated by Rule 104(b), and according to this approach, “it is appropriate for the trial judge to admit the evidence conditionally and to allow the jury to determine whether to accept or reject the evidence.” (*Id.*). Unlike the first approach, this approach recognizes and fully utilizes the authority provided by Rule 104(b), and allows the jury to weigh the conflicting facts pertaining to the authenticity of the evidence and determine, ultimately, whether the evidence is authentic and should be considered.

This approach should be advocated by any litigator attempting to authenticate and introduce social media evidence at trial, and it is supported by case law throughout the country. (See, e.g., *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 539 (D. Md. 2007); *Parker v. State*, 85 A.3d 682, 687-88 (Del. 2014); *State v. Gibson*, 2015 -Ohio- 1679, 2015 WL 1962850 (Ohio App. 6 Dist. 2015); *State v. Assi*, No. 1 CA-CR 10-0900, 2012 WL 3580488 (Ariz. Ct. App. Aug. 21, 2012); *People v. Valdez*, 135 Cal. Rptr. 3d 628 (Ct. App. 2011); *People v. Clevens*, 891 N.Y.S.2d 511 (N.Y. App. Div. 2009); *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012); *Manuel v. State*, 357 S.W.3d 66 (Tex. Ct. App. 2011); *In re T.T.*, 228 S.W.3d 312 (Tex. Ct. App. 2007)). Judge Grimm provided a simple articulation of this approach to authentication of social media evidence, which should be used when explaining it to the court: It is the “operation of a continuum—clearly authentic evidence is admitted, clearly inauthentic evidence is excluded, and everything in between is conditionally relevant and admitted for the jury to make the final determination as to authenticity.” (Honorable Paul W. Grimm et. al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433, 456-57 (2013)). While this is the favored approach (the better-reasoned approach, according to Judge Grimm), it is imperative in each case to identify which approach will likely be used by your trial judge. This is because each approach imposes a different burden on you to authenticate your evidence, and identifying which approach applies will determine what you must do during discovery to ensure that you identify and develop the necessary facts to build the foundational groundwork to authenticate your social media evidence.

III. Using the Tools of Discovery to Lay the Foundational Groundwork to Authenticate Social Media Evidence

Even if you are successful in convincing your trial judge to adopt the better-reasoned approach that mimics the operation of a continuum, the social media diamonds that you uncovered during discovery will be excluded unless you can produce sufficient facts to persuade the judge that a reasonable juror could find that the evidence was created by the person who you allege created the evidence. There are a number of discovery tools that can be used to lay the foundational groundwork to provide those facts, but this Article focuses on developing those facts through deposition questioning and requests to admit.

A. Authenticating Social Media Evidence Through Deposition Questioning

The easiest way to authenticate social media evidence is, of course, to have testimony from the owner of the social media. Getting a witness to testify that he or she is the owner of the social-media account is a sure-fire method to authenticate the social media evidence from that account. (See Fed. R. Evid.



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901(b)(1)). As explained in the various approaches in the application of the rules of evidence, the better-reasoned approach allows questions and concerns as to whether the witness actually authored the specific post being introduced as evidence to go to the weight of that evidence, not its admissibility. (See *State v. Jones*, 2014 WL 802022 (Kan. Ct. App. 2014)). Therefore, if the witness broadly admits that he or she is the owner of the account, the evidence from that account should come in, as any concerns related to whether the witness did or not create a specific post within that account should be resolved, ultimately, by the jury after weighing the facts.

Thus, take the time to gather *all* of the witness's social-media posts from the particular account at issue before the witness's deposition. Also, draft an outline of the questions you need answers to in order to lay the proper foundation for that evidence. In the context of Facebook postings, photographs, etc., the following questions could be useful to secure the necessary testimony to establish the foundation for this particular social media evidence:

1. Do you have a Facebook account?
2. Is it currently active?
3. Is your Facebook account associated with the Facebook username, _____?
4. Who has access to this page?
5. Does anyone have authorization to update or edit this page other than you?
6. Have you posted or created content any content to this Facebook account?
7. How is the page protected?
8. [*hand witness exhibit (printout, screenshot, etc.)*]
9. Do you recognize what I just handed you?
10. What is it?
11. Does it appear to be a fair and accurate representation of your Facebook timeline?
12. Does it appear to be altered in any manner?

As mentioned, it is important to secure the entire social-media account information rather than taking only a few of the most damaging posts or photographs. This is because you need a backup plan in the event that the witnesses chooses not to cooperate, or becomes evasive in answering the questions, which experience shows should be anticipated. When presented with an uncooperative or evasive witness, it must be remembered that social media evidence (like all evidence) can also be authenticated by distinctive circumstances or its distinctive characteristics. (See, e.g., Fed. R. Evid. 901(b)(4)). Therefore, even if the witness denies that it is his or her Facebook account, questions based upon the entire Facebook account can be used to establish certain distinctive circumstances or characteristics that unquestionably connect the account to the witness.

Rule 901(b)(4) allows evidence of "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" to authenticate any item, including social media evidence. This method of authentication, as the committee notes suggest, "afford authentication techniques in great variety." Therefore, consider such factors as:

Whether the post replied to an earlier inquiry or other posting;

- i. Any distinguishing language in the posting(s);
- ii. Abbreviations;

- iii. Slang;
- iv. Punctuation;
- v. Nicknames;
- vi. Internet address(es);
- vii. Date of the posting; and
- viii. Any other factors that are unique to the person that you claim is associated with the account or specific posting or photograph.

All of these factors can be developed into deposition questions, answers to which can provide the necessary foundation even if the witness denies being the owner. Looking through the entire account can also provide other evidence to corroborate the association you are putting forward and provide the basis for specific deposition questions. There could be, for example, postings or photographs about a family vacation or a business trip with specific date affiliations. During the witness's deposition, you could then ask whether he or she was on a family vacation or business trip on that date. Knowing that those photos exists, you may ask—**before asking any questions about Facebook**—whether the witness had taken a trip to California and when that trip had taken place. The uncooperative witness may readily admit to that trip when asked outside of the context of specific social media questioning, and the answers to those questions can establish the distinctive characteristics to use to tie the Facebook account to the witness, despite any denial that the witness may later make. Ultimately, all of this corroborating testimony can be used to establish the proper foundation for social media evidence under Rule 901(b)(4), and state equivalents, when faced with the uncooperative witness.

B. Authenticating Social Media Evidence Through Requests to Admit

Although requests to admit are an often overlooked discovery tool, they are particularly useful in authenticating documents, including social media evidence. Rule 36 of the Federal Rules of Civil Procedure provides a procedure by which a party may request that another party "admit for the purposes of the pending action . . . the truth of any matters within the scope of Rule 26(b)(1)." (Fed. R. Civ. P. 36(a)(1)). Under the federal rules, requests to admit may relate to, among other things, "the genuineness of any described documents." (Fed. R. Civ. P. 36(a)(1)(B)). According to the advisory committee's notes, the purpose of a request to admit is to "reduce trial time," which is accomplished because they "facilitate proof with respect to issues that cannot be eliminated from the case." Many states have similar rules related to requests to admit, but the following recommendations are made with the federal rules in mind.

An initial matter to be considered in each case is whether the particular rule governing your requests to admit require that the documents be provided to the answering party, and in what format. While such advice seems elementary, it becomes an important consideration when the requests to admit concern the genuineness of hundreds, or even thousands, of pages of social media postings and photographs. Under the federal rules, a copy of the document must be attached to the requests to admit "unless it is, or has been, otherwise furnished or made available for inspection and copying." (Fed. R. Civ. P. 36(a)(2)). Unlike the federal rules, which allow a requesting party to avoid providing copies of the documents by making them available to the other side, in both Missouri and Illinois, the rules mandate that copies of the documents shall be served with the request unless copies have already been furnished. (See Mo. Sup. Ct. Rule 59.01(c)(1); IL. R. S. Ct. Rule 216). In short, when preparing requests to admit,

be sure to spend time instructing that the documents be provided to the answering party in full compliance with the applicable rule.

With respect to the substantive requests, we suggest asking the most straightforward question regarding the gaminess of the documents you want admitted at the outset. To continue with the Facebook example, a request to admit could be drafted as follows:

1. Admit that the [...number of...] pages contained in the document that is attached hereto as Exhibit A are true and accurate copies of the Facebook postings and timeline information from the account, *i.e.* Facebook username, of “[...]” as captured on [...insert date from retrieval service...].

Response:

Note that this request references a “retrieval service,” which is typically a third-party software that captures digital signatures, timestamps, and other information to provide the facts that can then be used to authenticate the social media information that is retrieved through the program. When initially collecting social media information, the use of such a program or service is highly recommended to ease authentication burdens later in the case. Now, assuming that the responding party will not be cooperative, requests to admit can also be used to establish the other foundational factors discussed above, such as various distinctive characteristics under Rule 901(b)(4). Again, continuing with the Facebook example from an earlier case:

2. Admit that your Facebook profile/name, “Michael Harriss, Esq.” is associated with the Facebook account, *i.e.* Facebook username, of “meharriss.”

Response:

3. Admit that your Facebook account is “meharriss.”

Response:

4. Admit that you have access to the Facebook account, *i.e.*, Facebook username, of “meharriss.”

Response:

5. Admit that you have posted or created content that has been posted to the Facebook account, *i.e.*, Facebook username, of “meharriss.”

Response:

Affirmative answers to these requests to admit should be more than enough to persuade the trial judge that a reasonable juror could find that whatever social media evidence from that Facebook profile was created by the person making those admissions. If there has also been prior deposition testimony that other individuals have access to the uncooperative witness’s social-media profile, you may consider issuing a request similar to the following:

6. Admit that all postings attributed to your Facebook name, "Michael Harriss, Esq.," were posted by you. If this paragraph is denied in whole or in part, identify specifically what postings in Exhibit A were not posted by you.

Response:

Although this request to admit may seem objectionable at first blush, we have been successful in the past in obtaining a response that issued a denial but also provided hundreds of pages of Facebook postings, with the answering party specifically marking each posting which she claimed she did not post, so it is certainly worth asking.

IV. Concluding Thoughts

The deposition questions and specific requests to admit that are outlined above are only a few potential options to secure facts that can be used to establish the foundational requirements to authenticate social media evidence. What this Article aimed to show is that there are many underutilized discovery tools for authenticating social media evidence, and the only true limitations are imposed by the limits of our creativity. At the very least, you should now have some ideas for a response when asked, "Okay, but how are you going to admit this into evidence?"

Michael Reda has 32 years of experience in tort litigation. He has tried more than 100 civil jury trials in state and federal courts in Illinois and Missouri representing insured and self-insured entities. mreda@heplerbroom.com

Michael Harriss is a litigation attorney with a primary emphasis in the defense of complex, multi-party civil cases. mharriss@heplerbroom.com

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