

# Social Media Can be a Minefield — or a Gold Mine

The value of this evidence dissipates if it's not properly authenticated. Aim to do so during discovery.

*Dan Farino and Douglas G. Leney, The National Law Journal*

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Unlike a phone call or in-person comment, social-media posts are more permanent and potentially public, presenting the possibility of either a gold mine or minefield of evidence in litigation. Obtaining social-media evidence relevant to your litigation is now a must, and has rocketed to the top of every litigator's checklist of potential evidence sources. However, the value of evidence that is not properly authenticated disappears. Attorneys collecting relevant social-media evidence must be prepared to properly authenticate it.

The first step in the analysis for authenticating social-media evidence is the same as traditional paper evidence: satisfying Federal Rule of Evidence 901. Under that rule, a proponent should be prepared to demonstrate that the information in the exhibit in question appeared on the referenced website, and that the exhibit accurately reflects the information as it appeared on the website.

Most importantly, the printout should contain the web address of the website and the date on which it was printed. Additional authentication steps may be necessary, including witness testimony by the person who printed the posting, indicating the printer recalls the appearance of the printout, and that he or she recognizes the exhibit as that printout.

If the printer is not available, another witness could testify that the witness visited the site at issue, remembers the site contents, has read the information reflected in the proposed printout, and can identify the exhibit as accurately reflecting the posting that witness saw and remembers from the site.

The second step in authentication is satisfactorily demonstrating that the social-media evidence arose from the alleged source, i.e. the particular person that the proponent claims. This has proven to be the more complicated authentication step, and courts and judges can differ as to the foundational requirements.

## DIFFERING APPROACHES

Some jurisdictions require that the court must definitively determine that evidence is authentic, colloquially referred to as the "Maryland approach." Note, for instance, phrasing cited by Judge Dolly Gee of the U.S. District Court for the Central District of California in the court's September 2014 decision in *Morrocanoil v. Marc Anthony Cosmetics*: "*It is now well recognized that anyone can put anything on the internet. No website is monitored for accuracy.*"

*In Morrocanoil*, the court ruled that Facebook screenshots were inadmissible in a trademark infringement action when such screenshots were merely offered without supporting circumstantial information. The court, in the decision, applied the "heightened standard" that is the Maryland approach without specifically referencing it by that name.

In contrast, some jurisdictions apply the more relaxed standard that a proponent must introduce sufficient evidence of authenticity for a reasonable jury to conclude that the evidence was authentic, colloquially referred to as the "Texas approach."

For instance, in *Tienda v. State*, a February 2012 ruling by the Texas Court of Criminal Appeals and in *Parker v. State*, a February 2014 Delaware Supreme Court ruling, the courts applied the Texas approach to evidence that involved the authentication of names, photographs, comments and instant messages obtained from several MySpace profiles and Facebook postings, respectively.

As a result, a litigant's venue or presiding judge might ultimately dictate whether an exhibit from social media will be authenticated. In many instances, social-media evidence can be excluded based on a court's own speculative concerns regarding the reliability of the evidence, not because the opposing party raised a genuine dispute. Consequently, a general mistrust of social-media evidence has led to widely disparate outcomes and a lack of clarity and predictability in authenticating social-media evidence.

## AUTHENTICATE DURING DISCOVERY

Whenever possible, it is prudent to authenticate social-media evidence during the discovery phase of litigation. For example, an attorney can serve requests for authenticity upon an opponent, including copies of any printouts, requesting the admission of the genuineness, reliability and foundation of such printouts. During a deposition, the proponent can ask questions of a deponent to satisfy the methods of authentication identified in Federal Rule of Evidence 901. A computer forensic expert could be hired to examine a hard drive used exclusively by a particular person and recover postings from that drive. At the very least, an attorney should ensure that evidence is properly collected and printed, including the internet address, date printed, name of printer, and date last modified.

Similarly, a stipulation with an opponent as to authenticity is valuable. If an opponent is not willing to stipulate, a proponent can request judicial notice of the genuineness, reliability and foundation of an exhibit pursuant to Fed. R. Evid. 201. A proponent could attempt to obtain a certification of third-party Internet providers or hosts (*United States v. Hassan*, 2014). If all else fails, an attorney should research the relevant jurisdiction and judge's relevant rulings, and prepare to offer supporting testimony by a party or witness at trial to authenticate all social-media evidence.

For practitioners, the key takeaway is to ensure that in any case, the proponent of social-media evidence will be able to demonstrate that the content therein reflects the purported Web page at issue, and that it was in fact posted by the purported source. A party able to satisfy both of these elements will likely find itself winning the authentication battle, regardless of the stringency of a particular court's approach in dealing with social-media evidence.

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