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GETTING SOCIAL MEDIA INTO EVIDENCE

STATE BAR OF TEXAS
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Knowing What's Out There

- **Over 1 billion unique users each month; 400 hours of video are uploaded to YouTube each minute**

- **Over 2 billion users**

- **Approximately 1 billion registered users (284 million monthly active users)**

- **Over 400 million users**

Fun Facts

- 80% of all adult Americans have at least one social networking presence; 58% have two or more
- Sixteen minutes of every hour spent online is spent on Facebook
- More Facebook profiles (5) are created every second than there are people born (4.5)
- More than a billion tweets are sent every 48 hours
- Every 60 seconds, there are over 293,000 status updates posted on Facebook

Signs of the social networking times.

To quote further from people's exhibit A, your Twitter feed,
"@holdupguy I'm in the getaway vehicle with
the money and hostages. Where R U?"

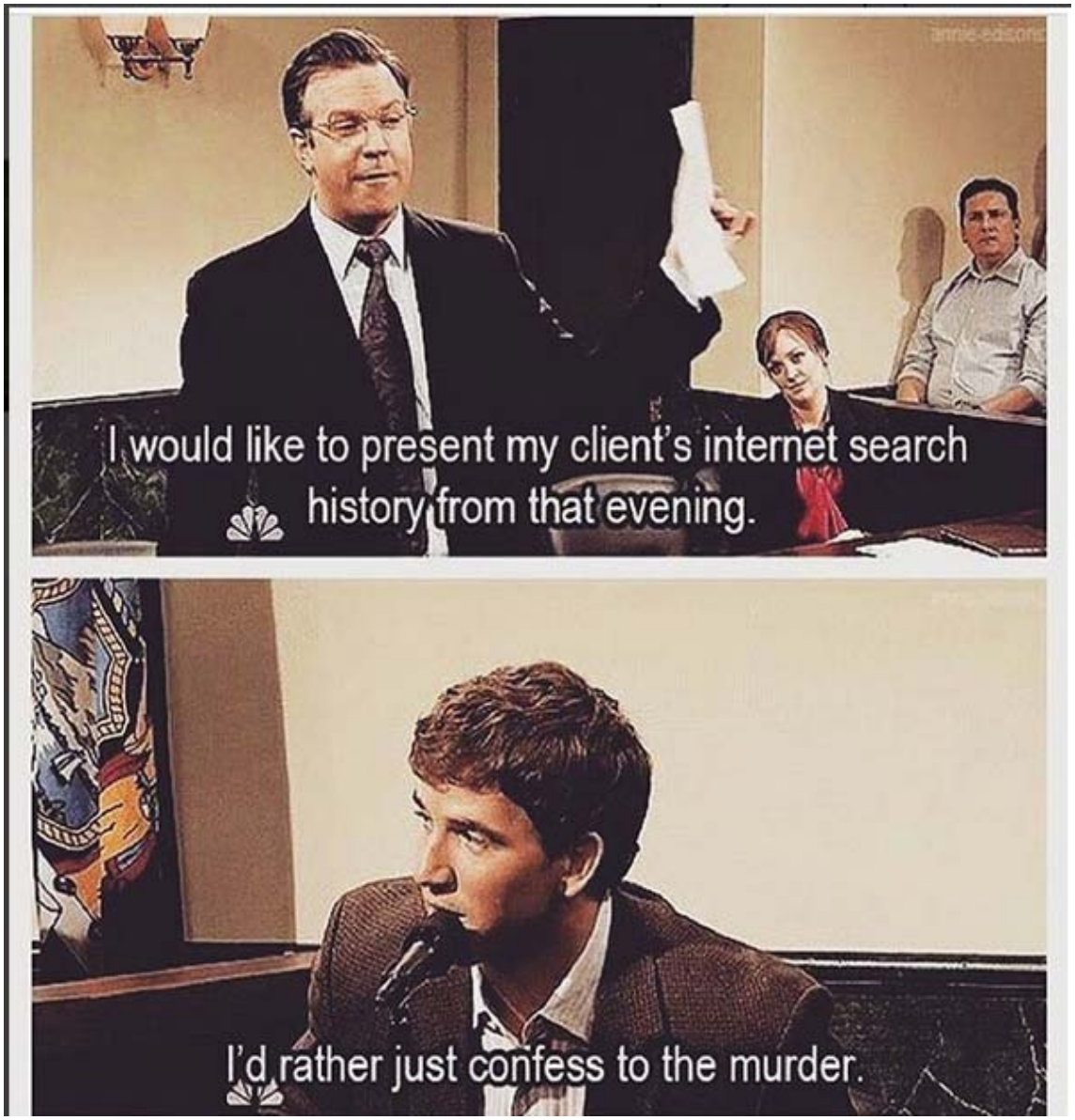

WHEN YOU REALIZE
OPPOSING COUNSEL HAS
THE SCREENSHOTS

Lawyer: you claim you were at the gym during the murder

Defendant: that's right

Lawyer: yet you didn't post about it on facebook

Judge: wow, GUILTY


I would like to present my client's internet search history from that evening.
I'd rather just confess to the murder.

SOCIAL MEDIA EVIDENCE AND PRETRIAL ISSUES

- Just like any other form of evidence, is subject to the same pretrial considerations and vehicles to challenge:
  - Motion to exclude / Motion in Limine
    - *Mixed Chicks, LLC v. Sally Beauty Supply, LLC* (C.D. Cal. July 25, 2012) (tweet purportedly showing racial animus)
    - *Blue Ink, Ltd. v Two Farms, Inc.* (Md. Cir. Ct. June 19, 2012) (hearsay)

- Timeliness
  - *Cutter v. Orr* (Sup. Ct. Az. May 7, 2012) (late disclosure of social media printouts)
- Relevance (TRE 401)
  - Typical situation: party claiming physical limitations due to accident can't really contest the relevance of Facebook photos of her running a marathon, playing sports, etc.
- Examples:
  - *Romano v. Steelcase, Inc.* (N.Y. 2009)
  - *Largent v. Reed* (Pa. 2009)

- But relevance has its limits. For example, in *Malhoite v. Home Depot USA*, an employment discrimination case, Plaintiff's Facebook postings about her employment and dealings with co-workers was relevant, while social media content about her emotional state was not.

Authentication of Social Media Content (TRE 901 & FRE 901)

- Direct authentication (admission by the author/creator of the content)
- Stipulation by the parties
- Self-authenticating evidence furnished by the opposing party during discovery
- Indirect authentication (testimony by a witness who observed the creation of the online content or who received it)

Texas Courts have been fairly lenient on indirect authentication:

- Mann v. Dept. of Family and Protective Services, 2009 WL 2961396 (Tex. App. – Houston [1st Dist.] 2009) (author of photos depicting her underage drinking not sure when pictures were taken, but admissible due to timing of photos' posting to MySpace while child in DFPS care)
- In Re J.W., 2009 WL 5155784 (Tex. App. – Waco 2009) (court permitted authentication by a witness who reportedly read statements in question on the Defendant's MySpace page –without any personal knowledge that Defendant herself had typed the admission.)

CIRCUMSTANTIAL AUTHENTICATION AND "THE TEXAS RULE"

- Authentication under TRE 901 is a low threshold, since it is for the jury to resolve issues of fact. Proponent can authenticate social media evidence using circumstantial means so long as he/she can demonstrate to the trial judge that a jury could reasonably find that the proffered content is what it purports to be.

TIENDA v. STATE 358 S.W. 3D 633, (Tex. Crim. App. 2012)

- Murder conviction of Ronnie Tienda, Jr. upheld based on social media postings by/linked to the Defendant.
- Examples: 1) photos of Tienda with gang slogans and the caption, "Rest in peace David Valadez."
    2) Statements by Tienda referring to people "snitching on me."
    3) Photos of Tienda's gang tattoos and his electronic monitoring bracelet.
    4) References to Tienda's gang nickname and the crime.
- Court: "The more particular and individualized the information, the greater the support for a reasonable juror's finding that the person depicted supplied the information."

Tienda has been followed consistently in Texas:

- Campbell v. State, 382 S.W. 36 545 (Tex. App. – Austin 2012) (aggravated assault defendant's conviction upheld, due to "internal characteristics" that confirmed Campbell as the author, such as his unique speech patterns, reference to certain facts about the incident and potential charges, and testimony regarding access to the account)
- Rene v. State, 376 S.W. 3d 302 (Tex. App. Houston [14th Dist.] 2012) (references to Defendant's gang affiliation, distinctive gang tattoos, and nickname)

Tienda has also been followed by Courts nationwide embracing the "Texas Rule:"

- Delaware - Parker v. State, 2014 Del. LEXIS 49 (Del. S. Ct., Feb. 2014)
- Georgia - Burgess v. State, 292 Ga. 821 (Georgia S. Ct., April 2013)
- Kentucky – Simmons v. Commonwealth (Ky. S. Ct., Feb. 2013)
- Mississippi – Smith v. State, 2013 Miss. App. LEXIS 318 June 2013)
- Arizona – State v. Assi (August 2012)
- California – People v. Valdez (April 2013)

- Wilkinson v. State, (Tex.App – Houston [14th Dist.] April 27, 2017)
  - Court admits Facebook posts pursuant to "present sense impression" exception to hearsay rule.

The Contrary Approach – The "Maryland Rule"

- As articulated in Griffin v. State, 19 A. 3d 415 (Md. 2011) this approach requires direct authentication of social media evidence, such as:
  - Testimony of the creator;
  - Information directly from the social networking site;
  - Documentation of the internet history or hard drive of the creator (and testified to by a digital forensics expert.)

Why? Potential for creation of fake profiles and hacking

- Some states have followed the "Maryland approach:"
  - Connecticut – State v. Eleck, 23 A. 3d 818 (2011)
  - Massachusetts – Commonwealth v. Purdy, 945 N.E.2d 372 (2011)
  - New York – People v. Lenihan, 911 N.Y. S 2d 588 (2010)

But then…. Maryland changed and decided to do things “the Texas way.”

-Sublet v. State (2015)

-3 cases (Sublet; Harris v. State; and Monge-Martinez v. State), in which Maryland decided to adopt the circumstantial authentication approach.

Other Resistance to Social Media Evidence

- U.S. v. Vayner, (2nd Cir. 2014)

(2nd Circuit acknowledged that authentication could be direct or circumstantial, but said that the mere fact that a Russian Facebook page with the defendant's name and photo happened to exist doesn't prove that he created it.)

U.S. v. Browne, 2016 WL 4473226 (3rd Circuit 2016)

- "The advent of social media has presented the courts with new challenges...including in the way data is authenticated under the Federal Rules of Evidence – a prerequisite to admissibility at trial."
- Defendant in child porn case challenged conviction, arguing Facebook records were not properly authenticated (government relied on self-authentication as a "business record under FRE 902)

- Court rejects the 902 rationale, but holds that authentication was accomplished by extrinsic means tying evidence to the defendant.
- Citing Tienda, Court says circumstantial authentication is fine, stating "conclusive proof of authenticity is not required" and "the jury, not the court, is the ultimate arbiter of whether an item of evidence is what its proponent claims it to be."

Other federal circuits have agreed:

- U.S. v. Barnes, 803 F.3d 209 (5th Cir. 2015)
  - Sufficient authentication of Facebook messages under 901 where a witness testified 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 messages.
- U.S. v. Hassan, 742 F.3d 104 (4th Cir. 2014)

OTHER SOCIAL MEDIA EVIDENTIARY ISSUES

Hearsay and Hearsay Exceptions

- Musgrove v. Helms, (Ohio 2011)
  - Admission against interest on MySpace
- In re K.W., (North Carolina 2008)
  - Prior inconsistent statement on MySpace
- Webb v. Jessamine County Fiscal Court, (Ky. 2011)
  - Prejudice exceeds probative value of MySpace photos
- In re A.D.W., (Iowa 2012)
  - Prejudice exceeds probative value of Facebook photo.

Improper character evidence

- U.S. v. Phaknikone, 605 F. 3d 1099 (11th Cir. 2010)
  - Photos of defendant brandishing a gun and displaying gang tattoos were improper character evidence offered to prove "action in conformity therewith."

SOCIAL MEDIA DISCOVERY ISSUES IN EMPLOYMENT CASES

1. Appler v. Mead Johnson Co. (S.D. Indiana 2015)
   - Plaintiff's narcolepsy and inability to be at work at early morning time was an issue. Court ordered production of Plaintiff's entire Facebook profile, because it "would reveal the times she is active online, so obviously awake."

Spoliation

2. Painter v. Atwood (D. Nev. 2014)
   - Plaintiff's sexual harassment case against dentist employer undermined when it's revealed Facebook posts discussing how happy she was at work were deleted by her. She also deleted text messages that contradicted her deposition testimony.

     Held: Adverse inference given to jury.

3. EEOC v. Simply Storage Mgt. (S.D. Ind. 2010)
   - Sexual harassment/hostile workplace Plaintiffs alleging emotional distress have to produce all social media content relevant to Plaintiffs' mental or emotional state.

4. EEOC v. Original Honeybaked Ham Co. (D. Colorado 2012)
   - Class action Plaintiffs in sexual harassment/retaliation case compelled to turn over social media content that undermined their case, including social media communications between the class members that discussed their financial expectations from the lawsuit.

5. Caputi v. Topper Realty Corp. (E.D. N.Y. 2015)
    - Unlimited access to Plaintiff's Facebook content denied in FLSA case; court orders limited production.

6. Ogden v. All-State Career School (W.D. Pa. 2014)
   - Plaintiff in gender discrimination/retaliation case ordered to produce social media content relevant to claims about emotional distress.

7. Smith v. Hilshire Brands (D. Kan. 2014)
   - Court orders "intermediate" production of Plaintiff's social media content in FMLA/Title VII case.

The Dangers of Not Knowing What Your Client is Doing on Social Media

- Gulliver Schools, Inc. v. Snay, (Fla. Ct. of App., 2014
  - $80,000 settlement torpedoed by Plaintiff's daughter's "Suck it" Facebook post, which violated release's confidentiality provision.

- W. Va criminal defense lawyer ordered to show cause why she shouldn't be held in contempt for allegedly giving her client a copy of a packet containing the identify of a confidential informant.
  - Client's roommate then posted several photos of the packet on Facebook, showing the name and address of the confidential informent, and bragging about "exposing the rat."
  - Result: fine

- 50 Cent ordered by bankruptcy court judge to explain why he's posting photos like this on Instagram:


© Instagram

THE NEW DUTY OF COMPETENCE

- ABA Ethics 20/20 Commission and new Rule 1.1
  - "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology.**"
- Trend in courts nationwide to hold lawyers to a higher standard regarding technology: a "duty to Google"

- Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) – affirmative duty to research jurors online.

- Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013) – failure to investigate social media recantation of sexual abuse victim held to be inadequate assistance of counsel.

- Womack v. Yeoman, 2011 WL 9330606 (Cir. Ct. Va. 2011) – the dangers of not being conversant in technology.