Social Media – Evidentiary Issues

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I. Introduction[1]

In 1999, a Texas federal district court judge warned in *Clair v. Johnny's Oyster & Shrimp, Inc.*, that internet information was "inherently untrustworthy" and akin to "voodoo[.]"[2] A lot has changed in the last twenty years. Today the internet and social media touches the lives of almost every person. In 2018 Facebook announced that 2.5 billion people worldwide used at least one of its apps: Facebook, Instagram, Whatsapp or Messenger.[3] Elections have been both positively and negatively influenced by social media (with a little help from foreign governments), and even the President of the United States routinely uses a Twitter to the delight and dismay of millions of Americans. It has been opined by one scholar that it is a matter of "professional competence" for attorneys to investigate relevant social networking cites.[4] It is therefore of little surprise that the same technologies that influence have how we communicate, share photos, listen to music and watch television, would impact the type of evidence we use at trial.

Authentication of social media evidence, like more traditional forms of evidence, often involves verification through witness testimony. But this testimony, in order to be most effective, may also need to address electronic security or eye witness verification. What can be done to ensure social media evidence can be used as reliable evidence in trial when it is most beneficial? Alternatively, what can be done to challenge the authenticity of social media evidence? As the

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[1] A special thanks to Meredith C. Manuel (Georgetown Univ. Law Center, Class of 2021) and Breanna N. Wenke (Univ. of Texas Law School, Class of 2021) for their work on this project.

[2] *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp 2d 773, 775 (S.D. Tex. 1999).

[3] John Constine*, 2.5 Billion People Use at least one of Facebook's Apps*, Techcrunch.com, July 25, 2018, https://techcrunch.com/2018/07/25/facebook-2-5-billion-people/

[4] See Sharon Nelson, et al., "The Legal Implications of Social Networking," 22 Regent U.L. Rev. 1, 1-2 (2009/2010).

law evolves to meet these concerns, courts have taken various approaches. Interestingly, Texas may arguably be one of the more lenient jurisdictions in the nation where it comes to the evidentiary bar for the authentication and admissibility of social media evidence.[5]

II. General Application of the Federal Rules of Evidence

When an attorney seeks to have evidence admitted, it must be first authenticated. Authentication involves demonstrating that the item is "what its proponent claims it to be."[6] This showing does not have to be conclusive, but rather it must be sufficient enough to "support a finding that the matter in question is what its proponent claims."[7] In other words, it is not always necessary to actually establish that an eye witness observed the creation or origin of the evidence first-hand. For example, if seeking to admit a document, authentication "in the form of proof that a particular person authored or executed a document is not required where the issue concerns only the content of the document or the fact of its existence."[8]

Though some have suggested that social media evidence should have its own set of rules for proper authentication, this argument has largely been rejected by courts, leaving advocates a wide berth to apply the federal rules to ever evolving social media platforms[9] and potentially

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[5] Elizabeth A. Flanagan, *#Guilty? Sublet v. State and the Authentication of Social Media Evidence in Criminal Proceedings,* 61 Vill. L. Rev**.** 287, 294 (2016).

[6] Fed. R. Evid. 901; Tex. Evid. R. 901.

[7] George L. Blum, Article, *Authentication of Social Media Records and Communications*, 40 A.L.R.7th (2019) (citing Am. Jur. 2d, Evidence § 1045).

[8] Blum, *supra* (citing Am. Jur. 2d, Evidence § 1046).

[9] *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 543–45 (D. Md. 2007) (nothing that "courts have recognized that the authentication of [electronically stored information] may require greater scrutiny than that required for the authentication of 'hard copy' documents" while also being "quick to reject calls to abandon the existing rules of evidence when doing so" and discussing

producing inconsistent results. According to the rules of evidence, there are a series of "hurdles" that social media evidence, like electronic evidence generally, must be able to overcome.[10] These challenges include relevance, authentication, hearsay, originality, and unfair prejudice. This paper, however, will not address other admissibility objections and will focus only on authentication.

The Federal Rules of Evidence Advisory Committee has noted that Rule 901(a) simply requires the authentication of evidence and that the rule was "liberally construed" so as to keep pace with technological developments.[11] Rule 901(b), on the other hand, provides ten suggested methods of authentication that include:

(1) testimony of a witness with knowledge;

(2) non-expert opinion about handwriting;

(3) comparison by an expert witness or the trier of fact;

(4) distinctive characteristics and the like;

(5) opinion about a voice;

(6) evidence about a telephone conversation (self-identification or matter of dealing);

(7) evidence about public records;

(8) evidence about ancient documents or data compilations (greater than 20 years old or in a place only something authentic would be);

(9) evidence about a process or system (and that it will produce an accurate result); and

recent Federal Rules of Advisory Committee notes suggesting "leaving room for growth and development in this area of the law").

[10] *Id.* at 538.

[11] *Lorraine*, *supra* at 545.

(10) other methods provided by statute or other rule.[12]

Fed. R. Evid. Rule 201 also allows for the admission of evidence via judicial notice either taken by the court itself or if a party requests it and the court is supplied with the necessary information at any stage of the proceedings.[13] Finally, Rule 902 provides twelve methods by which documents, including electronic ones, may be authenticated without additional extrinsic evidence (this process is also known as "self-authentication").[14]

Although certain electronic evidence, such as government websites, may be considered self-authenticating[15] or falling under exceptions to the hearsay rule,[16] social media evidence, in general, must be authenticated in accordance with Rule 901 or 201. This process is comparable to the authentication of more traditional forms of evidence that require an attorney to first show that the social media evidence in question is relevant and authentic.[17] This authentication process has been referred to as "not a burdensome one"[18] and can be established with a showing of direct proof, circumstantial evidence, or a combination of both; this may be accomplished via personal

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[12] Fed. R. Evid. 901(b); *see also* Tex. Evid. R. 901(b) (providing the same methodology for authentication).

[13] Fed. R. Evid. 201; *see also* Tex. Evid. R. 201 (allowing judicial notice of adjudicative facts).

[14] Fed. R. Evid. 901(b).

[15] *Nat'l Urban League, Inc. v. Urban League of Greater Dall. & N. Cent. Tex., Inc.*, No. 3:15-CV-3617-B, 2017 WL 4351301, at *17 (N.D. Texas) (citing *Brown v. JNH Invs., Inc.*, No. 416-CV-00675-ALM-CAN, 2017 WL 3205716, at *2 (E.D. Tex. July 7, 2017)).

[16] *See, e.g.*, *United States v. Ballesteros*, 751 Fed. Appx. 579 (5th Cir. 2019); *United States v. Roy*, 765 Fed. Appx. 85 (5th Cir. 2019).

[17] Browning, *supra* at 478.

[18] *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) (citing *United States v. Jackson*, 636 F.3d 687, 693 (5th Cir. 2011)).

testimony or by a showing of appearance or distinctive characteristics that could have only been attributable to the creator or discovered by the witness.[19] Although this showing is "not a particularly high barrier to overcome" it is especially important with regards to electronically stored information, including various types of social media data.[20]

Social media evidence can be broken down into several nuanced categories. These include group posts (posts to a certain population of people based on similar interests or geographic location), public status updates, censored status updates for a specific audience, direct messages, compiled wide-scale data (for use by the platform in developing advertising strategies, etc.), metadata (information embedded in the files shared regarding their origin), public photos, publicly or privately shared links to third party websites, and private photos (either sent via private message or posted to a select group). Furthermore, some types of social media "posts" may be targeted advertisements by a company or organization that are either clearly or not so clearly labeled to the casual user of social media.[21] In addition to direct advertisers, "influencers" on social media, or people who engage in paid sponsorships with various brands or organizations and make posts or photos of them interacting with the brand, are growing in numbers and impact.[22] It is possible for all of these types of social media posts to be used as relevant evidence in both civil and criminal trials that either make up the elements of a claim or describe the surrounding circumstances.

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[19] *See, e.g.*, *id.* at 217–18.

[20] *Lorraine*, supra at 542.

[21] Sapna Maheshwari, *Facebook Advertising Profiles Are a Mystery to Most Users, Survey Says*, N.Y. Times, Jan. 16, 2019, https://www.nytimes.com/2019/01/16/business/media/facebook-advertising-transparency-users.html.

[22] Kevin Roose, *Don't Scoff at Influencers. They're Taking Over the World.*, N.Y. Times, July 16, 2019, https://www.nytimes.com/2019/07/16/technology/vidcon-social-media-influencers.html.

The Federal Rules of Evidence do not provide specific instructions on how each of the aforementioned categories may be authenticated and it is possible that various authentication rules can be used simultaneously. However, there are some clear indications of what is not sufficient to authenticate certain types of social media. For example, a person's name being on a social media post or message as the author in and of itself is likely not sufficient to authenticate the message or information as being authored by the person whose name is displayed.[23] Similarly, a time and date stamp for when a photo, video, or post was put online may not serve as sufficient authentication for establishing when and where the photo was taken.[24]

Existing case law has established some additional guidelines about how to proceed under various rules, most commonly under Rule 901(b)(4) which allows for authentication via circumstantial evidence. For example, Facebook posts may be authenticated via testimony by establishing that the witness recognizes the account in question, has seen the account being used on various relevant mediums (computer, phone, etc.), and the content of the communication.[25] Photos on social media may be authenticated by someone "other than the photographer if he recognizes and identifies the object depicted and testifies that the photograph fairly and correctly

[23] Blum, *supra* (stating that "[w]ithout an affidavit or evidence in the record indicating that Facebook posts attached to a defendant's Motion for Reconsideration were authentic, the court may take judicial notice that anyone can post to Facebook from any device using a subscriber's log-in credentials").

[24] *But see Laurentz v. State*, No. 01-12-00269-CR, 2013 WL 5604740 (Tex. App. 2013) (finding Facebook messages properly authenticated with time date stamps indicating the defendant had authored and sent messages within a day of the alleged assault).

[25] *See, e.g., Barnes, supra*; *see also Lorraine*, *supra* (for extensive discussion regarding the verification of various types of electronic media).

represents it"[26] or alternatively via metadata available on the file itself that can reveal when the file was created or edited.[27] If the social media evidence comes in the form of a database or compilation of some kind (e.g. a database of all users or describing a particular user's activity on a website) a "custodian or other qualified witness with personal knowledge of the procedure that generated the records" may provide sufficient testimony to authenticate.[28]

Ultimately, after passing these evidentiary hurdles, responsibility for evaluating the reliability of evidence lies with the judge or jury.[29] Social media evidence, like other forms of evidence, is reviewed for abuse of discretion[30] subject to harmless error review[31] and an appeal, if the appeal is based solely on the fact that the social media evidence was not introduced with conclusive proof of authenticity, will not survive.[32] Rather, "nonconstitutional error requires

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[26] *United States v. Winters*, 530 Fed. Appx. 390, 395 (citing *United States v. Clayton*, 643 F.2d 1071, 1074 (5th Cir. 1981)).

[27] *See Lorraine, supra* at 547 (citing *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005)) (describing that metadata which may consist of file names, location, date of access, last modifications, permissions, etc. and is "data about data" or "information describing the history, tracking, or management of an electronic document" that "describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted").

[28] *Lorraine, supra* at 545 (citing *United States v. Kassimu*, 188 Fed. Appx. 264 (5th Cir. 2006); *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, No. 8:06-CV-223-T-MSS, 2006 U.S. Dist. LEXIS 28873, at *3–4 (M.D. Fla. 2006); *Safavian*, 435 F. Supp. 2d at 40 (D.D.C. 2006); *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp 2d 1060 (C.D. Cal. 2002)).

[29] *Barnes, supra* at 217 (citing *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (stating "the jury holds the ultimate responsibility for evaluating the reliability of the evidence")).

[30] *Winters, supra* at 394 (citing *United States v. Valencia*, 600 F.3d 389, 416 (5th Cir. 2010)).

[31] *Barnes, supra* at 217 (citing *United States v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007).

[32] *See Barnes, supra* at 217 (citing *United States v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir. 1989)).

reversal only if it substantially affects the substantial rights of the accused" while "examining the record as a whole."[33] Thus, it is extremely important to note that specific content within a piece of social media evidence, if it is corroborated by or duplicative of other witness testimony, this generally does not warrant reversal under harmless error review.[34]

When it comes to the authentication of electronic information, at times it is possible for less to be more.[35] In other words, it is not always necessary to authenticate social media evidence under a stringent standard of 901(b) as opposed to an arguably lesser standard, such as that of circumstantial evidence.[36] In practice, if a party contends that a particular piece of social media evidence was improperly authenticated, a court may decline to rule that the evidence was improperly authenticated if it is possible that the evidence could have been maintained under another category of Rule 901(b).[37] Further, social media evidence, if properly obtained during the discovery process, may in some cases be assumed as authentic.[38]

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[33] *Dering v. State*, 465 S.W.3d 668 (Tx. Ct. App. 2015); *see also Beaty v. State*, No. 03-16-00856-CR, 2017 WL 5560078 (Tex. Ct. App. Nov. 15, 2017).

[34] *See Barnes*, *supra* at 218 (citing *United States v. Bell*, 367 F.3d 452, 469 (5th Cir. 2004).

[35] *See Lorraine, supra* at 548–49.

[36] *See Lorraine, supra* at 548–49.

[37] *See, e.g., United States v. Meienberg*, 263 F.3d 1177, 1181 (10th Cir. 2001) (providing an example of court finding evidence permissible despite a party challenged the admissibility of computerized records and contended that opposing counsel was required to prove the electronic system was capable of producing reliable results).

[38] *See, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1153–54 (C.D. Cal. 2002) (finding posts on a website authenticated appropriately when obtained through the discovery process).

Alternatively, it may behoove a well prepared advocate to recognize that "given the wide diversity of [social media] evidence" there "is no single approach to authentication that will work in all instances[.]"[39] It is prudent to "identify certain authentication issues that have been noted by courts [and] be forearmed with this knowledge to develop authenticating facts that address these concerns."[40] Therefore, although it may be possible to authenticate social media evidence more easily with one method over another method, attorneys should be prepared to authenticate evidence in numerous ways, paying particular attention to how the court in question has dealt with similar evidence on previous occasions. A description of relevant 5th Circuit and Texas state court precedent follows.

III. Authentication of Social Media Evidence in the 5th Circuit

The vast majority of issues regarding the authentication of social media evidence have occurred in the course of criminal trials as opposed to civil litigation. Recent criminal cases reveal that authentication of social media evidence can be done circumstantially when seeking to establish relevant background information or circumstances leading to an alleged crime, e.g. witness testimony that the individual recognizes the account and that the communication is consistent with prior dealings.[41] However, when the social media evidence being introduced becomes dispositive of the defendant having actually committing the alleged crime, this may not be sufficient without a showing of additional evidence, such as an eye-witness.[42] Furthermore, authentication of the

[39] *Lorraine*, *supra* at 542.

[40] *Lorraine*, *supra* at 542.

[41] *See, e.g.*, *Barnes*, *supra* at 217–19.

[42] *See Winters*, *supra* at 395–97.

post by the actual social media platform in question is usually not necessary, but may be required if these details are central to the alleged crime or issue.[43] On appeal, social media evidence authentication issues generally have not survived clear error review when the totality of evidence given to the jury was considered.[44]

A. Social Media Evidence in 5th Circuit Criminal Cases

In criminal cases, when establishing the circumstances surrounding the alleged crime, witness testimony identifying that the communication in question is consistent with the parties' previous history of interaction is generally sufficient to authenticate the evidence.[45] In *Barnes*, the Defendant appealed a guilty verdict partially on the basis that Facebook and text messages relating to various drug transactions were allegedly insufficiently authenticated.[46] Barnes argued that the messages could not have been sent by a party who was a quadriplegic and therefore could not be authenticated. [47] The court disagreed and found that the government had laid sufficient foundation with personal testimony of an individual who recognized the account and stated that the communication in question was similar to the individual's normal way of communicating.[48] The court stated that even though the witness "was not certain that [the individual] authored the

[43] *See United States v. Muhammad*, No. 1:14cr36-HSO-RHW, 2014 WL 6680606, at *3-4 (S.D. Miss. 2014).

[44] *See Winters*, *supra* at 397.

[45] *See Barnes*, *supra* at 217.

[46] *Barnes*, *supra* at 217.

[47] *Barnes*, *supra* at 217.

[48] *Barnes*, *supra* at 217.

messages, conclusive proof of authenticity is not required for the admission of disputed evidence."[49]

However, once the social media evidence becomes dispositive of the crime committed, this manner of authentication may not be sufficient absent additional testimony describing the actual circumstances reflected in the social media post.[50] In *Winters*, a Defendant convicted of the charge of (1) possession of a firearm by a felon and (2) conspiracy to distribute cocaine argued on appeal that the admission of various Facebook and MySpace photos depicting the defendant next to firearms was improper because the government had failed to establish an adequate foundation for the items by relying on personal testimony that the photos were on the defendant's website and belonged to the defendant.[51] The court ruled that this authentication was insufficient because the photos were proffered to suggest the Defendant had possession and control of the money, weapons, and drugs and conclusively established that the defendant was part of a drug trafficking conspiracy.[52] The court went on to explain that the photo itself did not necessarily establish that the owner of the page or the person in the photo actually possessed or controlled any of the items pictured, especially because the witness used to authenticate was unable to recognize or identify the objects in the photo or their origin and relation to the defendant.[53] Despite appellate courts affording "an especially high level of deference to district courts in such circumstances" the

[49] *Barnes, supra* at 217.

[50] *Winters, supra* at 395–97.

[51] *Winters, supra* at 395–97.

[52] *Winters, supra* at 395–97.

[53] *Winters, supra* at 395–97.

appellate court ruled that admittance of the evidence was improper and then proceeded to analyze the evidence's effect on the outcome.[54] The court considered the totality of the record and decided ultimately that the photos, although admitted erroneously, did not affect the Defendant's conviction of conspiracy because of an abundance of other evidence presented.[55]

While testimony regarding the circumstances depicted in the social media post that form the elements of the alleged crime is necessary, expert testimony regarding the technical details of the post may also assist in having the evidence authenticated, especially if this evidence is dispositive or goes to the individual elements of a crime. In Muhammad, the government urged the court to assume the authentication of various Google, Facebook, and Yahoo records, arguing that having the records authenticated by a custodian would place an undue financial and logistical burden on the prosecution to transport authentication witnesses to trial.[56] The Court disagreed and found that "out of an abundance of caution" the government should be required to produce witnesses at the trial to testify as to the authenticity of the records from the companies in question.[57]

In summary, a review of 5th Circuit criminal litigation involving the authentication of social media evidence in trials suggests that while authentication is not overly complex when establishing background or circumstantial evidence, it becomes more necessary to authenticate proferred social media evidence in multiple, potentially more thorough, ways if it is an essential element of the crime. Cautious criminal attorneys practicing in the 5th Circuit should be prepared

[54] *Winters*, *supra* at 395–97 (citing *United States v. Fields*, 483 F.3d 313, 354 (5th Cir. 2007).

[55] *Winters*, *supra* at 395–97.

[56] *Muhammad*, *supra* at *3-4.

[57] *Muhammad*, *supra* at *3.

to assume this burden if seeking to introduce this evidence. Alternatively, advocates should seize key opportunities to contest the proper authentication of social media evidence as not being supported by eye-witness testimony if the social media evidence in question is dispositive of the alleged crime having actually been committed.

B. Social Media Evidence in 5th Circuit Civil Litigation

Civil cases, in general, are in alignment with their criminal counterparts when it comes to the authentication of social media evidence, although there has been less dispute in the civil arena between parties regarding the authentication of information depicted in social media evidence. These patterns indicate that as in criminal cases, social media evidence, if relevant to the claims, may be admitted provided that it is properly authenticated via witness testimony or another permissible way.[58]

In *Rea*, a civil case in which the plaintiff sought recovery after sustaining an injury, the court considered whether an overwhelming number of Facebook and Instagram postings of the plaintiffs own page, corporate page, and pages of various other individuals could be let in as evidence when the plaintiff argued their admission would be highly prejudicial. The court stated, "[p]hotographs of the Plaintiff enjoying regular activities . . . in poses or stances and positions in which she placed herself after the accident . . . have little relevance to the ultimate issues in this matter, though they may have some impeachment value."[59] The court also noted, however, that the photos could be authenticated via a testifying witness provided that they were indeed relevant

[58] *See Rea v. Wis. Coach Lines, Inc.*, No. 12-1252, 2015 U.S. Dist. LEXIS 27916 (E.D. La. 2015); *Herster v. Bd. of Supervisors*, No. 13-139-JJB-SCR, 2015 U.S. Dist. LEXIS 125948 (M.D. La. 2015); *Urban League*, *supra*.

[59] *Rea*, *supra* at 14.

to the matter at hand.[60] While the court did not allow all of the photos in to evidence, it declared that "at least some photographs may establish facts relating to the determination of loss of earning capacity and loss of enjoyment of life" and allowed the Defendants to introduce ten photos, excluding any comments below them.[61]

Social media evidence authentication in civil cases has also been denied as hearsay when it was not reinforced by other permissible ways of authenticating evidence. In *Herster*, a civil case involving sexual harassment and gender discrimination claims, the plaintiff produced Facebook comments and tweets of support for the plaintiff and anger directed towards the university regarding fees issued to the plaintiff after the lawsuit had already been filed.[62] The defendants sought to exclude the evidence, arguing that it constituted hearsay. The court agreed, prohibiting the evidence from being used because it was "impossible to know whether the comments were made while or immediately after the defendants had learned of the present lawsuit[.]"[63] In National Urban League, a disaffiliation and breach of contract case, the parties disputed the status of the company's logo, shared on various electronic and social media mediums, and whether it was protectable – in this case the court reaffirmed that the evidence was admissible when combined with printouts from the USPTO were self-authenticating.[64]

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[60] *Rea, supra* at 14.

[61] *Rea, supra* at 14.

[62] *Herster*, *supra* at 15–16.

[63] *Herster*, *supra* at 13-14. Notably in this case defense counsel also objected to the admission of the evidence on relevance grounds and it was noted that the posts could be used to impeach the witnesses.

[64] *Urban League*, *supra* at 17.

Ultimately, 5th Circuit precedent indicates that social media information, in both civil and criminal trials, is welcome and useful evidence, provided that it is relevant to the alleged wrong. However, the more reliant a party's claim is on the social media evidence in question, the more it becomes necessary to authenticate this evidence by showing the circumstances and origin of the social media post. In other words, dispositive social media evidence should be authenticated by circumstantial witness testimony and in some cases, a showing of an electronic "fingerprint" that matches the individual in question.

IV. Authentication of Social Media Evidence in Texas State Court

Trends in Texas state court regarding the authentication of social media evidence generally match what has been shown in the 5th Circuit when it comes to both civil and criminal trials. However, arguably the state court cases reveal more information about what forms of presentation of social media evidence are acceptable and what comprises a successful objection to social media evidence.

A. Social Media Evidence in Texas State Court Criminal Trials

Tienda is a landmark Texas case involving a multiple car shoot-out in Dallas that has been cited throughout the nation involving the authentication of social media evidence.[65] *Tienda* and its progeny have established that social media evidence may be authenticated via personal testimony or official reports (for example, from a licensed professional such as a doctor or therapist

[65] *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012).

from which the individual was receiving treatment) and may be presented in a variety of mediums, including printouts, screen captures, and word processing documents. Furthermore, the cases indicate that when challenging authentication, disputing authenticity on a basis of ease of access alone absent additional information is not sufficient. Further, to survive appeal, it must be shown that if the evidence was improperly authenticated, it impacted a substantial right.

At trial in *Tienda*, the government produced evidence in the form of photos, messages, and posts on MySpace, a social media platform, that established circumstantial evidence of threatening words and ideas shared by the participants ultimately leading to the crime.[66] The defendant, on appeal, disputed the use of the photos as being improperly authenticated because of the "ease with which a person could create a MySpace page in someone else's name and then send messages, purportedly written by the person reflected in the profile picture, without their approval."[67] Ultimately, the court ruled that because the victim's sister testified to how she found the profiles and how the pictures and videos depicted those involved and she was able to identify them by distinctive tattoos, this showing was sufficient to establish authentication of the evidence. Similarly, in *Steinmann*, a Facebook photo was maintained when corroborated via official report and testimony of a state-retained psychologist.[68]

Following *Tienda*, Facebook posts of photos depicting the defendant's clothing by the defendant's brother were ruled properly authenticated via detective testimony that the detective had visited the page and taken screenshots while affirming the photos depicted the defendant.

[66] *Id.* at 635–636.

[67] *Id.* at 636.

[68] *Steinmann v. State*, No. 10-16-00137-CR, 2017 WL 2623065, at *2–3 (Tex. App. 2017).

Opposing counsel had previously objected to the inclusion of the photos and requested that they be authenticated via a Facebook expert. Relying on *Tienda*, the court held "it would not have been outside the zone of reasonable disagreement for the trial court to conclude that a reasonable jury could have determined that the evidence was authentic."[69] Going further, the court admitted the possibility that "someone else could have manipulated images of [the defendant] and hacked into [someone's] account or uploaded them to Facebook through an alias account" existed, "but the likelihood of such 'an alternate scenario' was for the jury to weigh."

Alternatively, in *Dering*, the defendant contested his ability to receive a fair trial and sought to show this with the use of social media evidence in the form of third party posts and responses that had previously been denied at trial.[70] Distinguishing this case from *Tienda*, the Court ruled that simply offering "names and photos as shown on the accounts of the owner and posters" may not be sufficient to authenticate the Facebook post and replies, and then went on to state that even if the trial court erred by not admitting the posts, this exclusion did not amount to what should be overruled based on harmful error review. [71]

Courts have also been open to various styles of presentation of social media evidence in the form of screen captures, word processing documents, and print-outs. In *Woods*, a defendant appealed his conviction because the Facebook posts presented at trial were shown in the form of screenshots as opposed to printouts, but the court found this argument uncompelling, especially

[69] *Id.*

[70] *Dering v. State*, 465 S.W.3d 668, 672 (Tex. App. 2015).

[71] *Woods v. State*, No. 11-15-00134-CR, 2017 Tex. App. LEXIS 8206, at *12-16 (Tex. App. Aug. 25, 2017).

when the defendant was unable to show how a screen capture affected a substantial right.[72] In *Lowery*, the court upheld the use of Facebook messages that had been copied and pasted into a word processing document as properly authenticated via the testimony of the individual who had actually saved the document.

While courts are accepting of many different forms of the presentation of the social media evidence in question, when it comes to objecting to the authentication of social media evidence, successful objections should be specific and demonstrate precisely why traditional forms of authentication like witness testimony would be insufficient rather than simply pointing out the possibility of a fake profile or photo. In *Snow*, the defendant appealed on the basis that social media communications extracted from her cell phone were improperly authenticated when a police officer testified as to the contents and process by which the information was extracted from her phone, amongst documents and the testimony of other individuals.[73] The court disagreed, finding this method of authentication acceptable and explained that objections to the use of extracted social media evidence from a cell phone, in order to survive, must not be general in nature; rather, the objection must be specific, reference the applicable evidence rule, phrased as a clear objection, and directed at the exhibit.[74]

Ultimately, these cases show us that introducing social media evidence may be less burdensome than successfully objecting to appealing it.[75] Relevant evidence can be authenticated or presented in numerous ways, while challenging the same evidence may require more in depth

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[72] *Id.*

[73] *Snow v. State*, No. 02-17-00310-CR, 2019 WL 237734, at *1-6 (Tex. App. Jan. 17, 2019).
[74] *Id.*

[75] *Compare Snow*, *supra*, *with Woods*, *supra*.

research to be able to point out what exactly makes the social media post or account an untrustworthy source. It seems that ultimate authority lies with the jury.

B. Social Media Evidence in Texas State Court Civil Litigation

Overall, there are less civil cases in Texas state court, like the 5th Circuit, in which the use of social media evidence was contested; predictably the vast majority of civil cases involving social media relate to libel, slander, and defamation claims.[76] Social media authentication appears to be challenged less often in civil cases in Texas state court, perhaps because it is most often presented in conjunction with other information that supports similar claims.[77]

In *NCHM*, a parental rights case, the use of social media posts was upheld when combined with other evidence such as drug test results, criminal charges, to show evidence of substance abuse.[78] Additionally, in *Van Der Linden*, when the plaintiff claimed that the defendant was engaging in tortious interference of contract, social media evidence in the form of messages sent by the Defendant to other individuals urging them not to do business with the Plaintiff was used without objection.[79] Furthermore, in *Rodriguez*, social media evidence exclusively in the form of "negative statements" was used to form the basis of a defamation claim amidst a heated local political battle.[80]

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[76] *See, e.g., Van Der Linden v. Khan*, 535 S.W.3d 179 (Tex. App. 2017); *Rodriguez v. Gonzales*, 566 S.W.3d 844

[77] *See, e.g., In the Interest of N.C.H.-M.*, No. 04-18-00098-CV, 2018 Tex. App. LEXIS 6191 (Tex. App. 2018).

[78] *Id.* at *3-5.

[79] *Van Der Linden, supra* at 187.

[80] *Rodriguez, supra* at 848.

IV. Looking Ahead

Texas is one of the states leading the way when it comes to authentication of social media evidence.[81] The case law, when balanced against other jurisdictions, appears to be arguably coherent and well developed at this point, perhaps even lenient.[82] Many other states have adopted "the Texas approach espoused in *Tienda*[,]" finding that so long as a case is made to support a jury finding the evidence to be what it is claimed to be, this is sufficient, rather than requiring a more stringent standard, such as the Maryland approach, a "high standard" which requires authentication to prove it is not possible someone else could have created the account.[83] This stricter standard is reflected in the 4th and 9th Circuit cases *Hassan* and *Vayner* respectively; on the one hand, verification of authorship via internet protocols was deemed sufficient authentication and on the other hand, offering no evidence to show that the Defendant created a profile page other than its existence was deemed insufficient.[84]

While the fact that Texas's law appears to be more lenient than other states may be welcome to some, it certainly presents challenges by placing more pressure on attorneys wishing to object to social media evidence to do their own detective work and know enough about how the social media platform works to articulate a suggestion as to why the evidence should be considered improperly authenticated. We know that merely suggesting that anyone could make a fake profile is not always enough, but we don't know what exactly *is* enough, which arguably leaves room for

[81] Flanagan, *supra* at 293-295.

[82] *Id.*

[83] *Id.* at 293.

[84] *See United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014); *United States v. Vayner*, 769 F.3d 125 (2d Cir. 2014).

creativity. Some scholars have suggested that due to national inconsistencies, states should also apply a "balancing test to determine whether the probative value of the evidence sufficiently outweighs the concerns regarding authorship."[85] Under this theory, the more important the evidence goes to showing elements or direct evidence of a crime, the more necessary it is for the evidence to be authenticated directly rather than circumstantially. This theory seems to also be evidenced in the trend we see in generalized objections and appeals not surviving clear error review.[86]

Furthermore, as more and more individuals gain access to new electronic photography capabilities, this suggests that in the future, stricter scrutiny may be required to sufficiently authenticate social media evidence, not only to the court, but to the jury. It may become increasingly relevant to verify metadata of photos, for example, and whether they have been altered or if the software used to create the photo is designed to alter photos it posts. Combining the balance approach described above with the rate of photo alteration available suggests that eventually, expert witnesses may be very beneficial in authenticating photos shared on social media that are dispositive. Another interesting conundrum may be whether the so-called public records rule that permits government websites and printouts to be self-authenticating applies to social media. Whether or not a government organization's tweets and posts are self-authenticating appears to not be contested currently, but one can imagine a circumstance in which this may become relevant.

[85] Flanagan, *supra* at 319.

[86] *Id.*

V. Conclusion & Recommendations

Challenges in social media evidentiary standards may seem overwhelming, but attorneys can take comfort in knowing that similar problems were faced with the authentication of electronically stored information years ago. In *Lorainne* it was said that although courts are generally tending to be more lenient about the authentication of social media evidence, because of the "wide disparity between the most lenient positions courts have taken in accepting electronic records as authentic and the most demanding requirements that have been imposed" courts should be skeptical as to the "accuracy and reliability of computerized evidence[.]"[87] The court cautioned that "lawyers can expect to encounter judges in both camps" and should be thoroughly prepared to make use of varying methods.[88] It follows then that these final recommendations that enable an attorney to maximize the use of social media evidence at trial will come as no surprise to a seasoned advocate seeking to maximize the use of social media evidence on behalf of his or her client.

First and foremost, zealous advocates should not avoid social media evidence but rather should be strategic about when to include it and ensure that the evidence they seek to have admitted is relevant. Social media evidence is a tool that should be used and "woven into the cloth of the main issue"[89] to paint an accurate picture for the jury. When used, the evidence should be authenticated for accuracy via personal testimony and supplemented with other types of traditional evidence whenever possible. Further, because there is a direct correlation between the importance of the social media evidence and how thorough its authentication should be, the more dispositive

[87] *Lorraine*, *supra* at 559–60.

[88] *Lorraine*, *supra* at 559.

[89] *Sumler v. State*, No. 13-16-00542-CR, 2017 WL 2608282, at *7 (Tex. App. June 15, 2017) (citing *Reeves v. State*, 969 S.W.2d 471, 490 (Tex. App. 1998, pet. ref'd).

the social media evidence is to the case, the more an attorney should prepare various ways of authenticating the evidence via eyewitness testimony, personal testimony describing familiarity with the social media account and individual making posts, or expert witness testimony. When seeking to challenge the admission of social media evidence, successful objections arguably require a great deal of background research so as to enable an attorney to precisely identify how the authentication used was insufficient. Finally, attorneys should understand how the standard of review on appeal uniquely applies to social media evidence and that in order for an appeal to be successful, the attorney must have adequately shown that the social media evidence in question was authenticated improperly and that it impacted a substantial right.