
Authentication of Social Media Evidence: 2 Cases to Know

Social media has radically impacted the way we communicate with friends, family and the world at large. It is a medium embraced by teenagers and politicians alike. There is a growing consensus among courts that relevant information found on social media is discoverable. But discoverability of social media does not equate with admissibility of social media evidence at trial. For evidence to be admitted, it must, among other things, be properly authenticated. In a world of “fake news” and cyberhackers, there is little doubt that social media evidence presents unique challenges. Who among us has not read about a social media account being falsified or accessed by an unauthorized user?

In the latter part of 2016, both the Third Circuit and a New Jersey appellate court were presented with criminal cases in which defendants sought to overturn their convictions on the grounds that the lower courts improperly admitted social media evidence. For both courts, the authentication of social media evidence was an issue of first impression. Each court considered whether a new set of evidentiary principles should be developed to address social media evidence, and ultimately concluded that the traditional rules of evidence were adequate to address them. The lessons learned from these cases are applicable to civil litigation.

U.S. v. Browne

U.S. v. Browne, 834 F.3d 403 (3d. Cir. 2016) arose from defendant Tony Jefferson Browne’s (aka Billy Button) conviction for child pornography and sexual offenses with minors. The defendant appealed the conviction on the grounds that five Facebook chat records were not properly authenticated and should not have been admitted into evidence. The defendant claimed that the government failed to establish that he was the person who authored the communications as no witness identified the five Facebook chat records on the stand, the Facebook chats did not contain information uniquely known to him, and he was not the only one with access to his Facebook account or to his cellphone.



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Under Federal Rule of Evidence 901(a), the party offering evidence “must produce evidence sufficient to support a finding that the item is what the proponent claims it to be.” The government maintained that the Facebook chat records were properly authenticated as business records by a certificate of authenticity from a Facebook records custodian. FRE 902(11) permits records which fall under the business records exception to the hearsay rule to be self-authenticated by way of a certificate of a records custodian so long as the proponent gives the adversary reasonable written notice that it intends to offer the records into evidence and makes the records and certificate available for inspection prior to the trial. The trial court allowed the Facebook chat records into evidence after the government submitted a certificate of authenticity from a Facebook records custodian which stated that the Facebook chats were business records made and kept in the ordinary course of business.

The Third Circuit rejected the argument that the Facebook chats were business records. The court explained that Facebook chats were relevant to the case only if they were authentic. In this context, authenticity hinged on whether the defendant was the author of the Facebook chats. Thus, the court explained that the government must show that “Browne and the victims authored the Facebook messages at issue.” Browne, 834 F.3d at 410. The records custodian here, however, attested only that the communications took place between the named Facebook accounts and that the platform was used on particular dates and times with those particular accounts. The court found that “[t]his is no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest the accuracy or reliability of the contents of the enclosed mailed letter.” *Id.* at 411.

The court next considered whether the government had presented sufficient extrinsic (circumstantial) evidence to authenticate the Facebook chat records under FRE 901(a). The court recognized that social media presented special challenges because of “the great ease with which a social media account may be falsified or a legitimate account may be accessed by an impostor.” *Id.* at 412. It also acknowledged that authentication of electronically stored information required consideration of the ways in which such data could be manipulated or corrupted. Yet the court held firm to its view that the conventional evidentiary rules which govern other forms of evidence should be applied in this context, finding: “We hold today that it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for the more traditional documental evidence.” *Id.* at 412.

The court then found there was sufficient extrinsic (circumstantial) evidence to authenticate four of the five admitted Facebook chats. The extrinsic evidence included: detailed testimony from the minors regarding the content of the Facebook chats; in-person meetings between defendant and the minors following the Facebook communications; the defendant’s own concessions that he owned the Billy Button Facebook account; the defendant’s testimony that he knew and conversed with the minors via the Billy Button Facebook account and that he owned the cellphone from which sexually explicit photos of the minors and related messages were obtained; and finally, that biographical information such as his address, employment (plumber) and marital status (engaged) were present on his Facebook account. The court found no prejudice from the improper admission of one Facebook chat (between two of the minors only), and affirmed the conviction.

New Jersey v. Hannah

In *State of New Jersey v. Terri Hannah*, 2016 N.J. Super. LEXIS 156 (N.J. App. Div. Dec. 20, 2016), the defendant found herself at the same party as her ex-boyfriend and his new girlfriend (Cindy Edwards). The defendant allegedly made rude comments to both and ultimately hit Edwards with a high-heeled shoe. Edwards ended up in the hospital

with nine stitches. After the altercation, Edwards and the defendant bantered back and forth via Twitter. At trial, the court admitted the following tweet allegedly from the defendant to Edwards: “No need for me to keep responding to ya stupid unhappy fake mole having a** ..how u cring in a corner with a shoe to ya face b***h.” *Id.* at 7. Following her conviction for simple assault, defendant appealed, arguing that the tweet should not have been admitted because it was not properly authenticated.

At trial, Edwards had testified that she recognized the tweet as being written by the defendant because it displayed the defendant’s picture, she was familiar with the defendant’s Twitter handle (@cirocgirl25), and the tweet was posted in response to things that Edwards was saying. The defendant testified that although the Twitter page displayed a picture of her and her Twitter handle, she did not author the tweet. She maintained that anyone can create a fake Twitter page and tweet from it. *Id.* at 12.

On appeal, the court considered two approaches to authentication of social media evidence: (1) the Maryland approach (*Griffin v. State*, 419 Md. 343, 19 A.3d 415 (Md. 2010), which recognizes three ways to authenticate evidence (i.e., asking the author if the social medial evidence was his; searching the computer of the alleged author; or obtaining information from the social networking site); and (2) the Texas approach (*Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App, 2012)), which allows circumstantial evidence to support a prima facie case of authenticity. The defendant argued for the Griffin approach, urging the court to create a new test for the authentication of social media postings. Like the Third Circuit, the New Jersey Appellate Division rejected the need for a new framework: “We need not create a new test for social media postings. Defendants argue that a tweet can be easily forged but so can a letter or any other kind of writing. The simple fact that a tweet is created on the Internet does not set it apart from other writings. Accordingly, we apply our traditional rules of authentication under N.J.R.E. 901.” *Id.* at 11.

New Jersey’s Rule of Evidence 901 is comparable to FRE 901. It requires the proponent of evidence to prove that the evidence is what it purports to be. Under the rule, the proponent can authenticate evidence by direct proof such as the author’s testimony that he created the document/post, but direct proof is not required. Authenticity may also be established through circumstantial evidence. Circumstantial evidence may be a writing or an internet post showing that the proffered evidence was sent in “reply” to a previous communication. Here, the Court found that the State presented sufficient circumstantial evidence to establish authenticity. The tweet contained details about shoes that one would expect only a participant in the argument to have had. Edwards testified that the tweet was posted in response to back and forth communications between her and the defendant. The tweet itself noted that there was “no need” for Edwards to keep responding to them. Under the circumstances, the court found that “[d]efendant’s twitter handle, her profile photo, content of tweet, its nature as a reply, and the testimony presented at trial was sufficient to meet the low burden imposed by our authentication rules.” *Id.* at 14. As in *Browne*, the conviction was affirmed.

Conclusion

Social media is potentially a rich source of important evidence. But unless properly authenticated, that evidence may never been seen or considered by a jury. It is never too early to begin thinking about and planning for authentication. In civil cases, depositions and requests for admission may be helpful discovery tools to establish that social media evidence is what it purports to be.