Social Media Technology Evidentiary & Ethical Issues

Prepared for

Tampa Bay Bankruptcy Bar Association

Date

May 14, 2019



Bradford D. Kimbro

Partner | Tampa | 813.227.6660 | brad.kimbro@hklaw.com

Joseph H. Varner, III

Partner | Tampa | 813.227.6703 | joe.varner@hklaw.com

Corey E. Dorné

Associate | Tampa | 813.227.6430 | corey.dorne@hklaw.com

www.hklaw.com

Authentication

Why do we need to authenticate social media?

* While the exact frequency is unknown, inauthentic profiles do exist.
  + *Clear v. Superior Ct.*, No. E050414, 2010 WL 2029016, at \*1 (Cal. Ct. App. May 24, 2010).
    - Denying writ of prohibition on charge of false personation against defendant who created a false MySpace profile in the name of his pastor, suggesting that pastor was homosexual and used narcotics in an attempt to get him fired.
  + Associated Press, *Boy’s Myspace Prank Results in Sex Crime Arrest*, NBCNews.com, http://www.nbcnews.com/id/11708746/ns/technology\_and\_science-security/t/boys-myspace-prank-results-sex-crime-arrest/#.XNm9qI5KiUk.
    - A group of teenage boys created a fake profile to flirt with a heartbroken friend, and ended up luring and facilitating the arrest of an attempted child offender.
  + It is enough of a problem that Facebook has guidance for “Hacked and Fake Accounts”: https://www.facebook.com/help/1216349518398524?helpref=hc\_global\_nav
  + Finally, the use of “bots” and “fake accounts” has received significant media attention since the 2016 presidential election. https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election

**FRE 901**:

* (a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
* (b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:
  + (1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.
  + (3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.
  + (4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

**Cases**:

* *Lamb v. State*, 246 So. 3d 400, 408-09 (Fla. 4th DCA 2018).
  + “Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication.” *Symonette v. State*, 100 So.3d 180, 183 (Fla. 4th DCA 2012).
  + “Here, the state met the relatively low threshold required to authenticate the Facebook video. The digital forensic examiner visited one of the codefendants' public Facebook page. He looked for videos posted within the carjackings' time frame. He found a Facebook Live video showing the stolen vehicles being driven by the defendant and the codefendants. He downloaded the video, verified that the original and the downloaded videos were the same, confirmed that the video which the state sought to introduce into evidence was the same video which he downloaded, and testified that the video remained posted on the codefendant's Facebook page at the time of trial. The first victim testified that the defendant could be seen on the Facebook video driving the first victim's car while wearing the first victim's watch while a codefendant counted the first victim's Cuban money. The Jupiter police detective also testified that the defendant could be seen on the Facebook video driving the first victim's car while stating “we live” on the video. Based on this evidence, we conclude the state made a prima facie showing of the video's authenticity for the purpose of admission into evidence, thus allowing the jury to make the ultimate determination of the weight to be given to the video's contents.”
* *Parker v. State*, 85 A.3d 682, 687-88 (Del. 2014).
  + Defendant Tiffany Parker was accused of assaulting another woman in a fight over an mutual love interest. At trial, the state sought to introduce Parker’s subsequent Facebook posts to discredit her self-defense argument. The state authenticated the evidence using testimony of a third-party who viewed the posts and circumstantial evidence that the posts were written by Parker.
  + The Delaware Supreme Court held that procedures for authentication in DRE 901(b) (i.e., witness testimony, corroborative circumstances, distinctive characteristics, or descriptions and explanations of the technical process or system that generated the evidence in question) were appropriate for social media evidence just like any other evidence.
* *Griffin v. State*, 23 A.3d 415, 424 (Md. 2011).
  + Defendant Antoine Griffin was charged with numerous crimes relating to a shooting that resulted in the victim’s death. At trial, the state introduced a printout from Griffin’s girlfriend Jessica Barber’s MySpace profile to corroborate testimony that Griffin had threatened another witness called by the state.
  + When Barber testified, the state did not question her about the pages printed from her MySpace profile. Instead, the state authenticated the pages through testimony of Sgt. John Cook, who said he knew the profile was Barber’s because it had her photograph, it referenced her children, and her birth date was on the profile.
  + The court held that this was insufficient, given the prospect that someone other than Barber could have not only created the site, but also posted the comment. The potential for abuse and manipulation of a social networking site requires a greater degree of authentication that what was used, and offered several suggested ways to authenticate: asking the purported creator of the profile, searching the computer of the person who created the profile, and obtaining information from the social networking site itself.
* *Tienda v. State*, 358 S.W.3d 633, 645 (Tex. Crim. App. 2012).
  + In this case, the court upheld the authentication of the defendant’s MySpace page:
  + “This combination of facts—(1) the numerous photographs of the appellant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring; (2) the reference to David Valadez's death and the music from his funeral; (3) the references to the appellant's “Tango Blast” gang; and (4) the messages referring to (a) a shooting at “Rumors” with “Nu–Nu,” (b) Hector as a “snitch,” and (c) the user having been on a monitor for a year (coupled with the photograph of the appellant lounging in a chair displaying an ankle monitor) sent from the MySpace pages of “ron Mr. T” or “MR. SMILEY FACE” whose email address is “ronnietiendajr@”—is sufficient to support a finding by a rational jury that the MySpace pages that the State offered into evidence were created by the appellant. This is ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them.
    - Note for below, this is the case resulting in the majority approach in which courts are more lenient with authenticating social media evidence.

Standards:

* Maryland Approach – minority approach, reluctant
  + *Griffin v. State*, 23 A.3d 415, 424 (Md. 2011).
* Texas Approach – majority approach, lenient
  + *Tienda v. State*, 358 S.W.3d 633, 645 (Tex. Crim. App. 2012).

Takeaway:

* The best practice to avoid authentication issues is to use discovery devices to confirm authenticity (depositions and requests for admission).

Technical Concerns:

* The use of properly preserved and collected metadata of social media postings can be used to bolster a proponent’s likelihood of having such evidence properly authenticated.
* Can be used to show that the document is what it purports to be, and that certain individuals had access to, created, or received the document.
* Care should also be taken to create a defensible chain of custody record, which establishes the handling and movement of evidence during and after collection.

For helpful tips, see Judge McEwen’s guide on the Admissibility of Electronic Evidence, available at: http://www.flmb.uscourts.gov/judges/tampa/mcewen/GrimmBradyEvidAdmissChart.pdf

Hearsay

In general, hearsay concerns with the use of social media are analogous to hearsay concerns outside of social media.

**FRE 801(c):**

The following definitions apply under this article:

* (c) Hearsay. “Hearsay” means a statement that:
  + (1) the declarant does not make while testifying at the current trial or hearing; and
  + (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

**Cases:**

* *Canes Bar & Grill of S. Fla., Inc. v. Sandbar Bay, LLC*, 343 F. Supp. 3d 1236, 1245-46 (S.D. Fla. 2018).
  + This was a trademark infringement suit in which Plaintiff wanted to introduce reports of confused customers received on Plaintiff’s social media accounts as evidence of actual confusion.
  + “Turning to the record in this action, this Court finds that there is testimony by Plaintiff's principal, Mr. Perrin, which shows that he received reports of confusion, by way of posts and messages. At the evidentiary hearing, Mr. Perrin testified that he oversaw Sandbar Sports Grill's (Coconut Grove) social media accounts and had the administrative passwords for said accounts. During his testimony, he was shown “a collection of a lot of the social media messages or posts or – mostly messages and posts that were all either sent or directed towards Sandbar Coconut Grove, and they all show confusion over the Sandbar in Cutler Bay.” While this Court notes the Magistrate Judge sustained hearsay objections as to the admissibility of the collection of social media posts and messages to prove actual confusion, the Magistrate Judge did allow said collection as evidence that Mr. Perrine received them.

This Court will consider the evidence that Mr. Perrine received reports of confused consumers. Like in *Kos*, Mr. Perrine received “numerous and varied reports of alleged confusion” and the “factual claim[s]” shown therein have “independent evidentiary value tending to show actual confusion.” *Kos*, 369 F.3d at 719-720. Moreover, after a review of the proffered collection of posts and messages, this Court will consider them as probative of the declarant's state of mind. These social media posts and messages included but are not limited to: (1) a request to Sandbar Sports Grill (Coconut Grove) to have “a relief drive at the Cutler Bay location” (id. at 5); (2) customer inquiries as to whether Sandbar Sports Grill is opening a location in Cutler Bay (id. at 6-7); (3) employment inquiries (id. at 8-9) and at least one customer post stating he was “[g]etting a sandbar in cutler bay (sic) !!!” (id. at 17).5 Thus, this Court will consider the postings as evidence of actual confusion, as they show the declarants', or in this case, the social media posters' state of mind. *Conversive*, 433 F.Supp.2d at 1091.

Even assuming arguendo that the foregoing social media posts or messages are hearsay, this Court finds that, at this juncture in the proceedings, it may rely on “hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is ‘appropriate given the character and objectives of the injunctive proceeding.’ ” *Levi Strauss & Co.*, 51 F.3d at 985.”

* *United States v. Wright*, 285 F. Supp. 3d 443, 456 (D. Mass. 2018).
  + Here, the court admitted the twitter statements of a criminal defendant charged with conspiracy to commit terrorism into evidence under the hearsay exception for statements made by the party’s coconspirator during and in furtherance of the conspiracy. FRE 801(d)(2)(E).
  + “Applying a preponderance-of-the-evidence test, Abu Hussain's statements on Twitter were more likely than not made in furtherance of the conspiracy. The First Circuit has affirmed this finding where the statements at issue “were seemingly made for such purposes as recruiting new members into the conspiracy or passing information between conspirators.” *United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000). Here, Abu Hussain's Twitter postings all appear designed to advance the conspiracy's objectives, recruit new members, or promote the Twitter account itself (which in turn helps to promote the conspiracy and recruit members). These goals are particularly apparent in the statements posted after Rahim's death, in which Abu Hussain explains that Rahim's plan was to behead Geller, wishes for his martyrdom, and provides an address for Geller along with the direction to “GoForth.” See Exs. 119–20. As a result, the statements were nonhearsay and admissible as coconspirator statements under Rule 801(d)(2)(E).”

Pretext

Pretexting is a practice where an individual lies about her identity in order to obtain confidential or privileged information that she is not entitled to.

* In the practice of law, one common example is the use of “testers” to apply for job/housing opportunities to uncover discriminatory practices.

The ABA Model Rules of Professional Conduct (“MRPC”) and the Florida Rules of Professional Conduct (“FRPC”) forbid this practice:

* MRPC 4.1(a); FRPC 4-4.1(a) – forbid lawyer from making false statement of material fact to a third person.
* MRPC 4.2; FRPC 4-4.2 – prevent lawyer from communicating with a represented party about the subject of the representation, unless authorized to do so by the party’s attorney.
  + This includes contact on social media
* MRPC 8.4(c); FRPC 4-8.4(c) – prevent lawyer from engaging in contact involving dishonesty, fraud, deceit, or misrepresentation.
  + The aforementioned rules apply to a lawyer’s supervision of non-legal staff and investigators.

**Cases**:

* Typically, prosecutors are excepted from the rules on pretext. (Lawyers employed by government agencies who act in a non-representational official capacity do not violate the rules of professional conduct if they make misrepresentations that are reasonably intended to further the conduct of their official duties). But, even prosecutors can go too far. http://www.abajournal.com/news/article/prosecutor\_is\_fired\_after\_posing\_as\_woman\_in\_facebook\_chat\_with\_murder\_defe
  + An Ohio prosecutor was fired after admittedly posing as an ex-girlfriend of a murder defendant and chatting on Facebook with the man’s female alibi witnesses in an effort to get them to change their story.
* Philadelphia Bar Opinion 2009-02 Hypothetical:
  + Attorney was deposing a witness who had MySpace and Facebook profiles, and inquired of the Committee whether the attorney could have a third person “friend” the witness to gain access to her online profiles for use against her at her deposition. The third party would be someone the witness would not recognize, but who would only state truthful information about himself (thus, arguably preventing an issue with MRPC 4.1). The third person would not disclose his affiliation with the attorney.
  + The Committee found that the proposed course of conduct would violate Pennsylvania’s equivalent of MRPC 8.4(c) because the planned communication was “deceptive.”
* San Diego County Bar Opinion 2011-2 Hypothetical:
  + Attorney is representing Client, a plaintiff former employee in a wrongful discharge action. While the matter is in its early stages, Attorney has by now received former employer’s answer to the complaint and therefore knows that the former employer is represented by counsel and who that counsel is. Attorney obtained from Client a list of all of Client’s former employer’s employees. Attorney sends out a “friending” request to two high-ranking company employees whom Client has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney’s name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.
  + The Committee found that, if the attorney was friending the employees for the purpose of obtaining information, this contact violated the rule prohibiting ex parte contact with a represented party about the subject matter of the representation.

Other Ethical Concerns

Accessing Jurors’ Social Media:

* ABA Formal Opinion 466 (April 24, 2014)
* The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors’ or potential jurors’ presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.
  + Passive review is permitted, and possibly even required (see below).
  + A lawyer may not send an access request or try to “friend” a juror.

Diligence and Competence:

* MRPC 1.1; FRPC 4-1.1, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
  + MRPC Comment 8 states that a lawyer should “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” (The comments to the Florida rule contain similar language).
* MRPC 1.3; FRPC 4-1.3, “A lawyer shall act with reasonable diligence and promptness in representing a client.”
* Running social media searches about clients, opponents, jurors, and witnesses is now considered part of the minimum level of diligence expected.
  + Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use “reasonable efforts” to find potential juror’s litigation history in Case.net, Missouri’s automated case management system).
  + N. H. Bar Ass’n, Op. 2012-13/05 (lawyers “have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation”).
  + Ass’n of the Bar of the City of N. Y. Comm. on Prof’l Ethics, Formal Op. 2012-2 (“Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.”).
* Duty to warn clients about the risks of social media (especially jeopardizing or waiving privilege).

Spoliation of Evidence:

* *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 702 (Va. 2013).
  + “On March 25, 2009, Allied Concrete issued a discovery request to Murray, seeking production of “screen print copies on the day this request is signed of all pages from Isaiah Lester's Facebook page including, but not limited to, all pictures, his profile, his message board, status updates, and all messages sent or received.” Attached to the discovery request was a copy of a photograph Tafuri downloaded off of Lester's Facebook account. The photo depicts Lester accompanied by other individuals, holding a beer can while wearing a T-shirt emblazoned with “I ♥ hot moms.” That evening, Murray notified Lester via email about the receipt of the discovery request and the related photo.

The next morning, on March 26, 2009, Murray instructed Marlina Smith (“Smith”), a paralegal, to tell Lester to “clean up” his Facebook page because “[w]e don't want any blow-ups of this stuff at trial.” Smith emailed Lester requesting information about the photo. Smith also told Lester that there are “some other pics that should be deleted” from his Facebook page. In a follow-up email, Smith reiterated Murray's instructions to her, telling Lester to “clean up” his Facebook page because “[w]e do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!”

* + - This, along with related violations, caused the court to award Allied Concrete sanctions in the amount of $542,000 against the attorney and $180,000 against the client.
* *Painter v. Atwood*, No. 2:12-cv-01215-JCM-RJJ, 2014 WL 1089694, at \*9 (D. Nev. Mar. 18, 2014).
  + “Here, as explained previously, Plaintiff had an obligation to preserve her Facebook comments; she deleted the comments with a culpable state of mind, and the comments were relevant to Defendants' claim. Although Plaintiff's counsel may have failed to advise Plaintiff that she needed to save her Facebook posts and of the possible consequences for failing to do so, the deletion of a Facebook comment is an intentional act, not an accident, and the Court cannot infer that Plaintiff deleted Facebook comments which stated that she enjoyed working for Defendant Dr. Atwood, after she contemplated the instant litigation, for an innocent reason. Accordingly, the Court finds that an adverse inference regarding Plaintiff's deleted Facebook comments as described in the Declaration of Kelli Atwood, Docket No. 56, at 21, is appropriate.”

“Friending” judges

* Jurisdictions are mixed on this – some see no problem (provided the rules of professional conduct are otherwise observed) and others take a stricter view, finding it impermissible because it gives the impression that a lawyer in that position has the ability to influence the judge.
* Hypothetical from: Andy Radhakant & Matthew Diskin, *How Social Media Are Transforming Litigation*, ABA Litig. J. (Spring 2013):
  + “Even though Marta practices in a state where judges are allowed to ‘friend’ lawyers, she was a bit uncomfortable when Judge Jennifer sent her a friend request. Marta didn’t want to give Judge Jennifer access to her personal life; however, she also did not want to risk offending a judge, so she accepted. Then she appeared before Judge Jennifer on a motion, and she needed an adjournment because of a death in the family. Judge Jennifer granted the adjournment. Later, Judge Jennifer mentions that she saw Marta, obviously intoxicated, tagged in a photo taken on the evening of the funeral, at what appeared to be a party. Marta explains that in her culture, family members are expected to drink and put on a happy face at the post-funeral wake. However, Judge Jennifer, herself a teetotaler, is left feeling Marta lied to her and that she lives an intemperate lifestyle.”