

## Case Law Update: Authenticating Facebook Communications

By Adam J. Sheppard

Authenticating printouts of Facebook communications presents special challenges. First, because anyone can establish a fictitious profile under any name, a mere printout of a post or message is insufficient to establish that it emanated from a particular person's account. See *Campbell v. State*, 382 S.W.3d 545, 550 (Tex. App. 2012); *Commonwealth v. Purdy*, 459 Mass. 442, 945 N.E.2d 372, 381 (2011)(message sent from Facebook account bearing defendant's name cannot be sufficiently authenticated without additional "confirming circumstances" indicating that defendant was the author). Second, because a person may gain access to another person's account – as may occur in cases involving domestic relationships – the mere fact that the account was password protected does not, in and of itself, establish authenticity. See *id.* However, by using the Illinois Rules of Evidence, practitioners can likely succeed in authenticating Facebook evidence.

The starting point for authenticating any evidence in Illinois is Illinois Rule of Evidence 901 – "Requirement of Authentication or Identification." The rule is modeled after Federal Rule of Evidence 901. The rule states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." IL.R.Ev.901(a)(1). This requirement is not a particularly high hurdle to overcome. A *prima facie* showing will suffice. Rule 901(b) illustrates ten non-exhaustive methods of authentication or identification. IL.R.Ev.901(b). Two of those methods – "witness testimony" and evidence of "distinctive characteristics and the like" – can readily be used to authenticate social media evidence. See IL.R.Ev.901(b)(1) & (b)(4).

### Witness Testimony – Rule 901(b)(1)

Rule 901(b)(1) allows for authentication through testimony from a witness with "knowledge that a matter is what it is claimed to be." Testimony from a Facebook employee is not required. If a witness admits that a post came from his or her profile, and does not dispute its authenticity, the post may be admitted. See *In re Marriage of Miller*, 2015 IL App (2d) 140530, 40 N.E.3d 206 *appeal denied*, 39 N.E.3d 1002 (Ill. 2015)(ex-wife's "relationship status" on Facebook was authenticated when she conceded post appeared on her account and she did not deny making post).

When the account holder is unavailable to testify or denies making the post, practitioners must turn to other methods – outlined in Rule 901(b) – to authenticate the evidence.

### "Distinctive Characteristics and the Like" – Rule 901(b)(4)

Under Illinois Rule of Evidence 901(b)(4), "Distinctive Characteristics and the Like," evidence may be authenticated through "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Stated differently, evidence may be authenticated through circumstantial evidence. Three common forms of circumstantial evidence that can authenticate Facebook communications include: (1) evidence that the communication contained a distinctive speech pattern consistent with the purported author's; (2) evidence that the subject of the communication references a matter the author knew about; or (3) evidence that only the purported author had access to account in question. See *e.g. Griffin v. State*, 419 Md. 343, 358, 19 A.3d 415, 424 (2011); *Campbell*, 382 S.W.3d at 552.

"Metadata evidence" or "subscriber information" is also strong circumstantial evidence. See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 547 (D. Md. 2007). ["M]etadata shows the date, time and identity of the creator of an electronic record as well as all changes made to it." *Id.* Similarly "subscriber information" typically includes a customer's name and address, as well as the telephone number linked to the account and billing records. See *In re Applications of U.S. for*

*Orders Pursuant to Title 18, U.S. Code Section 2703(d)*, 509 F. Supp. 2d 76, 77 (D. Mass. 2007). While metadata evidence or subscriber information does not conclusively establish that a particular person made a post – somebody could access another’s computer – it is circumstantial evidence of such. See *Lorraine*, 241 F.R.D. at 547 (D. Md. 2007).

Metadata evidence or subscriber information is generally obtainable through a subpoena duces tecum served on Facebook. See <https://www.facebook.com/help133221086752707>. Additionally, federal precedent indicates that Facebook records are admissible as “self-authenticating” business records under Federal Rules of Evidence 902(11) and 803(6). See *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014). Illinois Rules of Evidence 803(6) and 902(11) essentially mirror their federal counterparts.

Under Illinois Rule 902(11), a written certification from a custodian of records or other qualified person that the record “(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice,” renders the records “self-authenticating.” Under Rule 803(6), “records of regularly conducted activity” (business records) are an exception to the hearsay rule. See IL.R.Ev. 803(6). Thus, if Facebook records are certified pursuant to Rules 902(11) and 803(6), they may be admissible “self-authenticating” business records – i.e., live testimony from a Facebook employee is not required.

A note to practitioners: a party intending to offer a record under Rule 902(11) “must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.” See IL.R.Ev.902(11).

## **Conclusion**

Social media evidence is increasingly common. Given technological advancements, hacking a Facebook account or creating a fictitious profile is not impossible. Accordingly, some might argue that the traditional rules of evidence do not adequately address social media evidence. For the time being, however, those rules must serve as guideposts to practitioners.

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