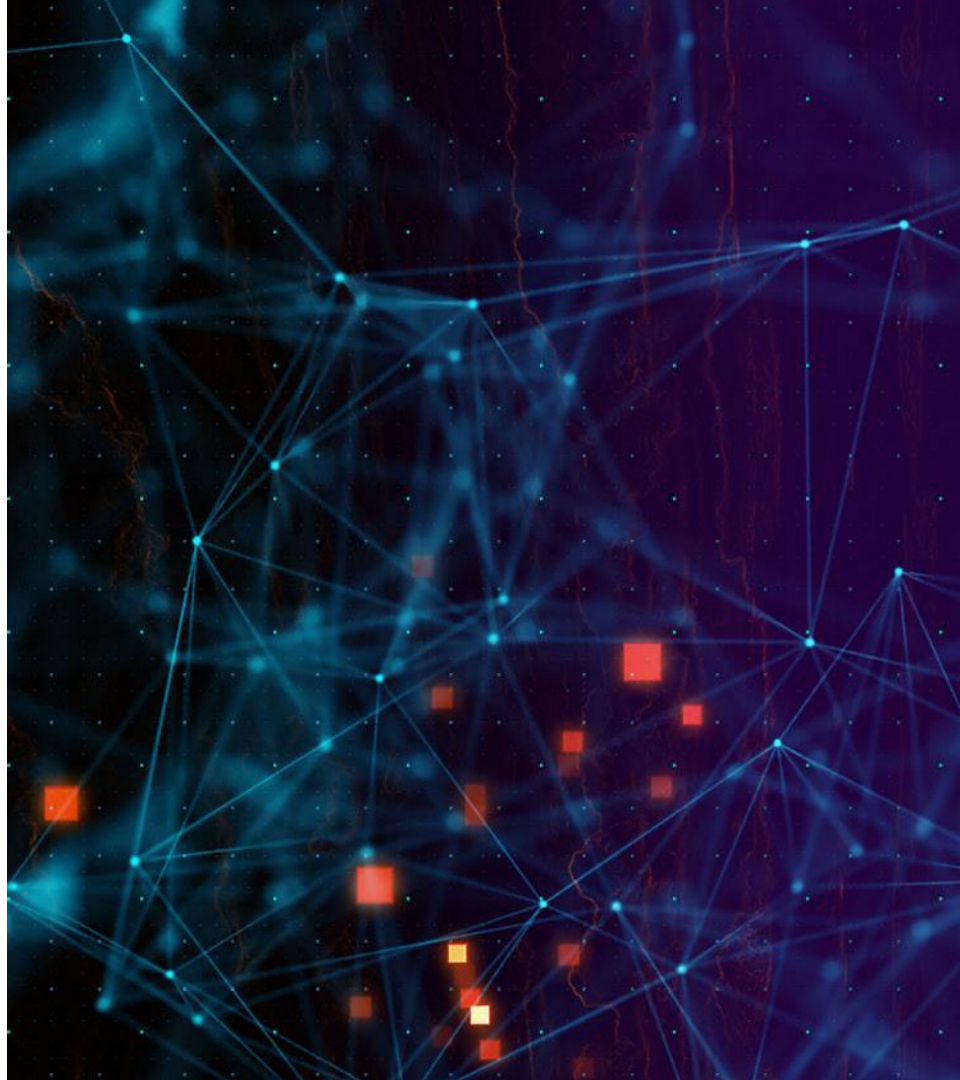


Authenticating Social Media Evidence

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Presenters



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Agenda

- Collection and Preservation of Social Media Evidence
- Use
- Authentication



Agenda

- Obstacles to Admission of Social Media Evidence
- Social Media Evidence in 5th Circuit Civil Litigation
- Best Practices





Preservation of Social Media Evidence

What is Social Media Evidence?

- Social media evidence can be broken down into several nuanced categories that include:
 1. group posts,
 2. public status updates,
 3. censored status updates for a specific audience,
 4. direct messages,
 5. compiled wide-scale data,
 6. metadata,
 7. public photos or videos,
 8. publicly or privately shared links to third party websites, and
 9. private photos or videos.

Does Your Preservation Notice and Preservation Demand Incorporate Social Media?

Preservation Obligations Extend to Social Media

“The duty to preserve electronically stored information applies to social media and messaging services as it does to other forms of communication. Preservation can be complicated when the client is regularly posting or regularly messaging. Clients must be instructed not to delete posts or deactivate or delete relevant social media or messaging accounts after the duty to preserve arises without having those accounts first forensically preserved. As long as content is preserved, attorneys may advise clients to adjust the privacy settings on their social media accounts.”

Cervini v. Cisneros, No. 1:21-CV-00565-RP, 2024 WL 1725011, at *10 (W.D. Tex. Mar. 21, 2024), report and recommendation adopted, No. 1:21-CV-565-RP, 2024 WL 1724258 (W.D. Tex. Apr. 22, 2024)

Preservation Obligations Extend to Social Media

“On July 17, 2021, Mesaros received a preservation letter pertaining to this litigation, which instructed her of her obligation to preserve relevant documents, including “social media data, including posts ... and direct or private messages,” “cellular phones,” and “smart phones.”

Deleted and or failure to preserve social media resulted in sanctions, including spoliation instructions to the jury.

Cervini v. Cisneros, No. 1:21-CV-00565-RP, 2024 WL 1725011, at *10 (W.D. Tex. Mar. 21, 2024), report and recommendation adopted, No. 1:21-CV-565-RP, 2024 WL 1724258 (W.D. Tex. Apr. 22, 2024)

The Practical Implications of Social Media Preservation



Where Is Social Media Data Stored?

- Mobile phones
- Computers
- Phone applications (not hard drive)
- Cloud storage (passwords and logins)
- Servers (IP access)
- Social media servers (messaging)

Authentication

The background features a complex network of thin, glowing blue lines connecting various points, creating a web-like structure. The points themselves are small, bright blue dots. Interspersed within this network are several red squares of varying sizes, some appearing as solid red and others as faint, glowing red. The overall aesthetic is futuristic and digital, with a dark blue color palette.

The Rules



TEX. R. EVID. 104(a) & 901

The requirement of authentication is a condition precedent to the court's determination of admissibility under [Texas Rule of Evidence 104\(a\)](#).

This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. TEX. R. EVID. 901(a). Unless the evidence sought to be admitted is self-authenticating (*see* TEX. R. EVID. 902, TEX. R. CIV. P. 193.7), other evidence must be used to accomplish authentication.

Rule 901(b) contains a non-exclusive list of methods for authentication. To authenticate evidence, a party need only make a *prima facie* showing that would allow the jury to reasonably find that the evidence is what the proponent claims.

FED. R. EVID. 901(a)

The authenticity of evidence is ultimately a factual determination for the trier of fact (typically, but not necessarily, a jury) to evaluate.

However, before a court admits evidence for the jury to consider, the court “must determine whether its proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.”

The process by which a judge addresses proper foundation for authentication does not itself establish evidence as authentic; the jury is still responsible for the ultimate determination of authenticity and therefore credibility.

Rule 901(a) states that to establish a proper foundation for authentication evidence, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”

Social Media Evidence: Obstacles to Admission

- Per the rules of evidence, there are a series of obstacles that social media evidence, like electronic evidence generally, must be able to overcome.
- These challenges include the following:
 - preservation
 - relevance
 - **authentication**
 - hearsay
 - originality, and
 - unfair prejudice

The background features a complex network of thin, light blue lines connecting various points, creating a web-like structure. Interspersed among these lines are several small, solid red squares. The overall color palette is dark blue and black, with the network lines and squares providing contrast.

Social Media Evidence in Texas State Litigation

Tienda and the Advent of Social Media Evidence

In *Tienda*, the State introduced at trial printouts of a MySpace profile allegedly belonging to the defendant and implicating him in a shooting. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012).

The issue was ***whether the MySpace pages were sufficiently authenticated by circumstantial evidence.***

The court noted that electronic evidence should be evaluated consistent with the rules that apply to other types of evidence, which permit *numerous avenues for authentication* and could include an ***admission or witnessing of authorship, business records of an internet service provider or cell phone company***, comparison ***with other authenticated evidence***, or content that is necessarily known only by the author. *Id.* at 638-41. With regard to the proffered MySpace pages, the court held that the following circumstantial evidence was sufficient to authenticate the pages as belonging to and being maintained by the defendant: (1) numerous photographs of the defendant showing unique tattoos, distinctive eyeglasses, and earring; (2) the reference to the victim's death and the music from his funeral; (3) references to the defendant's gang; and (4) messages referring to the defendant having been on a monitor for a year coupled with a photograph of the defendant displaying an ankle monitor. *Id.* at 645. Even though it was theoretically possible that the defendant was the victim of a conspiracy to set him up, the court held that the jury was entitled to assess the likelihood and weight of that "alternate scenario" once the State had met its *prima facie* burden. *Id.* at 646.

A Sponsoring Witness

- Generally, unaltered photographs and videos will be admissible if they are relevant to any issue in the case and are verified by a witness as being a correct representation of the facts. *Kroger Co. v. Milanes*, 474 S.W.3d 321, 342 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Huckaby v. A.G. Perry & Sons, Inc.*, 20 S.W.3d 194, 209 (Tex. App.—Texarkana 2000, pet. denied)).
- The verifying witness must know the object involved and be able to state that the photograph or video correctly represents it. *Id.*
- The verifying witness does not need to know when the photographs or video was made or have taken or observed the taking of the photo/video.

A Challenge to Accuracy

A dispute as to the accuracy of some part of the photograph or video usually goes only to the weight of the evidence, not to its admissibility.

A Preliminary Standard

“Authentication is therefore a preliminary standard to test reliability of the evidence, which varies according to the type of evidence and even the individual judge. ”

Tienda v. State, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). (N.B. Many of the cases construing the rules of authentication and admissibility are criminal in nature, but the same rules apply to civil cases. *See* Tex. R. Evid. 101.)

Three Key Components to Remember



Authentication

**Witness
Testimony**

Verification

OPINION AND ORDER

“Facebook helps you connect and share with the people in your life.”¹ But what if the people in your life want to use your Facebook posts against you in a civil lawsuit? Whether and to what extent online social networking information is discoverable in a civil case is the issue currently before the Court.

1. <http://www.facebook.com>.

ATTEST A TRUE COPY

LINDA L. BEARD, PROTHONOTARY

Authentication of Social Media Content— TEX. R. EVID. 901 & FED. R. EVID. 901

- Texas Courts have been lenient on indirect authentication:
 - What amount of evidence a “reasonable juror” would need to be persuaded that the alleged creator did create the evidence?
 - The burden of production then transfers to the objecting party to demonstrate that the evidence was created or altered by a third party.
 - *Mann v. Dept. of Family and Protective Services*, 2009 WL 2961396 (Tex. App.—Houston [1st Dist.] 2009) (The author took photos depicting herself underage drinking, but no testimony was given regarding the specific dates the pictures were taken, but admissible due to timing of photos being posted to MySpace while her child was in DFPS care.)

Authentication of Social Media Content—Cont.

- Texas Courts have been fairly lenient on indirect authentication:
 - *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.)
 - *Van Der Linden v. Khan*, 535 S.W.3d 179 (Tex. App.—Fort Worth 2017) (Social media evidence in the form of “private” Facebook messages sent by the defendant to other individuals urging them not to do business with the plaintiff was deemed admissible evidence).
 - *In the Interest of N.C.H.-M.*, No. 04-18-00098-CV, 2018 WL 3747744, at *2 (Tex. App.—San Antonio 2018) (In a parental rights case, the use of public social media posts was upheld, but they were introduced without objection).

Authentication Avenues

- **Direct authentication (admission by the author/creator of the content)**
 - Deposition testimony
 - Written discovery responses
 - 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
- **Expert testimony**
 - Forensic evidence

Authentication Factors to Consider

- **Testimony from the purported creator** of the social network profile and related postings;
- Testimony from **persons who saw the purported creator establish or post** to the page;
- Testimony of a **witness that she often communicated** with the alleged creator of the page **through that account**;
- Testimony about **the contextual clues and distinctive aspects** in the messages themselves tending to reveal the identity of the purported author;
- Testimony regarding the **account holder's exclusive access** to the originating computer and social media account; and
- Whether the purported author knows **the password to the account**, and how many others know it as well.

Authentication Factors to Consider–Cont.

- ***Expert testimony regarding forensic information*** may be used to support a circumstantial showing that social media post was published by the purported author;
- ***Expert testimony concerning*** the results of a search of the social media account holder's ***computer hard drive***;
- ***Expert testimony regarding how social network accounts*** are accessed and what methods are used to prevent unauthorized access; and
- ***Information from the social media network*** that links the page or post to the purported author.

Note: most courts have found that it is enough for the proponent to show that the pages and accounts can be tracked through internet protocol addresses associated with the person who purportedly made the post.

Authentication of Social Media Content— TEX. R. EVID. 901 & FED. R. EVID. 901

- What is **NOT** sufficient:
 - A person's name being on a social media post or message as the author cannot stand alone to overcome authentication challenges
 - A photo of the person on a social media post to prove up authorship



Hypothetical: The Patent Claim/False Adv.

- Your client is the owner of a beauty line and holds various patents in connection with its mascara brushes, a competing company has replicated your client's product and has made explicit claims on its social media pages that it owns the underlying patents.
- They've proudly shared it, but how can I use this infringement evidence in litigation?

Lashify, Inc. v. Qingdao Lashbeauty Cosm. Co., No. W22CV00776ADADTG, 2024 WL 629985, at *6 (W.D. Tex. Jan. 30, 2024), report and recommendation adopted sub nom. *Lashify, Inc. v. Qingdao Lashbeauty Cos-Metic Co.*, No. W-22-CV-00776-ADA, 2024 WL 629395 (W.D. Tex. Feb. 1, 2024)

Additional Considerations

- In *Lashify*, the plaintiff attempted to claim that the social media postings were sufficient to establish personal jurisdiction of the foreign defendant (minimum contacts).
- The Court disagreed among other reasons because the social media was not “in any way directed to Texas, specifically curated for a Texas audience.”

Lashify, Inc. v. Qingdao Lashbeauty Cosm. Co., No. W22CV00776ADADTG, 2024 WL 629985, at *7 (W.D. Tex. Jan. 30, 2024), report and recommendation adopted sub nom. *Lashify, Inc. v. Qingdao Lashbeauty Cos-Metic Co.*, No. W-22-CV-00776-ADA, 2024 WL 629395 (W.D. Tex. Feb. 1, 2024)

Hypothetical: Breach of Contract

- Your client has entered into a multi-year contract for the purchase and distribution of a widget which they falsely represented includes specific characteristics.
- The false product claims are all over the Company's social media page, how can this be used in?

Hypothetical: Evidence of Physical Activity

- A plaintiff in a personal injury suit posts activity on social media that contradicts or could disclaim the injury alleged in the lawsuit. The activity is photographed, filmed and publicly shared on various social media platforms.
- They've proudly shared it, but how can I use this footage in litigation?





Social Media Evidence in 5th Circuit Civil Litigation

Fifth Circuit Precedent

Fifth Circuit precedent indicates that social media information, in both civil and criminal trials, is welcome and useful evidence, so long as it is relevant to the alleged wrong.



Fifth Circuit Precedent—Cont.

- *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015)
 - “Holsen testified that she had seen Hall use Facebook, she recognized his Facebook account, and the Facebook messages matched Hall’s manner of communicating.”
 - “Hall could send text messages from his cell phone, she had spoken to Hall on the phone number that was the source of the texts, and the content of the text messages indicated they were from Hall.”
 - Hall argued that he was a quadriplegic and not able to send the messages.
 - Court found sufficient authentication of Facebook messages under 901.

Fifth Circuit Precedent—Cont.

- *Rea v. Wis. Coach Lines, Inc.*, No. 12-1252, 2015 U.S. Dist. LEXIS 27916 (E.D. La. 2015).
 - In 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 plaintiff’s 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.”
 - While the court did not allow all photos into 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.



Artificial Intelligence and Authentication

Current Developments: AI

- AI generated images
- AI generated voice duplication
- AI generated video



Authentication of Social Media Content— TEX. R. EVID. 901 & FED. R. EVID. 901

- The legal standard for authenticating photographic and video evidence in court has remained largely static throughout the evolution of media technology in the twentieth century. The advent of “deepfakes,” or fake videos created using artificial intelligence programming, renders outdated many of the assumptions that the Federal Rules of Evidence are built upon.
- The proliferation of deepfakes severely complicates the assumption that technological experts will be able to reliably determine real from fake. Although various organizations are actively devising means to detect deepfakes, the continued proliferation and sophistication of deepfakes will make debunking fake videos more challenging than ever. Witnesses who attest to the fair and accurate portrayal standard will likely not be able to identify subtle but important alterations in deepfakes.

Authentication of Social Media Content–Cont.

As a result, there is increasing concern that fraudulent evidence, **authenticated** through the Rule 901(b)(1) standard, will increasingly enter courtrooms with a decreasing ability for witnesses and courts to identify fakes. Because the technology to detect deepfakes lags behind the creation methods, deepfakes present a critical threat to courtroom integrity under the current standard.



Social Media Evidence: Best Practices

Best Practices

- Review preservation obligations carefully;
- Act quickly to assess each case for potential social media sites to be searched and to make sure that you are accessing the information in a permissible and ethical manner;
- Find out from your client what may be on social media, who created it, what it means, and how best to protect the client's interests;
- Determine if your client knows of digital communications or posts by other individuals that are relevant to a disputed matter; and
- Plan a path to pave the way for admissibility.



Thank you!