

Evidence and Practice Tips

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Laying Foundation to Properly Admit Social Media Content

Trial is about to start. During discovery or through investigation, you learned that the other party or their witnesses use social media, such as Facebook and Twitter. You find out that those social media accounts contain content that may contradict that party's claims. You also find out that these accounts contain inconsistent statements. The question becomes, how can you use the content in those social media accounts to support your client at trial, either as substantive evidence or to impeach the other side's witnesses?

"A party must lay a proper foundation before a document may be entered into evidence." *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 35. "Authentication of a document may be made by direct or circumstantial evidence." *Miller*, 2015 IL App (2d) 140530, ¶ 35. Failure to properly authenticate social media content will result in barring such evidence. *See People v. Kent*, 2017 IL App (2d) 140917, ¶ 119.

The Illinois Rules of Evidence provide the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence to support a finding that the matter in question is what its proponent claims." Ill. R. Evid. 901(a). Rule 901 includes examples of what constitutes proper authentication, such as "[t]estimony that a matter is what it is claimed to be," as well as "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Ill. R. Evid. 901(b)(1), (4).

Courts have held the authentication requirement met after a witness admits to being the creator of content on social media. *See Miller*, 2015 IL App (2d) 140530, ¶ 37 (finding adequate foundation to use Facebook posts for impeachment purposes when witness verified that the posts came from her Facebook profile but claimed she did not remember submitting them). If a witness admits to the authenticity of the content, a litigator may want to consider asking the following questions:

- Do you have a [name of social media] account?
- Who has access to the account?
- Who has authority to update or edit content on the account?

The litigator should then hand a printed copy of the social media page to the witness to complete the foundational requirements. These questions may include the following:

- Do you recognize what I handed you?
- What do you recognize the document to be?
- Does the document appear to be a true and accurate representation of your account?

What if the suspected originator denies creating the content or is not available to testify? “The authentication of social media poses unique issues regarding what is required to make a *prima facie* showing that the matter is what the proponent claims.” *Kent*, 2017 IL App (2d) 140917, ¶ 105 (citing *Smith v. State*, 136 So. 3d 424, 432-33 (Miss. 2014)). The *Kent* court noted the “ease in fabricating a social media account to corroborate a story means that more than a ‘simple name and photograph’ are required to sufficiently link the communication to the purported author under Rule 901.” *Kent*, 2017 IL App (2d) 140917, ¶ 118.

Kent then identified, as a non-exhaustive guide, methods to authenticate social media accounts, such as:

(1) the purported sender admits authorship, (2) the purported sender is seen composing the communication, (3) business records of an Internet service provider or cell phone company show that the communication originated from the purported sender’s personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone, (4) the communication contains information that only the purported sender could be expected to know, (5) the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or (6) other circumstances peculiar to the particular case may suffice to establish a *prima facie* showing of authenticity.

2017 IL App (2d) 140917, ¶ 118. *Kent* suggests that utilizing any of the recommended methods should be sufficient to lay the proper foundation.

To investigate social media accounts, a litigator should consider asking witnesses at depositions whether they have seen another witness use social media. A litigator should also consider subpoenaing business records from Internet service providers, as necessary. Also, be mindful that if a social media post contains unique information that only the purported sender could know, that alone may be appropriate to lay sufficient foundation, even if the witness fails to admit authorship.

Laying an adequate foundation may turn on the specific facts as to the social media content to be admitted. A prepared litigator should be able to adequately determine through the discovery process whether there is any corroborating circumstantial evidence to demonstrate that a social media post is authenticated to support admitting it as substantive evidence or for impeachment purposes.

As with all evidence, there are additional considerations to using social media content for substantive evidence or impeachment purposes. The content must be relevant and withstand a Rule 403 challenge. *See Kent*, 2017 IL App (2d) 140917, ¶ 85. Additionally, the evidence must be either non-hearsay or fall within a recognized hearsay exception. *See People v. Maya*, 2017 IL App (3d) 150079, ¶¶ 100-102 (holding Facebook messages admissible as a business records exception to hearsay). As long as the evidence is admissible, a proper foundation remains necessary to properly introduce social media content.

Conclusion

Laying the proper foundation to authenticate social media content as either substantive evidence or for impeachment purposes is necessary to properly utilize that evidence at trial. Social media content poses unique challenges to foundation, due to the ease of which these accounts may be created, manipulated or forged. If a witness admits to creating



the content, the court should find the content authentic. If not, a litigator will have to use circumstantial evidence to authenticate that the content is what the proponent claims it to be.

About the Authors

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