

Can You Really Authenticate “Covfefe”?

By Amelia Hartman

As a trial lawyer, one’s objectives are clear – uncover inconsistencies in the other side’s story and undermine an adverse witness’s credibility. What better way to achieve these goals than to use a witness’s own words against him or her? And, with social media becoming an integral part of most people’s lives, including our commander in chief, trial lawyers have newfound access to a witness’s thoughts, reactions and locations.

There are several evidentiary hurdles to consider with respect to the admissibility of social media evidence, *e.g.*, relevance and hearsay, but one particular hurdle that is not as common in business disputes is authentication. As with all forms of evidence, a proponent must show that a record is what it purports to be. For business litigators, most of the documents introduced at trial are business records, which, for the most part, are presumed to be authentic. With the fluid nature of online profiles and the seemingly easy

Amelia Hartman is an attorney with Anthony Ostlund Baer & Louwagie P.A. Amelia is a creative problem solver who enjoys working with clients to find practical solutions to complex legal problems. Amelia works with clients to pursue and defend matters, but has significant experience in contract and shareholder disputes and probate and trust litigation. For more information, visit anthonyostlund.com.



access to “hack” other’s profiles, the question of authenticity can appear to be more tenuous. Courts across the country, however, are reluctant to impose a higher standard for authentication of social media records. Rather, this area of law is merely in its early stages of development, and courts are deciding what type of extrinsic evidence is sufficient to overcome the age-old “wasn’t me” defense.

For example, in *U.S. v. Browne*, 834 F.3d 403, 413 (3d Cir. 2016), the Third Circuit concluded that the state provided “more than adequate extrinsic evidence” to establish the authenticity of defendant’s Facebook messages, including testimony from the recipients regarding the exchange of Facebook messages with defendant, in-person meetings with defendant following the communications, defendant’s admission that he owned the Facebook account and conversed with some of the recipients on that account, and the fact that some of the defendant’s biographical information was included in the content of the messages.

Other courts have relied on similar “indicia of reliability” in admitting social media evidence, such as the presence of biographical information on the account to verify that it belongs to the purported author of the

social media evidence. See *U.S. v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (finding that defendants’ Facebook accounts were self-authenticating and relying, in part, on biographical information on the accounts); *People v. Valdez*, 135 Cal. Rptr. 3d 628, 633 (Cal. App. 4th 2011) (relying on stated interests and personal photographs as sufficient authenticity for a MySpace profile).

Courts also rely on the content of the messages themselves. For instance, if the content references events or details that very few people other than the purported author would have personal knowledge of, courts have relied on this type of evidence to establish authenticity. See *Dickens v. State*, 175 Md.App. 231, 239-40 (2007) (finding no error in admitting text messages when content, considered with other circumstantial evidence, was sufficient to establish authenticity); see also *Sublet v. State*, 113 A.3d 695, 714-18 (Md. 2015).

A note of caution, however. It does not take much to challenge authenticity. In *State v. Eleck*, 23 A.3d 818, 822, 824 (Conn. App. 2011), the court affirmed the trial court’s exclusion of Facebook messages for lack of authentication. In *Eleck*, the defendant offered evidence of messages between himself and an



Celebrating 25 Years of Warm Wishes

As part of our longstanding commitment to community service, the Lindquist & Vennum Winter Closet Foundation has proudly donated more than 18,000 new coats to children in need.

Learn more at wintercloset.org.

LINDQUIST

Minneapolis Denver Sioux Falls lindquist.com

adverse witness for impeachment purposes. The adverse witness admitted that the messages were sent from her account, but denied authorship and also testified that her account had been hacked. This testimony created an issue as to whether a third party, and not the adverse witness, sent the messages to the defendant and without other “foundational proof,” the messages could not be properly authenticated. See also *Sublet*, 113 A.3d at 718-19 (affirming district court’s exclusion of certain pages of a Facebook conversation when the purported author testified that she did not write all of the entries reflected in the document and that she often gave her account password to other people).

Social media evidence can be a valuable resource to a trial attorney. But the proponent of such records must be able to properly authenticate the evidence before it can be presented to and considered by the finder of fact. When this type of evidence becomes available to an attorney, it is important to start thinking about and planning for establishing authentication through discovery methods, such as depositions and discovery requests, to establish that the social media evidence is what it purports to be.



Today’s successful businesses are all about automated processes and technological efficiency. Typewriters, stacks of paper and locked file cabinets have been replaced by laptops, digital document management, and secure networks. If your business technology is gathering dust, maybe it’s time to EVOLVE.

LOFFLER

MANAGED BUSINESS TECHNOLOGY & SERVICES
www.loffler.com • 952.925.6800