THIRD JUDICIAL CIRCUIT
OF MICHIGAN

CATHERINE L. HEISE
CIRCUIT COURT JUDGE

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE
DETROIT, MICHIGAN 48226

(313) 224-7084

May 8, 2015

Mr. Robert M. Freeman
Attorney at Law
Tharpe & Howell, LLC
15250 Ventura Boulevard, 9th Floor
Sherman Oaks, California 91403

Re: Journal of American Law Article

Dear Mr. Freeman:

Thank you very much for your article, "Use of Social Media Evidence in Litigation", which appeared in the Spring, 2015 edition of the *Journal of American Law*. As a trial judge in the criminal division of a busy metropolitan court, the evidentiary issues arising out of the use of social media are presenting themselves more and more frequently. Michigan case law in this area is still being developed. Your article provides valuable insight and a wealth of useful citations.

My thanks to you and Ms. Taghvay for this timely article!

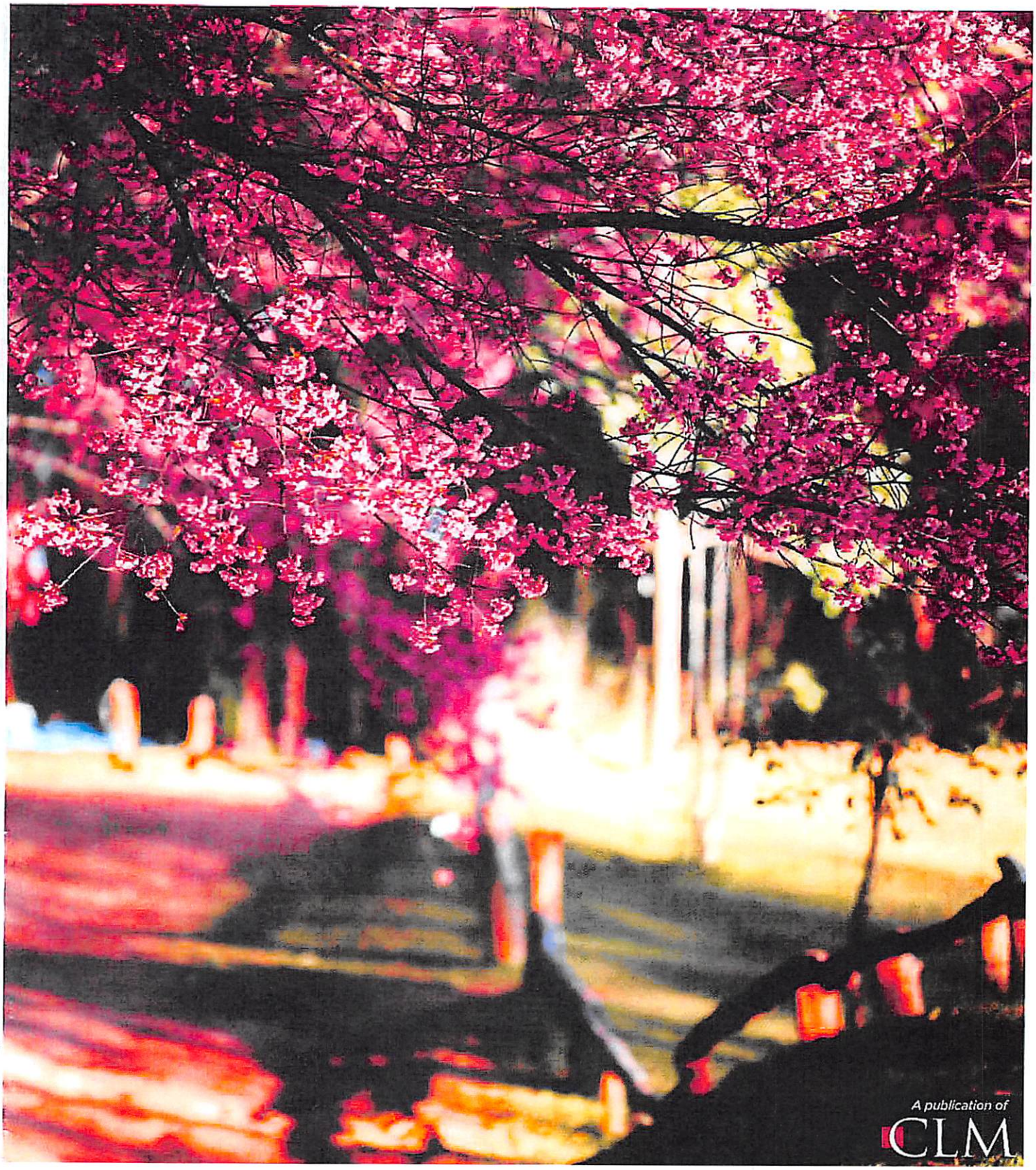
Very truly yours,

CATHERINE L. HEISE

/clh

Spring 2015
Issue 1, Vol. 2

Journal of American Law



A publication of CLM

Robert M. Freedman, Esq., is a 25-year lawyer and partner with Tharpe & Howell LLC in Los Angeles, Calif. He specializes in complex commercial and tort litigation and has successfully used evidence from social media postings to attack damage claims in tort cases. **Tara Taghvay, J.D.**, of Tharpe & Howell, assisted in the preparation of this article.

Use of Social Media Evidence in Litigation

Don't Post It if You Don't Want It Marked "Exhibit A"

By Robert M. Freedman, Esq., and Tara Taghvay, J.D.

SUMMARY

The use of social media as a communication tool is exploding, particularly with the youth. Social media websites are becoming an online depository for observations, thoughts, beliefs, actions, desires, health, relationships, business affairs, and everything else that affects people and organizations. The content comes in just about any form imaginable and provides a heretofore unavailable insight into people, places, things, and life in general. With respect to litigation, social media usage can be very powerful evidence to support or attack litigated claims, and its use in litigation is becoming more prevalent.

Social media usage while evidence is a different kind of evidence, and there are unique challenges in obtaining and using social media in litigation compared to more traditional forms of evidence. The challenges are due to the transient and ever-changing nature of social media coupled with the conflict between the discovery and confidentially rights of the parties. It is further complicated by the application of the Federal Stored Communications Act, which provides a safe harbor for social media sites to avoid disclosing content.

The topic of obtaining and using social media in litigated cases is very broad and arises in many differing contexts, and at some point in the future, there will be full-blown treatises written about it. This paper provides a current overview of the issues that typically arise with respect to obtaining and using evidence of social media usage in litigation and how it is addressed by various courts around the country.

It is a classic moment of which every lawyer dreams. The key witness for the other side has just provided testimony to the jury that, if not rebutted, will be devastating to the lawyer's case. With chest pounding, the lawyer looks at his trial notes and finds a reference to a series of photographs and commentary posted on the witness's Facebook pages that clearly show the witness was lying. The lawyer prepares to present the devastating social media posts to the jury. The counsel for the opposing side strenuously objects. Will the Facebook postings be admitted into evidence? That depends.

Electronically stored evidence of social media usage is a powerful tool that can be used to support or undermine claims and defenses. It can be effective particularly in lawsuits that allege life-altering damages. The introduction into evidence of even a single post has the potential to change the outcome of a case. Facebook, like many other Internet websites, is part of a social media ecosystem containing exponentially growing amounts of electronically stored evidence in the form of big data, which is evidence that can be used in litigation.

The use of social media in litigation is a very broad topic, and it affects most segments of our society. Volumes can be written about social media and how it is being handled by the courts. This paper is intended to focus on its use in the more typical tort and contract actions; however, its use in other areas of litigation, such as employment law, criminal law, family law, and intellectual property cases, should not be underestimated.

Finding and acquiring evidence of social media usage and getting it admitted into evidence at trial present challenges as concerns of privacy rights grow. This growing conflict between one party's discovery rights and another party's privacy rights has created a plethora of recent trial and appellate decisions concerning both discovery and admissibility.

Tiffany Parker v. The State of Delaware[1] and *United States v. Vayner*[2] are recent decisions that highlight some of the issues involved with the use of social media evidence in lawsuits. The *Tiffany* court focused on its credibility, while the *Vayner* case addressed au-

[1] *Tiffany Parker v. The State of Delaware*, 85 A.3d 682 (Del. 2014).

[2] *United States v. Vayner*, 769 F.3d 125 (2d Cir. N.Y. 2014).

thenticity. These cases are discussed later. What follows is intended to present an overall perspective on the issues of identifying, obtaining, and using social media and how they are being addressed by the courts.

What is Social Media Evidence?

The term "social media" is used as a broad descriptive umbrella for a methodology of substantive communications and storage of data. Fundamentally, social media is interaction among people in which they create, share, or exchange information, ideas, pictures, and videos in virtual communities and networks. It is "a group of Internet-based applications that build on the ideological and technological foundations of the Internet and that allow the creation and exchange of user-generated content."[3]

The use of social media has disrupted the more traditional forms of communications and storage of data with which the courts have historically dealt. In the context of litigation, social media usage is evidence—just a different form of evidence. Like all evidence, it has many uses in litigation. It can provide unfiltered insight into the life of a party. It can result in creating an online journal or diary of another's life, activities, and relationships that are intended to be viewed by others privately or publically. With the recent development of wearable electronics and other tracking applications, social media sites can track virtually all of the activities and movement of people and things and provide valuable and heretofore inaccessible information, including a person's daily physical and mental activities and health.[4]

There are a number of constantly evolving dynamics involving social media. The manner in which it is stored and distributed is a technical function developed by software engineers that thrive on developing the "next big thing" in new technologies. The content is supplied in large part by parties and advertisers that seek to share information, which is continuously expanding while at the same time becoming more personal and intrusive. The fast-paced development of technology and the ever-changing and growing amount of content is advancing faster than the law that governs it, which results in courts differing in their approach.

A classic example of how social media can be used in litigation is for impeachment purposes. In one case, a plaintiff claimed permanent injuries that affected her enjoyment of life and confined her to her house and bed, but Facebook photos showed her smiling happily outside her home.[5] In another case, a party claimed to be humiliated by sexual rumors about her in the workplace, but she posted similar sexual comments about herself on Facebook.[6]

Obtaining Social Media Evidence

The nature of social media evidence, as well as the application of federal and state privacy laws, makes it difficult to obtain via traditional discovery. Because of its electronic nature, it is relatively easy to delete or destroy although it becomes increasingly difficult to do so the more the social media postings have been disseminated. Obtaining it requires various levels of technical expertise and judicial oversight. It is subject to various forms of discovery, including discovery on other parties and subpoenas to service providers.

Generally, the social media sites resist producing documents or other electronic evidence for many reasons, most focusing on the user's general expectation of some level of privacy and specifically the Federal Stored Communication Act as discussed below. In most cases, it is more práctical to obtain evidence of a party's use of social media through targeted discovery. This includes specifically targeted interrogatories, depositions, and document productions.

Federal Stored Communications Act

The primary obstacle to obtaining this evidence from the social media hosting companies is the Federal Stored Communications Act (SCA), which prohibits social media websites from disclosing the content of social media usage. This creates major judicial headaches where the content is relevant and normal discovery statutes would otherwise allow for its production. These issues typically are resolved at the trial court level resulting in wide-ranging rulings and remedies.

Some have argued that the SCA creates a statutory right to privacy. However, this is not the case as it states there "exists no constitutional right of privacy that prohibits discovery sought concerning social media, nor is such social media protected by an established privilege."[7] What the SCA does is give a defined class of Web-based companies safe harbor from producing content provided by its users. It seizes upon the Fourth Amendment to the U.S. Constitution, which prevents a company from disclosing "stored wire and electronic communications and transactional records" held by third-party Internet service providers.

The SCA, 18 U.S.C. Section 2702 et seq., prohibits a "person or entity providing an electronic communication service to the public" from "knowingly divulge[ing] to any person or entity the contents of a communication while in electronic storage by that service." The SCA is part of the Electronic Communications Privacy Act of 1986. A disclosure in violation of Section 2702 of the SCA can expose the record holder to civil liability.[8] Since the SCA was passed in 1986, it has not been amended to reflect new technologies, so the courts are left to determine how and whether the SCA applies to a particular case.

In the January 2014 decision in *Litigation v. Facebook Inc.*,[9]

---

[3] Kaplan Andreas M., Haenlein Michael, *Users of the world, unite! The challenges and opportunities of Social Media*, 53 Business Horizons, 58 (2010).

[4] Social media usage by juries, attorneys, and judges, as well as parties, is having a significant impact on litigated cases.

[5] *Romano v. Steelcase Inc.* 907 N.Y.S.2d 650 (2010).

[6] *Targonski v. City of Oak Ridge*, 2010 WL 2930813 (E.D. Tenn. July 18, 2012).

[7] Pennsylvania Discovery Rules Pa.R.C.P. 4001, Pa.R.C.P. 4011, Pa.R.C.P. 4019.

[8] *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. Cal. 2004).

[9] *Facebook Privacy Litigation v. Facebook Inc.* 2014 U.S. App. LEXIS 8679 (9th Cir. Cal. May 8, 2014).

the 9th U.S. Circuit Court of Appeals clarified that the SCA only protects "content" and defined it as the "intended message conveyed by the communication and does not include information regarding the characteristics of the message...." As a result, social media sites can disclose data regarding a party's usage and other noncontent aspects of social media activity.

The application of the confidentiality provisions of the SCA to prevent disclosure may depend in large part on whether a communication was intended to be private, as noted in *Ehling v. Monmouth-Ocean Hospital Service Corp.*[10] Most social media sites such as Facebook have various levels of privacy settings that the courts look at, among other things, in determining intent. *Moreno v. Hanford Sentinel Inc.*[11] was an influential case that affirmed there is no expectation of privacy when "open to the public eye." It was determined that posts on pages were open to the public eye and, therefore, there could be no reasonable expectation of privacy.

In *Ehling*, a recent New Jersey federal court held that an employee's Facebook posts were protected from disclosure by the SCA. It analyzed the application of the SCA and found that Facebook posts were subject to the act as they were made over the Internet, transmitted via an electronic communication service, maintained in electronic storage, and not accessible to the general public. The court pointed out the question of accessibility to the general public depended on a user's privacy settings. The fact that the employee adjusted her privacy settings to restrict the reading of her posts by "friends" only was an important factor in the court's ruling.

In *Flagg v. City of Detroit,*[12] the court ordered the defendant to sign a release to allow production of electronically stored content confirming that the SCA does not prevent a party from providing consent to the release of social media content.

Social Media Must Be Relevant to the Issues in the Case

As pointed out by the court in a January 2014 decision by the U.S. District Court for the Northern District of Indiana, relevancy is a threshold issue that must be addressed. "To be sure, anything that a person says or does might be reflective of [her] emotional state. But, it is hardly justification for the production of every thought [she] may have had...."[13]

When requesting production of social media evidence, narrowly tailored requests for specific information should be used; release of all messages on social media accounts allows defendants to "cast too wide a net."[14] Another case in point is *Salvato v. Miley.*[15] Here, the court held that the "mere hope" that the texts, emails, and other communications such as social media might contain an admission is not enough to require "open access to the plaintiff's private communications with third parties."

One case that focuses on relevancy is *McMillen v. Hummingbird Speedway.*[16] This is a personal injury case where the court determined there was no "social website privilege" per se and the compelling production of login information could lead to discovery of information in prosecution or defense of a lawsuit. The court pointed out that privacy concerns weigh less when a party chooses to disclose information and that it was unfair to allow the party to hide evidence behind privacy controls. The party seeking evidence must demonstrate the threshold level of relevancy—the same as for tangible items and other electronic content. The court noted that the SCA prohibits entities that qualify as electronic communications services from disclosing the content but does not act to prohibit a party from obtaining the content via user consent or court order.

Another important case pertaining to the SCA is *Crispin v. Christian Audigier Inc.*[17] The court pointed out that one of the primary considerations in determining whether content was discoverable was the sites' functions as well as its privacy settings. Further, "[T]he courts have relied on information contained in the publicly available portions of a user's profile to form a basis for further discovery...."[18] "Discovery of nonpublic social media data may be obtained only upon an evidentiary showing that such private social media material is likely to contain information that will reasonably lead to the discovery of admissible evidence"[19]

In the majority of cases in which social media evidence is aggressively sought, it is likely the issues will end up in front of the judge in the form of a motion to compel, motion for a protective order, or motion to quash. There are a number of factors that are considered when ruling on motions related to social media evidence. This includes the nature of the social media evidence requested; relevancy to claims asserted, e.g., liability, damages, or both; discovery rights; other ways of obtaining evidence; prejudice to the parties; authentication; admissibility into evidence; and logistics. This typically results in a protective order arising from the court's balancing of interests between rights to discovery and rights to confidentiality.

Admissibility of Social Media Evidence

Just like any other piece of evidence presented to the court, social media evidence must be authenticated. In *United States*

---

[10] *Ehling v. Monmouth-Ocean Hospital Service Corp.*, No. 2:11-cv-3305 (WMJ) (D.N.J. Aug. 20, 2013).

[11] *Moreno v. Hanford Sentinel Inc.* 172 Cal. App. 4th 1125, 1130 (2009).

[12] *Flagg v. City of Detroit,* 252 F.R.D., 346, 363 (E.D. Mich. 2008).

[13] *D. O. H. v. Lake Cent. Sch. Corp.*, 2014 U.S. Dist. LEXIS 5585 (N.D. Ind. Jan. 15, 2014) – Simply Storage, 270 F.R.D. at 435 (quoting *Rozell v. Ross-Holst*, 2006 U.S. Dist. LEXIS 2277, 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006)).

[14] *Mackelprang v. Fidelity Nat. Title Agency of Nevada Inc.*, 2007 U.S. Dist. LEXIS 2379 (D. Nev. Jan. 9, 2007).

[15] *Salvato v. Miley,* U.S. Dist. LEXIS 81784 (M.D. Fla. June 11, 2013).

[16] *McMillen v. Hummingbird Speedway,* 2010 Pa. Dist. & Cnty. Dec. Lexis 270.

[17] *Crispin v. Christian Audigier Inc.* 717 F. Supp. 2d 965 (C.D. Cal. 2010).

[18] *Hoy v. Holmes,* 2013 Pa. Dist. & Cnty. Dec. LEXIS 204 (Pa. County Ct. 2013)

[19] *Holder v. AT&T Services Inc.*, 2013 U.S. Dist. LEXIS 157560, 2013 WL 5817575 (M.D. Tenn. Oct. 29, 2013)

v. O'Keefe,[20] the court stated that a "piece of paper or electronically stored information, without any indication of its creator, source, or custodian, may not be authenticated under Federal Rules of Evidence 901." The authentication of social media involves asking how the evidence was collected, where the evidence was collected, what types of evidence were collected, who handled the evidence before it was collected, and when the evidence was collected.

The most direct way to authenticate social media evidence is to present it to the witness, obtain an admission that he created and posted the content, and confirm a lack of privacy settings. Circumstantial evidence can be used as a foundation for authenticity obtained through other sources that have credible knowledge of a particular witness creating and posting content.[21] Under either scenario, a strategic consideration includes an evaluation of how an early attempt to authentic this evidence will affect the surprise value of using the evidence for impeachment purposes later.

In *Lorraine v. Markel American Ins. Co.*,[22] the court denied motions to compel based on the admissibility of electronically stored evidence. In its 101-page opinion, the denied motions for summary judgment were filed by both parties under Federal Rules of Civil Procedure 56. The court noted that none of the exhibits were authenticated, no attempt was made to resolve hearsay issues, the original writing rule was not complied with, and the absence of unfair prejudice was not demonstrated.

Social media evidence is often met with a sense of judicial skepticism about reliability. If the user does not provide testimony authenticating the social media evidence, authentication can be challenging and puts at issue evidence collection and preservation. This may require the use of witnesses with personal knowledge of how content is typically generated, maintained, and preserved. Circumstantial evidence includes dates, the presence of an identifying Web address on a printout, a declaration of how and when it was obtained, and knowledge of its contents.

Standards for admissibility may vary based on jurisdiction and courts. In *Griffin v. State of Maryland,*[23] in performing its evidence gate-keeping function, the court held evidence not admissible due to improper authentication as there were insufficient "distinctive characteristics" on a MySpace profile to authenticate its printout. In *Griffin,* the state sought to introduce a MySpace post of the defendant's girlfriend. To prove that the post was written by the girlfriend, the state sought to authenticate the evidence using the picture, birthdate, and location shown on her MySpace profile, but it failed to authenticate the page on the witness stand or introduce electronic records about who had authored the post. The court held that the admitting party should (1) ask the purported creator if she created the profile and the post, (2) search the Internet history and hard drive of the purported creator's computer "to determine whether that computer was used to originate the social networking profile and posting in question," or (3) obtain information directly from the social networking site to establish the appropriate creator and link the posting in question to the person who initiated it.

In *Tienda v. State*[24] from the Court of Criminal Appeals of Texas, the state introduced into evidence the names and account information associated with three MySpace profiles that indicated the defendant's knowledge of a murder. On appeal, the defendant argued that the state did not authenticate properly the MySpace profile or posts to attribute them to the defendant. The court explained that the best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case. This could include (1) direct testimony from a witness with personal knowledge, (2) comparison with other authenticated evidence, or (3) circumstantial evidence.

In *Tiffany Parker v. State of Delaware,*[25] the court analyzed the Maryland approach in *Griffin* and the Texas approach in *Tienda* and ultimately followed *Griffin,* which effectively allows the judge to be the gatekeeper of the evidence. The plaintiff argued that the court erred in admitting statements posted on her Facebook profile and that the court should have adopted the Maryland court's approach versus the Texas court's approach to authenticating social media evidence. Texas has a hurdle lower than Maryland because it allows the jury to resolve issues of fact and a jury could reasonably find that the proffered evidence is authentic. It was noted in the *Parker* decision that New York and Arizona followed the Texas approach in *Tienda.*

An illustration of applying the hearsay rule is demonstrated in the *People v. Oyerinde*[26] case. Here, the defendant's Facebook messages were not hearsay but rather a party admission because he sent them to another person. Just because the evidence was available on social media does not mean the test for a party admission changed. The rule states that "[a] statement is not hearsay if...[t]he statement is offered against a party and is the party's own statement, in either an individual or representative capacity." The judge applied the test as it would be applied to any other out-of-court statement.

A recent case, *United States v. Vayner,* illustrates the importance of the need for establishing a proper foundation when attempting to introduce social media evidence into trial. In *Vayner,* the government utilized an agent to offer into evidence a printed copy of a Web page that it claimed was defendant Aliaksandr Zhyltsou's profile page from a Russian social networking site similar to Facebook. The district court admitted the printout over Zhyltsou's objection that the page had not been properly authenticated and was, thus, inadmissible under the Federal Rules of Evidence Rule 901. Federal

---

[20] *United States v. O'Keefe* 537 F. Supp. 2d 14, 20 (D.D.C. 2008).

[21] Admission that the content is genuine. *See* Fed. R. Evid. 901(b)(1).

[22] *Lorraine v. Markel American Ins. Co.* 2007 U.S. Dist. LEXIS 33020 (D. Md. May 4, 2007).

[23] *Griffin v. State of Maryland* 419 Md. 343, 19 A3d 415 (2011).

[24] *Tienda v. State,* 358 S.W.3d 633 (Tex. Crim. App. 2012).

[25] *Tiffany Parker v. State of Delaware,* 85 A.3d 682 (Del. 2014).

[26] *People v. Oyerinde,* 2011 Mich. App. LEXIS 2104 (Mich. Ct. App. Nov. 29, 201.

Rules of Evidence 901(a) states, "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."

The United States Court of Appeals concluded that the district court erred in admitting the Web page into evidence and overturned the verdict because the government presented insufficient evidence that the page was what the government claimed it to be. The court stated that the fact that a page with Zhyltsou's name and photograph happened to exist on the Internet permits no reasonable conclusion that the page was created by the defendant or on his behalf. Furthermore, the special agent provided no extrinsic information showing that Zhyltsou was the page's author or otherwise tying the page to Zhyltsou. The court concluded that, as with any piece of evidence whose authenticity is in question, the "type and quantum" of evidence necessary to authenticate a Web page will always depend on context.[27] Rule 901 requires that there must be some basis on which a reasonable jury could conclude that the page in question was not just any Internet page but, in fact, Zhyltsou's profile. No such showing was made, and the evidence should therefore have been excluded.

Spoliation of Social Media Evidence

Because of the transient nature of social media and the ability to delete or destroy evidence at the press of a button, spoliation of evidence involving social media cases is starting to get attention. Spoliation occurs when evidence is altered or destroyed or when a party fails to preserve property for another's use as evidence in litigation. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[28] A failure to do so can lead to a motion for spoliation sanctions involving the destruction of electronic evidence. This requires establishing (1) the party with control over the evidence had an obligation to preserve it and it was destroyed, (2) the records were destroyed with a culpable state of mind, and (3) the destroyed evidence was relevant to the moving party's claim or defense.

Spoliation sanctions do not require bad faith but primarily focus on the prejudice shown to the other party. Some have stated that a party is presumed to have control over their social networking accounts and relevant information on those sites is discoverable: "Since the plaintiff controls when the litigation commences, as well as the nature and scope of the claims asserted, a plaintiff's attorney who does not take early and affirmative steps to preserve social media content risks spoliation sanctions."[29]

In *Gatto v. United Air Lines*,[30] an employee of JetBlue filed a personal injury lawsuit claiming that he was permanently disabled and precluded from physical and social activities. Gatto refused to comply with discovery requests and deactivated his Facebook account. The court awarded United an adverse inference instruction for failure to preserve a social media account and intentional destruction of evidence.

In *Lester v. Allied Concrete*,[31] the court awarded a $722,000 sanction against the plaintiff and his lawyer. The spoliation occurred when the plaintiff received a discovery request for the contents of his Facebook account and an attorney instructed a paralegal to tell the client to "clean up" his Facebook page because they didn't "want blowups of this stuff at trial."

Conclusion

Getting back to our trial moment, the lawyer wanting to discredit the key witness by using her Facebook postings was well prepared. The printouts of the witness's Facebook pages were obtained by an investigator who was prepared to testify as to how they were obtained. Further, the witness unwittingly admitted in deposition that she authored the Facebook pages and posted the incriminating material. With this in hand, the judge overruled the lack of foundation and hearsay objections, and the witness certainly will think twice about posting something on social media in the future.

The issues and cases surrounding the use of social media evidence are evolving. There has been discussion about updating state and federal statutes to reflect the recent judicial decisions; however, if and when this is done, it will quickly become outdated as new technology just as quickly will leave them in the dust.

Lawyers must think ahead and plan for the court's involvement when discovering and using evidence from social media. Developing and executing a social media evidence strategy requires a number of considerations. First, the demographics involving the likelihood that a person uses social media, which is ever widening to include even seniors as well as youths. Second, the use of preservation of evidence letters puts the other side on notice with perhaps unintended effects. Third, the preparation and execution of a plan to obtain social media evidence through investigation and discovery and the pushback from Internet service providers that likely will result. Finally, a risk/reward analysis that takes into account added costs and the likelihood of success.

---

[27] *United States v. Sliker*, 751 F.2d at 488 (2d Cir. 1984)

[28] *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("*Zubulake IV*").

[29] Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. 178, 204 (2013).

[30] *Gatto v. United Air Lines*, 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar 25, 2013).

[31] *Lester v. Allied Concrete*, 2011 Va. Cir. Lexis 132.