HEADNOTES

SOCIAL MEDIA

Social Media and Internet Evidence

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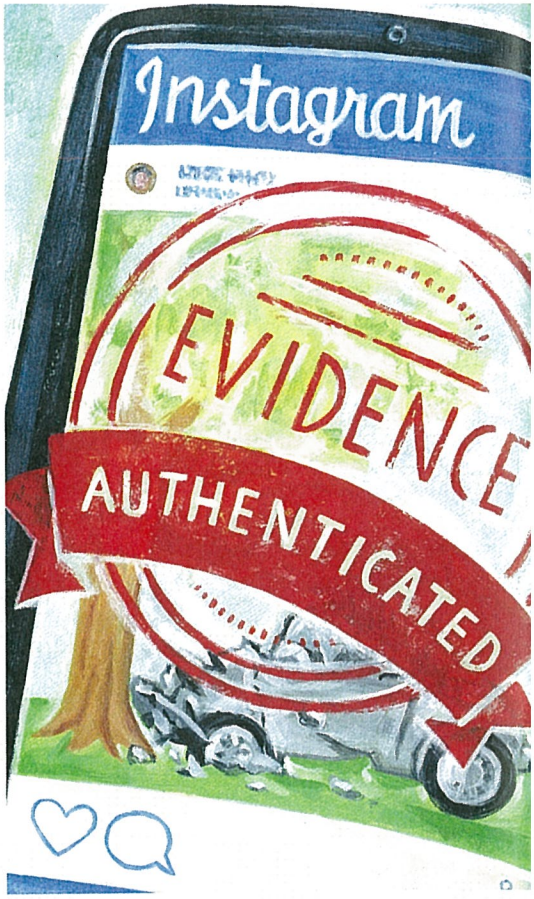
Your case can rise or fall on the admission of a Facebook profile, a YouTube video, a YouTube video posted on a Facebook page, a Yelp review, an Instagram photo, a Yelp review or Instagram photo posted on a website, or a statement on a website. This stuff is admissible? Maybe. Even that story about space aliens might be self-authenticating.

Twenty years ago, many judges, like almost all the rest of us, didn't know exactly what to make of the Internet, didn't use it that often, and didn't know how much to trust it. "Anyone can put anything on the Internet. . . . [H]ackers can adulterate the content on *any* web-site from *any* location at *any* time. . . . [E]vidence procured off the Internet is adequate for almost nothing." *St. Clair v. Johnny's Oyster & Shrimp, Inc.* 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999).

Today, everyone relies on the Internet, including judges, and this has affected their receptivity to Internet evidence: "Some courts have suggested applying 'greater scrutiny' or particularized methods for the authentication of evidence derived from the Internet due to a 'heightened possibility for manipulation.' . . . [W]e are skeptical that such scrutiny is required. . . ." *United States v. Vayner*, 769 F.3d 125, 131 n.5 (2d Cir. 2014). Judges now commonly take judicial notice of Internet evidence.

That doesn't mean that skepticism toward Internet evidence is inappropriate, just that it is addressable. Perhaps the most remarkable feature of evidence law is its elasticity—its ability to adapt to technological innovations. To warrant admission of any evidence, only a modest authentication hurdle must be satisfied under Rule 901(a) of the Federal Rules of Evidence: "[T]he proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." This showing can be made with inadmissible evidence. Under Rule 104(a), the court makes its initial determination of admissibility "not bound by evidence rules, except those on privilege." The rest is up to the fact finder, under Rule 104(b), as long as the judge is satisfied that sufficient proof is introduced at trial to support a finding of authenticity.

Four years ago, in an early decision on the admissibility of a social media profile page, the Maryland Court of Appeals took a restrictive view, essentially requiring an admission of authorship or expert evidence concerning the Internet history and hard drive of the alleged author, or



evidence from the social media network. *See Griffin v. State*, 419 Md. 343 (2011). Since then, virtually every state appellate court to address the issue has—like the Second Circuit in *Vayner*—concluded that circumstantial evidence, including the contents of the social media page itself, can suffice to authenticate it. That doesn't mean the evidence will automatically be admitted. *Vayner* excluded it. But it does mean the question is one of fact. If the trial judge as gatekeeper finds sufficient evidence "to support a finding by a reasonable juror that the proffered evidence is what its proponent claims . . . the jury will then decide whether to accept or reject the evidence." *Parker v. State*, 85 A.3d 682 (Del. 2014).

Consequently:

- You can authenticate a YouTube video with circumstantial evidence identifying the individual and items depicted, and establishing where and roughly when the video was recorded, without evidence from YouTube personnel or evidence that the recording

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equipment was reliable. *See United States v. Broomfield*, 2014 U.S. App. LEXIS 22670 (11th Cir. Dec. 3, 2014).

- You can make a YouTube video posted on a Facebook page self-authenticating under Rule 902(11) with certifications by records custodians from both companies that the video and profile page were maintained in ordinary course of business. *See United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014).
- Authorship of a Yelp or other Internet review can be circumstantially authenticated by its contents and similarity to other writings. *See Pham v. Lee*, 2014 Cal. App. Unpub. LEXIS 8812 (Dec. 11, 2014); *Judge v. Randell*, 2014 Cal. App. Unpub. LEXIS 4767 (July 7, 2014).
- A witness can authenticate an Instagram photo and, sometimes, a posted comment by testifying that it was downloaded from Instagram. *See In re D.H.*, 2015 Cal. App. Unpub. LEXIS 867 (Feb. 6, 2015); *Camowraps, LLC v. Quantum Digital Ventures*, 2015 U.S. Dist. LEXIS 16091 (E.D. La. Feb. 10, 2015).
- A witness can authenticate a website with testimony that the witness typed in the Internet address, logged onto the site, and reviewed what was there, and that the contents are fairly and accurately reflected on the proffered exhibit (which should bear the web address and date accessed). *See Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 10183 (D. Or. Jan. 28, 2014).

There is one recent rule change worth mentioning—the 2011 addition of Federal Rule of Evidence 101(b)(6), which provides that "a reference to any kind of written material or any other medium includes electronically stored information." Under this rule, all of the references to writings in the Federal Rules of Evidence extend to the Internet. That includes, for example, Rule 902(6), which makes self-authenticating "[p]rinted materials purporting to be newspapers or periodicals." Under Rules 101(b)(6) and 902(6), then, newspaper and magazine websites are self-authenticating. That makes sense. The court admits an article for the fact it was published, not for its truth; the content of the article is still hearsay. *See United States v. Kane*, 2013 U.S. Dist. LEXIS 154248 (D. Nev. Oct. 28, 2013).

But then combine these two rules with the hearsay exception for ancient documents in Rule 803(16), and the result is that articles more than 20 years old from the website of the most sensational tabloids are admissible for their truth. Something to keep in mind when a critical fact in the case is what was occupying space aliens before 1995. ▪