The Language of Social Media

To understand social media, common terms, definitions, and contexts must be understood.

Facebook: Pew reports that Facebook remains the most popular social media platform, which 79% of all online Americans use. Facebook also boasts 1.9 billion users worldwide. Users create a profile that can be tailored to be as public or as private as the user desires. Once a profile is created, the user can share photos, messages, and information amongst their “friends” and upload and send videos. Facebook includes: messenger—available online and through the users’ smartphone—which enables users to communicate in real time, much like a SMS text message.

Instagram: The second largest social media platform, its usage is slowly but steadily increasing due to its popularity with younger Americans. According to Pew, 32% of Americans use this platform. Unlike Facebook, Instagram users communicate mostly through photos, primarily taken from their smartphones and uploaded directly to the site. Users’ hashtag (#) their posts, which link other photos and users with the same hashtag. Instagram users may connect their Instagram account to other social media profiles, enabling them to share photos to those profiles as well. Users follow other users (including celebrities and other well-known figures) to subscribe to their feeds.

Twitter: The third largest social media platform, Twitter users comprise approximately 24% of all online adults. Younger populations also favor this platform: thirty-six percent of online Americans between the ages of 18-29 use Twitter. Twitter mandates users to keep their “tweets” to 140 characters or less. Registered users create a Twitter “handle,” with the @ sign following their registered name.

LinkedIn: With a reported 106 million active users in September 2016, LinkedIn’s niche is professional networking. Users can share articles, photos, or updates, and can post publications.

YouTube: Also considered a social media platform used to share videos, and has over 1 billion users. Both private individuals and media corporations are able to upload, view, share, rate, and comment on posted content. Unregistered users may only view content.

Pinterest: With 150 million registered users, this site encourages its registers to visually catalog ideas known as “pinboards” in a self-serving fashion. Registered users pin, upload, save, sort, and manage their pinboards as well as browse the content of other users’ pinboards in their feed.

Other notable social media platforms include: Reddit, Vine Camera, Tumblr, Flickr, and Google+.

Prevalence of Social Media in Society and, Increasingly in the Courtroom

Social media plays a large role in American life. Every minute users post 216,000 photos on Instagram, tweet 277,000 times, and share almost 2.5 billion pieces of content on Facebook. Social media’s importance also coincides with criminal prosecutions and investigations. Digital information yields millions of potentially pieces of evidence. Courts recognize the importance of social media, with jurisdictions both setting parameters and limiting discoverable content. A judge from a New York state court noted in his decision, “In recent years, social media has become one of the most prominent methods of exercising free speech, particularly in countries that do not have very many freedoms at all. Prosecutors and law enforcement use social media to gather evidence, establish connections between parties, locate witnesses, and identify aggravating factors—such as lack of remorse—at sentencing. Recent court decisions set forth rules when introducing social media into evidence and state bar associations provide guidance about how prosecutors can ethically collect social media to investigate, build, and try cases.

Authenticating Social Media Evidence in the Courtroom- Maryland’s and Texas’ Diverging Approaches

The state of the law regarding social media evidence admissibility is murky at best. Courts and academic writings have split the case law into two approaches. These best can be referred to as “The Maryland Approach” and “The Texas Approach.” The distinction between the Maryland Approach and the Texas Approach has been widening. However, admission generally hinges on how the prosecutor can show circumstantial evidence to prove the exhibits taken from social media are what they are purported to be. Fortunately for prosecutors, more jurisdictions follow the less restrictive Texas Approach, where the “judge is the gatekeeper for the evidence and the jury makes the final decision as to the reliability of that evidence.”

The Maryland Approach

Under the more restrictive Maryland Approach, courts are skeptical of authenticating social media evidence, finding the odds too great that someone other than the alleged author of the evidence was the actual creator of the account, posting, or tweet. Through two cases, Griffin v. State and State v. Sublet, the following conditions must exist for social media evidence to be properly authenticated and offered into evidence: authentication through testimony from the creator of the social media post; through hard drive evidence or internet history from the purported creator’s computer; or through information obtained directly from the social media site itself “that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.” The last condition has been established through contemporaneous social media conversational exchanges created in response to events occurring that same day.

In 2011, the Maryland Court of Appeals, the highest court in the state, heard Griffin v. State. Griffin was convicted of second degree murder. Prior to the trial, a State’s witness testified that defendant’s girlfriend threatened the witness, the prosecutor then sought to offer evidence through a state’s investigator that the girlfriend posted “…Snitches Get Stitches” on her MySpace account. The Court held that the lower court improperly admitted the MySpace page without the girlfriend’s testimony that she created the account. The Maryland Court of Appeals disagreed with the lower court’s reasoning that the MySpace profile in question showed the distinctive characteristics of the girlfriend, and “that the offered evidence is what it claims to be.” The lower court found that it was proper to admit the MySpace page due to “distinctive characteristics” based on the following factors:
the user’s account listed the same age, birthday, and city as the girlfriend; a witness testified the user’s profile picture was that of the girlfriend; the user mentioned her two children (the same number as the defendant’s girlfriend); and finally, the user referenced “Boozy” which was the defendant’s nickname. However, in its decision to reverse and remand, the Maryland Court of Appeals cited in part that despite these distinctive characteristics, “the [lower] court failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the “Snitches Get Stitches” posting.” Thus, in Maryland, under Griffin, the proponent must therefore affirmatively disprove the existence of a different creator for the evidence to be admissible.

Four years after Griffin in 2015, the Court of Appeals of Maryland, through Sublet v. State, offered some guidance on what constitutes “distinctive characteristics,” permissible to show circumstance evidence in a social media case. Sublet established Maryland’s standard that a “context-specific determination” whether the proof advanced is sufficient to support finding that the item in question is what its proponent claims it to be. The Court further opined on the importance of the judiciary’s role as a gatekeeper in admissibility of social media cases: “The role of judge as “gatekeeper” is essential to authentication, because of jurors’ tendency, ‘when a corporal object is produced as proving something, to assume, on sight of the object, all else that is implied in the case about it.’” (emphasis, Court’s own).

The Court also recognized “In the period since Griffin had been decided, cases in which authentication of social networking websites and postings at issue have proliferated.”

In Sublet, the Court of Appeals agreed with the lower court that it was proper to exclude testimony of a witness, who testified that other people had access to her account password so they could presumably access and change or insert information on the witness’ page, thereby attributing the posted content to her. The Court reasoned, “when a witness denies having personal knowledge of the creation of the item to be authenticated, that denial necessarily undercuts the notion of authenticity.” However, after this analysis, the court then turned its lens in Sublet to another case, Harris v. State, to show when authentication (and therefore admissibility) can be proper when the creator of the social media page does not testify about the ownership of the page. The key is exigency and the ability to show proof of authorship. In Harris, petitioner defendant “TheyLovingTc” sent “direct messages” from his Twitter account on his phone about “[aveng]ing keon” to another Twitter user, OMGitsLOCO. The Court of Appeals agreed with the State that there were “sufficient distinctive characteristics” for the trial judge to determine that a reasonable juror could find the “direct messages” and tweets authentic; to wit, [a witness] had identified “TheyLovingTc” as Defendant’s Twitter name and that the photographs accompanying the TheyLovingTc messages were of the defendant. The State also argued that the content of the messages indicated that Harris was the author, including that they demonstrated that OMGitsLOCO and TheyLovingTc knew about the plan for a shooting.” The Court also noted “The substance of the conversation referenced a plan to “avenge keon” that had only just been created in response to events occurring that same day... That the plan subsequently came to fruition the following day also indicates that the ‘direct messages’ were written by someone with knowledge of and involvement in the situation, which involved only a small pool of individuals.” Thus, the Court was satisfied that the Twitter handle, “TheyLovingTc” actually belonged to the defendant, and was therefore authentic and the evidence gathered from the page admissible.

The Texas Approach

Compared to Maryland, courts following the “Texas Approach” are more ‘lenient’ in determining what amount of evidence a “reasonable juror” would need to be persuaded that the alleged creator did create the evidence. This second approach is viewed as ‘better reasoned’ because it allows for proper interplay among the many rules that govern admissibility, including [FRE] 901. The standard is best explained in the 2012 case, Tienda v. State, where the defendant unsuccessfully
appealed his murder conviction by alleging the state improperly admitted information gathered from the defendant’s MySpace account through a subpoena. The victim’s sister then testified about the information posted on a MySpace account she believed the appellant defendant was responsible for registering and maintaining.

On appeal, the defendant argued “that the State did not prove that he was responsible for creating and maintaining the content of the MySpace pages by merely presenting the photos and quotes from the website that tended to relate to him.” In response, the State argued that 1) “the contents of the social networking pages in this case contained sufficiently distinctive information to justify conditionally submitting them to the jury for its ultimate finding whether ‘the matter in question is what its proponent claims’ and 2) the specificity of the content, an ‘admission’ by the appellant, was sufficient to tie him to this particular evidence and allow the jury to consider it for that purpose.” The Court of Criminal Appeals of Texas noted twenty-five identifying factors of Defendant’s MySpace account that showed he was the owner of the account, including: his picture, email address, other demographic information, a link to a song played at the victim’s funeral, pictures showing his gang tattoos, references to snitches, and conversations between him and other MySpace users about the ongoing investigation. “This combination of facts...is sufficient to support a finding by a rational jury that the MySpace pages that the State offered into evidence were created by the appellant. This is ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them.”

The Court noted “It is, of course, within the realm of possibility that the appellant was the victim of some elaborate and ongoing conspiracy... But that is an alternate scenario whose likelihood and weight the jury was entitled to assess once the State had produced a prima facie showing that it was the appellant, not some unidentified conspirators or fraud artists, who created and maintained these MySpace pages.”

**Briefly: After Showing Authenticity, Use Traditional Rules of Evidence to Prove the Case**

Issues relating to weighing admissibility of social media evidence apply to jurisdictions whose evidence rules are patterned after the Federal Rules of Evidence (“FRE”). Therefore, regardless of whether a jurisdiction follows the Maryland or Texas approach, the most persuasive way of introducing social media evidence is to show as much “distinguishing” and circumstantial evidence as possible. This will help authenticate the evidence (FRE 901), and also show that the evidence is relevant and more probative than prejudicial (FRE 403). Prosecutors may also argue that a post, tweet, or social media conversation is being used as an admission under FRE 801(2). Postings can also be exceptions to hearsay (FRE 803) if they prove: present sense impressions, excited utterances, then existing mental, emotional, or physical condition of the declarant, etc. Of course, case law in each jurisdiction is precedent especially for proving authentication and ownership.

**Notable Case Law from Smart Jurisdictions. (Most States use the Texas Approach)**

Similar to the Maryland and Texas Approaches, each jurisdiction’s courts—state and federal—rule differently when it comes to authenticating evidence derived from social media. Make sure you know the case law in your jurisdiction. Here is a sampling of recent decisions from four Smart Prosecution jurisdictions.

**New York: U.S v. Meregildo.** Defendant moved to suppress evidence gathered from his Facebook account pursuant to a search warrant. The government used a cooperating witness, who was one of Defendant’s Facebook friends to access his account. The Court held that “When a social media user disseminates his postings and information to the public, they are not protected by the Fourth Amendment. See Katz, 389 U.S. at 351 (1967) (citations omitted).” However, postings using
Consider the following: a man walks to his window, opens the window, and screams down to a young lady, "I’m sorry I hit you, please come back upstairs." At trial, the People call a person who was walking across the street at the time this occurred. The prosecutor asks, “What did the defendant yell?” Clearly the answer is relevant and the witness could be compelled to testify. Well today, the street is an online, information superhighway, and the witnesses can be the third-party providers like Twitter, Facebook, Instagram, Pinterest, or the next hot social media application.

See, People v. Harris.

more secure privacy settings reflect the user’s intent to preserve information as private and may be constitutionally protected. See Katz, 389 U.S. at 351-52 (citations omitted). The court also stated, “Where Facebook privacy settings allow viewership of postings by ‘friends,’ the Government may access them through a cooperating witness who is a ‘friend’ without violating the Fourth Amendment.” Here, Defendant posted information about his gang involvement, which was accessible to his Facebook friends, including the government’s cooperating witness. Therefore, he could not suppress information provided to the government from his Facebook friend/cooperating witness.

New York: People v. Harris. Defendant was charged with disorderly conduct after marching on roadway of the Brooklyn Bridge. The prosecutor sent Twitter a subpoena seeking information from his account related to the ongoing prosecution. Defendant moved to quash the subpoena, as did Twitter (stating it would not comply with the subpoena until the Court ruled on Defendant’s motion to quash). The court subsequently held that the defendant had no proprietary interest in the user information on his Twitter account, and he lacked standing to quash the subpoena. Twitter then moved to quash, and did not comply with its own subpoena. The Court held that Twitter must provide information relevant to the dates of the investigation, but information outside the investigation’s scope could be obtained only through a search warrant. The Court noted in its decision “if you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world. This is not the same as a private email, a private direct message, a private chat, or any of the other readily available ways to have a private conversation via the Internet that now exist. Those private dialogues would require a warrant based on probable cause in order to access the relevant information.”

New Jersey: US v. Gatson. Defendant was indicted for conspiracy to transport and receive stolen property. Pursuant to a search warrant, federal agents seized a laptop and tablet, which linked to his Instagram account. Law enforcement officers also used an undercover account to become Instagram friends with defendant, who accepted the friending invitation. As a result, law enforcement officers were able to view photos and other information the defendant posted to his Instagram account. Defendant argued there was no probable cause to search and seize information in his Instagram account. Defendant’s Instagram account displayed photographs of himself with large amounts of cash and jewelry, which were possibly the proceeds from the underlying offense. The court held that no search warrant is required for the consensual sharing of this type of information, and denied his motion to suppress.

Washington: State v. Kolanowski. Defendant appealed his conviction for rape and unlawful imprisonment. One issue on appeal was his argument that his counsel failed to authenticate a Facebook page of the victim—a photograph he argued showed she had access to her phone and was not with him during the time of the incident. At trial, the victim testified that she did not have access to her phone at a certain time (later revealed to be when a Facebook picture of her was taken and uploaded). However, based on the record, the court ruled the introduction of the photo through proper identification “would not have advanced the defendant’s case as authentication of the Facebook timestamp was at issue. Without proper authentication, the post was not relevant to the victim’s credibility. But we simply cannot determine from this record what evidence the timestamp would have provided.”

Georgia: Brown v. State. Defendant appealed his conviction for murder and other charges, arguing that the introduction of the improperly-authenticated evidence at trial required a reversal of all his convictions. During the trial, three witnesses testified that he held a shotgun, and two of the three testified they saw him firing

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\[^{42}\] People v. Harris, 36 Misc. 3d 868, (N.Y. City Crim. Ct. 2012)
\[^{43}\] id. at 870
\[^{44}\] id. at 874
\[^{46}\] id. at 860
\[^{47}\] id. at 858
\[^{50}\] id. at 5
\[^{51}\] id. at 13
During the trial, a city investigator and expert witness in criminal street crimes and gang activity testified she believed defendant belonged to the Young Choppa Fam gang. The State then presented her with the eight exhibits—taken from YouTube, Facebook, and Twitter—showing Defendant’s activity in the Young Choppa Fam gang. The witness testified she obtained the images through a public internet search. The Supreme Court of Georgia determined that these exhibits had not been properly authenticated, and, for that reason, it granted the motion for new trial only with respect to the count of criminal gang activity. The trial court further found that the admission of this evidence was harmless error that did not affect defendant’s remaining convictions surrounding the murder, noting the testimony of the three eyewitnesses to the murder.

**Anticipating Defense Arguments for Admitting Evidence Derived from Social Media**

Defense counsel may successfully argue (in addition to authenticity) the following to preclude evidence gathered from social media.

**Reliability:** “Since photographs can be doctored and written posts can be edited and backdated, it can be difficult for judges to determine reliability of social media posts.” To address this concern, law enforcement officers may sometimes obtain, confirm, or collaborate information gathered from social media through their own investigations including surveillance and witness affirmation. Subpoenas to the social media site may include metadata that confirms the date of the post or other indicia of reliability. See *People v Harris*, 36 Misc. 3d 868.

**Relevancy and Prejudice:** “Users often post playful images of themselves that are intended as jokes. These might be along the lines of flashing gang symbols.” Prepare to conduct a FRE 403 prejudicial v. probative balancing test. Probative evidence will be bolstered by contemporaneous investigations from law enforcement, including surveillance and witness testimony. If the judge rules to allow the evidence or testimony, be prepared with appropriate jury instructions.

**How to Properly Investigate Social Media Cases Without Misconduct: Guidance from Bar Associations**

Bar Associations across the country are beginning to pay close attention to what legal professionals are doing with social media, how they are doing it, and why they are doing it. In 2009, the Philadelphia Bar Association was the first to delve into the ethical issue of using social media for legal investigations. Bar Associations agree that viewing a witness’ public online profile is permissible because it is not a communication, but friending a represented witness to request otherwise restricted information amounts to impermissible communication with a represented party. Jurisdictions are split regarding friending unrepresented witnesses to gather information. The following chart summarizes ethical guidance from seven jurisdictions. Philadelphia, Pennsylvania’s rules are the most restrictive when collecting evidence from social media, while New York’s are the most liberal.

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*Id.* at 285
*Id.* at 285-286
Can attorney access a represented or unrepresented witness’ public social media profile?  

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Can attorney/agent create a fictional profile to friend a represented or unrepresented witness?  

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In Summary: How to avoid misconduct during criminal investigations

1. Gather evidence from public pages or feeds where no potential for misrepresentation exists. “There is no reasonable expectation of privacy for tweets that the user has made public.”  

2. See if a cooperating witness has access to the witness’ social media page. Here there is no misrepresentation made by the attorney, and also no direct contact made to the witness. 

3. Rely on law enforcement investigations. Courts generally have not questioned law enforcement for using false accounts or cooperating witnesses to gain access to social media sites. “Courts generally have not questioned law enforcement for using false accounts or cooperating witnesses to gain access to social media sites.”

4. Ask (or subpoena) opposing counsel for access to download the Facebook user’s entire account (Facebook’s “Download your information” tool is located under Account Settings.)

5. Subpoena the social media provider to access a user’s account. See U.S. v. Harris, where the Court held that pursuant to the State’s subpoena, Twitter must provide information relevant to the dates of the investigation.

Conclusion

Social media provides prosecutors and law enforcement critical information and evidence to develop and prosecute cases. However, prosecutors must be aware of ethical considerations in their respective jurisdictions and adhere to ethical boundaries to guide them while prosecuting a case. In this vast and ever-evolving field, prosecutors should keep abreast of relevant case law and Bar Association opinions to aid them in the pursuit of justice.

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