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Evidence

Dustin J. Karrison [a1]

WHAT'S NOT TO “LIKE”?

Social media sites provide attorneys with many more ways to pursue and defend the claims of clients during trial. Establishing social media content as evidence is now easier and less expensive thanks to new amendments to the Illinois Rules of Evidence.

***30 ALTHOUGH PEOPLE ROUTINELY POST THEIR NAMES, PHOTOGRAPHS,** employment histories, education, and other personal information on social media sites such as Twitter, Facebook, and Instagram, establishing a proper foundation for such evidence is still required by the Illinois Rules of Evidence.

Amendments to Rule 902 of the Illinois Rules of Evidence, which became effective on Sept. 28, 2018, ease the burden and expense of authenticating electronically stored evidence (“ESI”) for trial. The amendments eliminate the need to call a witness--such as a records custodian--to authenticate ESI, thus decreasing the cost associated with producing a witness at trial. The new amendments also allow counsel to determine whether opposing counsel has any evidentiary objections to any ESI prior to trial.

Illinois Rule of Evidence 901 remains the starting point for admitting evidence. Rule 901 requires a proponent to produce “evidence sufficient to support a finding that the matter in question is what its proponent claims.” [1] Rule 901 provides examples of ways counsel may admit evidence. [2] The most common is testimony of a witness with knowledge. [3]

Illinois Rule of Evidence 902 recognizes that some kinds of evidence are self-authenticating. [4] In other words, “evidence of authenticity as a condition precedent to admissibility is not required.” [5] Newspapers and certified public records are examples of self-authenticating evidence under Rule 902. [6]

The new amendments to Rule 902 will recognize ESI as self-authenticating-- so long as certain requirements are met. However, attorneys must be mindful that other evidentiary objections may lead to digital evidence being excluded despite a foundation in compliance with Rule 902's new amendments.

A closer look at paragraphs 12 and 13 of Rule 902

The two new amendments are described in paragraphs 12 and 13 of Rule 902. Paragraph 12 allows a qualified person to attest, by certification, that “[a] record [was] generated by an electronic process or system that produces an accurate result.” [7] Paragraph 13 permits “[d]ata copied from an electronic device, storage medium, or file” to be “authenticated by a process of digital identification, as shown by a certification.” [8]

Put simply, ESI certifications are affidavits from a custodian of records describing how the information is generated by, stored in, or copied from its electronic source. Such affidavits can replace witness testimony authenticating ESI.

Paragraphs 12 and 13 mirror the recent amendments to Federal Rule of Evidence 902, which first recognized the increased use and reliability of ESI.[9] The manner in which technology stores electronic information is one reason it has become more reliable. As explained in the Committee Comments to paragraph 14 in Federal Rule 902, "data copied from storage media, and electronic files are ordinarily authenticated by 'hash value.' A hash value is ... often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file."[10] If the hash values of the copied data are not identical to the original, then the copied data will not self-authenticate under Federal Rule of Evidence 902.

A reasonable guide: *United States v. Hassan*

The certifications must comply with the requirement set forth in paragraph 11 of Illinois Rules of Evidence 902. Certifications of social media must contain statements to comply with the hearsay exception in Rule 803(6).[11] Paragraph 11 also requires "a written declaration under oath subject to the penalty of perjury."[12]

Also, a party intending to offer a record into evidence under paragraph 11 "must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their ***31** offer into evidence to provide an adverse party with a fair opportunity to challenge them."[13]

Although no Illinois caselaw has considered the amendments to Rule 902, "it is appropriate to look to federal cases for guidance" where Illinois Rules of Evidence follow the Federal Rules.[14] In *United States v. Hassan*, the fourth circuit gave implicit approval of what a potential certification for evidence from YouTube or Facebook should contain.[15] In *Hassan*, the government sought to introduce screenshots from Facebook and the associated YouTube links depicting the defendants supporting terrorist activities.[16] "In establishing the admissibility of those exhibits, the government presented certifications from the records custodians of Facebook and Google that verified the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities. According to those certifications, Facebook and Google create and retain such pages and videos when (or soon after) their users post them through use of the Facebook or Google servers."[17]

Hassan provides attorneys a starting point when drafting a certification for a records custodian of a social media company. Many social media websites also explain how they collect and store information.[18] Counsel should review a social media's website to determine how a social media company receives and maintains data. This will assist counsel in determining what a certification must include.

Having a records custodian from a social media company sign a certification, as was done in *Hassan*, sidesteps the burden of having to produce the custodian at trial. Additionally, since any certification must be sent to opposing counsel before trial, counsel will have advance notice as to whether his or her opponent will have an objection to the social media evidence. In other words, counsel will have more time to prepare for, and overcome, objections at trial.

Avoiding the pitfalls of Rule 902's new amendments

Providing a certification of ESI as permitted under the new amendments does not eliminate every potential objection to its admission. Even if Rule 902 is followed, opposing counsel may still have valid objections to the social media evidence. Satisfying Rule 902 only establishes that the proposed Facebook page, for example, is actually a Facebook page. Compliance with Rule 902 does not establish the author of the Facebook page. As noted by the Committee Comments to Rule 902: "The opposing party is free to object to admissibility on other grounds, including but not limited to relevancy, hearsay, or (in criminal

cases) the right to confrontation."[19] Thus, opposing counsel may still object that the party in question did not author that Facebook page or post.

In *People v. Kent*, the court excluded a Facebook post finding "no evidence of circumstances surrounding the post's creation to show that [the] defendant was responsible for its contents."[20] The court in *Kent* relied on the rationale in *United States v. Vayner*.[21]

In *United States v. Vayner*, the second circuit excluded evidence from a social media site because the government failed to establish that the defendant was the author of the social media page.[22] In *Vayner*, the government sought to introduce information from the defendant's VK profile page (VK is Russia's most popular social media platform) to provide evidence that the defendant created a fake birth certificate.[23] The court affirmed the district court's decision to exclude a screenshot of the VK page because no evidence was produced that the defendant "himself created the page or was responsible for its contents."[24]

Therefore, even with the new amendments to Rule 902, counsel should collect sufficient evidence showing the adverse party authored the social media page or post. Of course, the easiest way to avoid objections regarding authorship is through stipulation or to have the adverse party admit that he or she is the author of the purported social media evidence at a deposition.[25] Where a party refuses to admit he or she is the author, counsel can use "circumstantial evidence" to establish authorship.[26]

Establishing authorship with circumstantial evidence

Nearly every social media account is connected to an email address. In addition, in many cases, each internet connection has its own unique internet protocol address (commonly referred to as an "IP address"). Thus, counsel can use "email addresses via internet protocol addresses" to establish an author's or poster's identity.[27]

Counsel also may produce a witness who knows the party or knows how ***47** the party communicates and who can verify that the party is the author of the purported social media content. In *United States v. Barnes*, for example, the fifth circuit held that the government laid a sufficient foundation demonstrating the authenticity of a witness's Facebook messages concerning the sale of illegal drugs.[28] The witness first testified that the defendant was able to operate a cell phone despite being a quadriplegic.[29] The witness further testified that she had seen the defendant use Facebook, recognized his Facebook account, and confirmed the Facebook messages matched the defendants manner of communicating.[30] Although the witness was not certain that the defendant authored the messages in question, conclusive proof of authenticity was not required for the admission of disputed evidence.[31]

There are no limitations as to how counsel may use circumstantial evidence to establish authorship. Some courts have implied that comparing existing authenticated evidence with nonauthenticated evidence is sufficient.[32] Alternatively, if a social media message refers to an alias, a witness can verify a party's use of the alias.[33] Further, some courts have suggested that evidence produced in response to written discovery is an appropriate manner in which to establish a party's authorship of ESI.[34] Counsel should not be deterred or limited by the examples provided in existing caselaw to establish whether a party posted or authored information on a social media website.

Practical application

At the inception of a case, counsel should determine whether opposing counsel will stipulate to the social media evidence. If no stipulations can be reached early in the case, counsel should determine the appropriate records custodian at the social media

company who can sign and provide the Rule 902 certification. Also, counsel should collect evidence at a deposition or through written discovery to establish that the party authored the social media evidence.

Illinois Rule of Evidence 902's new amendments recognize the increased use and reliability of ESI and should decrease costs at trial and provide counsel advance notice of any evidentiary objections to social media content. Counsel must be mindful, however, of the potential objections to social media evidence despite compliance with Rule 902. Counsel should start preparations to admit social media evidence at the inception of the case to avoid the evidence being excluded at trial.

TAKEAWAYS >>

• New amendments to Rule 902 recognize electronically stored information as self-authenticating--so long as certain requirements are met. The amendments ease the burden and expense of authenticating social media content for trial.

• Compliance with Rule 902 does not establish the original source of social media content. In other words, if a social media site is admitted into evidence, this does not necessarily confirm the content posted on the account was authored or posted by the owner of the account.

• At the inception of a case, counsel should determine whether opposing counsel will stipulate to social media evidence. If no stipulations can be reached early in the case, counsel should determine the appropriate records custodian at the social media company who can provide Rule 902 certification.

SSBA RESOURCES >>

• Richard S. Kling, Khalid Hasan, & Martin D. Gould, *Getting Access to Social Media Evidence*, 105 Ill. B.J. 24 (Dec. 2017), law.isba.org/2QV0Q0N.

• George S. Bellas & Michael Rizo, *Social Media as Evidence?*, Trial Briefs (Feb. 2017), law.isba.org/2DyWnyd.

• Richard S. Kling, Khalid Hasan, & Martin D. Gould, *Admissibility of Social Media Evidence in Illinois*, 105 Ill. B.J. 38 (Jan. 2017), law.isba.org/2xEdeu4.

Footnotes

a1 **DUSTIN J. KARRISON** *is a senior associate who practices in the areas of civil-litigation defense at Purcell & Wardrope, Chtd., in Chicago*.
dkarrison@pw-law.com

1 Ill. R. Evid. 901.

2 *Id.*

3 *People v. Kent*, 2017 IL App (2d) 140917, ¶ 86.

4 Ill. R. Evid. 902.

5 *Id.*

6 *Id.*

7 Ill. R. Evid. 902(12).

8 Ill. R. Evid. 902(13).

9 Fed. R. Evid. 902(13), (14).

10 Fed. R. Evid. 902(14).

11 Ill. R. Evid. 902(11).

12 *Id.*

13 *Id.*

14 *People v. McCullough*, 2015 IL App (2d) 121364, ¶ 108.

15 *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014).

16 *Id.* at 127.

17 *Id.* at 133.

18 *See, e.g.*, Facebook, Data Policy, www.facebook.com/full_data_use_ policy.

19 Ill. R. Evid. 902 (Committee Comments).

20 *People v. Kent*, 2017 IL App (2d) 140917, ¶ 84.

21 *Id.* at ¶¶ 87-93.

22 *United States v. Vayner, 769* F.3d 125, 132 (2d Cir. 2014).

23 *Id.*

24 *Id.*

25 *Anderson v. United States*, 2014 WL 6792129 *10 (N.D.Ga.2014).

26 *U.S. v. Flutter*, 698 F.3d 988, 999 (7th Cir. 2012).

27 *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014); see also *People v. Kent*, 2017 IL App (2d) 140917, ¶ 58.

28 *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015).

29 *Id.*

30 *Id.*

31 *Id.*

32 *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006)

33 *United States v. Brinson*, 772 F.3d 1314, 1321 (10th Cir. 2014)

34 See, *e.g., Broadspring. Inc. v. Congoo*, LLC, 2014 WL 7392905 (S.D.N.Y. 2014); *AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc.*, No. 2014 WL 7270160 (D. Conn. 2014).

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