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Find Me on Facebook: Authenticating Social Media Evidence

by Amanda Villalobos

It's 2015 and yes, plaintiffs still do it. They file product liability and personal injury lawsuits and then sit back and wait for the millions to roll in but they forget to do one thing…change the privacy settings on their Facebook and Instagram accounts. That's where we come in. As the associates on the case, it's usually our job to troll through a plaintiff's social media accounts looking for juicy quotes ("I filed this totally frivolous lawsuit against Pharma Giant, Inc. and I can't wait to get my huge settlement check!") or compromising photographs (a picture of the "happily" married plaintiff with his new girlfriend).

I recently came across a social media gem in one of my cases. The plaintiff was claiming serious physical injuries, including a debilitating right shoulder injury that limited his mobility and made it impossible for him to raise his arm above his waist. Imagine my surprise to find several Facebook photographs of him, post-injury, being hoisted on a chair, waving his arms in the air and lifting one of his friends over his head. After patting myself on the back for several moments, I informed the partner of my discovery and he promptly responded "Make sure we can get it into evidence." It sounded like a reasonable request. My first thought was to attach the photographs to requests for admission and ask plaintiff to authenticate the photographs himself. I quickly learned, however, that the client did not want Plaintiff to know we had these photographs until we got to trial. We had to find another way.

The Code

Unfortunately, no special statutes have been drafted to deal specifically with authenticating social media evidence. Rather, we are stuck with the same code sections that we use to authenticate regular photographs and documents. We'll start with the basics. A photograph is a writing and must be authenticated before it can be admitted into evidence. *See* Cal. Evid. Code §§ 250 and 1401 (While this article is based on the California Evidence Code, these rules are similar across jurisdiction). Authentication requires evidence sufficient to sustain a finding that the writing is what the proponent of the evidence says it is. *See* Cal. Evid. Code § 1400. Finally, there are no absolute restrictions on the means by which you can authenticate a writing as long as you provide sufficient evidence to satisfy the trier of fact that the writing is authentic. *See* Cal. Evid. Code § 1410.

There are three primary authentication options, the last of which we will discuss in depth. First, you can use expert testimony. Under this approach, you hire an electronic discovery or photograph expert to testify that the photograph has not been altered or modified in any way and is what it purports to be. In many cases, however, this is going to be cost prohibitive. The client may not want to spend the money to have an expert review the evidence and render an opinion. Second, you can use testimony from a witness with personal knowledge. This would include testimony from the webmaster that maintains the website from which the photograph was downloaded and can testify to its authenticity. If sending a subpoena to Facebook does not sound appealing, there is another option. Under the third option, you can present circumstantial evidence of reliability regarding the authenticity of the photograph. In other words, whatever you think will convince the judge that your evidence is authentic. The last method, which is the most ambiguous and the most open to interpretation, will be discussed in more detail.

The Case Law

Given the ubiquitous nature of social media, there is surprisingly little case law discussing the proper procedure for authentication. The majority of the decisions discussing authentication through circumstantial evidence of reliability involve criminal cases. We will discuss two illustrative decisions – *People v. Beckley* (2012) 185 Cal. App. 4th 509 and *People v. Valdez* (2012) 55 Cal. 4th 82.

In *Beckley*, the court examined whether a photograph downloaded from MySpace had been properly authenticated. Beckley was convicted of murder and attempted murder with a gang enhancement. At trial, a police officer who was a gang expert testified that the defendant was a member of the Southside Crips. His opinion was based, in part, on a photograph from defendant's MySpace page showing his girlfriend flashing the Southside Crips gang sign. The officer testified that he had downloaded the picture from defendant's MySpace page. Defendant objected based on lack of authentication. The appellate court held that the trial court erred in admitting the

photograph. In its opinion, the court emphasized that the internet is like the wild west – anyone can put anything they want online. Defendant's webpage could have been hacked or someone pretending to be defendant could have created a fake MySpace page. In the appellate court's view, "the record does not contain ... evidence sufficient to sustain a finding that it is the photograph that the prosecution claims it is, namely, an accurate depiction of [the girlfriend] actually flashing a gang sign." *People v. Beckley*, *supra*, 185 Cal. App. 4th at 515.

In *Valdez*, the defendant again argued that printouts from his MySpace page that were used to show his gang affiliation were not properly authenticated. The appellate court determined that there was sufficient circumstantial evidence of reliability to support authentication. Similar to *Beckley*, a gang expert testified that defendant was a member of T.L.F. – Thug Family Life. The expert relied on Valdez' MySpace page. The entire page, including posts, comments, interests, and photographs was admitted into evidence. The court distinguished *Beckley*on several grounds. First, there was evidence that Valdez was the owner of the page. Defendant did not dispute that the profile picture was a picture of him and the posts on the page had personal details, including greetings address to him by name. Second, the webpage contained mutually reinforcing content. The posts and photographs made sense together. Third, the evidence on defendant's MySpace page indicating that he was in a gang corroborated other external evidence the police collected indicating that defendant was a gang member. Lastly, the court noted that the website was password protected, which diminished the possibility that someone could tamper with the page.

Since *Valdez* was decided, there have been several unpublished decisions that have relied on similar reasoning to determine social media evidence was properly authenticated. In *People v. Boner* (Cal. App. 3d 2012) 2012 WL 4044546, the court held that social media evidence regarding defendant's gang affiliation was properly authenticated because there was pervasive consistency on the page. There were a number of photographs showing defendant engaging in gang related activities (e.g. wearing red, making signs), rather than one isolated photograph. There was also mutually reinforcing content – the photographs corroborated the posts on the page. In addition, the court noted that the site was password protected. Similarly, in *People v. McKinney* (Cal. App. 4th 2013) 2013 WL 1281559, the court relied on the pervasive consistency of defendant's page and external corroboration to find that social media evidence was properly authenticated.

The Tips

As discussed above, authentication can be an evidentiary landmine but there are a few rules of thumb you can use to increase the chances of getting your social media evidence admitted. First, be sure to admit the entire Facebook or MySpace page, not just isolated photographs or select comments or posts. This is where the prosecutor in *Beckley* got in trouble. There was no other evidence available from the MySpace page to corroborate the content of the photograph. Second, look for evidence on the page that the plaintiff controls the content. For example, can you prove that the profile picture is a picture of plaintiff or are there posts specifically addressed to the plaintiff by name? Third, look for external corroborating evidence. If the page has photographs of a family vacation in Maui and you know plaintiff went on a vacation in June you can use this to prove that it's the plaintiff's page. Fourth, look for mutually reinforcing content. For example, if the information section of the page says plaintiff works at McDonald's and you can find a picture of plaintiff in his or her McDonald's uniform that could be persuasive evidence that the page is authentic.

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