Section of Litigation Trial Evidence

Social Media and the Federal Rules of Evidence

By Hon. J. Michelle Childs – August 22, 2013

The proliferation of mobile communications technologies and the emergence of social-networking services have changed the way people communicate. Users communicate more quickly, more frequently, and often more candidly than they would through more conventional modes of communication. And unlike traditional conversation, communication via social media, such as Facebook and Twitter, leaves behind a digital trail of information referred to as electronically stored information or ESI. ESI may often have evidentiary value; therefore, attorneys must evaluate social media evidence, knowing when and how it is relevant and understanding how to apply the Federal Rules of Evidence to it. Although these new methods of communication present novel evidentiary issues, courts will rely on the existing rules of evidence to address them.

In his pioneering decision in *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007), Chief U.S. Magistrate Judge Paul W. Grimm identified a litany of evidentiary issues that will be most pertinent to the admission of ESI into evidence in federal cases. Of particular note, Judge Grimm counseled that attorneys should consider whether the ESI evidence is relevant under Rule 401 of the Federal Rules of Evidence, whether it is barred by the rule against hearsay under Rules 801–807, and whether it can be authenticated under Rule 901.

Relevance Requirement, Rule 401

The increasing prevalence of social media, as well as its ease of use, has rapidly generated a vast amount of data easily available to parties seeking to use it in litigation. However, not all of the content on social media sites is relevant evidence. "Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." Fed. R. Evid. 401. If evidence is irrelevant, it cannot be admitted. Fed. R. Evid. 402. Application of these rules to social media and ESI in general has been most acute in the discovery phase of litigation.

Parties seeking discovery of social media content must carefully define the scope of the information sought in order to comply with the relevance requirement. Rule 26(b)(1) of the Federal Rules of Civil Procedure limits the scope of discovery to information that "appears reasonably calculated to lead to the discovery of admissible evidence." Thus, discovery requests must be sufficiently tailored so as to elicit evidence that will be relevant to the subject matter of the litigation, according to Rule 401's parameters. Parties will not be able to compel disclosure using overly broad requests that amount to nothing more than "fishing expeditions." E.g., *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 572 (C.D. Cal. 2012). As one court recently put it, "[j]ust as the Court would not give defendant the ability to come into plaintiff's home or peruse her computer to search for possible relevant information, the Court will not allow defendant to review social media content to determine what it deems is relevant." *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011). However, a party's expectation that his or her communications remain private—shared only with his or her contacts in a social media site—does not bar those communications from discovery. Relevance, and not privacy concerns, has thus far been the touchstone for discovery of social media content.

To place at least minimal limits on discovery, some courts have developed a requirement that litigants make a threshold showing that some publicly available information on the site at issue undermines an opponent's claims. *See Keller v. Nat'l Farmers Union Prop. & Cas.*

Co., No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at *4 (D. Mont. Jan. 2, 2013). This is thought to prevent fishing expeditions and ensure that requested information will be reasonably calculated to lead to admissible evidence. Often, the type of information sought also defines the scope of discovery. Where the evidence sought is relevant and concerns a party's mental health for example, the scope of review of the party's social media sites may be broad. *See EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010).

Rule Against Hearsay, Rules 801–807

Social media content, because it consists of statements made out of court, is also likely to raise hearsay issues. Rule 801(a)–(c) of the Federal Rules of Evidence defines hearsay as a declarant's out-of-court statement used to prove the truth of the matter asserted, and Rule 802 precludes hearsay from evidence, subject to significant exclusions and exceptions found in Rules 801(d), 803, 804, and 807. Statements made via social media sites, because they are extrajudicial, are hearsay if used to prove the truth of the matter asserted, unless an exclusion or exception applies. The likeliest of these to apply in the social media context are the Opposing Party's Statement exclusion in Rule 801(d)(2), the Present Sense Impression exception in Rule 803(1), the Excited Utterance exception in Rule 803(2), and the Then-Existing Mental, Emotional, or Physical Condition exception in Rule 803(3).

Opposing party's statement exclusion. A statement that would otherwise be hearsay does not fall within the definition of hearsay if it is an admission of a party and is used against that party. Specifically, this exclusion includes statements made by the party in an individual or representative capacity, statements the party manifested that it adopted or believed to be true, statements made by the party's authorized representative, statements made by the party's agent or employee on a matter within the scope of that relationship, and certain statements made by the party's coconspirator. Fed. R. Evid. 801(d)(2). Statements made through social media will often fit this exclusion as long as they are offered against, not by, the party who made the admission or adopted it. *Lorraine*, 241 F.R.D. at 568. Social media sites seem designed specifically for users to assert their views, relate their experiences, manifest agreement with others' opinions, and acknowledge others' activities. Courts have found theses activities to come under Rule 801(d)(2)'s exclusion from hearsay by admission. For example, a plaintiff's sexually explicit Facebook comments were not hearsay when used by the defendant to show that the defendant's remarks concerning similar conduct should not be considered harassment against the plaintiff. *Targonski v. City of Oak Ridge*, 3:11-CV-269, 2012 WL 2930813 (E.D. Tenn. July 18, 2012).

Present sense impression and excited utterance exceptions. Hearsay statements may be admitted if they are (a) statements that describe or explain an event or condition made while or immediately after the declarant perceived it or (b) statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by it. Fed. R. Evid. 803(1)–(2). The theory underlying these exceptions is that, because the contemporaneity or excitement of the event renders the declarant unable to consciously misrepresent it, such statements attain remarkable reliability. Fed. R. Evid. 803 advisory committee's note (note to paras. (1) and (2)). The deliberateness necessary to compose a written message renders social media postings unlikely candidates to trigger these exceptions. Yet, where the circumstances establish that the message was crafted almost concurrently with the event at issue, some courts may find the Rule 803(1) exception applicable. *See Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners, LLC*, No. CIV.A. H-06-1330, 2008 WL 1999234, at *13 (S.D. Tex. May 8, 2008) (finding the Present Sense Impression exception applied to an email).

Then-existing mental, emotional, or physical condition exception. A declarant's statement may also be excepted from the rule against hearsay if it is a statement of the declarant's then-existing state of mind or emotional, sensory, or physical condition. Fed. R. Evid. 803(3). Judge Grimm explained that Rule 803(3) is especially useful "when the medium of communication seems particularly prone to candid, perhaps too-candid, statements of the declarant's state of mind, feelings, emotions, and motives." *Lorraine*, 241 F.R.D. at 570. Judge Grimm had emails in mind, but his analysis seems equally applicable to comments posted on sites such as Facebook and Twitter. Rule 803(3) specifically does not except from the rule against hearsay statements of memory or belief to prove the fact remembered or believed. Attorneys seeking to admit statements made through social media sites pursuant to this exception should establish that the statement at issue is one describing the declarant's state of mind, and not the declarant's belief. *See Versata Software, Inc. v. Internet Brands, Inc.*, No. 2:08-cv-313-WCB, 2012 WL 2595275, at *10 (E.D. Tex. July 5, 2012).

Authentication, Rules 901–902

Social media evidence, as with all ESI evidence, also raises concerns over the proffered evidence's authenticity. Although some courts may give more scrutiny to ESI evidence than to traditional documents, both remain subject to the same existing evidentiary rules of authentication. Rule 901(a) of the Federal Rules of Evidence requires that proponents of an item of evidence provide evidence sufficient to support a finding that the item is what the proponent claims it to be. This prerequisite to admission is intended to impose only a "light burden of proof" on proponents. 5 Jack B. Weinstein & Margaret A. Berger,

Weinsten's Federal Evidence § 901.03[2] (Joseph M. McLaughlin ed., 2d ed. 1997). Rules 901(b) and 902 present a nonexclusive catalogue of authentication methods. Some methods particularly relevant to the admission of social media evidence include the Testimony of a Witness with Knowledge, Rule 901(b)(1); Distinctive Characteristics and the Like, Rule 901(b)(4); and Evidence That Is Self-Authenticating, Rule 902. Attorneys should also consider authentication methods that may be especially relevant to the admission of ESI evidence beyond those listed in the rules.

Testimony of a witness with knowledge. The testimony of a witness with knowledge that a proffered item is what it is claimed to be satisfies the authentication requirement. Fed. R. Evid. 901(b)(1). In the case of social media messages, testimony from the message's author or someone who witnessed the author compose and post the message would suffice; however, such testimony might not be readily available. Instead, proponents may call an authenticating witness with personal knowledge of how the type of exhibit offered is routinely made, so long as the witness explains with factual specificity how the ESI is "created, acquired, maintained, and preserved without alteration." *Lorraine*, 241 F.R.D. at 545. For example, the testimony of a witness describing the reliability and validity of the Wayback Machine, a website that archives prior versions of websites, was sufficient to support a finding that screenshots of the websites at issue were authentic. *United States v. Bansal*, 663 F.3d 634, 667–68 (3d Cir. 2011).

Distinctive characteristics and the like. An exhibit may be authenticated by its "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item taken together with all the circumstances." Fed. R. Evid. 901(b)(4). It is well established that Rule 901(b)(4) is applicable to authenticating emails. *See,* e.g., *United States v. Safavian*, 435 F. Supp. 2d 36 (D.D.C. 2006). The rule will often apply when the ESI itself contains knowledge of facts known peculiarly to the alleged author, which may often be the case with social media content. In *United States v. Grant*, No. ACM S31758, 2011 WL 6015856 (A.F. Ct. Crim. App. Oct. 17, 2011), for example, the court determined that a series of Facebook messages had been authenticated because the sender's name was next to each message, because each message contained a photograph of the sender, and because a recipient was able to communicate to the sender using information contained in the messages.

Evidence that is self-authenticating. Certain specified items of evidence do not require extrinsic evidence of authenticity in order to be admitted; instead, they are self-authenticating. Fed. R. Evid. 902. Subsections (1) through (5) of Rule 902 concern materials that constitute public records; subsection (6) applies only to exhibits that purport to be newspapers or periodicals; subsections (7), (9), (11), and (12) relate to business records; subsection (8) concerns documents acknowledged by a notary public; and subsection (10) applies only to documents that are presumed authentic by federal statute. None of the rules contained in Rule 902 specifically addresses ESI evidence. However, Rule 902(6) now applies to written material that exists online, even if not actually printed. *See Ciampi v. City of Palo Alto*, 790 F. Supp. 2d 1077, 1091 (N.D. Cal. 2011). Rule 902 has often been applied to authenticate emails that comprise public or business records. *See, e.g.*, *DirecTV, Inc. v. Murray*, 307 F. Supp. 2d 764, 772–73 (D.S.C. 2004). Social media messages sent by persons in their private capacities are unlikely to be self-authenticating, but, to the extent that messages posted to sites like Facebook and Twitter have an official or business purpose, Rule 902 may apply.

Nontraditional authentication. Rule 901(b), by its terms, does not present an exhaustive list of authentication methods. Consequently, courts have identified means of authenticating evidence beyond the examples found in Rule 901(b). For example, in both ESI and non-ESI cases, courts have held that an opposing party's act of producing an item in response to a discovery request authenticates that item. *Lorraine*, 241 F.R.D. at 552–53. Courts are likely to respond to rapid technological innovation by developing creative means of authenticating ESI evidence. For instance, in 2004, the then-nascent Wayback Machine at issue in *Bansal* was considered a nontraditional but valid method of authenticating exhibits depicting a website. *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02 C 3293, 2004 WL 2367740 (N.D. Ill. Oct. 15, 2004). Practitioners should look for similarly novel means to meet the authentication requirements of Rule 901.

Conclusion

The increasing prevalence and use of social media sites, along with other ESI, may create novel evidentiary issues. However, successful attorneys will be able to navigate these uncharted waters by presenting their cases with care and attention to the established rules of evidence.

Keywords: litigation, trial evidence, social networks, Facebook, Twitter, Federal Rules of Evidence, relevance, hearsay, authentication

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