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State E-Discovery

Authentication of Social Media

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Social media communications are becoming increasingly important evidence in litigation and the New York State Court of Appeals in *People v. Price*, 29 N.Y.3d 472 (2017), made it clear that there is no strict rule or formula that must be met in order to have social media communications authenticated in order to be admitted into evidence. However, what is clear is that, whether for purposes of summary judgment or for trial, when a party denies that the actual social media post or picture, frequently offered in the form of a “screen shot,” was his or hers, there must be sufficient indicia, which may not be that difficult to obtain, that the communication came from the author in order to be properly authenticated.

Case Law Provides Guidance

As demonstrated by the cases described below, “courts have been flexible as to the manner of authenticating electronic evidence. Often the authentication comes from a combination of sources. Also, the evidence is frequently authenti-

cated circumstantially, such as through the distinctive nature of the contents of the messages.” *Matter of R.D. (C.L.)*, 58 Misc. 3d 780 (Fam. Ct. N.Y. Co. 2017).

The concurrence in *Price* noted:

[g]iven the general population’s mass consumption and use of social media, “[p]redictably, social media postings are becoming an important source of evidence.” Courts have recognized that this evidence presents unique challenges as some commentators have noted, “social media is often stored on remote servers, is accessed through unique interfaces, can be dynamic and collaborative in nature, and is uniquely susceptible to alteration and fabrication.” Arguably, traditional approaches to authentication are inadequate because these new online platforms “can complicate the application of those traditional concepts, and we must be prepared to deal with these complications.” On this appeal, we are squarely presented with the question of how our flexible authentication standard applies to social media images. Therefore, we have the opportunity to resolve an evidentiary issue of growing concern given the proliferation and ubiquitousness of social media.

(citations omitted) The majority in *Price* was clear in that it was not adopting a general and comprehensive test for authentication to be applied, not only in this case, but in all cases involving authentication of photographs found on a social network web page.... In our view, it is more prudent to proceed with caution in a new and unsettled area of law such as this. We prefer to allow the law to develop with input from the courts below and with a better understanding of the numerous factual variations that will undoubtedly be presented to the trial courts.

In *Price*, the People failed to establish that it was defendant’s web page through direct or circumstantial evidence, or with proof establishing “reasonable inferential linkages [that] ordinarily supply foundational prerequisites.” However, the concurrence noted that such evidence may have existed in that the “People had knowledge of personal information posted on the web page which might have established the necessary link to defendant, but the People did not present that evidence as part of the proffer” and that “other evidence arguably address[ed] the authentication of the web page and the depiction therein, such as proof that the

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defendant posted or adopted the photograph, or knew of the photograph and allowed it to remain on the profile page without objection.”

In *Matter of R.D. (C.L.)*, the lower court found that a “screen shot” of text messages sent by a mother to an unknown party agreeing to engage in sex for money was authenticated through the following evidence. The father testified that: (a) he observed the incriminating messages on a cell phone and that the screen shot, although he did not personally take it, was an accurate representation of the messages that he saw on the cell phone; (b) the cell phone belonged to the mother based on his familiarity with the make, model and color of the cell phone; (c) he had seen the mother use the cell phone many times; (d) while he was visiting his daughters, he picked up the cell phone after it rang and the mother asked him to hand it to her; and (e) the cell phone was password protected, making it unlikely that someone, other than the mother, was able to send the messages sought to be introduced.

On the other hand, in *Lantigua v. Goldstein*, 149 A.D.3d 1057 (2d Dept. 2017), where the party seeking to use social media posts against the alleged author of them was unable to produce the person who obtained such printouts and where plaintiff denied that the printouts were from his Facebook account and that he made the statements therein, the Appellate Division precluded their use because plaintiff “had no other means to prove or disprove their authenticity.”

Further Guidance

The below recent cases provide further guidance as to the vari-

ous representations courts look for before they will authenticate a social media post or picture:

People v. Cotto, 2018 N.Y. App. Div. LEXIS 5820, 2018 NY Slip Op 05861 (2d Dept. Aug. 22, 2018) (“Photographs of text messages between the defendant and the complainant were properly admitted into evidence” where “complainant’s testimony that the photographs of the text messages fairly and accurately depicted the text message conversation between her and the defendant was sufficient to authenticate the photographs”).

People v. Khan, 2018 NYLJ LEXIS 2563 (Crim. Ct. Queens Co. July 27, 2018), (“text messages in this case were properly admitted as a party admission, and only one was admitted for the truth of its contents” where “complainant testified that the messages were actual photographs taken of her phone” and “were received from the defendant’s number and the content of the messages would have made no sense unless the originated from the defendant”).

People v. Shortell, 155 A.D.3d 1442 (3d 2017), (private Facebook message authenticated where the second confidential informant “had been Facebook friends with defendant for two years prior to trial and stated that she knew the message came from defendant’s account because an icon of defendant’s picture was displayed next to it” and that “she had firsthand knowledge of the content of the Facebook message”).

Matter of Montalbano v. Babcock, 155 A.D.3d 1636 (4th Dept. 2017), (screen shot of Facebook post admitted based on the mother’s testimony that it accurately repre-

sented the father’s Facebook page on the date in question and that she had communicated with the father through his Facebook page in the past).

People v. Franzese, 154 A.D.3d 706 (2d Dept. 2017), (YouTube video was “authenticated by a YouTube certification, which indicated when the video was posted online, by a police officer who viewed the video at or about the time that it was posted online, and by the defendant’s own admissions about the video made in a phone call while he was housed at Rikers Island Detention Center” and the court, citing Federal Rule of Evidence Rule 901(b)(4), noted that further authenticated was through “its appearance, contents, substance, internal patterns, and other distinctive characteristics”).

Holgado De Vera v. 243 Suydam, 2018 N.Y. Misc. LEXIS 3546, 2018 NY Slip Op 51222(U) (Sup. Ct. Kings Co. April 24, 2018), (text messages authenticated for purposes of summary judgment through an affidavit attesting to an email containing snapshots of text messages with tenant showing the date and time of the messages, and that the tenant identified herself as such).

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