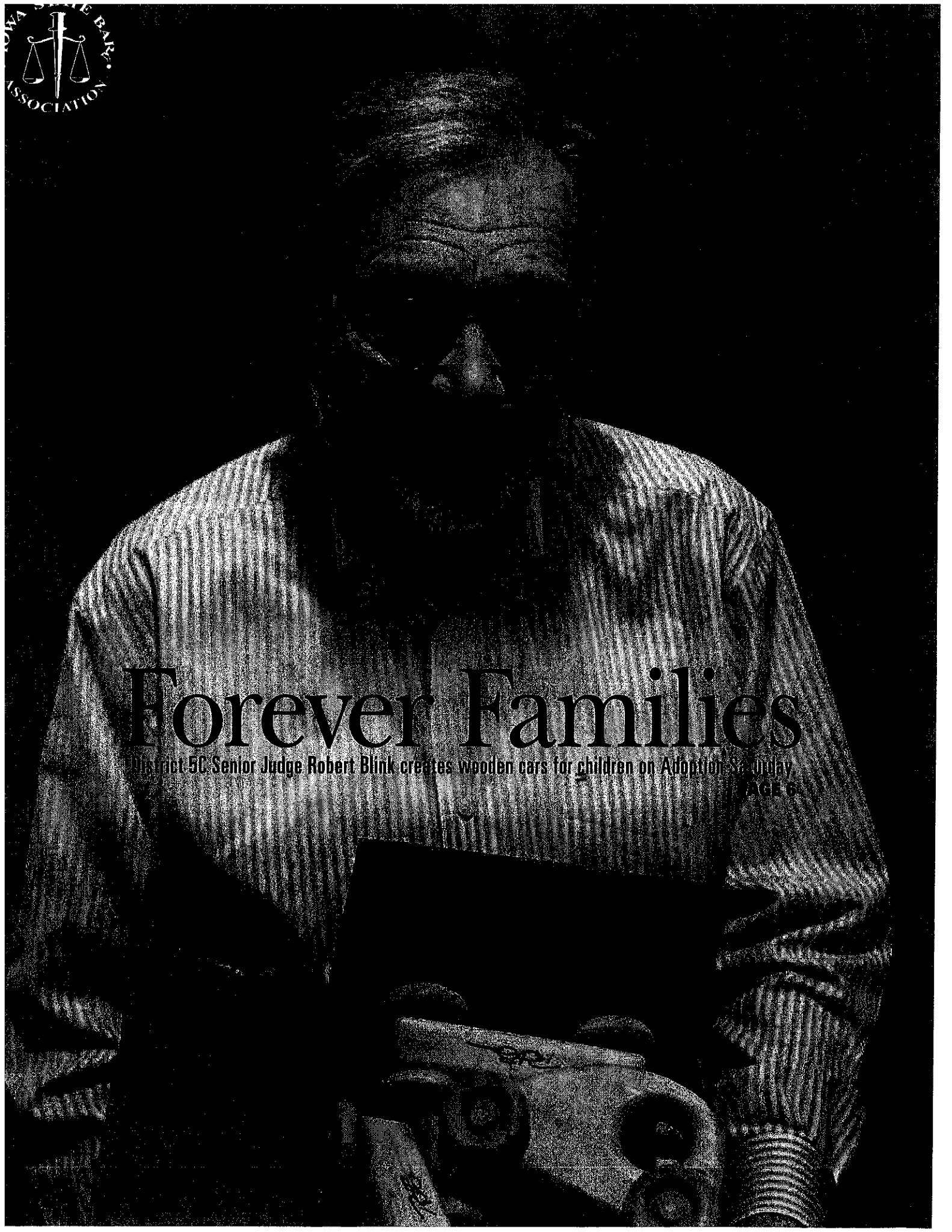




Forever Families

District 5C Senior Judge Robert Blink creates wooden cars for children on Adoption Saturday. PAGE 6



AUTHENTICATING SOCIAL MEDIA EVIDENCE

By Brett Wessels, Assistant County Attorney for Pottawattamie County

“There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently trustworthy. Anyone can put anything on the Internet.”

- *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, (S.D. Tex. 1999)¹

In late August, the National Computer Forensic Institute (NCFI) hosted a Digital Evidence course outside Birmingham, Alabama. While Alabama football fans eagerly anticipated their season opener, our class of 20 prosecutors attended four days of instruction in a magnificent 32,000-square-foot facility. One evidentiary issue discussed was the uncertainty surrounding authenticating social media evidence. This short article briefly addresses this topic and contains footnotes for reference.

AUTHENTICITY AND SOCIAL MEDIA

There are few evidentiary rules as longstanding and uncontroversial as authenticity. A condition to admissibility since ancient times, Wigmore on Evidence called the rule an “inherent logical necessity.”² When being codified in the early 1970’s, even legislators couldn’t argue over authenticity, and the common law seamlessly carried over to the Federal Rules of Evidence.

While authenticity epitomizes uncontroverted longevity, technology has spurned the social media explosion. Since you started reading this article, about 180 new Facebook profiles were created and over 180,000 Tweets were sent. Facebook and Twitter are two widely popular platforms, but social media exists for nearly every interest group.³

The accessibility and self-revelatory nature of social media has created a potential evidentiary goldmine (or perhaps, landmine) for litigators. However, evidence must first be admitted. If a purported social media account holder denies ownership, this scenario implicates authenticity. This raises the topic of this article: What is the status of authenticating social media evidence?

THE LEGAL STANDARD FOR AUTHENTICITY

For authenticity, a judge makes a preliminary legal determination of whether a reasonable jury could find the item to be what it purports to be. Unlike a highly categorical rule like hearsay, authentication is a very flexible.⁴ The origin of the evidence does not need to be conclusively proven and extrinsic evidence establishing authenticity can be entirely circumstantial. The question can be viewed on a continuum: Clearly authentic evidence is admitted, clearly inauthentic evidence is excluded and everything between is conditionally admitted and left for the jury to decide.⁵

Ideally, an offering attorney will be armed with a stipulation, admission, or direct witness. For example, John Doe admitting responsibility for sending a Facebook message likely meets ‘clearly authentic.’ Additionally, Jane Doe witnessing John Doe type and send the Facebook message likely meets ‘clearly authentic.’

Traditionally, the conditional admittance threshold has been very attainable.⁶ However, since 2011, two approaches – the Texas and Maryland Approaches – for authenticating social media have been popularized and one is inconsistent with the traditional standard.

The “Texas Approach” is the majority approach for authenticating social media evidence and is consistent with the traditional authentication standard.⁷ The preliminary question remains whether a reasonable jury could find the evidence authentic and this can be established by entirely circumstantial evidence.

Obviously, some unique challenges exist. For example, a handwriting analysis cannot be conducted on a Facebook post. However, other traditional methods (i.e., identifying distinctive characteristics) are still applicable under the Texas Approach. In other words, the name “Texas Approach” might be a misnomer because this approach largely applies the traditional legal principles of authenticity and

does not carve out any special rules.

The “Maryland Approach” represents a more skeptical contingent of jurisdictions applying a higher standard of authentication.⁸ These courts believe that social media evidence is inherently unreliable and highlight easily created accounts, unattended devices and hacking, as reasons for concern.⁹ Disadvantageously, the offering attorney must affirmatively disprove the possibility that someone else created the evidence. Geographically speaking, this approach appears more prevalent on the East Coast and does not appear to have widespread acceptance.

SUCCESSFULLY AUTHENTICATING SOCIAL MEDIA EVIDENCE

Despite the Maryland Approach’s best efforts, the good news is that social media evidence has not dramatically altered the authentication landscape.¹⁰

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However, the bad news is that no uniform approach exists. From a methodology standpoint, authenticating social media evidence remains a flexible process. Since no one-size-fits-all approach exists, below are three wide-ranging observations on authenticating social media evidence.

Extrinsic evidence. Any type of circumstantial evidence is helpful.¹¹ This implicitly means that several small strands of extrinsic evidence may be sufficient. In other words, extrinsic evidence may be used in piecemeal fashion to cumulatively establish authentication. For example, helpful extrinsic evidence might include a Facebook profile being linked on a phone, consistent email addresses, or GPS location establishing where a social media posting was made.

Extrinsic evidence includes witness testimony. This includes witnesses communicating with the purported author on social media,¹² witnesses in social media photos, or witnesses corroborating unique information posted on social media.

Significantly, a witness does not need to be positive about the identity of the author, but just provide evidence supporting the likelihood of the social media authorship.¹³ For example, Jane Doe does not need to be positive John Doe was the author of a Facebook Chat, but does need to testify why she believed John Doe was on the other end of the Facebook Chat.

Distinctive characteristics. A subset of extrinsic evidence, distinctive characteristics is often regarded as the most successful method of authentication. This can be thought of as highlighting corroborating information on the social media account to help establish authorship.

The more unique and specific the information is, the more persuasive.¹⁴ Social media profiles are replete with personal information such as birthdays, hometown, hobbies, personal background, lifestyle preferences, pictures, status updates, Twitter followers and Facebook Friends. A fake social media account may still contain truthful, revelatory biographical information. The text itself may provide authentication evidence by substance, syntax, internal patterns, unique information, slang, nicknames or consistency.

For example, if Jane Doe denies posting a Facebook status update, look at Jane Doe's previous Facebook status updates. Examine the punctuation, emojis, language, style, substance and frequency. Jane Doe's previous Facebook status updates can potentially connect Jane Doe to the offered evidence. If previous Facebook status updates resemble the offered evidence, this means Jane Doe is more likely to have authored the offered Facebook status based on these distinctive characteristics. This is authenticating the Facebook status update. Remember, conclusive proof of Jane Doe's authorship is unnecessary, just enough circumstantial evidence to be conditionally admitted.

Photographs and video. Social media photographs and videos are authenticated similarly to non-social media photographs and videos. For example, a Facebook photograph would be authenticated by establishing the Facebook photograph is a fair and accurate representation of the subject matter.

However, note that careful lines must be drawn between photographs/videos and textual evidence during authentication.¹⁵ This requires paying close attention to the type of extrinsic evidence being used and a basic working knowledge of the underlying platform.

For example, John Doe might put a photograph from Google Images on his Twitter account. However, John Doe did not take the photograph, does not know the photograph's origin and does not know whether the photograph accurately represents the subject matter. All John Doe did was copy and paste the photograph to his Twitter account. Therefore, even as a cooperative witness, John Doe is unlikely to be able to authenticate a photograph on his own Twitter account.

Now suppose John Doe did take and post the Twitter photograph, but denies doing so. When authenticating the Twitter photograph, exclusively relying on John Doe's Tweets to authenticate the Twitter photograph may be insufficient. John Doe's Tweets may help authenticate information on the Twitter account, but by itself, arguably does not authenticate the Twitter photograph.

How do the Tweets show where the Twitter photograph came from? How do the Tweets establish personal knowledge of the photograph? John Doe's Tweets might be a helpful strand of evidence offered in the cumulative for authentication, but if possible, try not to exclusively rely on that evidence to authenticate a photograph.¹⁶


Conversely, using John Doe's Twitter picture may be insufficient to authenticate textual information. John Doe's Twitter profile picture, by itself, does not prove John Doe's authorship for all the information on the Twitter account.

AUTHENTICATING SOCIAL MEDIA EVIDENCE IN IOWA

There are two helpful Iowa Court of Appeals cases, one juvenile and one criminal. In 2012, In re A.D.W. examined whether the juvenile court improperly admitted a Facebook photograph tying one parent to a marijuana growing operation.¹⁷



Although not reversing the holding, the Court determined that authentication of the Facebook photograph was insufficient.¹⁸ There was no evidence

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identifying the time or place of the photograph, who took the photograph, who posted the photograph, who was aware the photograph was posted, or any personal knowledge surrounding the photograph. Therefore, there was insufficient authentication because there was no foundational testimony offered.¹⁹ Despite being decided by lax juvenile evidentiary standards, *In re A.D.W.* still illustrates insufficient authentication.

In 2018, a defendant contested the admission of incriminating Facebook messages in *State v. Akok*. Ultimately, the Court concluded there was no abuse of discretion in admitting the Facebook messages and provided a clear, logical statement of Iowa's law on authenticity. The Court stated authenticity can be predicated on circumstantial evidence, generally clear proof is not required, and any speculation to the contrary affects weight.²⁰ The Court then applied these principles to the admitted Facebook messages. This legal analysis reaffirms that the traditional legal standard of authenticity applies in the social media context.

Iowa's approach. *Akok* and *In re A.D.W.*, neither of which have negative treatment on Westlaw, establish that Iowa follows the majority Texas Approach. *In re A.D.W.* cites to the leading Texas Approach case, and neither Iowa case demands a heightened standard of authentication.²¹ In fact, *Akok* concluded sufficient authentication based on only two circumstantial pieces of evidence. In *re A.D.W.* only found the evidence to be clearly inauthentic because not a single competent witness verified the social media photograph.

Furthermore, both *Akok* and *In re A.D.W.* acknowledge that social media photographs are authenticated the same as traditional photographs. Noticeably, both cases cite to law from well before the advent of social media. For example, *Akok* cites to two Iowa cases from the 1920's.²² This underscores the fact that the Iowa judiciary believes the law of authenticity has not changed, even with the emergence of social media. Therefore, despite some new challenges, the longstanding standard and methods of authenticity are still applicable to social media evidence.

AUTHENTICATING SOCIAL MEDIA EVIDENCE: MAIN TAKEAWAYS

- Authenticity does not need to be proven conclusively, can be entirely circumstantial, and attacks typically go to the weight of the evidence. The best evidence for authentication is a stipulation, admission or a direct witness.
- Traditional rules and methods of authentication apply to social media evidence.
- There are two primary legal standards for authenticating social media evidence. The Maryland Approach is a heightened standard and the Texas Approach embodies the traditional standard. The Texas Approach is the majority and followed by Iowa.
- Identifying distinctive characteristics of text on a social media account (i.e., Facebook Post, Tweets, profile information) may not by itself be sufficient for authenticating photographs/videos (i.e., Facebook photo, profile photo). Conversely, using only photographs/videos to authenticate text on a social media account may be, by itself, insufficient.
- There is Iowa case law illustrating insufficient authentication (*In re A.D.W.*) and sufficient authentication (*Akok*) of social media evidence.

1. *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999).

2. 7 J. Wigmore, *Evidence in Trials at Common Law* § 2129, at 703 (Chadbourn rev. ed. 1978).

3. Gaming: World of Warcraft, PlayStation, and Xbox Live; Social Games: Clash of Clans and Farmville; Discussion Forums: Meebo and Skype; Sharing: Instagram and Pinterest; Publishing: Blogger and Wikia; Microblog: Twitter and Pownce; Virtual Worlds: Second Life and Club Penguin; Livecasting: Justin.tv and Periscope; Lifestreams: Socializr and Friendfeed; Relationships: eHarmony, Tinder, and Bumble

4. Aviva Orenstein, Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords, 31 Miss. C. L. Rev. 185, 203 (2012) ("Unlike hearsay, which is very technical and categorical, authentication is ultimately more flexible and practical, but less uniform and predictable.") (citation omitted).

5. Authentication of Social Media Evidence, 36 AM J. Trial Advoc. 433, 457-458 (2013); Andrew Jablon, "God Mail": Authentication and Admissibility of Electronic Mail in Federal Courts, 34 Am. Crim. L. Rev. 1387, 1399 (1997).

6. For preventing admissibility, a more effective approach might be properly identifying hearsay. Since statements on social media are by definition out of court, such a statement potentially raises traditional hearsay concerns. In fact, there is scholarly work stating that hearsay is easier to apply to social media evidence than authentication. See Emma W. Sholl, Exhibit Facebook: The Discoverability and Admissibility of Social Media Evidence, 16 Tul. J. Tech. & Intell. Prop. 207, 221 (2013).

7. Elizabeth Flanagan, #Guilty? Sublet v. State and the Authentication of So-

cial Media Evidence in Criminal Proceedings, 61 Vill. L. Rev. 287, 293-294 (2016).

8. *United States v. Hobbs*, 403 F.2d 977, 978 (6th Cir. 1968); See Also Deborah R. Eltgroth, Best Evidence and the Wayback Machine: Toward A Workable Authentication Standard for Archived Internet Evidence, 78 Fordham L. Rev. 181, 188 (2009).

9. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 537, 73 Fed. R. Evid. Serv. 446 (D. Md. 2007). This is considered the landmark case standing for the proposition that the traditional rules of evidence apply to social media evidence.

10. "The authentication of electronically stored information in general requires consideration of the ways in which such data can be manipulated or corrupted, and the authentication of social media evidence in particular presents some special challenges because of the great ease with which a social media account may be falsified or a legitimate account may be accessed by an imposter. But the authentication rules do not lose their logical and legal force as a result." *United States v. Browne*, 834 F.3d 403, 412 (3d Cir. 2016) (citations omitted).

11. *United States v. Browne*, 834 F.3d 403, 412 (3d Cir. 2016) (examining other jurisdictions using extrinsic evidence to authenticate social media evidence).

12. *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) ("The Government laid sufficient foundation regarding Holsen's Facebook and text messages. Holsen testified that she had seen Hall use Facebook, she recognized his Facebook account, and the Facebook messages matched Hall's manner of communicating.")

13. *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) ("Although she was not certain that Hall authored the messages, conclusive proof of authenticity is not required for the admission of disputed evidence. As the district court correctly recognized, the jury holds the ultimate responsibility for evaluating the reliability of the evidence.") (Citations omitted).

14. *Tienda v. State*, No. 05-09-00553-CR, 2010 WL 5129722, at 5 (Tex. App. Dec. 17, 2010) (stating that even users who choose to use pseudonyms often still reveal unique information which can help establish authentication).

15. Textual social media evidence refers to anything that is text. Facebook posts, Facebook status updates, Facebook profile information, Twitter account information, Tweets, and a Twitter handle, are examples of textual information.

16. While a photograph on a social media account does not by itself authenticate a social media profile, a large number of pictures (including a profile picture) matching the purported author will be helpful evidence. See *United States v. Lewisbey*, 843 F.3d 653, 658 (7th Cir. 2016).

17. *In re A.D.W.*, 821 N.W.2d 778 (Iowa Ct. App. 2012).

18. For a more in-depth case involving no evidence tying a purported author to a social media page, See *United States v. Vayner*, 769 F.3d 125,132 (2d Cir. 2014) ("And contrary to the government's argument, the mere fact that a page with Zhytsou's name and photograph happened to exist on the internet...does not permit a reasonable conclusion that this page was created by the defendant or on his behalf.")

19. *In re A.D.W.*, 821 N.W.2d 778 (Iowa Ct. App. 2012).

20. *State v. Akok*, No. 17-0655, 2018 WL 4362085, at 1 (Iowa Ct. App. Sept. 12, 2018).

21. *Id.* ("In admitting the Facebook messages into evidence, the trial court noted that the Facebook messages were sent from the account of a person identifying himself to be Akok Akok. The specific messages in the exhibit were sent from an internet protocol address associated with the University of Iowa Hospitals and Clinics during a time when Akok was being diagnosed and treated there. The court determined this circumstantial evidence was sufficient to make a prima facie showing of authentication.")

22. *Id.*