

AUTHENTICATING SOCIAL MEDIA EVIDENCE

Overarching Principles

- A “Foundation” objection encompasses authenticity.
- While hearsay is a highly categorical rule, authentication is a flexible concept.
- Authentication has two layers: The printout and the content. A proponent must identify who retrieved the printout, when the pages were printed, and whether the printout accurately reflects the contents on that particular date.¹
- Authenticating social media evidence is no different than traditional evidence, such as a letter or photograph.² Therefore, authorship does not need to be conclusively proven and any helpful evidence (circumstantial or direct) can be used.
- Authenticity 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.³
- Once the offering attorney meets the evidentiary threshold, attacks go to weight.

Authenticating Social Media Evidence

- A stipulation, admission, or personal knowledge is ideal. If none exist, piece together circumstantial evidence.
- Distinctive characteristics are helpful for textual evidence, such as writing style, punctuation, emojis, and spelling. Distinctive characteristics on the actual social media profile include lifestyle preferences, birthday, employment, interest, pictures, and status updates. Unique content within the text itself can also be unique if only the defendant or a few others would know that particular information.
- Corroborating evidence includes GPS location, possession of cell phone, knowing passwords, using a nickname on the profile, and hobbies.

¹ The Iowa Practice Series observed that authenticating the printout is an often forgotten component. “Courts seem to pay little, if any, attention to the equally necessary task of authenticating the tangible printout or screenshot of that content as it existed on a certain date.” 7 Ia. Prac., Evidence 5.901:11.

² A (small) minority of jurisdictions do apply a heightened standard of authenticity (the “Maryland Approach”). The Maryland Approach requires the offering attorney to disprove the possibility that someone else created the evidence. *Griffin v. State*, 419 Md. 343, 19 A.3d 415, 424 (2011).

³ *In re A.D.W.* and *Akok* show the Iowa Court of Appeals arguably agrees with this continuum. *In re A.D.W.* concluded insufficient authentication because “the State did not offer *any* evidence” (clearly inauthentic), while *Akok* stated conclusive evidence is not required (conditional admittance).

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Relevant Iowa Case Law

State v. Akok, No. 17-0655 (September 12, 2018). Defendant appealed claiming the State failed to adequately prove authorship of the Facebook messages. The Court applied traditional rules of authenticity and stated that evidence may be authenticated by distinctive characteristics, positive proof is generally not required, and speculation to the contrary affects weight. Court affirmed, stating defendant's name was on the Facebook account and the GPS location of the phone being consistent with the defendant's location.

In re A.D.W., 821 N.W.2d 778 (2012). The Iowa Appellate Court concluded a Facebook photograph of a marijuana plant was erroneously admitted into evidence during a juvenile proceeding. Notably, the Court directly cites to the majority case on authenticating social media evidence: "Information found on social networking websites may be authenticated in the same manner as more traditional kinds of evidence."⁴ The following was *not* established: personal knowledge, who took the photograph, who posted the photograph, whether the mother was aware of the photograph being on her Facebook account, and was not brought up on cross-examination. Therefore, the Facebook photograph was insufficiently authenticated.

Relevant Federal Case Law

United States v. Browne, 834 F.3d 403 (2016). Defendant appealed the admission of Facebook chats in a sexual assault case involving four victims. The defendant solicited victims during Facebook chats. Defendant argued that none of the victims identified the defendant as the party on the other end of the Facebook chat. However, the Court of Appeals stated that personal knowledge is only one form of authenticity. Instead, a wide range of extrinsic evidence can provide authentication and authorship does not need to be conclusive. Extrinsic evidence included the defendant admitting ownership of the fake Facebook profile, knowing the password, and defendant's address and employment was accurate on the fake Facebook account.

United States v. Vayner, 769 F.3d 125 (2014). Court of Appeals concluded a Facebook page was insufficiently authenticated. Although there was information about the defendant on the Facebook profile, there was *no* extrinsic evidence providing that the defendant created the page or was responsible for the contents on the page. Court acknowledged that unique content can support authentication, but no unique information existed on the Facebook profile. The federal government also inconsistently argued the particular reason for admitting the Facebook profile.

United States v. Barnes, 803 F.3d 209, 217-218 (2015). The defendant contended that text and Facebook messages were insufficiently authenticated because the witness was not "certain" that the defendant authored the messages. The appellate court affirmed the admission of the evidence. The witness stated she had seen the defendant use Facebook, the witness recognized the Facebook account, the Facebook messages matched the defendant's manner of communicating, and the content indicated that the Facebook messages belonged to the defendant. The Court stated that conclusive proof is not required and "the standard for authentication is not a burdensome one."

⁴ *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012). Based on Westlaw, the reference to *Tienda* in *In re A.D.W.* is significant for at least three reasons. First, *Tienda* stands for the majority approach that social media evidence is authenticated based on traditional authentication standard. Second, this appears to be the only time the Iowa Court of Appeals cites to a jurisdiction outside of Iowa when addressing the authenticity of social media evidence. Last, this also appears to be the only time the Iowa Court of Appeals cites a case which the issue was whether social media evidence was properly authenticated.