

Off the Wall Authentication: Social Media “Friends” the Evidence Code

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I was translating the inscription: “tbh jkeee wntt ngl bykt” on my teenager’s Facebook wall, when I realized I’d better start that *Commentator* article I promised.¹

I remember thinking, “authentication should be easy to write about, the statute is only two sentences.” Basically, you need a competent witness to establish that an exhibit is what it purports to be to keep out fraudulent evidence.²

I thought of authentication as an aging rock band, a sort of statutory Pink Floyd, which had gotten stale from overplaying. Some question whether authentication is even necessary. The Law Revision Council’s comments to the Code, for example, suggest that the slight obstacles to fraud are outweighed by the “time, expense, and occasional untoward results entailed by the traditional negative attitude toward authenticity.”³

Just as bellbottoms and platform shoes are fashionable again, Rule 901 has become a hot little number this season. The revival is due to the increasing use of Electronically Stored Information (“ESI”) as exhibits; evidence like computer data, digital photos, emails, texts, blogs, and social media websites.

The flip side of the Council’s comments is best seen in a recent divorce – a true story by the way – printed in the unofficial case reporter, *The Smoking Gun*:

Embroided in a contentious child custody fight, an Indiana woman decided last month to pose on Facebook as a comely teenage girl in a bid to surreptitiously extract

damaging information from her ex-husband. The scheme proved so successful, in fact, that FBI agents last Friday arrested Angela Voelkert’s former spouse on a felony charge for allegedly installing a listening device in her vehicle, according to court records.⁴

Wait, it gets even better:

In an embarrassing about-face, federal prosecutors yesterday abruptly dropped criminal charges against an Indiana man who they accused of bugging his ex-wife’s automobile. Voelkert spent four days in custody until federal prosecutors moved yesterday to drop charges against him. He was freed after proving to investigators that he knew all along that his ex-wife was the one sending him messages from the “Studebaker” account. Voelkert explained that he played along with the ruse so that he could use his ex-spouse’s machinations against her in their custody case.⁵

Authenticating Mrs. Voelkert’s Facebook page is done through her testimony: is the exhibit an actual printout from her profile? Did it appear there? Does it accurately reflect it as it appeared on the website? We would normally avoid putting on a records custodian’s testimony, unless there are legitimate issues to testify to.⁶ A few evidentiary rules have developed to facilitate the authentication of exhibits, which is also the problem, as Mrs. Voelkert’s Facebook wall becomes easier to authenticate too. It is helpful to review some of those Code provisions before examining how the trustworthiness of ESI has rejuvenated authentication.

Judicial Notice

Some exhibits are so trustworthy

they don’t even require a witness. Rule 201 lists matters which a court must judicially notice, meaning a judge does not have discretion but to admit indisputable evidence. The list is short, and includes laws of the Congress and Florida Legislature; Florida statewide rules of court, rules of United States courts, and U.S. Supreme Court rules.⁷

Rule 202 includes even more matters, but also provides judges leeway in deciding whether or not to take judicial notice. For example, the statute allows a court to take judicial notice of facts that are not subject to dispute because they are “generally known within the territorial jurisdiction of the court”, and facts that are not subject to dispute because they are “capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.”⁸

The drafters of the Code have found these forms of evidence to be so reliable, they are deemed self-authenticating. Self-authentication makes sense for these facts, as fighting over them would turn a trial into a Shakespeare comedy:

Petruchio: Good Lord, how bright and goodly shines the moon!

*Katharina: The moon! The sun: it is not moonlight now.*⁹

Business Records

Records of regularly conducted business activity are another form of evidence which has become, pretty much, self-authenticating. Rule 803(6) provides in part:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time

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by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness.¹⁰

The Legislature relaxed the business records hearsay exception in 2003. Accordingly, authentication as a condition to admissibility is no longer required for business records, if they are accompanied by certification from the custodian of records.¹¹

However, there is a danger with self-authenticating exhibits. Documents may be self-authenticating, but they are not self-explanatory. For example, your judge may not have much of a tax background, and even routine W2 forms can have obscure codes, like "IIM" and "IMP", which may be incomprehensible unless explained.

Stipulations

Another way to authenticate exhibits is to agree to foundational matters with counsel. Occasionally you may face an attorney who refuses to stipulate to foundations. In those cases, you may have to schedule a pretrial conference, and raise the issue of admissibility before the court.¹²

Stipulations can be risky when attorneys are not in agreement about what is being stipulated to. To some attorneys, stipulating to the foundation means stipulating to their *authenticity*; that is, that the records are the official records, and a records custodian does not need to appear. To other attorneys, stipulating to the foundation means you are stipulating

to the records' *relevancy*; that the records tend to prove or disprove a fact in controversy. Still to other attorneys, stipulating to the foundation means you are stipulating to the *admissibility* of the records into evidence, and the records will be admitted into evidence for all purposes at trial.

Back to the Wall

Over the years, the threat of false evidence being introduced has been diminished through requests for admission and pretrial conferences, making authentication less of a concern.¹³ However, family law is unique. We have evidentiary hearings early in litigation, and well before a pretrial conference can be scheduled or discovery is due. Personal details are also the bricks and mortar of a divorce, so we are likely to see more social media evidence in our cases.¹⁴ If as they say, you pan for gold where the vein lies, you are going to hit pay dirt on-line:¹⁵

Husband . . . [posts] his single, childless status while seeking primary custody of said nonexistent children.

Father seeks custody of the kids, claiming . . . that his ex-wife never attends the events of their young ones. Subpoenaed evidence from the gaming site World of Warcraft tracks her . . . [on-line] with her boyfriend at the precise time she was supposed to be out with the children.

Husband denies anger management issues but posts on Facebook . . . "If you have the balls to get in my face, I'll kick your ass into submission."

Mom denies in court that she smokes marijuana but posts partying, pot-smoking photos of herself on Facebook.¹⁶

This evidence is relevant and highly probative.¹⁷ But, is your opponent's next exhibit authentic? ESI is so persuasive it may not be just the Voelkerts who are tempted to smear extra mortar on the wall, but opposing counsel too. Consider this recent story out of New Orleans:

A federal investigation involving New Orleans landfill magnate Fred Heebe took a surprising turn this week. Heebe filed a court petition claiming a frequent commenter on the website NOLA.com was in fact Sal Parricone, one of the prosecutors assigned to his case. Heebe turned out to be right. . .¹⁸

U.S. Attorney Jim Letten confirmed . . . that Sal Parricone, one of his top prosecutors, has been using the handle "Henry L. Mencken1951" to bash landfill owner Fred Heebe . . .¹⁹

Griffin v. State helps resolve the problem of authenticating evidence pulled off the wall of a social media site.²⁰ Antoine Griffin, nicknamed "Boozy", was charged with a fatal shooting. The issue in *Griffin* was the trial court's admission of pages printed from a MySpace profile in the name of "Sistasouljah", Griffin's girlfriend. The prosecutor wanted to introduce the exhibit to corroborate that a state witness had been threatened. The MySpace pages contained the following comment:

FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!

Interestingly, "Sistasouljah" was called by the prosecution at trial, but not about the authenticity of her alleged MySpace profile. Instead, the prosecutor authenticated the MySpace pages through the testimony of the lead police investigator. A portion of defense counsel's examination of the investigator went as follows:

[Defense Counsel]: How do you know that this is her [MySpace] page? . . .

[Sergeant Cook]: Through the photograph . . . the reference [to] . . . the children, and . . . her birth date indicated on the form.

[Defense Counsel]: How do you know she sent it?

[Sergeant Cook]: I can't say that . . .

The MySpace pages were admitted, and the defendant was convicted. The *Griffin* court reversed the conviction,

identifying three ways to authenticate social media exhibits: (1) ask the purported creator if they created the profile; (2) search the computer of the person who allegedly created the profile, examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile, and (3) by obtaining information directly from the social networking site linking the profile and post to their creator.²¹

Surprisingly, the dissent could not find a motive to impersonate a poster on MySpace before the trial. The dissent brushed aside the "technological heebie-jeebies" that someone other than the owner would access or create a social media post, arguing those fears go to the weight of the evidence not its admissibility.²²

No doubt an exhibit is easiest to admit under the first of *Griffin's* three methods, when there is an admission or a stipulation as to its foundation. Under the second and third *Griffin* methods, authentication requires hiring a computer forensic firm to inspect a witness's computer, or analyzing the server logs, among other items, from a social media website.²³

Relaxed authentication rules developed under the assumption that: "genuineness may be correctly assumed in 99 of 100 cases."²⁴ That assumption is from the 1970s, a long gone age of recession, divisive wars, and high gas prices. Things are completely different today. Back then, "microcomputers" were sold as kits to a few hobbyists. Now, household internet usage is over 80 percent,²⁵ and more than 65 percent of us are using social networking sites.²⁶

Recent news makes you wonder whether the 1970s genuineness assumption still stands. Governments manipulate photographs,²⁷ and so does the media.²⁸ Spouses hack computers,²⁹ and borrow smartphones to impersonate their owners' texts.³⁰ Anyone can set up a Facebook page, email, or twitter account.³¹ The increasing use of ESI at trial, and the

ease with which it is impersonated and manipulated, pressures us to bolster foundational evidence more than ever. We can no longer remain comfortably numb about authentication.

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Endnotes:

- 1 "Norris" it. *See infra*, n.31.
- 2 *See* §90.901, Fla.Stat. (2011).
- 3 *Id.* Law Revision Council Note (1976) [internal citations omitted].
- 4 *See FBI Busts Man Duped In Facebook Ploy*, The Smoking Gun, (June 7, 2011), available at <http://www.thesmokinggun.com/documents/internet/fbi-busts-man-facebook-sting-342901> (last visited March 25, 2012).
- 5 *See Charges Dropped in Facebook Spy v. Spy Case*, The Smoking Gun, (June 9, 2011), available at <http://www.thesmokinggun.com/documents/funny/facebook-spy-vs-spy-case-126493> (last visited March 25, 2012).
- 6 It goes without saying that if an exhibit is an important part of your case, a credible witness and the credibility of the exhibit should be developed as much as possible.
- 7 *See* §90.201, Fla.Stat. (2011).
- 8 *See* §90.202, Fla.Stat. (2011).
- 9 *See* William Shakespeare, *Taming of the Shrew*, Act 4, Scene 5 (1623).
- 10 *See* §90.803(6), Fla.Stat. (2011).
- 11 *See* §90.902(11), Fla.Stat. (2011).
- 12 *See* Fla. Fam. L. R. P. 12.200(b)(3) (Providing for pretrial conferences to consider the possibility of obtaining admissions of documents that will avoid unnecessary proof.).

13 Effective September 1, 2012, the Florida Supreme Court adopted specific amendments to the Florida Rules of Civil Procedure to address discovery of ESI. *See In re Amendments to Florida Rules of Civil Procedure-Electronic Discovery* 37 Fla. L. Weekly S442 (Fla. July 5, 2012).

14 An overwhelming 81% of the nation's top divorce attorneys say they have seen an increase in the number of cases using social networking evidence. *See Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers*, AAML, (February 10, 2010) available at <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey-> (last visited March 25, 2012).

15 For the gold panning analogy *see* Sharon Nelson, et al., *The Legal Implications of Social Networking*, 22 Regent Univ. L. Rev. 1 (2009/2010).

16 *See* Leanne Italie, *Facebook is divorce lawyers' new best friend*, MSNBC, (June 28, 2010) available at http://www.msnbc.msn.com/id/37986320/ns/technology_and_science-tech_and_gadgets/t/facebook-divorce-lawyers-new-best-friend/#.T3Boq2HOW5I (last visited March 25, 2012).

17 So probative, employers are asking job applicants for their Facebook login information. *See* Orin Kerr, *The Volokh Conspiracy, Employers Asking for Facebook Login Information of Employees and Job Applicants?* (April 2, 2012) available at <http://volokh.com/2012/04/02/employers-asking-for-facebook-login-information-of-employees-and-actual-employees/> (last visited April 3, 2012).

18 *See Embattled businessman outs news site commenter as a federal prosecutor*, Ars Technica, (March 19, 2012) available at <http://arstechnica.com/tech-policy/news/2012/03/embattled-businessman-outs-news-site-commenter-as-a-federal-prosecutor.ars> (last visited March 25, 2012).

19 *See 'Mencken1951' unmasked: It is federal prosecutor Sal Perricone*, Nola.com (March 25, 2012).

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15, 2012) available at http://www.nola.com/politics/index.ssf/2012/03/letten_announces.html#incart_mce (last visited March 27, 2012).

20 See *Griffin v. State*, 19 A.3d 415 (Ct. App. Md. 2011).

21 See *Griffin* at 427-428. There are few and inconsistent federal and state decisions concerning the authentication of ESI. *Griffin* has a majority and dissenting opinion representing the two main views, and discusses *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), the lead-bearing case for the authentication of ESI.

22 See *Griffin* at 430.

23 Without building a wall of jargon, websites automatically record pages requested when their sites are visited. These server logs can include, among other things, your Internet Protocol (IP) address, and cookies that uniquely identify your browser.

24 See §90.901, Fla.Stat., (2011), Law Revision Council Note (1976) (Quoting McCormick, Evidence §218, p. 545 (2nd ed. 1972)).

25 See U.S. Census Bureau, *Household Internet Usage In and Outside of the Home by State: 2010*, available at <http://www.census.gov/compendia/statab/2012/tables/12s1157.pdf> (last visited March 25, 2012).

26 See Pew Internet & American Life Project, *65% of online adults use social networking sites* (August 26, 2011) available at <http://pewinternet.org/~media/Files/Reports/2011/PIP-SNS-Update-2011.pdf> (last visited on March 25, 2012).

27 See Mark Mooney ABC News, *North Korea Restores Order to Kim Funeral With Photoshopping* (December 29, 2011) available at <http://abcnews.go.com/blogs/headlines/2011/12/north-korea-restores-order-to-kim-funeral-with-photoshop/> (last visited March 30, 2012).

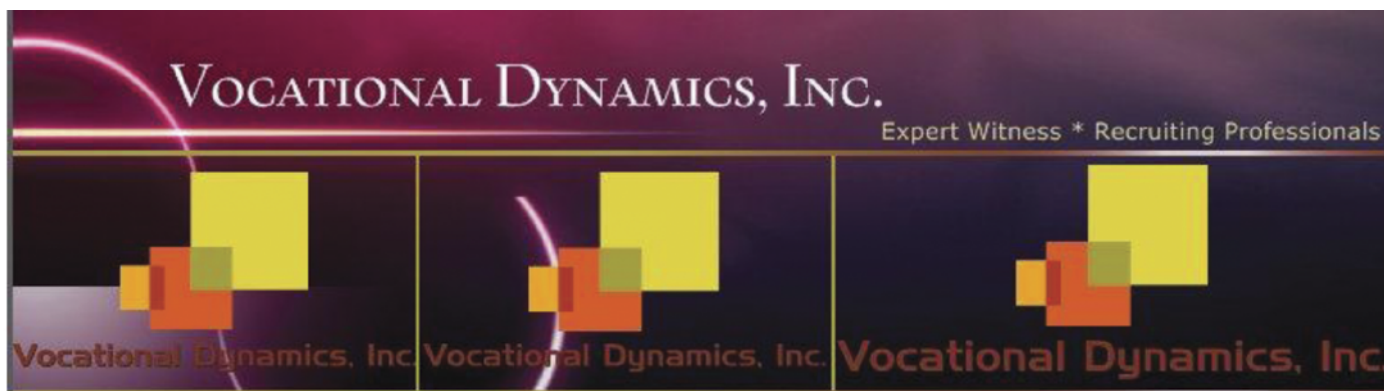
28 See Matt Sedensky, ABC News, *Old Photos May Be Deceptive in Fla. Shooting Case* (March 30, 2012) available at http://abcnews.go.com/US/wireStory/photos-deceptive-fla-shooting-case-16040803#.T3t1N_DOW5J (last visited

April 1, 2012).

29 See Kaja Whitehouse, New York Post, *Wife: I hacked 'sugar daddy' computer* (November 24, 2011) available at http://www.nypost.com/p/news/local/manhattan/weet_revenge_XdbT-0DOtiFyJqRj2lxtDI (last visited March 30, 2012).

30 Worse, there may be ways to send texts from other people's phone numbers without "borrowing" phones. See e.g. Hacking University, *How to Send Fake SMS With Others Mobile Number*, <http://www.hackinguniversity.in/2011/06/how-to-send-fake-sms.html> (last visited March 30, 2012).

31 See Mackenzie Schmidt, The Village Voice, *The Best Fake Twitter Accounts: Fake Rahm Emanuel, Fake Christopher Walken, Fake AP Stylebook, and More* (December 8, 2009) available at http://blogs.villagevoice.com/runninscared/2009/12/top_10_fake_twi.php (last visited March 30, 2012)(Discussing the proliferation of fake social networking profiles, like Chuck Norris: "when google has a question they "norris" it.).



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