SOCIAL MEDIA:
HOW TO GET THE INFORMATION AND GET IT INTO EVIDENCE

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Every day litigants post potential evidence on social media platforms. Most American adults regularly use social media. 79% of American internet users have Facebook accounts.[1] 32% of Americans use Instagram.[2] In the last quarter of 2017, there were 1.37 billion people who accessed Facebook daily, and 2.01 billion who accessed Facebook at least once per month.[3]

The picture people paint on social media sites is often very different than the one they attempt to portray in litigation. For example, a truck driver may claim to be a careful driver who always follows the hours-of-service rules. In contrast, that driver may post videos to social media showing him using a smart phone while driving, or make posts complaining about his dispatcher making him drive when he is falling asleep. Similarly, a plaintiff may testify that her back injuries are debilitating, and at the same time post photos showing her dancing the night away while wearing high heels.

Twenty-First Century litigators need to know how to obtain social media evidence from opponents and witnesses, and how to admit that evidence in court.

I. OBTAINING SOCIAL MEDIA EVIDENCE

There are at least three ways to obtain social media evidence. The first, and simplest, is to access the information directly from social media websites. The second is to use the traditional discovery process. The third is to employ a computer forensic professional to search for hidden or deleted social media files.

A. Accessing Social Media Websites

The easiest method to obtain social media evidence is to simply access it from a social media website. A person's profile can often be accessed through a Google search or a search within the social media site. Sites like spokeo.com and pipl.com and some investigative databases also provide information on social media profiles. Even in litigation, it is permissible to access an opposing party's publicly-available social media postings.

Many social media users have privacy settings restricting access to their "friends" on a social media site. If an attorney knows that a party is represented by counsel, it is improper to send a "friend" request to that party, or to direct another person to direct a friend request to that party. Such a request would constitute a direct communication with a person represented by counsel. Tex. Disp. R. Prof. Conduct 4.02.

If a person is not represented by counsel, there should be no blanket prohibition on making a friend request. However, the ethics rules do prohibit making a false statement of fact or law to a third person. Tex. Disp. R. Prof. Conduct 4.01(a). Therefore, an attorney cannot pretend to be someone else to become social media "friends" with someone, nor can the attorney direct someone else to do so.

B. Social Media and the Traditional Discovery Process

Social media evidence is simply another form of evidence. It is no less, and no more, subject to discovery than other forms of evidence like paper documents or photographs. Courts apply the same rules to social media discovery that they apply to discovery of other information.

In Texas state court cases, the scope of discovery is limited to matters that are not privileged and that are relevant to subject matter of the pending action. Tex. R. Civ. P. 192.3. Litigants are not allowed to conduct "fishing expeditions," requiring the production of broad categories of irrelevant information in the hope that something useful will be found. Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989). Discovery requests must be reasonably tailored to include only matters relevant to the case. *In re National Lloyds Ins. Co.*, 448 S.W.3d 486, 488 (Tex. 2014) (per curiam). "Overbroad requests for irrelevant information are improper whether they are burdensome or not." *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 670 (Tex. 2007) (per curiam). For example, a request for "all notes, records, memoranda, documents, and communications made that [plaintiff] contends supports its allegations" is so vague, ambiguous, and overbroad that is amounts to an improper "request that [defendant] be allowed to generally peruse all evidence [plaintiff] might have." *Loftin v. Martin*, 776 S.W.2d at 148.

Some attorneys have ignored these basic principles and simply requested all information posted on social media, or the username and password to a litigant's social media accounts. Such requests are improper. "[A] party is no more entitled to such unfettered access to an opponent's social networking communications than it is to rummage through the desk drawers and closets in his opponent's home."

[1]Gordon Donnelly, *75 Super-Useful Facebook Statistics for 2018*, The WordStream Blog (Feb. 5, 2018), https://www.wordstream.com/blog/ws/2017/11/07/facebook-statistics.

[2]Mary Lister, *40 Essential Social Media Marketing Statistics for 2018*, The WordStream Blog (Feb. 5, 2018), https://www.wordstream.com/blog/ws/2017/01/05/social-media-marketing-statistics.

[3]Gordon Donnelly, *75 Super-Useful Facebook Statistics for 2018*, The WordStream Blog (Feb. 5, 2018), https://www.wordstream.com/blog/ws/2017/11/07/facebook-statistics.

Gondola v. USMD PPM, LLC, 223 F.Supp.3d 575, 591 (N.D. Tex. 2016). At the same time, there is no general privilege or privacy protection for information voluntarily placed on social media. *Id.* Therefore, properly tailored requests for social media evidence are permissible. *See, e.g. Moore v. Wayne Smith Trucking, Inc*., 2015 Westlaw 6438913 (E.D. La. 10/22/15) (discovery limited to social media posts related to the accident and made with 4 months of the accident). Similarly, merely asking what social media accounts a litigant uses, as opposed to asking for all the information posted in those accounts, is permissible. *Abraham v. Cavender Boerne Acquisition of Texas, Ltd.*, 2011 Westlaw 13127173, No. SA-10-CA-453-XR (W.D. Tex. April 26, 2011).

Because social media discovery is still a developing area of the law, practitioners should be familiar with the leading cases thus far on the issue.

1. *In re Indeco Sales, Inc.*, 2014 Westlaw 5490943, No. 09-14-405-CV (Tex. App.–Beaumont September 23, 2014).

In re Indeco Sales, Inc. is a personal injury case arising out of an August 23, 2013 crash. The defendants sent requests for production for social media information, including:

> (1) A color copy of any and all photographs and/or videos of you (whether alone or accompanied by others) posted on your Facebook page(s)/account(s) since the date of the accident on August 23, 2013.
> (2) A color copy of all Facebook posts, Facebook messages and/or Facebook chat conversations, other than those protected by the attorney-client privilege, authored, sent or received, and/or otherwise entered into by you since August 23, 2013.
> (3) A color copy of any and all photographs and/or videos of you (whether alone or accompanied by others) posted on your Facebook page(s)/ account(s) prior to August 23, 2013.
> (4) A color copy of all Facebook posts, Facebook messages and/or Facebook chat conversations, other than those protected by the attorney-client privilege, authored, sent or received, and/or otherwise entered into by you prior to August 23, 2013.

The plaintiff objected, and the trial court granted a motion for protection, holding that the plaintiff did not have to produce the requested documents. The court of appeals affirmed.

In the mandamus proceeding, the defendants argued they limited their first request to photographs and videos depicting the plaintiff after the date of the accident and that should be sufficiently narrow, and plaintiff should be compelled to respond. The court of appeals disagreed:

> [T]he request on its face requests that [the plaintiff] produce every photograph and video posted since the date of the accident regardless of when the photograph was taken or created. Their second request requires that [the plaintiff] produce every post, message or chat conversation authored, sent, or received by her, no matter how mundane or remote, regardless of the topic, content, or subject, includes everything anyone sent or posted to her account. Although limited to posts made or received after the date of the accident, there is no limit on the scope of the request or the subject matter of the post. The third and fourth requests ask for every photograph, video, post, message, or chat conversation posted before the date of the accident, and are unlimited as to scope, topic, content, and subject. Accordingly, the trial court could reasonably conclude that each of the requests for production were overly broad. Therefore, the trial court did not abuse its discretion when it denied Relators' motion to compel production of information from [the plaintiff]'s Facebook account.

2. *Cory v. George Carden Int'l Circus, Inc.*, 2016 Westlaw 3475609, No. 4:13-CV-760 (E.D. Tex. March 18, 2016).

In *Cory*, the defendant sought to compel all Facebook messages sent by the plaintiff. The request was not limited to messages regarding specific topics. Defendant claimed it needed messages between the plaintiff and other witnesses to determine whether there was collusion with the witnesses, and whether there were any statements inconsistent with the plaintiff's testimony. The court first noted that there was no evidence of the plaintiff colluding with witnesses over Facebook. The Court held that the request involved a "disproportional intrusion into Plaintiff's privacy," and sustained the plaintiff's objection to producing the information.

3. *Gondola v. USMD PPM, LLC*, 223 F.Supp.3d 575 (N.D. Tex. 2016)

Gondola was an ADA disability discrimination case. It included claims for mental anguish, lost wages, and medical bills. The defendant requested complete copies of all social media accounts. The plaintiff objected, and the court sustained the objection and only required the plaintiff to respond to a more limited request. The court noted:

> Generally, social networking site content is neither privileged nor protected by any right of privacy. But neither do courts generally endorse an extremely broad request for all social media site content. Courts have held that ordering a party to permit access to or produce complete copies of social networking site accounts would permit his opponent to cast too wide a net and sanction an inquiry into scores of quasi-personal information that would be irrelevant and non-discoverable. Courts have observed that "a party is no more entitled to such unfettered access to an opponent's social networking communications than it is to rummage through the desk drawers and closets in his opponent's home."
>
> . . .
>
> [W]here a defendant seeks extremely broad social network site discovery because a plaintiff has placed both his physical and mental condition at issue, this "placing at issue" makes some of a plaintiff's social networking site information discoverable but "that rather predictable decision by Plaintiff cannot and does not justify the broad discovery sought by the defendant."

The court held that the request sought too wide a scope of materials. The court ordered the parties to meet and confer on a more limited scope, "to include information, messages, and postings on social networking sites relevant to the claims and defenses in this case, such as many mention of Defendants by Plaintiffs, any discussion of the termination of employment by Defendant, any discussion of Plaintiffs' job searches after leaving Defendants, and any effects that their termination by Defendant had on Plaintiffs."

4. *In re Christus Health Southeast Texas*, 399 S.W.3d 343 (Tex. App.–Beaumont 2013)

In re Christus Health Southeast Texas was a wrongful death case. The defendant sent requests for production for any social media postings related to the decedent or the decedent's death. The plaintiffs objected, asserting that "such request is an invasion of privacy and any such information would be unreliable and constitute hearsay and a fishing expedition and this request is meant for the purpose of harassment." The trial court sustained the objection and denied the defendant's motion to compel. The court of appeals denied the defendant's request for mandamus relief.

The court of appeals noted that the request was not limited at time. "While the time period of relevant discovery while [the decedent] was alive may be broad, it is not unlimited. Discovery orders requiring document production from an unreasonably long time period are impermissibly overbroad." In explaining its holding, the court of appeals noted:

> While one of the plaintiffs indicated in her deposition that she had placed posts about [the decedent] on a social media site, the request at issue in this proceeding was not limited to those posts, nor was it limited to the period after [the decedent]'s death. While [the plaintiffs] are seeking damages for their mental anguish, and statements [the plaintiffs] made about [the decedent]'s death are within the general scope of discovery, [the plaintiffs] did not establish that they had an expectation of privacy in their statements on social media sites. Nevertheless, a request without a time limit for posts is overly broad on its face.

5. *Alex v. KHG of San Antonio*, 2014 Westlaw 12489735, No. SA-13-CA-728-OLG (W.D. Tex. August 6, 2014).

Alex was an employment case against Tiffany's Cabaret, a "gentlemen's" club. There was evidence that dancers communicated with managers by text and e-mail. The defendant sent a request for production for:

> All emails, text messages, social media site comments/posts/status updates, sent or received . . . which refer or relate to the events, facts, or allegations giving rise to this lawsuit of the allegations contained in the Complaint.

Despite the broad wording, Defendant represented that the request was "limited to those e-mails/tests in Plaintiffs possession related to their work schedules or performing at Tiffany's Cabaret." The plaintiffs argued that the request was a fishing expedition and violated their privacy rights. The district court disagreed. The court noted that there was already a protective order in place to protect their privacy rights. The court compelled production, but limited to documents related to "hours worked, work schedule, or matters relating to that plaintiff's employment by defendant." The court also limited the scope to documents from August 15, 2010 through the date of termination of employment.

6. *Zamora v. GC Services, LP*, 2016 Westlaw 8853096, No. EP-15-CF-48-DCG (W.D. Tex. August 19, 2016).

Zamora was an employment law case. The defendant sent a request for production for:

> All correspondence, communications and data, whether written or electronic, including emails, instant messages, Facebook or Twitter postings, recordings, and text messages, that mention, refer to, or relate to your factual allegations in this lawsuit.

The plaintiff objected, claiming the request was vague and overly broad. In response, the defendant argued that the request was narrowly tailored because it only asked for documents "directly related to plaintiff's claims" in that they "mention, refer to, or relate to plaintiff's factual allegations." The district court held that the request was narrowly tailored and ordered the plaintiff to produce the responsive documents. It is difficult to reconcile the district court's holding with *Loftin v. Martin*'s prohibition on a request for all documents supporting a claim, but it is unclear whether that issue was fully briefed in the case.

7. *Abraham v. Cavender Boerne Acquisition of Texas, Ltd.*, 2011 Westlaw 13127173, No. SA-10-CA-453-XR (W.D. Tex. April 26, 2011).

Abraham was an employment case. The plaintiff sought to recover lost wages. The defendant wanted to see what efforts the plaintiff made to find other employment. The defendant sent an interrogatory asking the Plaintiff to identify "any social media accounts, any YouTube postings (or similar online postings) made by plaintiff or on his behalf, any e-mail addresses and any mobile phone numbers used by him from 2008 to the present, including the third-party provider and any account numbers."

The plaintiff objected, arguing that the information was not relevant and seeks confidential information. The court disagreed, holding that the interrogatory was reasonably calculated to lead to the discovery of admissible evidence, and that there was no privacy interest in social media accounts.

8. *Forman v. Henkin*, 30 N.Y.3d 656 (N.Y. 2018)

Although it is a New York case, *Forman* contains an extensive, well-reasoned discussion on the discovery issues relating to social media and is likely to be cited by courts around the country. *Forman* was a personal injury case. The plaintiff alleged spinal and traumatic brain injuries, including difficulties with written and oral communication. At deposition, the plaintiff testified that she posted "a lot" of photographs showing her pre-accident active lifestyle, and that she did not recall whether she posted any post-accident photographs. She testified that she had difficulty composing messages on the computer; a simple e-mail could take hours to write because she had to go over the written material several times to make sure it made sense.

The defendant sought an unlimited authorization to obtain plaintiff's entire private Facebook account. Plaintiff objected. The trial court did not grant unlimited access to the entire Facebook account. Instead, the trial court entered an order limiting the production to potentially relevant information while protecting Plaintiff's privacy. The trial court ordered production of:

> 1. All photographs posted to Facebook prior to the accident that she intends to introduce at trial
> 2. All photographs posted to Facebook after the accident that do not depict nudity or romantic encounters
> 3. An authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of words or characters in each message, but not the content of the messages.

The trial court did not order the disclosure of any of plaintiff's written Facebook posts.

The plaintiff appealed. The Court of Appeals affirmed the trial court's ruling. The court first noted, "we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable." Rather, existing discovery rules should be applied to social media discovery.

> [C]ourts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials to be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying accident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate–for example, the court should

> consider whether photographs of messages posted years before an accident are likely the be germane to the litigation. Moreover, to the extent that the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court.

9. *Johnson v. PPI Tech. Servs., L.P.*, No. 11-2773, 2013 Westlaw 4508128 (E.D. La. Aug. 22, 2013)

Johnson was a personal injury case. The defendant sent the plaintiffs a request for production that would grant broad access to the plaintiff's social media postings. The plaintiffs failed to respond to the request for production on time, so all objections were waived. Even so, the district court refused to order unfettered access to the plaintiffs' social media postings.

The court noted that the scope of discovery is limited, and there is no "generalized right to rummage at will" through an opposing party's social media postings. The court was unpersuaded by the defendant's argument that all social media information was discoverable because the plaintiff put his mental and physical condition at issue:

> Simply placing their mental and physical conditions at issue is not sufficient to allow PPI to rummage through [the plaintiffs'] social media sites. Almost every plaintiff places his or her mental or physical condition at issue, and this Court is reticent to create a bright-line rule that such conditions allow defendants unfettered access to a plaintiff's social networking sites that he or she has limited from public view.

Id., at *1. The court did not require the plaintiffs to produce any social network postings.

10. *Farley v. Callais & Sons LLC*, 2015 Westlaw 4730729 (E.D. La. Aug. 10, 2015)

Farley was a personal injury case. The defendant sought unfettered access to the plaintiff's social media accounts, including:

1. A download of Plaintiff's complete Facebook account;
2. The username and password for every social media account;
3. An authorization allowing Defendants to obtain all information from Facebook.

This request would not only require the production of all Facebook activity, but would also give the defendant "unsupervised and ongoing entry into (and even 'real-time' monitoring of) the 'private' portions of [the plaintiff's] Facebook account.' *Id.* at *1. The plaintiff objected. The court held that the requests were overly broad and intrusive.

In Farley, the defendant tried to argue that because social media information was not privileged, defendant was entitled to unfettered access to the plaintiff's social media account. The defendant argued, "if the plaintiff has nothing to hide, then he should not object to producing his Facebook records." Defendant cited a case in support of its arguments, *In re White Tail Oilfield Services, L.L.C.*, No. 11-CV-9, 2012 Westlaw 4857777, at *2-3 (E.D. La. Oct. 11, 2012), but the court noted that *White Tail* was not authority because the plaintiff in *White Tail* did not object to the request or oppose producing the social media information.

The Defendant also argued that the plaintiff made all his social media posting discoverable because he put his physical and mental condition at issue by bringing a personal injury claim. The court disagreed, holding "this 'placing at issue' by plaintiff makes *some* of his [social networking site] information discoverable, that rather predictable decision by plaintiff cannot and does not justify the broad discovery sought by [the defendant]. . . ." *Farley*, 2012 Westlaw 4857777, at *4.

The Court concluded that some social networking information was discoverable, but that defendant was not entitled to the entire account or to have a password to access the account. The court limited the scope of social media discovery to:

1) postings by Farley that refer or relate to the accident in question;
2) postings that refer or relate to emotional distress that Farley alleges he suffered as a result of the accident and any treatment that he received therefor;
3) postings or photographs that refer or relate to alternative potential emotional stressors or that are inconsistent with the mental injuries he alleges here;
4) postings that refer or relate to physical injuries that Farley alleges he sustained as a result of the accident and any treatment that he received therefor;
5) postings that refer or relate to other, unrelated physical injuries suffered or sustained by Farley; and
6) postings or photograph that reflect physical capabilities that are inconsistent with the injuries that Farley allegedly suffered as a result of the accident.

With respect to the mechanics of responding to discovery, the court ordered the plaintiff to make all his postings available to his own attorney. Plaintiff's

attorney would then review the postings and determine whether they fit into one of the categories of discoverable information set out by the court. The plaintiff's attorney would then produce the responsive postings. Plaintiff was also required to execute a declaration affirming that he provided his counsel all social networking site information or access to that information. Finally, plaintiff was ordered to preserve all social networking site information, regardless of whether it was produced by plaintiff in response to the order.

11. *Moore v. Wayne Smith Trucking, Inc*., 2015 Westlaw 6438913 (E.D. La. Oct. 22, 2015)

Moore was a wrongful death case arising out of a crash with a tractor-trailer. The plaintiffs sent discovery to the defendants, seeking to obtain access to the defendant truck driver's social media accounts. The plaintiff requested the username and password to every one of the defendant driver's social media accounts, as well as a downloaded file of his complete Facebook page.

The defendants objected, arguing that the requests were overly broad. The court agreed, and limited production to postings or messages related to the accident and that were made during the four months following the date of the accident. The court also declined to order direct access to the social media accounts, and instead ordered the same procedure ordered in *Farley* (that is, the defendant provided the information to his counsel, who then reviewed the information and determined what was responsive).

C. Forensic Examination of a Party's Computer

In rare circumstances, a court may order a forensic examination of a party's computer to search for hidden or deleted data. However, in most cases direct access to an opposing party's computer is not allowed. The Texas Supreme Court has held:

> Intrusive discovery measures—such as ordering direct access to an opponent's electronic storage device—require, at a minimum, that the benefits of the discovery measure outweigh the burden imposed upon the discovered party. Providing access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be.

In re Shipman, No. 16-607, 2018 Westlaw 1022467 (Tex. Feb. 23, 2018) (orig. proceeding) (internal quotations and citations omitted) (quoting *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding). Before allowing access to electronic devices, the court must find that "the responding party has somehow defaulted on its obligation to search its records and produce the requested data." *Id.* "Mere skepticism or bare allegations" are insufficient. *Id.*

Social media information is stored on a third-party's site. For example, Facebook postings are stored on Facebook's servers, not user's computer. Therefore, it is unlikely a forensic examination of a party's computer would be permitted absent extraordinary evidence that the party defaulted on its obligation to search for and produce discoverable information, that the information would exist on the party's computer, and that the information could not be obtained through a less intrusive means.

II. USING SOCIAL MEDIA EVIDENCE IN COURT

The same standards govern social media evidence applicable to other types of evidence. That is:

1. The evidence must be relevant. Tex. R. Evid. 401, 402; Fed. R. Evid. 401, 402;
2. The evidence must the authenticated; that is, it must be shown to be what the offering party claims it is; Tex. R. Evid. 901(a); Fed. R. Evid. 901(a); and
3. The evidence must not be subject to an exclusionary rule. Some of the exclusionary rules commonly applicable to social media evidence include the hearsay rule, the character evidence rule, and the rule against impeachment on collateral matters. Tex. R. Evid. 404(a), 608(b), 802; Fed. R. Evid. 404(a), 608(b), 802; *see Penwell v. Barrett*, 724 S.W.2d 902, 906 (Tex. App.–San Antonio 1987) (holding impeachment by statements pertaining to collateral matters inadmissible).

A. Authenticating Social Media Evidence

Most of the caselaw on authentication comes from criminal cases, where the defendant often elects to not testify. Authentication should be easier in civil cases, where parties can send each other written discovery and examine each other under oath to determine whether a person authored a social media post. However, litigants sometimes lie, and third parties who made otherwise admissible postings sometimes cannot be found, so it is still useful to review the other methods of authenticating social media evidence without the author's testimony.

The mere fact that a social media posting purports to have been made by a person does not mean it was actually made by that person. As the court noted in *Dering v. State*:

> Facebook presents an authentication concern that is twofold. First, because anyone can establish a fictitious profile under any name, the person viewing the profile has no way of knowing whether the profile is legitimate. Second, because a person may gain access to another person's account by obtaining the user's name and password, the person viewing communications on or from an account profile cannot be certain that the author is in fact the profile owner. Thus, the fact that an electronic communication on its face purports to originate from a certain person's social networking account is generally insufficient, standing alone, to authenticate that person as the author of the communication.

465 S.W.3d 668, 671 (Tex. App.–Eastland 2015) (internal citations omitted).

Parties can use circumstantial evidence to authenticate social media posts in cases where the purported author does not testify as to authenticity. In *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012), the trial court admitted posts from what was purported to a criminal defendant's MySpace page. The Court of Criminal Appeals held that there was sufficient circumstantial evidence of authenticity to admit the posts. The page was registered to a person with the defendant's nickname and legal name, the photographs on the profiles were clearly of the defendant, and the profile referenced the murder, the defendant's arrest, and the defendant's electronic monitoring.

The *Tienda* court established a low hurdle for authentication: "the trial court itself need not be persuaded that the proffered evidence is authentic. The preliminary question for the trial court to decide is simply whether the proponent of evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic." *Id.* at 638. The jury would then determine whether it believed the evidence was truly authentic. *Id.* at 639.

In contrast, the court in *Dering* held that a trial court properly excluded social media posts due to lack of authentication. 465 S.W.3d at 672. *Dering* did not involve social media posts made by a party; the defendant offered posts made by third-parties in attempt to show he could not get a fair trial in the venue. The court noted that there was no evidence showing that these posts were made by their purported authors and affirmed their exclusion.

Even if a social media post cannot be authenticated, a different standard applies to photographs, even if those photographs are posted on a social media page. To authenticate a photograph, a party only needs to show that it accurately represents the scene or event it purports to portray. *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988). That being said, there may sometimes be additional hurdles to showing the relevance of a photograph on a social media page. For example, in a case where a plaintiff testifies that she can no longer run because of an injury, a photograph of the plaintiff running posted on social media may or may not end up being admissible. It would depend on whether the proponent can establish that it portrays the plaintiff running after the injury. There mere fact that the photograph was posted after the date of injury may be insufficient, as people sometimes post old pictures. Any commentary posted by the plaintiff along with the picture might show the time it was taken. Similarly, there may be information in the photograph that establishes the time it was taken (such as a sign saying 2018 Disney World Marathon).

B. Exclusionary Rules Potentially Applicable To Social Media Evidence

1. Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserts. Tex. R. Evid. 801(d). However, the statement of an opposing party is not hearsay. Tex. R. Evid. 801(e)(2). Therefore, an opposing party's social media posts are not hearsay.

With respect to social media posts made by third parties or by the party offering evidence, there are exceptions to the hearsay rule which may allow admission of the evidence. For example, a party might want to introduce her own prior social media posts as prior consistent statements to rebut an assertion that her trial testimony was fabricated. Tex. R. Evid. 801(e)(1)(B). Conversely, a third-party witnesses social media posts may be used for impeachment if they can be shown to be prior inconsistent statements. Tex. R. Evid. 801(e)(1)(A). Third-party social media posts may also constitute present sense impressions, statements of then-existing emotions, mental, or physical condition, excited utterances, statements against interest, or reputation concerning character. Tex. R. Evid. 803. Social media posts can also be used as recorded recollections to refresh a witness' memory. Tex. R. Evid. 803(5).

2. Character Evidence

Rule 404(a) prohibits character evidence to prove that a person acted in accordance with the character or trait on an occasion. Tex. R. Evid 404(a); Fed. R. Evid. 404(a). Therefore, social media posts regarding drinking or drug use on nights other than the one of the crash in question may not be admissible in a car crash case. Similarly, photographs or posts making a party look like a thug, and adulterer, or a racist are probably

not admissible to impeach a party's credibility. Evidence of other crimes or wrongs are not admissible to show that a person acted in accordance with the character; it is only admissible when introduced for another purpose, "such as proving motive, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Tex. R. Evid. 404(b); Fed. R. Evid. 404(b).

3. Impeachment on Collateral Matters

Many civil litigators incorrectly believe that they can impeach a witness at trial regarding any false statement made in deposition. However, the rule against impeachment on collateral matters often prohibits such impeachment. For example, if a client testified in deposition in a breach of contract case that he never drinks alcohol, but does not repeat that testimony at trial, it would be improper to bring up the testimony on cross-examination just to allow impeachment with social medial posts showing the witness drinking. The test for whether something constitutes a collateral matter is whether it is relevant to a cause of action or defense. *See Ramirez v. State*, 802 S.W.2d 674, 676 (Tex. Crim. App. 1990) (in a criminal case, "the test as to whether a matter is collateral is whether the cross-examining party would be entitled to prove it as a part of his case tending to establish his plea").