

## INTRODUCING FACEBOOK POSTS AND TEXT MESSAGES

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- I. Introduction
  - a. Social media is constantly growing every day and changing the way in which we communicate with each other. In the past people wrote letters and talked face to face or on the phone. Nowadays everything is about Tweeting, Poking, and Instant Messaging each other. Social media has become such a part of our everyday lives that you could go online and catch up with a person by simply looking at their Facebook page.
  - b. So...What's so important about social media in the legal field?
    - i. People post almost everything about their lives on Facebook, Instagram, Twitter and so on. This information may be seemingly harmless to the poster, but in fact can be used against them in court proceedings.
    - ii. From pictures to statuses to pages a person likes on social networks, this can all be potentially helpful or harmful evidence in a court proceeding.
- II. How to Advise Clients Regarding Their Social Media Usage
  - a. Be Smart!
    - i. Don't post photographs or comments on social media networks that you wouldn't want to your mother or pastor to see.
      1. If you have to question whether to post it or not...DON'T!
    - ii. Don't discuss or share personal information online.
      1. This is a public website and anyone can access it!
  - b. Your Friends Can Be Your Enemies!
    - i. Be cautious about who you friend, or allow to follow you on social media networks.
      1. Just because you are not friends with the opposing party doesn't mean that your friends aren't feeding them information. As long as the information is not obtained illegally, you and/or the opposing party can use the social media information in anyway desired as long as it fits within the Rules of Evidence.
- III. How to Obtain Evidence from Social Media Networks
  - a. The Easy Way
    - i. Have your client go on the social media network and print off the incriminating or helpful information.
  - b. Old-fashioned Way
    - i. Go on Facebook and type the person's name in the search box.
      1. Not sure what type of social media networks they are a part of?
        - a. Type the person's name into a Google search and everything things associated with that name will appear. Select the link you want to view, then sit back and gather evidence!
  - c. The Secret Agent Way

- i. Have someone who is friends with the person you are trying to obtain information on provide you with the desired posts, messages, pictures or Tweets.
- IV. How to Obtain Evidence in the Form of Text Messages
  - a. Photographs
    - i. Take a picture of the screen with the text message displayed. Make sure that the name and/or phone number of the individual sending the message is clearly displayed, as well as, the time and date the message was sent. This is important because you need to be able to establish when the messages were sent in context to when the incident in question occurred.
  - b. Screen shots
    - i. Screen shots are pictures taken by a cell phone of whatever is displayed on its screen. Almost all smartphones have the capability of taking screen shots. If you don't know how to take a screen shot, simply use a camera and take a photo of the message or screen.
- V. Reasons to Use Information from Social Media Networks or Text Messages
  - a. Impeachment
    - i. One easy way to use information from social media networks or text messages is to impeach a witness. Simply ask them questions regarding the information you discovered on their page and if they deny it bring out the page and impeach them with it.
  - b. To Prove Something was Said or Done
  - c. To Prove That Someone Was Where They Claimed to be or Not to Be
- VI. Now That You've Gotten the Information How to Get it Introduced as Evidence
  - a. Social Media Posts
    - i. Through the Creator of the Page
      - 1. If the information gathered is from your client's page then have them get on the stand and identify it as such.
        - a. How to lay the proper foundation
          - i. Do you have a Facebook page?
          - ii. Is it currently active?
          - iii. Who has access to this page?
          - iv. Does anyone have authorization to update or edit this page other than you?
          - v. How is the page protected?
          - vi. (Hand copy of social media page to witness) do you recognize what I just handed you?
          - vii. What is it?
          - viii. Does it appear to be a fair and accurate representation of your page?
          - ix. Does it appear to be altered in any manner?
          - x. \*\*Your Honor at this time I would like to enter \_\_\_\_\_ into evidence as Exhibit\_\_.\*\*
    - ii. Through a friend of the Page's Creator

1. If the information was obtained through a third party, place them on the stand and have them identify the page/post/picture.
  - a. How to lay the proper foundation
    - i. Are you familiar with (defendant/opposing party)?
    - ii. How do you know them?
    - iii. Are you friends with them on any social media networks? Which ones?
    - iv. Are you familiar with his/her Facebook page?
    - v. Is it currently active?
    - vi. Would you recognize it if it were presented to you today in court?
    - vii. (Hand copy of social media page to witness) Do you recognize what I just handed you?
    - viii. What is it?
    - ix. Does it appear to be a fair and accurate representation of \_\_\_\_\_'s page?
    - x. Does it appear to be altered in any manner?
    - xi. \*\*Your Honor at this time I would like to enter \_\_\_\_\_ into evidence as Exhibit\_\_.\*\*

b. Text Messages

- i. How to Introduce them into evidence
  1. Are you familiar with the Defendant/opposing party?
  2. Do you communicate with them on a regular basis?
  3. In what ways to you communicate with them?
  4. Did you receive a text message from the Defendant/opposing party recently/on \_\_\_\_\_ date?
  5. Would you recognize the message if it were presented to you today in court?
  6. (Hand picture of text message to witness) Do you recognize what I just handed you?
  7. What is it?
  8. How do you know that this is a message from the Defendant/opposing party?
    - a. Name; number...
  9. Does it appear to be a fair and accurate representation of the text message you received on (specific date)?
  10. Does it appear to have been altered in any way?
  11. \*\*Your Honor at this time I would like to enter \_\_\_\_\_ into evidence as Exhibit\_\_.\*\*

VII. How to Overcome Objections to this Type of Evidence

a. Authentication- Rule 901

- i. **Rule 901. Requirement of authentication or identification.** —(a) General Provision. —The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence

sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

1. **Ways to Authenticate a Document**
  - a. Testimony of Witness With Knowledge. —Testimony that a matter is what it is claimed to be.
  - b. Distinctive Characteristics and the Like. —Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
- b. Relevancy- Rule 401 and 402
  - i. **Rule 401. Definition of "relevant evidence."**—"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
  - ii. **Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.** —All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible.
    1. WATCH OUT FOR RULE 403!
      - a. **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** —Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
- c. **Hearsay Exceptions-** Rule 804
  - i. (1.2) Admission by Party-Opponent. —A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. An admission is not excluded merely because the statement is in the form of an opinion. Statements admissible under this exception are not conclusive.
  - ii. 2) Excited Utterance. —A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

- iii. (3) Then Existing Mental, Emotional, or Physical Condition. —A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- iv. (5) Recorded Recollection. —A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- v. (19) Reputation Concerning Personal or Family History. —Reputation among members of a person's family by blood, adoption, or marriage or among associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.
- vi. (21) Reputation As to Character. —Reputation of a person's character among associates or in the community.

#### VIII. Conclusion

- a. Social media and text messages are constantly changing the way we communicate and the type of evidence we can use in court. So make it your new practice to do your due diligence and check your client's Facebook page and the opposing party's page.