

Defendant's Computer Printout of Facebook Messages Excluded as Evidence: Authentication Requires Corroborating Facts

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Authenticating electronic evidence such as email, text messages and Facebook postings offer unique challenges for parties and the courts. Recently, in *State v. Eleck*, 2011 WL 3278663 (Conn.App. August 9, 2011), the court held that authentication requires more than simply printing out a copy of the proffered Facebook postings. As impeachment evidence in *Eleck*, defense counsel sought to introduce a printout from the defendant's computer of his Facebook account showing that the state's key witness had "friended" him on Facebook and sent him three messages following the crime he was charged with

testified that she had not communicated by telephone or computer with the defendant since the incident. For purposes of impeachment, the defendant testified that she had both "friended" him on Facebook after the incident, and sent him three messages on Facebook, including the message that "the past is the past," and attempted to offer into evidence a printout from his computer containing the Facebook message. The defendant also subsequently testified the witness had removed him as a Facebook "friend" after his testimony. The witness then testified that she hadn't sent any of the messages to the defendant

"To impeach the witness' testimony, the defendant testified that she had both 'friended' him on Facebook after the incident, and sent him three messages on Facebook, including the message that 'the past is the past.'"

committing. The witness denied sending the messages to the defendant, claiming her computer had been "hacked." Although skeptical of the witness' veracity, the appellate court affirmed the trial court's exclusion of the Facebook messages holding that the defendant was required "to advance other foundational proof to authenticate" that the messages came from the witness herself and "not simply from her Facebook account."

In this case, the defendant was charged and convicted of aggravated assault involving an altercation at a party which resulted in multiple stabbings of two victims, and was sentenced to five years' imprisonment. At the trial, the state's key witness testified that prior to the party, the defendant told her that if anyone "messed" with him, he was "going to stab them." On cross-examination by defense counsel, the witness

and that her Facebook account had been "hacked." The court suggested that the witness' claim was "dubious under the particular facts at hand, given that the messages were sent before the alleged hacking of the account took place..." Notwithstanding this skepticism, the court stated that the witnesses' "testimony highlights the general lack of security of the medium and raises an issue as to whether a third party may have sent the messages via [her] account."

The *Eleck* court began its legal analysis by noting that there were no appellate decisions directly on point in Connecticut, and cited *In Re F.P.*, 878 A.2d 91 (Pa.Super. 2005) a Pennsylvania Superior Court case

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(from p. 1)

for the principle that electronic communications (in that case instant messages) can be properly authenticated within the existing framework of the rules of evidence. On this point, the *Eleck* court stated:

We agree that the emergence of social media such as e-mail, text messaging and networking sites like Facebook may not require the creation of new rules of authentication with respect to authorship. An electronic document may continue to be authenticated by traditional means such as the direct testimony of the purported author or circumstantial evidence of "distinctive characteristics" in the document that identify the author.

appellate court, however, rejected this argument stating that more was required, and cited numerous cases where additional "distinctive" evidence was offered including *United States v. Safavia*, 435 F. Supp.2d 36, 40 (D.D.C. 2007) (distinctive content of email messages included discussions of identifiable personal and profession matters) and *Dickens v. State*, 927 A.2d 32 (Md.App. 2007) (threatening text messages on victim's cell phone contained details "few people" would know and were sent from the defendant's cell phone in his possession at the time).

According to the *Eleck* court, the exchange of Facebook messages "could have been generated by any person" using the witness' account and did "not re-

"According to the Eleck court, the exchange of Facebook messages 'could have been generated by any person' using the witness' account and did 'not reflect distinctive information that only [the witness] would have possessed regarding the defendant or the character of their relationship.'"

The *Eleck* court, however, added that "the circumstantial evidence that tends to authenticate a communication is somewhat unique to each medium." See e.g. *People v. Clevestine*, 891 N.Y.S.2d 511 (2009) [MySpace messages authenticated by police retrieval of conversations from victim's hard drive and testimony that the defendant had created the account sending the messages.]

In this case, because the state's witness testified that she had not sent the Facebook messages to the defendant, the trial court properly ruled that "it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate that the proffered messages did, in fact, come from [the witness] and not simply from her Facebook account."

The defendant argued on appeal that the exchange of messages with the witness was "distinctive evidence of the interpersonal conflict between" them, i.e. the witness' statement that "the past is the past." The

flect distinctive information that only [the witness] would have possessed regarding the defendant or the character of their relationship." The court also pointed out that distinctive evidence of the author could have been provided by "forensic computer evidence." Accordingly, the appellate court concluded that "the reference...to an acrimonious history, with nothing more" did not sufficiently establish that the witness had "authored the messages such that it would be an abuse of discretion to exclude [them]."

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