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ABA Annual Meeting – New York City – August 10-15, 2017
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CLE In The City Series at the ABA Annual Meeting
Earn up to 4.5 CLE credits and step out of the meeting room and into the law firm with this new and exciting CLE Series.

TIPS CLE: “Discovering Your Purpose, Mastering Your Life and Practice”
Fostering work-life-balance, this CLE will take place on Friday, August 11 from 9:45 A.M. until 10:45 A.M. at the Grand Hyatt New York.

The Annotated Performance Bond At The FSLC Spring Meeting
TIPS is sponsoring The Annotated Performance Bond Program at the FSLC Spring Meeting in Naples, Florida from May 10, 2017 through May 12, 2017 at the Ritz Carlton.

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If you have an idea for an Article or 101 Practice Series Article, contact Alexandra Maiolini at amaiolini@kirwanspellacy.com.
ARTICLES

Social Security Disability Insurance Claims: *Tips to a Successful Hearing*
By Jack Pogosian, Esq.

I. Introduction

The average claimant has been waiting years for a successful outcome to their Social Security Disability Insurance (“SSDI”) Claim; often after having been denied subsequent to their initial application, and any appeal to follow. Consequently, many claimants give up after the initial denial. But, as any attorneys with exposure to SSDI Claims know, the denial of an initial application and appeal are invariably routine. Nevertheless, even before the hearing before an Administrative Law Judge (“ALJ”) is held, success is obtainable. As such, the focus of this Article is to provide tips for receiving a fully favorable decision by the ALJ.

II. Request Medical Records As Soon As Possible

A vital part of being prepared for a SSDI hearing is to ensure that all relevant medical records supporting the claimant’s impairments are received from the healthcare provider and submitted to the court, at least five days prior to the hearing. Although a claimant-witness’s testimony is an important part of the hearing, having the medical records to cite to during the hearing - which corroborate the testimony - is crucial and most effective. The new 75-day rule\(^1\) requires the Office of Disability Adjudication and Review (“ODAR”) to send out a Notice of Hearing at least 75 days in advance, which will allow more time for the representative to gather medical evidence. The representative should contact the claimant as soon as possible upon receiving the Notice of Hearing, conduct a medical update consisting of requesting name, address, and treatment dates of each healthcare provider, and submit a request for records to each provider immediately. Take note of the healthcare provider in question, and adjust the time frame for requesting records accordingly. For example, Kaiser Permanente is notorious for taking several months to submit records, and can delay the process by requiring their own specific authorization form. A records request to an institution like Kaiser Permanente should be sent as soon as

\(^1\) See, e.g., Program Uniformity Regs Finalized, NOSSCR, available at https://nosscr.org/program-uniformity-regs-finalized.
possible to afford adequate time for the records to be received by the representative. Additionally, if you know that the claim is for a closed period (i.e., the claimant has returned to work), submit the records request even before receipt of the Notice of Hearing since there will probably be no need for up-to-date records.

III. Preparing the Client to Testify

In order to adequately prepare your clients to testify, you should walk him or her through the hearing experience in as detailed a fashion as possible. Explain the issues and procedures while describing what will happen step by step, from the moment they walk into the ODAR office, until the moment the ALJ closes the hearing. The more familiar your client is with the process, the more comfortable he or she may be when the red light is on and the ALJ is firing questions.

It is not common for the ALJ to warn claimants before swearing them in to answer only the question that is asked, and not volunteer information. Although generally great advice, it is wise to advise your client to expand upon topics which may require further explanation. For example, an ALJ may ask the claimant if he has a driver’s license and drives a car. Where the simple and direct answer may be yes, it can be beneficial for the claimant to discuss the self-imposed limitations of driving caused by disabling impairments. Of course, it is a good attorney-representative’s job to ensure responses that leave room for more detail should be noted and revisited upon that attorney’s examination of the claimant-witness.

Many of the questions an ALJ may ask are very similar from hearing to hearing, and a fully prepared client should have these types of questions posed to him or her in a pre-hearing conference, allowing little room for surprises.

IV. Argue Applicable GRID Rules & Listings

The “Grid” rules are medical-vocational guidelines offering arguments of disability if certain conditions are met.\(^2\) A supportive Grid rule argument is available for claimants 50-years-of-age or older, and should be considered in every such circumstance. A medical source statement or residual functional capacity assessment provided by a treating Medical Doctor can be an

invaluable method of setting forth a successful Grid rule argument. A claimant should request either statement be provided by a doctor during the same timeframe as a medical records request, as discussed above.

Furthermore, the Social Security Administration ("SSA") has several Listings which, if met, will result in a favorable decision. Listings can be referred to as diagnoses with strings attached, because the claimant must not only be diagnosed with a certain condition, but also must experience certain symptoms or have objective medical testing to meet or equal the listing.³ Think of the Listing as a rule, which has factors or elements (or both, depending on the Listing) that need to be supported by medical evidence, or facts. Since a Listing argument relies heavily on medical records, each claim should be assessed to determine how strong of an argument can be made. If medical evidence can support a Listing, it is extremely worthwhile to draft an argument citing to the record, which can be made during an opening statement.

V. **Move to Amend!**

Finally, a motion to amend the Alleged Onset Date ("AOD") should be considered as an influential tool in certain circumstances. A motion to amend is most helpful in coordination with a Grid rule argument. For example, your client is 49-years-old at the original onset date (which is typically the day he or she stopped working), while at the time of hearing the client is 53; if the medical evidence supports a restriction to sedentary work, you may consider amending the alleged onset date to the client’s 50th birthday. By amending the onset to his or her 50th birthday, the claimant gains a Grid rule argument since onset, and the judge has a much smoother and straightforward way of drafting the final decision. Let the motion to amend be your friend. A little negotiation can go a long way.

VI. **Conclusion**

The average SSDIE claimant has likely been awaiting an opportunity to be heard for far too long. Unfortunately, with the backlog of SSDI claims, there isn’t much that can be done to expedite that process. What can be done is: confidently prepare to put forth the strongest

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arguments available; have claimants prepared to testify about the most pertinent limitations in detail; ensure all relevant medical records are submitted for review prior to the hearing before an ALJ; and take home a fully favorable decision.

Jack Pogosian, Esq., is an attorney with Champagne & Associates, LLP, working out of San Diego, California. C&A’s sole area of practice is Social Security Disability Insurance Claims, and Jack has represented claimants in over 250 hearings across the western United States. Jack is a member of the San Diego County Bar Association, Armenian Bar Association, and a 2016-17 Vice-Chair for the ABA YLD TIPS. You can contact him directly at jpogosian@cacadvocates.com.

Wearable Technology Data in Personal Injury Litigation

By Rachel A. Lowes, Esq.

By all estimates and despite its recent introduction, wearable technology remains a multi-billion-dollar industry. “Wearable technology data” refers to data collected by devices such as Fitbits, Apple Watches, and dozens of similar gadgets on the market today (“wearables”). Many wearables track and report the user’s activity, sleep, and health data, which can - in theory - either prove or decimate a plaintiff's personal injury claim. Because of its potential, this type of data is being requested and produced in discovery with increasing frequency, prompting additional scrutiny regarding its accuracy, utility, and admissibility.

I. Uses for Wearable Technology Data

For plaintiffs’ attorneys, data from these devices can provide concrete information upon which they can more accurately evaluate, substantiate, and present their clients’ claims. For defense counsel, such data can assist in cracking down on exaggerated or downright fraudulent claims, and in discrediting plaintiffs who falsely claim they can no longer maintain the same level of activity they did pre-incident.

Published court opinions discussing wearable technology are rare, due in part to the fact that the overwhelming majority of personal injury cases settle before trial, and to the fact that trial court decisions are not published in most jurisdictions. Still, a few instances of the use of wearable technology data have found their way into the news and legal blogs in the past few years. For example, one Canadian law firm made headlines in December 2014 when it used its client’s Fitbit
data to show a decreased post-incident activity level.\textsuperscript{4} Then, in June 2015, police in Lancaster, Pennsylvania, used a victim’s Fitbit data to refute her claim of assault; the victim said she was asleep when a man broke into her home and attacked her, but the data showed she was awake and walking around.\textsuperscript{5}

In today’s personal injury case, possible uses for wearable technology data include: (1) establishing the extent of an incident’s impact on a plaintiff’s life by comparing pre- and post-incident activity levels; (2) comparing a plaintiff’s activity levels to those of other uninjured people; (3) proving failure to mitigate damages; (4) and the list goes on. Once a determination is made that such data may be useful in a case, the next step is to obtain it through discovery.

II. Discoverability of Wearable Technology Data

In addition to advising their clients of standard preservation obligations, plaintiffs’ attorneys should consider investigating their clients’ use or non-use of wearables early in the case. Defense attorneys who send form preservation letters to plaintiffs’ counsel at the beginning of a case should add language specific to wearables. Regardless of whether the evidence exists or is ultimately used, this practice can put opposing counsel on notice of an issue she might not have thought to discuss with her client, and it can help avoid any inadvertent waiver of a later spoliation argument, depending on the rules that govern preservation of evidence in the jurisdiction. If it is later discovered that the device manufacturer – and not the individual user - manages the storage and release of the data, counsel should consider sending a litigation hold letter to the company.

Given the low threshold for discoverability—“reasonably calculated to lead to the discovery of admissible evidence”—it is difficult to envision a personal injury case in which a good-faith argument for the discovery of wearable technology data would be recalcitrant. Critical information to obtain may include: the type of device used; the plaintiff’s start date and end date (if applicable); frequency of use; who controls the data; and, of course, the data itself.

Discovery can start with an interrogatory and/or a request for production. The request for production may look like this: “All activity data collected by any wearable technology (such as a


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Fitbit, Apple Watch, Microsoft Band, Jawbone UP, pedometer, etc.) that you [the plaintiff] use or have used in the past, from one year before the incident to present." Alternatively, counsel may choose to give plaintiffs the option of providing the username and password to any online account associated with the wearable device(s) for collection of the data. The basis for the latter type of request can typically be found in opinions on discovery of social media evidence. Deposition questions may inquire further into whether the plaintiff uses his or her phone, an app, or any device to track exercise and activity goals.

Issues surrounding cloud storage, which movements particular wearables count in calculating “activity,” and circumstances in which a subpoena to the wearable’s manufacturer may be required, are beyond the scope of this article; online research of a specific wearable will often yield ample information on how data is collected, stored, and viewed by the wearer so targeted deposition questions and discovery requests can be prepared and defended in front of a judge if necessary. Counsel can also reach out to vendors that specialize in the analysis of smartphone and wearable technology data.

III. Admissibility of Wearable Technology Data

Depending on what the data shows, either the plaintiff or the defense may try to admit the evidence. The usual hurdles apply, though the ways around them may be unique in the context of wearables. Proving the authenticity of wearable technology data involves demonstrating chain of custody and establishing who wears (or wore) the device. Counsel faced with an argument that “anybody” could have been wearing the device can turn to case law regarding what goes to the weight rather than the admissibility of evidence. Cases that discuss the admissibility of text messages, social media posts, and emails are often particularly helpful.

Litigants seeking to enter this kind of data into evidence should expect privacy challenges, as well as challenges to the data’s accuracy and reliability, especially in light of class actions like those filed against Nike, Apple, and Fitbit in recent years.\(^6\) \(^7\) As with any evidence, the


admissibility of wearable technology data will most likely turn on the facts and circumstances of a particular case.

IV. Conclusion

Economic forecasts predict that the wearable technology industry will continue to grow in the coming years. As the technology continues to improve and its use becomes more widespread, it seems reasonable to expect that the evidentiary value of the information wearables collect will follow a trajectory similar to that of other electronic and social media evidence. This technology has already added entire layers to the kind of information tracked by and stored on our nearly ubiquitous smartphones. Litigators looking for a creative leg up should educate themselves on the types of data different wearables collect, how to retrieve and analyze the data, and how to use it (or combat its use) in settlement negotiations and trial.

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Buyer Beware, or Caveat Emptor
By Professor Ulysses Jaen, J.D., M.P.A., M.I.L.S., & Rebekah Skiba, J.D.

Billboards, television ads, radio marketing, glossy brochures, pop-op ads, and subliminal messages have taken over the legal industry. The constant barrage of advertising by Lawyer Referral Services is overwhelming. It can mislead victims into thinking they are engaging a professional who will provide zealous advocacy when, in fact, they are communicating with a telemarketer who, without any education or training, will decide who will handle their case. Does the subversive influence referral services have obtained over the past few years serve the public and the legal profession well? The answer is: it depends.

At first glance, a referral service seems an excellent opportunity to the consumer. It gives them unlimited access to options and the opportunity to shop around before choosing a lawyer. Looking closer, however, the overwhelming marketing tactics of these referral services tend to confuse the customer. They begin to think that they are hiring an attorney rather than using a
referral service.

From the attorney’s perspective, a referral service seems useful to bolster their client base; however, because more and more customers rely on referral services, attorneys no longer rely on their reputation or ability to attract their own clients. Further, these referral services are so prevalent that economic circumstances often force attorneys to sign up for multiple referral services in order to get clients since the well of clients seeking attorneys directly is drying up.

Nevertheless, is that really so bad? Don’t referral services make the legal world easier? Not really. These referral services are often scams, putting themselves out as a “one stop shop” for a customer. When Florida changed the automobile insurance Personal Injury minimum coverage to $10,000.00, the referral services jumped in quickly, taking over attorneys’ business by bombarding the customers directly. The referral service promises to take care of everything – from MRIs and chiropractor visits to the attorney. They rack up the bill and charge it to the insurance company; arguably, the customer and patient does have their needs met. What the customers do not know, however, is that these all-in-one referral services are often filing complaints on behalf of the customer against the insurance company for a missing $1 in the insurance payout – and getting thousands of dollars in attorney’s fees awarded; attorney’s fees awards that the referral service keeps.8 “Disputes over a few hundred dollars or less can mean huge payouts for the attorneys doing the suing. . . . [L]awyers have fought insurers in court over $2.53, $1.19 and even one penny. The attorneys say they’re keeping insurance companies honest and blame them for the costly courtroom battles.”9 Oftentimes, these cases come from “soliciting accident victims through radio and television ads, billboards and toll-free hotlines.”10 Sometimes these hotlines even offer to assist customers, even without an attorney.11

The Florida Bar has reprimanded and cracked down “on referral service ads, which violate Bar advertising rules.”12 When the referral service advertisements do not “comply with the Bar’s rules, . . . lawyers [are not] supposed to receive clients from it.”13 The rules regulating attorney

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9 Id.
10 Id.
11 See id.
13 Id.
advertisements are strict, as are those allowing attorneys to participate in referral services. If these referral services continue to ignore these rules, attorneys will lose even more clients, and the services will confuse even more customers.

“[These] marketing juggernauts . . . caused an exodus of patients/clients . . . Our traditional word-of-mouth method of helping patients stopped working, and instead these for-profit call centers somehow inspired injury victims to allow a phone operator to push them to clinics owned by the referral service while setting them up with attorneys from their list of highest bidders – with little regard to quality of care or legal competency.”

The referral services affect the medical industry just as they affect the legal profession. Thankfully, “the Florida Supreme Court instructed the Florida Bar to propose amendments to our rules,” effectively stating that the referral services threaten the public. Since then, the Florida Bar has “decided the real problem was not just lawyer referral services but the more recent proliferation of online legal directories and client matching services.” The Florida Bar proposed regulations “to impose registration and screening requirements on a broad array of legal marketing outfits, including . . . ‘a for-profit lawyer referral service, a group or pooled advertising program with a common telephone or URL, a lawyer directory, an internet ‘matching’ site, or a tips or leads service.’” This proposal may solve the issue, but then again, it may not since it is controversial.

How can attorneys protect the integrity of the legal profession in the face of these referral services and their gross misrepresentation? Perhaps a class action lawsuit where all affected attorneys join to pressure the Florida Bar and the Florida Legislature to work harder to prevent the misrepresentation these services promote. The measures taken thus far, seem less effective

15 Id.
16 Alison Frankel, Florida Bar wants to regulate Avvo and other legal marketers. Will state Supreme Court allow it?, REUTERS, Apr. 12, 2017, 4:13 PM.
17 Id.
18 Id.
than desired. When imposed intermediaries control the legal industry, individual attorneys cannot succeed in fighting this control on their own. In spite of reprimands, these referral services continue to permeate and control the legal market. Individual attorneys cannot tackle the referral service conglomerate on their own. Attorneys must band together to present a force comparable to that of the referral services. Through a class action, attorneys can take the fight directly to the referral services.

In conclusion, a class action can be certified on the part of the attorneys who are paying monthly fees for these services, even while they lose clients to the services. Additionally, the public may also qualify as a class based on the fraud committed on their behalf. Either way, a class action solution should be explored.

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Social Networking Sites and the Requirement of Authentication
By Kimberly K. Seibert, Esq. and Robert J. Seibert, Esq.

With the escalating popularity of social networking, trial lawyers face new challenges relating to the admissibility of evidence obtained from social networking sites. This article discusses authentication techniques for common types of electronic evidence available through social media sites.

Facebook, Twitter, Pinterest and Instagram are among the most popular social networking sites offering free accounts to users. A national survey of 1,520 adults conducted in 2016 found that Facebook continues to be America’s most popular social networking platform by a substantial
margin: “Nearly eight-in-ten online Americans (79%) now use Facebook, more than double the share that uses Twitter (24%), Pinterest (31%), Instagram (32%) or LinkedIn (29%). On a total population basis (accounting for Americans who do not use the internet at all), that means that 68% of all U.S. adults are Facebook users, while 28% use Instagram, 26% use Pinterest, 25% use LinkedIn and 21% use Twitter.”19 “Roughly three-quarters (76%) of Facebook users report that they visit the site daily (55% visit several times a day, and 22% visit about once per day.)”20

These sites contain several forms of electronic communication in a single interface, a feature that makes them appealing to users but that presents new challenges to trial attorneys seeking to admit their content. Evidence can include information posted on profile pages, postings between users, private messages, photographs and videos. The sites require each user to create a unique login and password; the sites do not, however, employ security measures for verifying the identity of the person creating or accessing the account.

I. The Authentication Requirement

An attorney seeking to introduce evidence from social networking sites must first overcome the evidentiary hurdle of authentication. Under Federal Rule of Evidence (“FRE”) 104(a), the issue of whether or not to admit evidence at trial is a preliminary question to be decided by the court. A bedrock condition of admissibility is that the proffered evidence is relevant to an issue in the case. FRE 401. If the proffered evidence is not relevant, it is not admissible under any circumstances. FRE 402.

Evidence has no relevance if it cannot be authenticated. FRE 901(a) defines authentication as a “condition precedent” to admissibility that requires the proponent to make a threshold showing that would be “sufficient to support a finding that the matter in question is what its proponent claims.” Whether the proponent has met this threshold is one of the preliminary questions of admissibility addressed by Rule 104(a).

Determining authenticity is a two-step process. First, “[b]efore admitting evidence for consideration by the jury, the [trial] court must determine whether its proponent has offered a

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20 Id. at 9.
satisfactory foundation from which the jury could reasonably find that the evidence is authentic." 21

Then, "because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims." 22 In making its preliminary determination as to admissibility, the court may consider inadmissible evidence except evidence with respect to privilege. FRE 104(a).

To establish authenticity, the proponent need not rule out "all possibilities inconsistent with authenticity, or . . . prove beyond any doubt that the evidence is what it purports to be. Rather, the standard for authentication, and hence for admissibility, is one of reasonable likelihood." 23 Rule 901(b) provides by way of illustration examples of authentication or identification conforming with the requirements of Rule 901(a). The most likely illustrations to apply to social networking sites include:

- Rule 901(b)(1), Testimony of Witness with Knowledge
- Rule 901(b)(3), Comparison by Trier of Fact or Expert Witness
- Rule 901(b)(4), Distinctive Characteristics and the Like
- Rule 901(b)(9), Process or System

II. Application of Authentication Requirement

Although there are numerous cases involving the discoverability of electronic records, there are very few decisions which analyze the evidentiary issues associated with the admissibility of electronic evidence. Once counsel has obtained the records through discovery, the next hurdle is to determine whether the records are admissible in evidence. As Magistrate Judge Grimm recognized, "it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence." 24

Any lawyer wrestling with the admissibility of evidence from social networking sites is advised to read Lorraine v Markel American Insurance Co, 25 which is widely regarded as the watershed opinion regarding the admissibility of various forms of electronically stored and/or

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21 United States v. Branch, 970 F.2d 1368, 1370 (4th Cir. 1992) (citing Fed. R. Evid. 104(b) advisory committee's note).
22 Id. at 1370-71.
23 United States v. Holmquist, 36 F.3d 154, 168 (1st Cir. 1994).
25 Id.

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transmitted information.

The *Lorraine* decision identifies the following evidentiary issues that must be addressed in order to assess the admissibility of electronically stored evidence:

Whether [electronically stored information, ("ESI")] is admissible into evidence is determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence. Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible. When ESI is offered as evidence...the following evidence rules must be considered: (1) is the ESI relevant as determined by Rule 401...; (2) if relevant under 401, is it authentic as required by Rule 901(a)...; (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception; and, (4) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice under Rule 403.26

In summary, ESI should be admissible so long as it is: (1) relevant under Rule 401; (2) authentic, as required by Rule 901(a); (3) not hearsay or a hearsay exception; and (4) is not overly prejudicial, as required by Rule 403.27

A. The Maryland and Texas Approaches to Authenticating Social Media Evidence

There is little judicial precedent that addresses the authentication of electronically stored information evidence and more specifically social media evidence. The few courts that have addressed the issue have identified two approaches to analyzing social media authentication: the Maryland approach and the Texas approach, *infra*.

The Maryland approach is discussed in *Griffin v State*, a Maryland Court of Appeals decision.28 In *Griffin*, the state sought to introduce a post from the MySpace profile of defendant’s girlfriend. The prosecution sought to authenticate the profile evidence using a picture of defendant’s girlfriend, coupled with her date of birth and location, both of which were displayed on her MySpace profile. The state did not request defendant’s girlfriend to authenticate the page on the witness stand nor did it introduce electronic records definitely showing that she had authored the post. The trial court admitted the evidence.

The Maryland Court of Appeals held that the state failed to properly authenticate the profile

26 *Id.* at 539.
27 *Id.*

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post. The Court explained that the trial court “failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the . . . posting.”\textsuperscript{29} The Court of Appeals held that to properly authenticate social media posts, the admitting party should (1) ask the purported creator if she created the profile and the post, (2) search the internet history and hard drive of the purported creator’s computer “to determine whether that computer was used to originate the social networking profile and posting in question,” or (3) obtain information directly from the social networking site to establish the appropriate creator and link the posting in question to the person who initiated it.\textsuperscript{30}

The alternative line of cases is best represented by the Court of Criminal Appeals of Texas decision in \textit{Tienda v State}.\textsuperscript{31} In \textit{Tienda}, the Texas Court of Criminal Appeals affirmed defendant’s murder conviction, concluding that the trial court did not abuse its discretion in admitting evidence of MySpace profile pages allegedly authored by defendant. The profile pages were provided to the prosecution by the victim’s sister who testified that she believed that defendant registered and maintained the sites. Messages contained on the profile pages included specific references to the circumstances surrounding the crime. Defendant argued that the prosecution failed to prove that he was responsible for creating and maintaining the content of the MySpace pages by merely presenting the photos and quotes from the website.

In affirming the trial court’s admission of the evidence, the Court of Criminal Appeals held that the internal content of the MySpace postings – photographs, comments, and music – was sufficient circumstantial evidence to establish a prima facie case that a reasonable juror could have found that they were created and maintained by defendant. Further, the Court explained that it was the province of the jury to assess and weigh the evidence presented by the state to determine whether it was defendant who created and maintained the MySpace pages.\textsuperscript{32}

While the Maryland approach appears to place an excessively high bar on social media evidence, most courts considering authentication of such evidence simply apply the well-settled principles set forth in FRE 901.

\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.} at 427-28.
\textsuperscript{32} \textit{Id.} at 646.
B. Overview of State Court Decisions

*People v Goins*\(^{33}\) demonstrates how evidence from social networking sites may be authenticated by distinctive content, context and used to impeach a witness. In *Goins*, defendant argued that the trial court erred in excluding the contents of a MySpace entry purportedly written by the complainant and defendant’s former girlfriend, Holly Bradley. The photographs would be used to show a contrasting account of the alleged assault. The trial court refused to allow admission of the content because no evidence was submitted to verify that the MySpace account belonged to Bradley. The trial court affirmed this ruling even after defendant testified that he met Bradley through MySpace, that he was familiar with her account, and that the statement came from her account.

The Court of Appeals noted that “what certainly appears to be Bradley’s MySpace page” contains “descriptive details of the assault that fit within what a reasonable person would consider to be ‘distinctive content’ not generally known to anyone other than Bradley or someone in whom one or the other confided.”\(^{34}\) Given the content of the entry, which was only slightly less inculpatory than Bradley’s own testimony, and the unlikelihood that she would have given her account password to a third party, the Court ruled that the jury could have reasonably found that Bradley authored the content. The Court held that these indicia were sufficient for the jury to reasonably find that Bradley was the author of the MySpace content.

In *People v Mills*,\(^{35}\) a jury convicted Ellis Mills of second degree murder. Mills admitted that he shot the victim, Jordan Clark, but claimed that he did so in self-defense after Clark pointed a gun at him. Mills argued that the trial court erred in excluding photographs of the victim’s MySpace page depicting the victim holding a black and silver gun. Mills was unaware of who shot the photographs of the victim and he did not know who posted the photographs on MySpace. The Court noted that Mills had no way of knowing if the photos were altered in any way. Further, Mills could not prove that the guns in the photos were actually real. The Court affirmed the lower court’s ruling in excluding the photographs.

The Appellate Court of Illinois in *People v Downin*\(^{36}\) upheld the admissibility of emails

\(^{34}\) *Id.* at 2.
purportedly sent by defendant to his underage victim in a sexual abuse case. The Court found that the prosecution authenticated the emails by introducing evidence that the victim knew defendant personally, had exchanged emails with him in the past at an email address she knew to be his, and the email contained information that would have been known exclusively by defendant.

In *State v Eleck*, the Connecticut Court of Appeals upheld the lower court’s refusal to admit a printout from defendant’s Facebook page. Defendant attempted to impeach the testimony of a prosecution witness who claimed that she had not communicated with him since the evening of an assault that gave rise to the criminal charges. Defendant proffered messages from his Facebook page that he claimed he received from the witness. Although the witness identified the user name as her own, she denied sending the messages, explaining that someone had “hacked” into her Facebook account and changed her password several weeks prior. The Court explained that “proving only that a message came from a particular account, without further authenticating evidence, has been held to be inadequate proof of authorship.” In this case, the witness denied authorship of the messages, testified that her account had been hacked and there was insufficient evidence of distinctive characteristics to authenticate the messages.

The Supreme Court of Massachusetts recently ruled that there was insufficient evidence to authenticate MySpace messages allegedly sent by defendant’s brother to a friend of defendant. In *Commonwealth v Williams*, the Court found it significant that there was no testimony regarding how secure the Web page was, who could access the MySpace page or whether codes were needed for access to the page. In short, “there was no basis for the jury to conclude that the statements from the MySpace page were generated, adopted, or ratified by the defendant or, indeed, that they had any connection to him.”

In *People v Clevenstine*, the New York Supreme Court held that the prosecution offered ample testimony to authenticate numerous instant messages from defendant’s MySpace account involving defendant and sexual abuse victims. A legal compliance officer for MySpace testified

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38 *Id.* at 822.
40 *Id.* at 1173.
that the messages on defendant’s computer disk had been exchanged by users of accounts created by defendant and the victims, and defendant’s wife recalled that the sexually explicit conversations she viewed in her husband’s MySpace account were on their computer.

In *State v Hannah*, the Superior Court of New Jersey rejected the Maryland approach set forth in *Griffin*, supra in affirming the admissibility of defendant’s Twitter posting. In *Hannah*, defendant was charged with simple assault after allegedly attacking her ex-boyfriend’s girlfriend at a party at a community center. At trial, the prosecution sought to admit a message allegedly sent by defendant to the victim on defendant’s Twitter account. Defendant objected to the admission of the evidence arguing that social media postings are subject to a greater level of authentication for the reasons set forth in *Griffin*.

The Court in *Hannah* rejected “any suggestion that the three methods of authentication suggested in *Griffin* are the only methods of authenticating social media posts.” Citing the Texas Court of Criminal Appeals decision in *Tienda*, the Court noted that “the rules of evidence already in place for determining authenticity are at least generally “adequate to the task.” The Court in *Hannah* concluded that defendant’s Twitter handle, “her profile photo, the content of the tweet, its nature as a reply, and the testimony presented at trial was sufficient to meet the low burden imposed by our authentication rules.”

### III. Practice Pointers

The potential for fabricating or tampering with electronically stored information on social networking sites poses significant challenges from the standpoint of authentication of printouts of the site. The current trend is to require more evidence than just a distinctive profile page to authenticate a specific posting or message on the social networking site. As explained by the Court in *Griffin v State*:

> [W]e recognize that other courts, called upon to consider authentication of electronically stored information on social networking sites, have suggested greater scrutiny because of the heightened possibility for manipulation by other than the true user

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43 *Id.* at 105.
44 *Id.* at 106.
45 *Id.* at 108.

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Some or all of the following forms of authentication should be utilized when attempting to introduce evidence from social networking sites: 1) testimony from the creator of the profile and relevant postings; 2) testimony from the person who received the message; 3) testimony about the distinctive aspects in the messages revealing the identity of the sender; 4) testimony regarding the account holder’s exclusive access to the account; and 5) testimony from the social networking website connecting the post to the person who created it.

The rules concerning authentication are flexible and offer a variety of methods by which to authenticate evidence from social networking sites. Authenticating such evidence is in large part no different than authenticating more traditional forms of evidence. Whether seeking to admit hard copies of photos, videos, correspondence, accident reports or information from social networking sites, the trial attorney must offer sufficiently reliable proof that the proffered evidence is what he/she claims it to be.

**Fast Facts**

As aptly stated by Judge Grimm in *Lorraine*:

> Considering the significant costs associated with discovery of electronically stored information, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence because the proponent cannot lay a sufficient foundation to get it admitted.

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Taking the Conversational Deposition

By Domenick Lazzara, Esq.

As a young lawyer, I have had the privilege of taking and defending well over one-hundred depositions. In the process of doing so – and especially in defending clients in depositions taken by lawyers many times my senior – I have learned an invaluable strategy for taking depositions: the conversational deposition. This strategy is especially effective when deposing low and mid-level employees, managers, and fact-witnesses.

Like most things written by lawyers, this too comes with a caveat. This is merely one strategy among hundreds – if not – thousands, of strategies for taking effective depositions. It probably will not work, for example, when deposing a well-prepared and experienced expert witness, doctor, or corporate representative. Nevertheless, it is a strategy that, when employed properly and in the right situation, could yield extraordinary results.

1. **Realize the Power of First Impressions.**

   “We don’t know where our first impressions come from or precisely what they mean, so we don’t always appreciate their fragility.”

   - Malcolm Gladwell

   The first step in taking an effective, conversational deposition is to recognize the power of first impressions. More importantly, the power of YOUR first impression. Treat meeting your deponent for the first time as you would when meeting any other professional or colleague for the first time: with professionalism, courtesy, and attention. And yes, it’s okay to smile. It’s okay to introduce yourself and explain why you’re here today. It’s okay to act like a real human being, and not a robot! To that same end, it’s equally important to treat opposing counsel – who will most likely be accompanying the deponent – with the same level of professionalism, courtesy, and attention that any member of our profession deserves. Doing so will set the mood and put the deponent in a more relaxed state-of-mind; one where he or she is more likely to cooperate, remember answers correctly, and be a helpful – not a hostile – witness.

   Once the deposition has begun, introduce yourself on the record, explain why you are
both here (consider thanking the deponent for being here), and explain the ground rules for the
deposition in a friendly and warm manner. For example, “Mr. Patel, do you prefer I call you Mr.
Patel, or is Amar okay?” “Amar, if at any time today you wish to take a break, or need to use the
bathroom, or just want a drink of water, all you have to do is ask.” Once you’ve laid the ground
rules, the best way to get into the meat of your deposition is to ask the deponent, simply, “Do you
know why you’re here today?” What then ensues should, just as a natural conversation would,
versus a scripted and awkward series of question-and-answers.

2. Prepare Points; Do Not Prepare a Script.

When you prepare for a deposition, you must keep the big picture, and the end, always in
mind. Start with what it is that you have to prove to win your case. Then, narrow in on what you
believe, or how you believe, this specific witness can help you win your case; or, at the very least,
point you to additional discovery. To do so, you should go into a deposition with a list of points
you wish to get out of the deposition. You should not go into a deposition with a script of questions.
This will allow you to be more conversational and increase the chances of actually establishing
the points you want to – or think you can – establish. More importantly, taking a deposition in this
style is more likely to lead to the discovery of information you didn’t anticipate discovering before.
This is because the deposition will unfold naturally; just as conversations do in every-day life.

3. Documents, USE THEM!

If you go into a deposition having already obtained documents in discovery, USE THEM! Even if you think the deponent has no connection, whatsoever, to the document, it probably can’t
hurt to at least ask him or her about it (assuming, of course, you are not divulging privileged
information or violating any confidentiality agreements). In this situation, you are using each
document as you used the points above; as conversation starters. Don’t be afraid to look “dumb"
in this situation, either. If you don’t understand a document, well now might be your opportunity
to ask someone that does understand, to explain it to you. In addition, in the process of doing so,
you might be pleasantly surprised with what you do – or do not – learn.
4. Conclusion

Remember that you are not just a lawyer, you are also a human being. In doing so, you will discover that the conversational deposition has a time and place. When used appropriately, it could yield extraordinary results and become a powerful tool in your fight for the truth.

Domenick Lazzara is a Partner with Lee & Lazzara, PLLC, a four-attorney litigation law firm in Tampa, Florida. Domenick practices civil litigation, with a focus on Personal Injury and Professional Liability, and an adjunct professor at the University of Tampa, Sykes College of Business, teaching Business Law and Social Responsibility. Domenick is a past Vice-Chair for ABA YLD TIPS, current Co-Chair and Senior Content Editor for ABA YLD TIPS, and a 2017 ABA YLD Star of the Quarter. You can contact Domenick directly at 813.606.5036, or by email at: DLazzara@LeeLazzara.com.

NEWS AND ANNOUNCEMENTS

TIPS SECTION CONFERENCE – CHICAGO, ILLINOIS – APRIL 26 – 30, 2017

The Third Annual Tort Trial and Insurance Practice Section Conference will be held at the JW Marriot in Chicago. The CLE Program begins Wednesday afternoon, April 26, 2017, and concludes on Friday afternoon, April 28, 2017. There are several networking events, CLE programs, and other events to attend For more information on scheduled events, check out the Conference Brochure here. While there, don’t forget to attend the Young Lawyers Social Networking Reception, Wednesday April 26, 2017 at The Marq, 60 West Adams Street, Chicago, Illinois 60603, from 9:30 P.M. until 11:30 P.M.

Although advance registration is now closed, on-site registration will be available on Wednesday, April 26, 2017 at 12:00 pm at the JW Marriot Chicago.

TIPS APRIL MEMBER MONDAY FREE CLE SERIES

COOYL, BLC, and E&P have joined forces and will be hosting TIPS April Member Monday FREE CLE PROGRAMS! These teleconferences/webinars are every Monday through the month of April and if you haven’t already checked them out, don’t forget! You can access this series from the comfort of your office or home! Speakers include William E. Kruse.
On April 3, 2017, TIPS hosted “Getting The Devil Out Of The Details: Ethical Technology Solutions For Practice Management Problems” a free CLE Program. This teleconference addressed the challenges of trying to practice a pen and paper profession in a digital world. A panel of practicing attorneys addressed how technology can take some of the stress and risk out of tasks like document management, time tracking, cloud computing, and legal billing, business and trust accounting. However, practitioners must take the time to use technology safety, protect sensitive data, and manage their practices effectively without ignoring ethical obligations.

Check out our SUMMER NEWSLETTER for an article discussing technology, reasonable safety practices, and your duties as an attorney using public Wi-Fi and cloud services. Check the ABA TIPS website here for future FREE CLE programs.

ABA ANNUAL MEETING – NEW YORK CITY – AUGUST 10-15, 2017

Among many amazing events, the Annual Meeting has nine CLE Showcase programs, 100+ entity CLE programs, many round table sessions, and various tours allowing you to experience all that New York City has to offer. Some tours include: The National September 11 Experience, New York Orientation Tour – A Slice of the Big Apple, and Lincoln Center: A Behind the Scenes Perspective with the GC.

Don’t forget to register for the annual meeting here.

CLE IN THE CITY SERIES AT THE ABA ANNUAL MEETING

Step out of the meeting room and into the law firm with the new CLE IN THE CITY SERIES. You can earn up to 4.5 CLE credits; just choose from one of twelve specialties:

1. Antitrust Law
2. Commercial Litigation
3. Construction Law
4. Corporate Governance/Mergers & Acquisitions/Securities Law
5. Corporate Reorganization
6. Litigation Management
7. Financial Technology (FINTECH)
8. International Dispute Resolution
9. The Legal Profession
10. Trial Practice

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5. Family Law
6. Financial Restructuring & Insolvency
11. United Nations
12. White Collar Criminal Law

TIPS CLE PROGRAM “DISCOVERING YOUR PURPOSE, MASTERING YOUR LIFE AND PRACTICE”

While at the ABA Annual Meeting, please make plans to attend this TIPS CLE Program focusing on work-life balance: “Discovery Your Purpose, Mastering Your Life and Practice.” The CLE will take place on Friday, August 11 from 9:45 A.M. until 10:45 A.M. at the Grand Hyatt New York.

THE ANNOTATED PERFORMANCE BOND AT THE FSLC SPRING MEETING

TIPS is sponsoring The Annotated Performance Bond program at the FSLC Spring Meeting, from May 10, 2017 through May 12, 2017, at the Ritz Carlton in Naples, Florida.

The Annotated Performance Bond program includes distinguished speakers addressing the most important substantive areas and current issues in the law interpreting standard performance bond language across the country’s many jurisdictions. The program co-chairs, Patrick Laverty of Tokio Marine HCC - Surety Group, and Cynthia Rodgers-Waire, of Wright, Constable & Skeen, LLP, have put together a program that will be of interest to anyone involved in the handling of performance bond claims, from newcomer to seasoned veteran, company claim representatives to underwriters, and lawyers to accountants to investigators to other professionals. Everyone attending will receive a flash drive of the written materials.

PUBLISH YOUR ARTICLE WITH YLD TIPS!

If you have an idea for an article and are interested in authoring an article for future newsletters, please contact Alexandra Maiolini, Esq. at amaiolini@kirwanspellacy.com.

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If not a newsletter article, consider publishing a 101 Practice Series Article with the YLD TIPS Committee. The 101 Practice Series Articles are specifically geared toward the young lawyer. This is not a law review, scholarly journal, or magazine. If you litigate or practice according to certain steps and/or procedures or just a certain way in which you practice that you would like to share with other young lawyers, this is a great opportunity to do so! This resource is designed to deliver specific, practical information in an easy-to-read format that maintains a professional presentation. These Article can include tips, lists, bullet points, examples, good quotes, lively writing, and other techniques to facilitate the readers’ grasp of information.

If interested, please contact Alexandra Maiolini at amaiolini@kirwanspellacy.com.