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Authenticating Webpages and Social Media Posts: A Practical Guide

by Dustin B. Herman, Esq., Jeradon Z. Mura, Esq., and Marie Magner

IN THE AGE OF FAKE NEWS AND DEEPFAKES, we will continue to see a steady increase in challenges to the authenticity of exhibits pulled from the internet, especially for printouts/PDFs of webpages and social media posts. With such exhibits, there are indeed reasonable questions to be asked: Did this webpage/social media post actually exist--or is the exhibit a forgery? Is the exhibit a fair and accurate representation of the webpage/social media post as it existed--or has it been altered? Who actually published/authored the original webpage/social media post?

Luckily, the bar for authenticity is very low. The judge need only find there is "evidence sufficient to support a finding that the matter in question **is what its proponent claims.**" Ohio Evid. R. 901(A). The jury will then make the ultimate determination of whether the exhibit is what the proponent claims--which means most objections to authenticity will/should go to weight rather than admissibility.¹

The problem is that many defense attorneys will not stipulate to anything and judges have wide discretion over authenticity determinations. We cannot simply print out a webpage and show up at trial and expect to have the exhibit admitted. The practical question is: **What steps do we need to take to turn a printout of a webpage/social media post into a properly authenticated exhibit at trial?**

Below, we provide 8 practical tips for preparing for and overcoming objections to the authenticity of webpages and social media posts.²

Practical Tip #1:
Remind Your Judge the Bar for Authenticity is Very Low and the Ultimate Determination of Authenticity is for the Jury

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid. R. 901(A).

- "The evidence necessary to support a finding that the document is what a party claims it to be has a **very low threshold**, which is less demanding than the preponderance of the evidence." *State v. Gibson*, 2015-Ohio-1679, ¶46 (6th Dist.) (quoting *State v. White*, 2004-Ohio-6005, 61 (4th Dist.)). See also *State v. Padgett*, 2020-Ohio-672 (8th Dist.) ("The hurdle the proponent of the document must overcome in order to properly authenticate a document is not great.... The ultimate decision on the weight to be given to that piece of evidence is left to the trier of fact.") (quoting *State v. Brown*, 2002-Ohio-5207, ¶¶33-35 (7th Dist.)); *State v. Inkton*, 2016-Ohio-693, ¶73 (8th Dist.) ("the threshold standard for authenticating evidence pursuant to Evid. R. 901(A) is low").

- * "[B]ecause **authentication is essentially a question of conditional relevancy**, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims." *State v. Gibson*, 2015-Ohio-1679, ¶47 (emphasis added) (quoting *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 539 (D.Md.2007)). Thus, "a trial court 'need not find that the evidence is necessarily what the proponent claims, but only that there was sufficient evidence that the jury might ultimately do so.'" *Id.* (quoting *Lorraine*, at 542).
- * "[O]nce the prima facie threshold is met, 'the burden of going forward with respect to authentication shifts to the opponent to rebut the prima facie showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document.'" *Gibson*, at ¶47 (quoting *Hartford Insurance Co. v. Parker*, 6th Dist., 1982 WL 6662, *7).

Practical Tip #2:
Steps for Proving the Exhibit is a Fair and Accurate Representation of a Webpage/Social Media Post that Actually Exists/Did Exist

The focus of any authenticity analysis will depend on what the proponent is claiming the exhibit to be. "Authentication procedure is a form of relevancy; that is, authentication connects the particular evidence sought to be introduced to the issues or persons involved in the trial." Evid. R. 901, Staff Notes. In the context of printouts/PDFs of webpages and social media posts, the proponent is, at a minimum, claiming that the exhibit is a fair and accurate representation of a webpage/social media post that actually exists (or did exist).

That burden can be easily satisfied with testimony from a person who visited the website and printed it/saved it as a PDF. See Evid. R. 901(B)(1) (authentication can be established through "[t]estimony that a matter is what it is claimed to be."). To do this you need: (1) someone--not you--to save the webpage as a PDF;³ and (2) an affidavit from the person that did so which states--in as much detail as possible--how and when the webpage was accessed, how the webpage was saved as a PDF, and that the PDF is a fair and accurate representation of the webpage at the time it was accessed. Make sure the judge can track the steps the person took in accessing the website and creating the PDF (e.g., at this date and time the affiant used Google Chrome to access the webpage; affiant saved the webpage as a PDF using the "save as PDF" function (or whatever procedure the person used); the PDF is a fair and accurate representation of the original webpage; and the PDF is attached). The PDF itself should contain the full URL of the webpage and the date and time the webpage was saved as a PDF.⁴

The cheapest (free) way to do this is to have a staff member save/print the webpage and sign an affidavit. A better way is to hire a company to archive the webpage and provide an affidavit of the process they used for doing so. There are many companies out there that provide this service (e.g., Hanzo Archives, Inc.). They usually have their own software that creates a highly accurate copy of the webpage (much better than using the "save as PDF" function in your web browser). The cost for an affidavit is around \$100 per webpage. If live testimony is necessary, that would cost extra.

Following those steps will establish the fact that the webpage/social media post was actually published on the internet at a specific point in time--and your judge will likely be annoyed if defense counsel

requires you to bring the witness in live to testify. But you should make sure the witness is available to testify--and on your witness list--just in case. Of course, defense counsel may still contest who authored/published the webpage/social media post, and that issue is dealt with below.

Practical Tip #3:
Proving Source Authenticity

The proponent of a webpage is usually, but not always, claiming that the webpage was authored/published by a specific person (e.g., the defendant, a defense expert, a governmental body, a medical authority, etc.). Fortunately, "**challenges to the authorship of documents... normally go to the weight rather than admissibility.**" *State v. Bell*, 2019-Ohio-340, ¶73 (8th Dist.) (quoting *State v. Townsend*, 2005-Ohio-6945, ¶¶ 54-55 (7th Dist.)). We can often satisfy the burden of source authenticity by relying on circumstantial evidence--e.g., "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances", see Evid. R. 901(B) (4)--that would allow a reasonable juror to conclude the webpage/social media post was published by the purported publisher. *Id.*

Webpages almost always contain indicia of authorship (e.g., the defendant's name, logo, physical address, email address, phone number, location, other identifying information, etc.). Indeed, the Eighth District has upheld the admissibility of a plaintiff's webpage based merely upon an "affidavit attesting that [the witness] retrieved the information about [Plaintiff's] Microtel Hotels from its webpage on the Internet." *Kassouf v. White*, 8th Dist. Cuyahoga No. 75446, 2000 WL 235770, *4. More recently, the Sixth Circuit upheld the admission of Facebook evidence based on circumstantial evidence, including an

"account in defendant's name, an email address with his name and moniker, a location linked to defendant, dates that correspond to witness testimony, and a picture of defendant." *United States v. Quintana*, 763 Fed.Appx. 422, 427 (6th Cir.2019).

If you have a particularly skeptical judge, you should consider trying to establish that the defendant registered the domain name of the website. For a quick and dirty reference, try lookup.icann.org/lookup. Domain registration services like GoDaddy.com act as a proxy, publishing their information instead of the private owner of a domain. GoDaddy is responsive to subpoenas for domain-owner identities and account information. Mail subpoenas to Compliance Department, GoDaddy.com, LLC, 14455 North Hayden Rd., Suite 219, Scottsdale, AZ 85260.

Unlike webpages authored by a defendant, government websites--and the rules and regulations published by governmental and administrative bodies--are self-authenticating under Evid. R. 902(5). *State v. Frakes*, 2008-Ohio-4204, ¶44 (5th Dist.) ("The NHTSA manual qualifies as a self-authenticated exhibit under Evid. R. 902(5) and as such, extrinsic evidence is not required."). See also *Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 WL 33313134, *3 (S.D. Ohio) ("The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under Rule 902(5) of the Federal Rules of Evidence.").

You can use the rules and circumstantial evidence connecting the webpage to the purported author to satisfy the low authenticity burden. If the defendant wants to argue to the jury that the webpage was authored by someone else they are free to do so, but that should not affect the admissibility of the exhibit.

Practical Tip #4:
Address Authenticity Issues for a Defendant's Statements Through Deposition Testimony, Stipulations, Requests for Admissions, or Interrogatories

Most authenticity issues can be--and should be--dealt with in advance of trial. "A member of the Federal Rules of Evidence Advisory Committee has stated: 'it may be well to remind bench and bar that in any event the problem of authentication or identification should be confronted before actual trial. Whether by interrogatories, depositions, requests for admission or--as is most effective--by confrontation in final pre-trial conference many (if not all) problems of authentication or identification should be isolated and resolved.... In a recent case...the writer had more than 1100 documents admitted in a little over two hours. This was possible because Judge Fullam ordered that counsel should meet *before* the final pre-trial conference to mark all documents and resolve all problems of authenticity or identity.'" Ohio Evid. R. 901, Staff Notes.

You can authenticate a defendant's current webpages, past webpages, social media posts, etc., by: (1) having the defendant authenticate the exhibit at the defendant's deposition; (2) serving requests for admissions--"A party may serve upon any other party a written request for the admission... of... the genuineness of any documents described in the request[.]" Ohio Civ. R. 36(A); (3) interrogatories; or (4) getting a stipulation in advance of trial.

Moreover, the Ohio Supreme Court has held that any documents produced by a party in discovery will be considered authentic. *Columbus City Schools Bd. of Education v. Franklin Cty. Bd. of Revision*, 2020-Ohio-353, ¶22 (Ohio).

Practical Tip #5:
Users Can Download Their Entire Social Media Profiles

Authenticating social media evidence can be more complicated than merely showing a witness a printout of a Facebook photo or Tweet that includes an account name and profile picture. See e.g., *United States v. Vayner*, 769 F.3d 125 (2d Cir.2014) (prosecution failed to authenticate print out of social media profile bearing defendant's name). However, most social media platforms have a function that allows a user to download their entire profile, including all postings, messages, etc., made on the platform. The downloaded data will often include information identifying the IP addresses and devices used to log on to the account and can be invaluable in showing, for instance, that a post was made at 2 am, from the party's own phone, at or near their home. Please note, however, that the downloaded data will not include deleted posts or deleted direct message conversations, nor any indication of whether something was deleted.

You should consider sending a request for the defendant to produce the relevant data from their social media platform(s)--and include instructions in the request for how the defendant can and should download their social media platform:

- ♦ **Facebook:** Go to Settings > Your Facebook Information > Download Your Information. Select the relevant date range and information to include, and click "Create File." The resulting zip file can then be shared with all relevant parties.
- ♦ **Instagram:** From the profile page, select the Settings gear > Privacy and Security > Request Download under the Date Download section.

- ♦ **Twitter:** Select "More" in the left-hand menu > Settings and privacy > Account > Your Twitter data. Enter the password under "Download your Twitter Data" and select "Request Archive."
- ♦ **WhatsApp** uses end-to-end encryption and does not store messages or transaction logs anywhere except on a user's device. WhatsApp was purchased by Facebook in 2014. In the app go to Settings > Account > Request Account Info > Request Report.

If you use social media, go through the download process for your own account and get familiar with how it works--and what information you can and cannot get from different platforms. Note that most social media companies are not keen on providing social media records or authenticating contents thereof--so do not count on them to simplify your authentication process. If you obtain social media content other than through discovery from a defendant, you will need to authenticate it similarly to other webpages.

Practical Tip #6:
Avoid Problems of "Link Rot" and "Reference Rot" By Creating a Permanent Record of a Webpage with Harvard's Perma.cc or a Similar Archival Service

Websites are inherently dynamic. They are constantly changed, updated, and deleted. There are two primary issues that arise with older web content--link rot and reference rot. Link rot occurs when a URL is broken and no longer pulls up content (think a "404: Page Not Found" warning). Reference rot occurs when a URL is still active but the content to which it links has changed. Reference rot is actually a huge problem. Indeed, "50% of the URLs within U.S. Supreme Court opinions suffer reference rot." See

<https://harvardlawreview.org/2014/03/perma-scoping-and-addressing-the-problem-of-link-and-reference-rot-in-legal-citations/>.

If you are seeking to admit a printout of a webpage that is no longer available, you may run into problems because the court can no longer verify the existence of the webpage by simply visiting it. [T]he attached press release here did not contain a web address to its location on the Ohio Attorney General's website. Moreover, a search of that website did not locate the press release. Therefore, we hold that the attached press release does not satisfy the condition precedent of authenticity, and as a result is inadmissible as evidence." *Residential Funding Co. v. Thorne*, 2012-Ohio-2552, ¶30 (6th Dist.). See also *Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir.2013) (Posner, J.) ("A document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself").

You can avoid those issues by creating a permanent record of the website using an archival service like Harvard's Perma.cc, which allows you to make customized permanent records of webpages (the first 10 are free, but after that you will be charged a fee). The Wayback Machine has a similar "Save Page Now" feature.

Practical Tip #7:
An Increasing Number of Courts Will Take Judicial Notice of the Wayback Machine/Internet Archive

If the web content was changed or deleted before you could preserve it yourself, we highly recommend taking advantage of the Wayback Machine. If you are not familiar with the Wayback Machine, you need to be. Courts across the country have taken judicial notice of the contents of the Wayback Machine (which is also known as the "Internet

Archive"). See *Wensink Farm Seeds, Inc. v. Lafever*, No. 16-CV-1282, 2017 WL 2735573, *6 (N.D. Ohio 2017) ("the Internet Archive... has been found to be an acceptable source for the taking of judicial notice.") (citations omitted); *Pohl v. MH Sub I, LLC*, 332 F.R.D. 713, 716 (N.D. Fla. 2019) ("This Court follows the lead of the overwhelming number of courts that have decided the issue and takes judicial notice of the contents of Wayback Machine evidence because they 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)(2).").

Thus, for those courts willing to take judicial notice of the Wayback Machine, to properly authenticate a webpage from the Wayback Machine all you need is an affidavit from the person who saved the webpage from the Wayback Machine, and you're good to go (although source authenticity--that is, the author of the original webpage--might still be an issue). To gauge the level of scrutiny your judge will apply to Wayback Machine evidence, you should simply ask your judge in advance of trial if they are familiar with the Wayback Machine.

Practical Tip #8:
If a Court Will Not Take Judicial Notice of the Wayback Machine, You Can Get an Affidavit Directly from the Wayback Machine

For courts that will not take judicial notice of the Wayback Machine's reliability, you will need additional evidence to authenticate its results. The Second, Third, and Seventh Circuit courts and a number of district courts ask for an affidavit from a person with knowledge of how the Wayback Machine works.⁵

Due to the number of affidavit requests it receives, the Internet Archive established a system for responding to

them for a fee. Requesters take the first step by submitting payment and a list of desired URLs to be provided.⁶ The Internet Archive will respond to any requests deemed reasonable.

A Wayback Machine affidavit costs \$250 plus \$20 per requested URL (\$30 for those with downloadable or printable files, like .pdf files). There is an additional \$100 fee for notarization which must be expressly requested if desired. The Internet Archive accepts payment via check or PayPal. Checks can be sent to Internet Archive, 300 Funston Avenue, San Francisco, CA 94118. If using PayPal, send payments to info@archive.org through <http://www.paypal.com>. Immediately send a confirmation of payment email to info@archive.org referencing your affidavit request. Whether through mail or PayPal, payments absolutely must reference the affidavit request and additional information so the Internet Archive can match your payment with your requested URLs. Due to being stiffed in the past, the Internet Archive will not process requests without first receiving payment.

The requested URLs must be sent electronically to the Internet Archive at info@archive.org. An extended URL must be provided for every desired page, even if they fall under a single domain. While the Internet Archive does not set a hard limit on how many URLs can be requested, it will refuse any request deemed unreasonable.

The Internet Archive makes no guarantees for response time but tries to turn these requests around in fifteen business days. The Internet Archive sends the requested documents by regular mail but will use FedEx if a FedEx account number is provided by the requester. It will not send documents by fax. You can learn more information at <http://www.archive.org/legal>.

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The bottom line is that you must prepare in advance of trial to overcome objections to authenticity of webpages and social media posts. We hope these tips will help you in your practice! ■

End Notes

1. Authenticity challenges “normally go to the weight of the evidence the trier of fact should place on the evidence rather than their admissibility.” *State v. Brown*, 2002-Ohio-5207, ¶ 40 (7th Dist.).
2. To be clear, there are obviously other objections under the rules of evidence (e.g., hearsay, relevance, 403, etc.) that must also be overcome before an exhibit can be admitted into evidence. This article focuses solely on overcoming challenges to authenticity.
3. Here we use “PDF,” but it could also be saved as a JPEG or another type of electronic file or printed directly to a hard copy exhibit.
4. “[C]ourts have considered website print-outs sufficiently authenticated where the proponent declared that they were true and correct copies of pages on the internet and the print-outs included their webpage URL address and the dates printed.” *Haines v. Home Depot U.S.A., Inc.*, 2012 WL 1143648, *7 (E.D.Ca. 2012).
5. *See, e.g., Specht v. Google Inc.*, 747 F.2d 929, 933 (7th Cir. 2014); *United States v. Bansal*, 663 F.3d 634, 667-68 (3d Cir. 2011); *United States v. Gasperini*, 894 F.3d 482, 490 (2d Cir. 2018); *My Health, Inc. v. GE*, W.D. Wis. No. 15-cv-80-jdp, 2015 U.S. Dist. LEXIS 172252 at *10 (Dec. 28, 2015); *St. Luke’s Cataract & Laser Inst., P.A. v. Sanderson*, M.D. Fla. No. 8:06-cv-223-T-MSS, 2006 U.S. Dist. LEXIS 28873 at *6 (May 12, 2006).
6. Pages found on the Wayback Machine will have a URL similar to <http://web.archive.org/web/19970126045828/http://www.archive.org/>.

Editor’s Note

As we finalize this issue of the *CATA News*, we invite you to start thinking of articles to submit for the Winter 2020-2021 issue. If you don’t have time to write one yourself, but have a topic in mind, please let us know and we’ll see if we can find a volunteer. We would also like to see more of our members represented in the Beyond the Practice section. So please send us your “good deeds” and “community activities” for inclusion in the next issue. Finally, please submit your Verdicts & Settlements to us year-round and we will stockpile them for future issues.

From everyone at the *CATA News*, we hope you enjoy this issue!

Kathleen J. St. John, Editor