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At the Intersection of Social Media, Text Messages, Tweets, Screen Shots and the New Jersey Rules of Evidence: State v. Hannah.

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On December 20, 2016, the Appellate Division (Judge Leone) published the decision of *State v. Hannah*. The case itself — a de novo appeal from a conviction in Municipal Court — is not of great importance (other than to Ms. Hannah). However, this case is an important published decision that centers on the authentication (see ~~N.J.R.E.~~ 901) of social media posts (in this case a purported "Twitter" fight). Any attorney in New Jersey who litigates (regardless of subject matter) must read this decision because the authentication of social media, texts, posts, Tweets, etc., are handled with a wide range of approaches.

As a starting point, ~~N.J.R.E.~~ 901 provides that: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." In other words: "*Judge, I swear, it is what it is…*" But, what does it require? The authenticity of a particular piece of evidence can be established by direct proof (for example, testimony by the author admitting authenticity), ~~see~~ ~~N.J.R.E.~~ 903; but, this level of proof (sometimes called "direct proof") is not required. For example, under what is known as the "reply doctrine," a writing "may be authenticated by circumstantial evidence establishing that it was sent in reply to a previous communication." *See State v. Mays*, 321 ~~N.J. Super.~~ 619, 628 (App. Div.), ~~certif. denied~~, 162 ~~N.J.~~ 132 (1999).

However, as many people know, social media, text messages, screen shots, etc., can be manipulated. At the far (terrible) end of the spectrum are these: http://nypost.com/2016/12/01/teen-bullied-with-fake-sex-profiles-kills-herself-in-front-of-family/ and http://www.vocativ.com/380055/stephani-lawson-framed-boyfriend-fake-facebook/. Accordingly, a Judge of the Superior Court may be left

with a modern-day "he said, she said" — except this one has "screen shots" or "screen grabs" of a purported social media page or text message. In *State v. Hannah*, the court reviewed two conflicting approaches to authentication of this "class" of evidence: the "Maryland approach" and the "Texas approach", both of which stem from cases involving MySpace postings.

Under the Maryland approach, *see Griffin v. State*, 19 ~~A.~~3d 415, 423-24 (Md. 2010), the court ruled that greater scrutiny must be applied to "social media" evidence than to "letters and other paper records" due to "[t]he potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user[.]" Thus, in Maryland, one of three methods of authentication can be used:

1. *The first method is "to ask the purported creator if she indeed created the profile and also if she added the posting in question, i.e. '[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be.'"*
2. *The second method is "to search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question."*
3. *The third method is "to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it."*

Any Attorney who has litigated, a domestic violence proceeding under the Prevention of Domestic Violence Act for example, knows that Maryland methods #2 and #3 are generally unavailable means of obtaining evidence due to the limited Discovery available in a domestic violence case. Of course, method #1 is unavailable in a criminal proceeding (you know, that whole Fifth Amendment privilege*).* In fact, while the Maryland approach is the most prophylactic approach that can be utilized to avoid the introduction of improper evidence to a jury (or the court), it is a bit unwieldy or impractical.

On the other hand, under the Texas approach, *see Tienda v. State*, 358 ~~S.W.~~3d 633 (Tex. Crim. App. 2012), the court held that "the internal content of . . . [the] MySpace postings – photographs, comments, and music – was sufficient circumstantial evidence to establish a prima facie case such that a reasonable juror could have found that they were created and maintained by" a particular individual. The Texas appellate court further held that "jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consistent with Federal Rule 901 and its various state analogs." ~~Id.~~ at 639.

Assessing the two approaches, the New Jersey Appellate Division rejected the Maryland approach and, quite simply, held: "[w]e need not create a new test for social media postings." It added, as to Hannah's case, that the introduction of "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." That is, like the lower courts, the Appellate Division rejected the common defense asserted by defendants, like Hannah that she "deleted" her Twitter page and "[anybody can make a fake Twitter page and put your name on it and put something on there."

So, there you have it. Following *State v. Hannah*, attorneys seeking to introduce social media evidence may generally follow the methods used for non-social media writings, photographs, etc.