



THE ATTORNEY GENERAL OF TEXAS
KEN PAXTON



**#Admissibility:
 Getting Social Media Evidence into the Record**


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Overview

- ▶ Capturing the Evidence
- ▶ Getting the Evidence Admitted
 - Relevance
 - Authentication
 - Exclusionary Rules
 - Hearsay
 - Rule 404 Character Evidence



Hypothetical

- ▶ On January 13, there was a gang fight at the local mall resulting in 5 youths being seriously wounded
- ▶ 14 yo Chase is suspected of participating in melee, but denies being at the mall
- ▶ Prosecutor seeks to admit Facebook posts

	
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Capturing the Evidence

- ▶ You found it on the Internet. Now what?



Screenshots

PrintScreen



Full Screen & Taskbar

Alt+PrintScreen



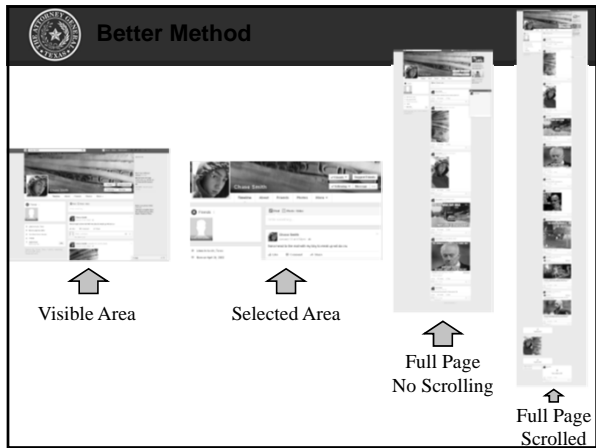
Active Window Only, No Taskbar



Better Method

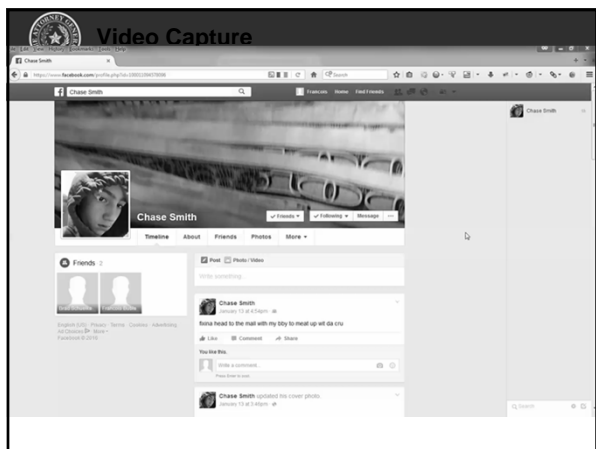
- ▶ Browser Extension (e.g. Fireshot)
- ▶ Copy full page or just a portion
- ▶ Save in multiple formats
 - pdf
 - jpg
 - png
 - gif
 - Bmp
- ▶ Make annotations and add text
- ▶ Show what appears "below the fold"





Video Capture

- ▶ Camtasia Studio (TechSmith)
 - \$\$
 - Lots of options and features
 - Can edit videos
- ▶ Snagit (TechSmith)
 - \$
 - Fewer options, but probably sufficient
 - Limited or no editing capability (e.g. blurring sensitive info)
- ▶ Open Broadcaster
 - Free
 - Doesn't compress the files





Capturing Videos From the Web

- ▶ Video Downloadhelper
 - Extension Available for Firefox and Chrome
 - Firefox version has more features
- ▶ RealPlayer
- ▶ If those don't work, play video with Camtasia/Snagit



Full Site Capture

- ▶ Save a fully-functional version of a website locally and access it later with a browser
- ▶ Can be used to recreate a website in a courtroom
- ▶ Teleport Ultra (Tenmax.com)
 - \$
 - Easy to use
 - Doesn't always work
- ▶ Win HTTrack
 - Free
 - More powerful, can overcome breakdowns
 - Requires more technical knowledge to use



Getting the Material Admitted

- ▶ Relevant – Rule 401-402
- ▶ Authentic
 - Rule 901
 - Rule 104
- ▶ No Exclusionary Rule
 - Rule 404
 - Rule 802



Authentication

- ▶ Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012)
- ▶ Two Steps
 - It is what it purports to be
 - It was created by the Defendant



Authentication - Step 1

- ▶ Similar to photograph
- ▶ Investigator testify capture looks just like what I saw online
- ▶ If obtained from social network probably need business record affidavit



Authentication - Step 1 - Pitfalls

- ▶ Printout distorts the format, so not identical
- ▶ Capture does not capture some feature on the page (e.g. a video, advertisements)
- ▶ Full page not captured



Authentication - Step 2

- ▶ Must show connected to Defendant
 - Some courts very skeptical of Internet evidence
- ▶ Doesn't have to be definitive
 - Trial Court does not need to be persuaded
 - Offer facts sufficient to support a reasonable jury determination that evidence is authentic
 - Some courts require preponderance of the evidence
- ▶ Objecting party can seek to demonstrate he or she did not create the evidence
- ▶ If jury could find either way, trial court should admit the evidence
 - Possibly conditionally admit the evidence with proper instruction – Rule 104



Authentication - Step 2

- ▶ No single approach; best method for each case will depend on nature of evidence and circumstances of the case
- ▶ Typically not sufficient that social media page includes Defendant's name, photos, etc.
 - Someone else could set up fake profile
 - Hacked account
- ▶ Testimony from person with personal knowledge
 - Person admits he/she posted (e.g. in interrogation or to third party)
 - Someone with the person when he/she posted
- ▶ Distinctive Characteristics



Distinctive Characteristics

- ▶ Unique speech patterns
 - E.g. consistent with non-native speaker (See Campbell v. State, 382 S.W.3d 545 (Tex.App.-Austin 2012))
- ▶ Abbreviations or slang commonly used by person
- ▶ Use of punctuation or emoticons
 - E.g. always using lots of !!!!!!!! or 😊😂😂😂😂😂
- ▶ Content only known to Defendant or claimed author
- ▶ Demonstrate nobody else had access



Distinctive Characteristics

- ▶ Back to the hypothetical
 - Possibly a witness present when he posted
 - Witness testify that Chase always used "fixina" and "bby" and misspells "meet"



- Show Chase was using the account on day in question (so not hacked)
 - e.g. witness receive private message on day of posts



Technical Authentication

- ▶ Forensics of the claimed author's computer
- ▶ Legal process to social media company
 - Stored Communications Act
 - Non-content records – warrant or court order
 - Content
 - Less than 180 days – Warrant
 - More than 180 days – warrant, administrative subpoena, § 2703(d) order



Technical Authentication

- ▶ Subscriber Information
 - Depends on company, but FB says they have:
 - Email address
 - Phone Number
 - Date and Time of account creation
 - Last 2-3 days of login
- ▶ Content
- ▶ Connection logs
 - Possible IP logs
 - Depends on timing and company's record retention policies
 - If yes, warrant/court order to ISP to show who using IP at the time



Exclusionary Rules

- ▶ Character Evidence - Rule 404
 - United States v. Phaknikone, 605 F.3d 1099 (11th Cir. 2010)
- ▶ Hearsay
 - Admission by Party Opponent
 - Not offered for truth of matter asserted



Thank You

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