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## New Guidance in Colorado on Rules of Evidence for Social Media

When litigating cases in court, lawyers must follow formal rules of evidence. In 1965, Chief Justice Earl Warren of the United States Supreme Court started developing what would eventually become formal Rules of Evidence. The underlying principles behind these rules, however, had been tested for centuries. With the 21st century come new tests. For example, how do the square pegs of Facebook communications fit into the round holes of the Rules of Evidence? The Colorado Court of Appeals just answered that question. Although a criminal case, the decision offers guidance to any litigant seeking to admit social media posts at trial.

On Feb. 26, 2015, in *People v. Glover*, the Colorado Court of Appeals upheld a trial court's ruling to allow a prosecutor to admit a defendant's Facebook communications, including his status updates, wall posts, and chats, but held that the trial court had admitted them in the wrong way. The trial court admitted the records as what are called "self-authenticating business records" under Rules 902(11) and 803(6) of the Colorado Rules of Evidence ("CRE"). In other words, the trial court entered them as if they were the business records of Facebook. On review, the Court of Appeals held that those were the wrong rules for analyzing the authenticity of social media records because, while a user's communications are captured in Facebook's records, they are themselves not created or relied upon by Facebook.

The case involved the murder of a member of a teenage "street family" comprised of runaway teens. The defendant, the leader of the street family, was charged with ordering the murder. The twist? The defendant ordered the murder through a Facebook message. At trial, the prosecutor sought to admit the Facebook message to prove that the defendant had ordered the murder.

The central question the court faced was whether the prosecutor had laid enough foundation to authenticate the Facebook records. In rejecting the trial court's basis for admitting the records, the Court of Appeals held that the prosecutor had instead met the requirements of CRE 901(b). To authenticate social media posts under CRE 901(b), the Court of Appeals held that a litigant (here the prosecutor) faces two hurdles: (1) proof that the records are actually from Facebook (or some other social media site) and (2) proof that the statements in the records were made by the defendant.

The prosecutor overcame the first hurdle with an affidavit from a records custodian at Facebook certifying that the records were from the account linked to the defendant and that the records were made at or near the time the information was transmitted through Facebook. The Court of Appeals found that the prosecutor also overcame the second hurdle. The court began its analysis of this more challenging hurdle by considering the following aspects of the defendant's profile:

- The name on the profile;
- The photos linked to the profile;
- Witness testimony that they communicated with the defendant through the profile and never doubted it was the defendant;

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- The phone number used to create the profile;
- The defendant's nickname appeared on the profile.

All of that suggested that the posts were really by the defendant, not someone who had, for example, opened a false account under his name. After considering each of these factors and their weight collectively, the Court of Appeals held that the prosecution had met its burden.

The Court of Appeals ruling in *Glover* provides a blueprint for both offering and objecting to the admission of social media records at trial. When drafting or reviewing a company social media policy or when auditing one's own individual use, companies and individuals alike may want to review the two hurdles the Court of Appeals identified, and consider whether they themselves would be able to overcome or defend against them. In *Glover*, it took an experienced police officer to testify to those things. In a civil case, litigators will need to work with their clients to identify an appropriate witness capable of meeting this new test. Although the Court of Appeals' decision is based on the CRE, not the Federal Rules of Evidence, the court's ruling has the potential to act as persuasive authority in other jurisdictions.

*This document is intended to provide you with general information regarding rules of evidence regarding social media in Colorado. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*

**Bill C. Berger**  
Shareholder  
[bberger@bhfs.com](mailto:bberger@bhfs.com)  
303.223.1178

**Amanda C. Hoberg**  
Associate  
[ahoberg@bhfs.com](mailto:ahoberg@bhfs.com)  
303.223.1264