

Selfies in Court: Snapchat as Admissible Evidence

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Social media is now a widely accepted and important medium of evidence in court. Yet Snapchat, a new and popular image messaging app among the youngest generation of smartphone users threatens to upend the field of social media evidence. Snapchat is unique among social media platforms because it functions to avoid permanence. Such is the appeal to today's teenagers: a normal "snap" (a picture or video captured through the app) can only be viewed for a maximum of ten seconds before it deletes. Users may also choose to upload a snap to their "Story," which posts the picture or video for all their contacts to view multiple times within a twenty-four hour period. The deleting function unique to Snapchat presents inherent difficulty in saving images taken through the app. In fact, recipients of snaps are left with only one method of saving the images they see: the "screenshot." A screenshot is a smartphone function not related to Snapchat which captures what the viewer sees on their phone screen at that moment and can be saved. While it has been these screenshots which have allowed Snapchat to enter the world of admissible evidence, it is now use of the app itself as evidence which have signaled courts' acceptance of Snapchat and its greater value to justice in the near future.

One case involving Snapchat that garnered national attention relied on screenshots of snaps as important evidence. In July 2016, a jury found two Massachusetts teenagers guilty of assault to rape and indecent assault and battery of a then-16 year old teenage girl. [1] The assault was captured on Snapchat and a friend who viewed the snaps that night took screenshots of the videos. [2] These screenshots were submitted as evidence to the jury without objection from the defense. [3] One of the snaps of the assault was also obtained by subpoena because the recipient

had not opened it yet (and thus had not been deleted), but this video was not able to be presented to the jury since neither Snapchat nor the teenager who took the video would testify to its authenticity. [4] As this latter example illustrates, some courts have blocked the use of Snapchat as evidence unless the individual who took the snap is willing to testify to its authenticity.[5] As an alternative, some courts have reached out to Snap, Inc. itself but, per their Law Enforcement Guide, they refuse to participate in any lawsuit, with some exceptions (such as imminent danger). [6]

Another high-profile case involving Snapchat screenshots involved a Western Pennsylvania high schooler who shot and killed his sixteen year old classmate and former friend, then took a selfie with the body.[7]This selfie was sent over Snapchat to a friend who managed to take a screenshot before the snap deleted.[8] The District Attorney who prosecuted the teenager called the Snapchat screenshot “a key piece of evidence” in the trial that convicted the high schooler as an adult for first-degree murder and homicide.[9] Once again, the defense did not object to the screenshot as evidence.[10] As evidenced by this case, Snapchat has grown increasingly popular in part because it provides a platform for users to boast about their daily activities and achievements. When these activities are unlawful, a criminal’s snaps may be turned against them as important evidence because Snapchat screenshots have become an acceptable form of evidence.

In one of the highest profile cases involving Snapchat, the victim of a devastating car crash impleaded Snapchat, alleging the app company was contributorily negligent. Maynard v. McGee, Spalding County Georgia 2016, 7. The victim, an Atlanta-area Uber driver hit by a teenage girl driving a car that was speeding over 100 m.p.h., alleged that Snapchat’s speed filter, which records the speed at which one is going directly onto the app screen, was a “critical cause”

of the crash. [11] The teenage driver captured and sent snaps directly before and after the crash, including one selfie captioned “Lucky to be alive.” [12] Even though some screenshots were admitted to the jury as evidence, the plaintiffs relied most heavily on the driver’s use of the app itself. The other passengers in the car were called to testify that Christal McGee, the teenage driver, expressed a desire to drive in excess of 100 m.p.h. and post a filtered snap to her Story. [13] She was indeed successful in this endeavor, as evidenced by one snap of the car’s odometer captioned “180 kmh LMAO” (180 kmh is about 112 mph). [14] The fact that the plaintiffs emphasized McGee’s very use of Snapchat to paint a portrait of negligence hints at the danger snaps pose to society.

A separate case in California also pointed to the dangers of Snapchat without screenshots as evidence. [15] One student, M.H., took a humiliating snap of a classmate, M.B., in the mens’ bathroom of their school, resulting in widespread ridicule that led to M.B.’s suicide. [16] The District Attorney’s office, which prosecuted the case, was able to “recreate” the humiliating snap with the help of a friend who also saw the video that day but did not think to screenshot it. [17] This recreated snap was actually admitted as evidence to the court, again without objection from the plaintiff, even though it was not the original video. [18] This case is therefore important precedent for the long-term danger and value of snaps which at first do not seem harmful. Although the app has the potential to seriously harm others in society by means of one snap, Snapchat is redeemed by the fact that the app can substantially help achieve justice.

Within the past year, Snapchat “geofilters” have also been used as evidence. These filters, which mark one’s snap with a design of the user’s specific location, have seen far less use than screenshots in court. However, their submission to police for investigative purposes has become ever more frequent, as evidenced by two recent incidents in Massachusetts. In October 2016, a

Fall River, Massachusetts high schooler uploaded to his “Story” a snap of his classmate holding what appeared to be a gun on his lap in class. [19] The school, B.M.C. Durfee High, was immediately put on lockdown when the police were shown the snap with the Durfee “geofilter,” which can only be applied when a user is within the specific location of the design (here, the high school campus). [20] The student was later arrested. [21] Then, on the day after Donald Trump became President-elect of the United States, two Wellesley, Massachusetts college students drove their truck, with Trump flag waving, through Wellesley College, the all-girls alma mater of Hillary Clinton.[22] A student who witnessed the incident captured a video of the truck on Snapchat and attached the Wellesley College geofilter.[23] This snap was submitted to the police investigating the incident as the only evidence besides eyewitness reports that the students were in fact driving through the campus. [24] While snapchat geofilters have not debuted in any major court case, its use in police investigations is a certain harbinger for its use as evidence in court. Location is important to so many investigations and cases. Since geofilters can stamp the location onto any snap, a function not available for normal pictures and videos, geofiltered snaps are likely to be important pieces of evidence in future litigation involving the app.

There is little in terms of judicial opinions to explain why judges have chosen to admit Snapchat as evidence, but the precedent of social media in court provides a valuable guide to its past and future use. When social media was first introduced as evidence in court, judges referred to the Federal Rules of Evidence for guidance. [25] One passage that judges have primarily looked at for guidance is Article IX (Rules 901-903) on authentication and identification. Rule 901 states that to achieve authentication, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” [26] Examples listed include witness testimony, non-expert opinion, and comparison to similar specimen. [27] This rule has

become the first of many light-posts which have guided judges in the dark of social media admissibility down the path to legitimate social media evidence, one federal rule at a time.

Now, the admissibility of social media is becoming well-established. Since its rise in the early 2000s with Myspace and later Facebook, social media has become a well-accepted form of evidence due in large part to its popularity and appeal of anonymity, which in turn has encouraged candidness. In 2011, a Pennsylvania District Court advised that evidence from social media platforms should be treated as any other photographs, as long as the court follows the Federal Rules of Evidence. [28] The court also noted the importance social media poses: “As the use of social media...has proliferated, so too has the value of these websites as a source of evidence for litigants.” [29] The Second Circuit has also weighed in, arguably putting any apprehension to rest when it openly doubted that authentication of internet-related evidence should be held to higher scrutiny than traditional photographs. [30]

Even as the question of admissibility has been almost settled, it must still be determined how to present Snapchat evidence to a jury. On this question, judges may find direction in previous federal cases which have proposed two different approaches to dealing with social media evidence. The first approach more strictly scrutinizes pictures obtained from social media by placing the burden of authenticating the pictures on the party attempting to present the pictures to the jury. [31] This approach looks to Federal Rules of Evidence 901, which requires that the proponent “support a finding that the item is what [the proponent] claims it is” before it may be presented to the jury. [32] The other approach grants more leniency by allowing pictures obtained from social media to be authenticated by the jury itself during trial. [33] This approach means more pictures are able to be shown to the jury, yet recognizes the issue of authentication

as a matter of fact to be determined by the jury. [34] Both approaches may apply to Snapchat. Authentication is certainly an issue in admitting Snapchat screenshots because these saved images can easily be edited and reproduced, so authentication may sometimes be a threshold issue to make trials more efficient. Additionally, features of Snapchat such as geofilters are often inconsistent and misleading, so it may be a factual question as to whether the geofilter may be evidence of a snap taking place in that location.

An impending yet uncertain third party may yet become a crucial player in the use of Snapchat as evidence. A digital forensics company in Utah has recently attracted a national clientele intent on availing its services to retrieve snaps already deleted. [35] For a price, this company is able to hack into the Snapchat app on one's phone and recreate a snap sent with surprising accuracy. [36] The company's services have already been used in divorce, personal injury, and kidnapping cases involving Snapchat. [37] So, while digital forensic recreation of snaps may eliminate the last bar to the app's treatment as fully acceptable evidence—the deleting function—authentication may rear its ugly head here too. Accuracy must be adhered to before society may gain the benefit of undeletable snaps.

The use of Snapchat is growing and here to stay. As of Fall 2016, Snapchat is now the third-most downloaded app among millennials, claims the second-most daily users among all social media apps (behind only Facebook), and is the most-used picture and video-oriented app. [38] All this means that the youngest generation is recording pictures and videos of their surroundings with Snapchat more than any other app. With more people recording what they see every day, Snapchat has the power to help justice in civil and criminal cases. Of course, the app's downsides must be recognized all the same. The recreation of snaps is too new to judge its

accuracy, geofilters often stamp the wrong location onto snaps, and any picture taken with the app can be instantly edited using in-app tools. To focus on these downsides would eliminate perhaps the future's most important evidence-collecting method. So, while the app's deleting function may be erasing countless pieces of important pieces of evidence every day, it also presents an opportunity to harness a new era of admissible evidence. To put it simply, the positive potential of Snapchat far outweighs its downsides. Instead of rejecting Snapchat evidence by adhering to strict authentication standards, the app's power to record important, sometimes crucial evidence should be embraced by courts in the name of justice.

[1]. Crimaldi, Laura and Wang, Vivian, *Pair Convicted in Snapchat Rape*, The Boston Globe, <https://www.bostonglobe.com/metro/2016/07/19/deliberations-resume-snapchat-sex-assault-case/EJEg111tW3KKGcXQeDqOJP/story.html> (last visited December 4, 2016).

[2]. *Id.*

[3]. Telephone Interview with Laura Crimaldi, Metro reporter, Boston Globe (Oct. 26, 2016).

[4]. *Id.*

[5]. *Id.*

[6]. *Snapchat Law Enforcement Guide*, Snap, Inc., updated October 11, 2016.

[7]. Holley, Peter, *Teen killed classmate and uploaded 'selfie' with the body to Snapchat*. *Washington Post*, https://www.washingtonpost.com/news/post-nation/wp/2015/02/08/teen-murdered-classmate-and-uploaded-selfie-with-the-body-to-snapchat-police-say/?utm_term=.2606b4cc43d6 (last visited December 4, 2016).

[8]. *Id.*

[9]. *Id.*

[10]. *Id.*

[11]. *Id.* at 1.

[12]. Mettler, Katie, *Teen took Snapchat photos while crashing Mercedes at 107 mph. Now her victim has sued Snapchat*, Washington Post, https://www.washingtonpost.com/news/morning-mix/wp/2016/04/28/lawsuit-blames-snapchat-for-107-mph-crash-in-mercedes-caused-by-teen-girl-using-speed-filter/?utm_term=.37af41108d72 (last visited December 4, 2016).

[13]. Fleischer, Jodie, “Passengers say 100 mph crash encouraged by Snapchat ‘speed filter.’” *WSB-TV Atlanta*, May 2, 2016.

[14]. Maynard’s Complaint for Damages (April 19, 2015) (unpublished manuscript), 3. <http://www.mlmlaw.com/wp-content/uploads/2016/04/maynard-v-snapchat-complaint.pdf>.

[15]. *See In re M.H.*, 1.Cal.App.5th 699, 699 (2016).

[16]. The prosecutors emphasized M.B.’s suicide note, which read in part “I can’t handle school anymore, I have no friends,” but the defense questioned the causal link between the snap and the suicide since the note also read “I have been planning this for months.” *Id.* at 702 & 705.

[17]. *Id.* at 705.

[18]. *Id.*

[19]. Quintana, Olivia, *Fall River Teen Arrested After Posting Picture of BB Gun on Snapchat*, The Boston Globe, <https://www.bostonglobe.com/metro/2016/10/25/fall-river-teen-arrested-after-posting-picture-gun-snapchat/GxvtVDtGnEVrmViKR5KsjK/story.html> (last visited December 4, 2016).

[20]. *Id.*

[21]. *Id.*

[22]. Travis Anderson, *Trump Supporters Removed from Wellesley Campus*, Boston Globe, <https://www.bostonglobe.com/metro/2016/11/09/disruptive-trump-supporters-removed-from-wellesley-campus/nPKSh9mpedkNWjxjGCvdvN/story.html> (last visited December 4, 2016).

[23]. Barrie, Zara, *Two Frat Bros Drive Around Wellesley Harassing Women Post-Election*, *Elite Daily* (November 10, 2016, 2:50 PM), <http://elitedaily.com/news/two-men-harass-wellesley-students/1687982/>.

[24]. Travis Anderson, *supra*, note 22.

[25]. Hon. J. Michelle Childs, *Social Media and the Federal Rules of Evidence*, American Bar Association, <http://apps.americanbar.org/litigation/committees/trialevidence/articles/summer2013-0813-social-media-federal-rules-evidence.html> (last visited December 4, 2016).

[26]. Fed. R. Evid. 901.

[27]. Fed. R. Evid. 902.

[28]. *Quagliarello v. Dewees*, 86 Fed. R. Evid. Serv. 21, 2011 WL 3438090, *2 (E.D. Pa. 2011).

[29]. *Id.*

[30]. *U.S. v. Vayner*, 769 F.3d 125, 131 (2d Cir. 2014).

[31]. *Griffin v. State of Maryland*, 19 A.3d 415, 424 (2011).

[32]. *Id.*

[33]. *Tienda v. State of Texas*, 358 S.W. 3d 633, 642 (Tex.Crim.App. 2012).

[34]. *Id.*

[35]. Hill, Kashmir, *Snapchats don't disappear: Forensics Firm Has Pulled Dozens of Supposedly-Deleted Photos From Android Phones*, Forbes (May 9, 2013, 4:51 PM), <http://www.forbes.com/sites/kashmirhill/2013/05/09/snapchats-dont-disappear/#147430412ed4>.

[36]. *Id.*

[37]. *Id.*

[38]. Kokalitseva, Kia, *Snapchat's Daily Active User Count Has Surpassed a New Milestone*, Fortune (September 26, 2016, 3:17 PM), <http://fortune.com/2016/09/26/snapchat-users-us-canada/>.