

Social Media in Litigation: The Increasing Impact and Evolving Standards for Discoverability and Admissibility

By: David R. Zaslow and Mark Paladino

Litigation Alert

3.28.18

The explosion and influence of social media over the past decade cannot be overstated. As social media becomes more enmeshed in the fabric of our society, it has also become more prevalent as a potential source of evidence in the legal arena. Consequently, courts have been tasked with developing standards on how social media may be mined and used in the context of litigation. Two recent Pennsylvania decisions highlight the continually evolving landscape pertaining to both the discoverability and admissibility of social media posts in litigation.

At the discovery level, a recent unpublished opinion from the Monroe County Court of Common Pleas addressed whether a defendant is entitled to access a plaintiff's social media account in order to challenge the extent of the plaintiff's alleged injuries. In *Kelter v. Flanagan*, The plaintiff claimed that her injuries prevented her from engaging in typical physical activities. The plaintiff acknowledged use of an Instagram account which contained references and photographs of her engaged in physical activities such as shoveling snow and exercising at the gym. The photographs were posted while her account was marked as public, but she later changed that status to private. The defendant sought further discovery on the account, including access to posts labeled as private, but the plaintiff refused.

The trial court noted that social media accounts can be discoverable if it appears likely they contain relevant information. Because the plaintiff had posted photographs that plainly were relevant to her alleged injuries, the trial court ordered the plaintiff to provide the defendant with access to her Instagram account, even after the account became private. In so ruling, the court further emphasized that social media does not carry with it an expectation of privacy related to litigation because the user is sharing information with others in a public or quasi-public domain.

In the recently published opinion of *Commonwealth v. Mangel*, the Superior Court of Pennsylvania addressed – in a matter of first impression – the standard for admissibility of social media posts. The defendant had been charged with aggravated assault, simple assault and harassment. The State sought to introduce evidence of an image of bloody hands posted to Facebook, as well as messages allegedly authored by the defendant. The Facebook account at issue bore the defendant's name, hometown and high school, which the prosecution argued was sufficient to authenticate the proffered evidence.

The Superior Court unanimously upheld the trial court's preclusion of the social media evidence, finding that merely presenting evidence that a post came from a social media account attributable to an individual is not sufficient to authenticate it. Rather, as has been found with regard to the admissibility of text messages, the social media posts must be properly authenticated with direct or circumstantial evidence that corroborates the identity of the author. Such evidence may include testimony from the person who sent or received the communication or contextual clues in the communication tending to reveal the identity of the sender. The State's computer forensics expert acknowledged that type of substantiation is the only way to determine with a reasonable degree of certainty that the actual user authored the communication in question given that social media accounts are easily hacked or falsified. Although this decision was rendered in the criminal context, its extension to civil admissibility is predictable.

These two latest court opinions underscore the need for both counsel and social media users to be attuned to developments in the law's treatment of social media posts. Due to the pervasiveness of its usage in modern society, social media can serve as a goldmine of valuable information that can have significant impacts on a case. All interested parties – whether insurer, counsel, or individual –

125th
ANNIVERSARY

White and
Williams LLP

must be mindful that social media constitutes the sharpest of double-edged swords.

When an opponent's social media activity is carefully researched and properly developed, it can be used to severely discredit or limit claims for injuries and damages. On the other hand, when one's own social media is used recklessly, it can result in a self-inflicted wound.

The intersection of social media and its use as evidence in litigation will continue to evolve. Understanding the evolution of how courts are treating this issue is critical to the potential success or failure of a case.

If you have questions or would like additional information, please contact David R. Zaslow (zaslowd@whiteandwilliams.com; 215.864.6844) or Mark Paladino (paladinom@whiteandwilliams.com; 215.864.6817).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

