KALBAUGH PFUND & MESSERSMITH, P.C.

Defending Cases in a Social Media World

By Written by Erin Slusser, Esq.
Edited by Bill Pfund, Esq.

Litigating cases in 2017 is ever changing given the growth of technology and its evolving use in people's daily lives. This is nowhere more apparent than in the use of social media. According to the Pew Research Center, as of November 2016, 69 % of the American public uses social networking sites. (Pew Social Media Update 2016).[1] While new platforms seem to pop up on an almost hourly basis, Facebook remains the predominant favorite with approximately 79% of *online* Americans using this site, followed by Instagram, Twitter, LinkedIn and Pinterest. *Id*.

This prevalent use of social media presents both great opportunities and risks in civil litigation. Individuals often provide extensive personal information about themselves and their activities on these social media platforms. This provides unrivaled access to background information, pictures, comments, wall posts and messages that previously was unavailable to litigants.

Social media appears to be fair game in the discovery process under both the Rules of the Supreme Court of Virginia and the Federal Rules of Evidence. While there are no rules specifically addressing social media, the rules governing e-discovery provide a good framework for litigants attempting to discover information from social media platforms. Federal Rule of Evidence 34 and Rule 4:9 of the Supreme Court of Virginia both permit discovery of electronically stored information which encompasses social media information.[2]

While social media is most likely discoverable under the state and federal discovery rules, the next step is getting the useful information you obtained admitted into evidence. Again, there is no Virginia or local federal court case specifically addressing the admissibility of social media, however, the general rules of evidence on admissibility will apply and support the introduction the same where authentication is properly established.

Federal Rule of Evidence 901(b)(4) provides that identification or authentication of a document may be circumstantially established through an item's appearance, content, substance, internal patterns or other characteristics. There have been at least two federal cases from the courts within both districts of Virginia which seem to support to the admissibility of social media evidence. In *United States v. Rimmer*, the U.S. District Court for the Western District of Virginia accepted evidence from the government, without objection, regarding the criminal defendant's use of his Myspace profile in the commission of child pornography crimes.[3] Similarly, the U.S. District Court for the Eastern District of Virginia relied upon evidence from the Plaintiff's Facebook profile and a video on YouTube in granting the defendants' motion for summary judgment.[4] The social media evidence was again considered without objection from the opposing party.

Additionally, the Virginia state courts have found that circumstantial evidence can be sufficient to authenticate a document. In *Bloom v. Commonwealth*, the Virginia Court of Appeals held that messages received over the internet are admissible against the sender if the evidence establishes the identity of the sender.[5] For example, the messages or postings in question may contain a unique screen name or signature. Here the court evaluated the content of the communications and found that verifiable personal information, including a screen name used by the criminal defendant contained in the messages, to find that the sender was sufficiently identifiable. *Id*. Other jurisdictions have found that repeated misspellings of certain words may provide a sufficient link between the document and the known works of a poor speller to support the inference that he or she authored the document.[6]

What these cases show is that while the use of social media continues to evolve the way we practice law and defend civil cases, some things simply do not change. The underlying rules for both discovery and the admissibility of evidence still apply.

[1] http://www.pewinternet.org/2016/11/11/social-media-update-2016/

[2] Federal Rule of Civil Procedure 34 states:

- In General. A Party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations

– stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form….

Rule 4:9 of the Virginia Supreme Court states:

- Scope: Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into a reasonably usable form)…

[3] 2010 U.S. Dist. LEXIS 79175 (W.D. Va. 2010)

[4] *Key v. Robertson*, 626 F. Supp. 2d 566 (E.D. Va. 2009).

[5] 34 Va. App. 364, 542 S.E.2d 18 (2001).

[6] *United States v. Clifford*, 704 F. 2d 86 (3d Cir. 1983).