



F24 The Evidentiary Standard for Authenticating Social Media Posts in Litigation

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Learning Overview: After attending this presentation, attendees will have a better understanding of the trial court’s authentication standards regarding expert testimony in relation to social media posts.

Impact on the Forensic Science Community: This presentation will impact the forensic science community by increasing knowledge regarding authenticating social media posts.

Since social media and networking accounts can be faked or hacked, the Pennsylvania Superior Court three judge panel ruled in *Commonwealth v. Mangel*, a case of first impression in Pennsylvania, that social media posts cannot be authenticated in criminal cases unless prosecutors can present evidence of who actually authored said social media posts.¹

The procedural and factual background follows. At a hearing on the State’s motion in *Limine*, the prosecution presented testimony of an Erie County Detective as a computer forensics expert. The trial court questioned the expert as to whether she could “testify to a reasonable degree of computer and scientific certainty” that the defendant had actually authored Facebook® posts and chat messages. The expert replied she could not so testify. The expert also testified she had not obtained an IP address for the Facebook® account in question. The trial court ultimately denied the motion in *Limine*.

On appeal, prosecutors argued trial court had applied a higher burden of proof than was required, but the Superior Court disagreed. Noting the issue of authenticating social media posts is one of first impression in Pennsylvania, the appeals court relied heavily on its own 2011 decision in *Commonwealth v. Koch*, which dealt with cellphone text messages.² The *Koch* court held that “authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required.”

The PA Superior Court in *Mangel* pointed to various rulings by the United States Court of Appeals for the Second and Seventh Circuits, as well as state courts in Maryland, Massachusetts, Mississippi, and Texas, noting these courts required some evidence of authorship in order to authenticate social media posts. In *Mangel*, PA Superior Court stated the State “presented no evidence, direct or circumstantial, tending to substantiate that Defendant created the Facebook® account in question, authored the chat messages, or posted the photograph of bloody hands.” Moreover, prosecutors failed to produce any evidence that the defendant created or had access to the email accounts or phone number associated with the Facebook® account. Nor did prosecutors establish any relationship between the defendant and the owner of the phone number. In a separate footnote, the PA Superior Court noted the trial court correctly applied the expert testimonial standard when questioning the expert as to whether she could testify to a reasonable degree of certainty that the Facebook® posts were authored by the defendant. The PA Superior Court stated: “The mere fact that the Facebook® account in question bore Mangel’s name, hometown, and high school was insufficient to authenticate the online and mobile device chat messages as having been authored by Mangel.” The PA Superior Court further stated: “Moreover, there were no contextual clues in the chat messages that identified Mangel as the sender of the messages.” The prosecution also did not provide any evidence of the dates or times of the posts.

As emails, text messages, and social media data are increasingly used as common and powerful evidence at trial, new legal issues are being applied to the litigation process. Anyone collecting this evidence for use in criminal or civil litigation must authenticate and prove who owns the social media account, as well as provide at least circumstantial evidence of authorship of any specific posts, messages, or pictures. Direct testimony from the author admitting to having written the post or message in question is vital. Otherwise, parties wishing to use social media evidence must have circumstantial evidence as to authorship directly from social media companies, such as timestamps for messages, IP addresses for the devices making the posts, or other metadata.

Reference(s):

1. *Commonwealth v. Mangel*, 181 A.3d 1154, 1164 (Pa. Super. Ct. 2018).
2. *Commonwealth v. Koch*, 39 A.3d 996, 1005 (Pa. Super.2011).

Social Media, Evidence Admissibility, Authentication