The Use of Social Media in Preparation for and During Trial

by Brandon D. Minde and Elizabeth A. Farrell

Social media (*e.g.*, Facebook, Twitter, Instagram) has impacted Americans' lives in unpredictable and material ways and, unsurprisingly, now impacts preparing for and trying cases. As social media touches many aspects of the practice of law, effective and ethical advocacy now requires that every trial attorney develop social media literacy. This article explores the role of social media in a recent Racketeer Influenced and Corrupt Organizations Act (RICO) trial, *U.S.A. v. Hamlet, et al.*,[1] and expands upon the lessons learned during that trial to help readers better prepare and navigate the use of social media in litigation.

During that trial, both the government and the defense relied on social media as evidence of its racketeering conspiracy charge and to create reasonable doubt, respectively. The government relied on Instagram posts in an effort to establish an illicit, criminal

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enterprise involving dozens of people. Conversely, the defense used them advantageously to highlight defendants pursuing additional educational opportunities and advertising legitimate party-promoting businesses.

A working knowledge of various social media accounts and careful attention to the rules of evidence is required in preparing for any case involving social media. Similar to any medium of evidence, evidence housed on social media servers presents three main challenges to attorneys: 1) how it can be obtained; 2) how it can be admitted; and 3) what it can be used for.

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Friending to Find?

The process of obtaining social media evidence must be considered long before trial. New Jersey's Rules of Professional Conduct provide guidance when considering what may constitute overstepping the online line. It is misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[2] They require truthfulness in statements to others, prohibiting lawyers from making a "false statement of material fact…to a third person."[3]

For represented persons, ethical implications must be considered, given the restriction of communications with represented parties. For example, in a personal injury case, a defense team paralegal 'friended' the plaintiff on Facebook. 'Facebook friends' can typically access information unavailable on the public profile. Though the paralegal used her actual name, she did not volunteer her connection to the defendant, resulting in the New Jersey Office of Attorney Ethics issuing a formal complaint to the defense attorneys.[4] The Supreme Court noted the newness of the application of ethics to Facebook: "This matter presents a novel ethical issue: whether an attorney can direct someone to 'friend' an adverse, represented party on Facebook and gather information about the person that is not otherwise available to the public."[5] The issue remains outstanding, as the underlying matter was not resolved due to parallel litigation.

The New York State Bar's Commercial and Federal Litigation Section published *Social Media Ethics Guidelines* in 2015, expressly permitting viewing "the public portion of a person's social media profile or public posts, even if such person is represented by another lawyer."[6] New Jersey has not followed suit, but there is no binding precedent or ethical ruling prohibiting counsel from viewing the public social media profiles of potential witnesses. In *U.S.A. v. Hamlet, et al.*, those public profiles revealed previously unknown relationships between co-defendants and witnesses, as well as potential motives for cooperation.

The next step of friending, or gaining access to the non-public portion of a user's profile, is more complicated. States and bar organizations have begun issuing rulings on social media use. In New York, the ethics rules permit Facebook friending of unrepresented third parties,

if an accurate name is used, even without disclosure of the reason for the request.[7] The bar associations of New Hampshire,[8] Massachusetts,[9] San Diego,[10] Philadelphia,[11] and Oregon[12] require disclosure of the reason of the request (*i.e.*, in connection with the lawsuit).

It is important to distinguish the ethical obligations of lawyers from those of other professionals. For example, in an unpublished federal decision, a New Jersey district court held these same restrictions do not apply to police utilizing undercover accounts to friend or follow targets of an investigation.[13] Once an attorney obtains information through social media, the next question is how to get it admitted.

Getting It Admitted: Authentication and the Role of Denial

Once at trial, authentication is an initial hurdle to overcome with all evidence, and has the potential to become a major issue with social media. In order for any item to be admitted, there must be "evidence sufficient to support a finding that the matter is what its proponent claims."[14] One must especially be prepared when dealing with information obtained online, an arena fraught with concerns of what is real or fake. Even before opening statements, an attorney should have an understanding of whether certain evidence is likely to be admitted at trial. Stipulations, when available, remain an effective way to resolve potential authenticity issues that may arise with social media.

New Jersey treats social media evidence similarly to its less technologically advanced counterparts. While some other jurisdictions require a more scrutinizing standard for admission in order to combat 'manipulation' unique to social media, New Jersey courts have rejected this approach: "The simple fact that a tweet is created on the Internet does not set it apart from other writings."[15] Despite the novelty of social media, traditional rules of authentication apply.[16]

Authentication of social media evidence, like other types of evidence, can be established through direct testimony or by circumstantial evidence sufficient to support a reasonable juror's conclusion that the proffered evidence is what it purports to be. Denial of authorship alone will not prevent the low burden imposed by the authentication rules from being met. Established methods often used to authenticate traditional writings when circumstantial evidence is required, such as the reply letter doctrine and via content known only to the participants, remain applicable to social media evidence.[17]

For example, in *State v. Hannah* a defendant appealed a conviction for assault on the grounds that an incriminating tweet was admitted into evidence despite a failure to authenticate. The defendant was alleged to have thrown a shoe at the victim at a party. Though the Twitter handle, or username, did not suggest any particular owner, the victim testified she recognized it as being the defendant's Twitter account and profile picture. The victim testified the tweet sought to be admitted was part of an exchange of tweets between her and the defendant. The defendant denied authorship, and counsel argued that someone from Twitter was required to authenticate the evidence.

The Appellate Division rejected this argument. First, the court found circumstantial proof given that the writing "divulged intimate knowledge of information one would expect only the person alleged to have been the writer to have."[18] While other partygoers certainly could have known of the shoes' involvement in the assault, it is important to keep in mind the low bar for authenticity. Second, it reasoned that under the reply doctrine, a writing may be authenticated by circumstantial evidence establishing it was sent in reply to a prior communication, precisely what was being alleged about the subject tweet. The court considered the Twitter handle, the profile picture, the content, and whether it appeared in reply, and found the authentication standard satisfied.[19]

Of course, this analysis does not guarantee admission. In an unpublished case, the Appellate Division affirmed a matter where the trial court found the testifying witness was not competent to lay a sufficient foundation to admit screenshots of Facebook messages from an account belonging to the witness's minor child. Although the Facebook messages were alleged to be relevant to the defendant's theory of the case, they were ruled inadmissible. The witness was neither the recipient nor the author of the messages, and the lower court determined she was not competent to lay the necessary foundation. The court also noted that two individuals had the password to the Facebook account, thus there was insufficient proof to show the account owner was the author of every message.[20]

Openings, Opening the Door, and Impeachment by Tweet

Once authentication issues are resolved, what can social media be used for? In the RICO trial *U.S.A. v. Hamlet, et al.*, the government's opening argument promised the defendants' Instagram accounts would establish membership in the gang and general use of Instagram for alleged gang business. After extensive review with the client of hundreds of photographs from the same account, and creating groups of the social media posts to convey different aspects of the defendant's life shown by posts, the defense countered in its opening argument that the posts showed a very different picture: a normal Instagram account showing individuals involved in work, school, parties, and family life.

It is well known that opening statements may only include admissible

information that can be proved.[21] Without precedent and truly analogous factual situations, the question of how much faith an attorney can put into the admissibility of any one piece of social media evidence is suspect. In preparing for opening statements in trials where social media is part of the case, attorneys must keep in mind the application of established evidentiary doctrine, despite the novel type of evidence.

The doctrine of opening the door is an expanded relevancy rule, authorizing admission of evidence to respond to admissible evidence that has generated an issue or to respond to inadmissible evidence admitted by the court over objection.[22] New Jersey courts have consistently held that the defendant's opening statement will not be understood to open the door, as it is not in evidence.[23] But, its evidential consequences have not been ignored; for example, character evidence in a civil matter has been permitted in the case in chief after a credibility attack during an adversary's opening.[24]

In *U.S.A. v. Hamlet, et al.*, during direct examination, the government entered into evidence select Instagram posts from the defendants' accounts allegedly supporting gang activity. On cross-examination, counsel sought to introduce additional posts in response. "The doctrine of opening the door allows a party to elicit otherwise inadmissible evidence when the opposing party has made unfair prejudicial use of related evidence."[25] Defense counsel asserted these additional posts responded to the issue created by the government's statements during the opening and the subsequent admission of select posts from the account, and were required because the government had claimed the primary purpose of these Instagram accounts was gang activity, which the defense disagreed with.

Alternatively, defense counsel requested that the entire Instagram accounts be admitted pursuant to the doctrine of completeness. The doctrine of completeness holds that when a writing or part thereof is introduced, an adverse party may require the introduction at that time of any other part or any other writing that in fairness ought to be considered contemporaneously.[26] Admission may be justified if the writing will explain the admitted portion, place the admitted portion in context, avoid misleading the trier of fact, or insure a fair and impartial understanding.[27] This is true even when the evidence is otherwise inadmissible.[28]

Ultimately, the court was not persuaded, and the defense was not permitted to admit the additional posts. Establishing the purposes for which the defendants used social media, even to defend against the impression that the Instagram accounts were used for illicit purposes, was not enough to convince the court of the relevancy of additional posts or to view the entire account as a continuous writing. This is where lawyers need to be creative with social media evidence. What the defense could not achieve through admission of specific posts, it accomplished through questioning regarding the account itself. For example, on cross-examination the defense asked about the time period covering the search warrants for the Instagram account (over two years' worth of posts), as well as the number of pages contained in the account (over 1,000 pages). How many pages did the government show the jury? The government produced 59 pages, a point emphasized during defense closing in arguing that the Instagram accounts were not being used in the manner and for the purposes the government alleged.

In today's social media world, due diligence requires performing online searches of various social media platforms to identify what, if anything, is publically available for each witness. In *U.S.A. v. Hamlet, et al.*, due diligence uncovered a Twitter account with the handle and profile picture of the government's ballistics expert. Posted under that account were numerous racist, anti-Semitic, homophobic, and misogynist tweets authored or re-tweeted by the government's expert. The account directed hateful comments toward African Americans and Muslims, communities with which each defendant identified. Given the subjectivity with which the science of ballistics is fraught, the evidence of bias established by the tweets was critical. Since the expert did not deny authorship of the tweets or the account, there were no authentication issues. Even if authorship was denied, it is likely the tweets could still be used for impeachment.

Cross-examination is the "greatest legal engine ever invented for the discovery of truth."[29] Not only are authentication and foundation preconditions for admission of evidence, impeachment of credibility need not be limited to evidence adduced at trial.[30] This is not to say cross-examination knows no bounds: Counsel is rarely permitted to "roam at will under the guise of impeach[ment]."[31] Further, just because a writing is social media-generated does not transform its character from that of a writing (at least in New Jersey). The Twitter account was a public account and would have been accessible to the government had it conducted its own search. The government and defense counsel agreed the expert could be cross-examined on the tweets, even before confirmation that he would admit authorship. Such agreement, however, is not always available.

For example, in a recent personal injury matter, the plaintiff testified at trial that he no longer could go to the gym and work out, despite his prior love of this activity.[32] Following an objection concerning a question about Facebook, counsel revealed at sidebar screenshots from the plaintiff's public Facebook profile. One post depicted the plaintiff in

workout clothing at the gym, captioned: "In order to maintain the artistic action figure"; another post showed the plaintiff in a wetsuit on a Wave Runner, captioned: "In water hesitating." The trial court was concerned about the prejudicial aspect of these photos, as they were not turned over in discovery. On motion for new trial, the court noted there was little probative value, a lack of authentication and foundation, and unfair surprise to the plaintiff.

The Appellate Division disagreed. Most notably, it found no profound surprise to the plaintiff. In contrast to an undisclosed video simulation, the plaintiff posed for the photographs, wrote the captions, posted the photographs to his Facebook page, and responded to comments. His surprise was limited to its use at trial, as opposed to its existence.

The Appellate Division found that though uniform interrogatories require photographs relating to the complaint to be turned over in discovery, exclusion of relevant evidence is a drastic remedy. The Appellate Division found no issue concerning foundation and authenticity. It noted that the rules require authentication and foundation for admission of evidence, as opposed to its use. In response to argument concerning the date the photographs were taken, as opposed to posted to Facebook, the court advised that a better course would have been to leave to the jury a more intense review of the screenshots and the credibility of the testifying witness. This holding provides some guidance on the use of social media posts, which are often discovered after the close of the discovery end date or during the trial itself.

Conclusion: Social Media Competence is Required

Effective representation and advocacy require at least minimal understanding of social media and the availability of information on the internet, and how to use it at trial. While New Jersey has not accepted Comment 8 to Model Rule 1.1, adding that a lawyer must stay abreast of the benefits and risks associated with relevant technology, it is plausible that, if accepted, a failure to include internet social media research as part of an attorney's due diligence could equate to a breach of the RPCs. In order to be an effective litigator, a trial attorney must be competent in the navigation and use of social media, both before and during trial. ⚖

Endnotes

1. Crim. No. 14-220 (D.N.J.).
2. RPC 8.4(c).
3. RPC 4.1.
4. *Robertelli v. New Jersey Office of Atty. Ethics*, 224 N.J. 470, 475 (2016).
5. *Id.* at 487.
6. NYSBA, Commercial and Federal Litigation Section, *Social Media Ethics Guidelines* (updated June 9, 2015), Guideline 4.A.
7. *Id.*, Guideline 4.B.
8. New Hampshire Bar Assoc., Op. 2012-13/05, Social Media Contact with Witnesses in the Court of Litigation.
9. Mass. Bar Assoc., Op. 371 (Nov. 2016).
10. San Diego Cty. Bar Legal Ethics, Op. 2011-2.
11. Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02.
12. Oregon Formal Opinion No. 2013-189. Though Oregon requires the third party to inquire into the purpose of the request before requiring disclosure.
13. *U.S. v. Gaston*, 2014 WL 7182275 (D.N.J. 2014) ("No search warrant is required for the consensual sharing of this type of information.").
14. N.J.R.E. 901.
15. *State v. Hannah*, 448 N.J. Super. 78, 89 (App. Div. 2016).
16. *See id.* at 91.
17. *See generally*, comment 3, §§ b and c to N.J.R.E. 901 (explaining contents or knowledge doctrine and reply doctrine).
18. *Hannah*, 448 N.J. Super. at 90.
19. *See id.* at 90–91.
20. *See New Jersey Div. of Youth & Family Servs. v. J.I.*, A-4117-12T1, 2014 WL 4930455, at n. 5 (App. Div. 2014).
21. R. 1:7-2.
22. *State v. James*, 144 N.J. 538, 554 (1996).
23. *See e.g., Velazquez v. City of Camden*, 447 N.J. Super. 224, 237 (App. Div.), *certif. den.* 110 N.J. 156 (1988).
24. *Ostrowski v. Cape Transit Corp.*, 371 N.J. Super. 499, 514–15 (App. Div. 204), *aff'd o.b.*, 182 N.J. 585 (2005).
25. *State v. James*, 144 N.J. 538, 554 (1996).
26. N.J.R.E. 106.
27. *Alves v. Rosenberg*, 400 N.J. Super. 553 (App. Div. 2008).
28. *State v. DeRoxtro*, 327 N.J. Super. 212, 742 (App. Div. 2000).
29. *State v. Cope*, 224 N.J. 530, 555 (2016).
30. *Delgaudio v. Rodriguera*, 280 N.J. Super. 135, 141–42 (App. Div. 1995).
31. *Id.*
32. *Angeles v. Nieves*, A-2302-15T4, 2018 WL 3149551, at *5 (N.J. Super. Ct. App. Div. June 28, 2018).