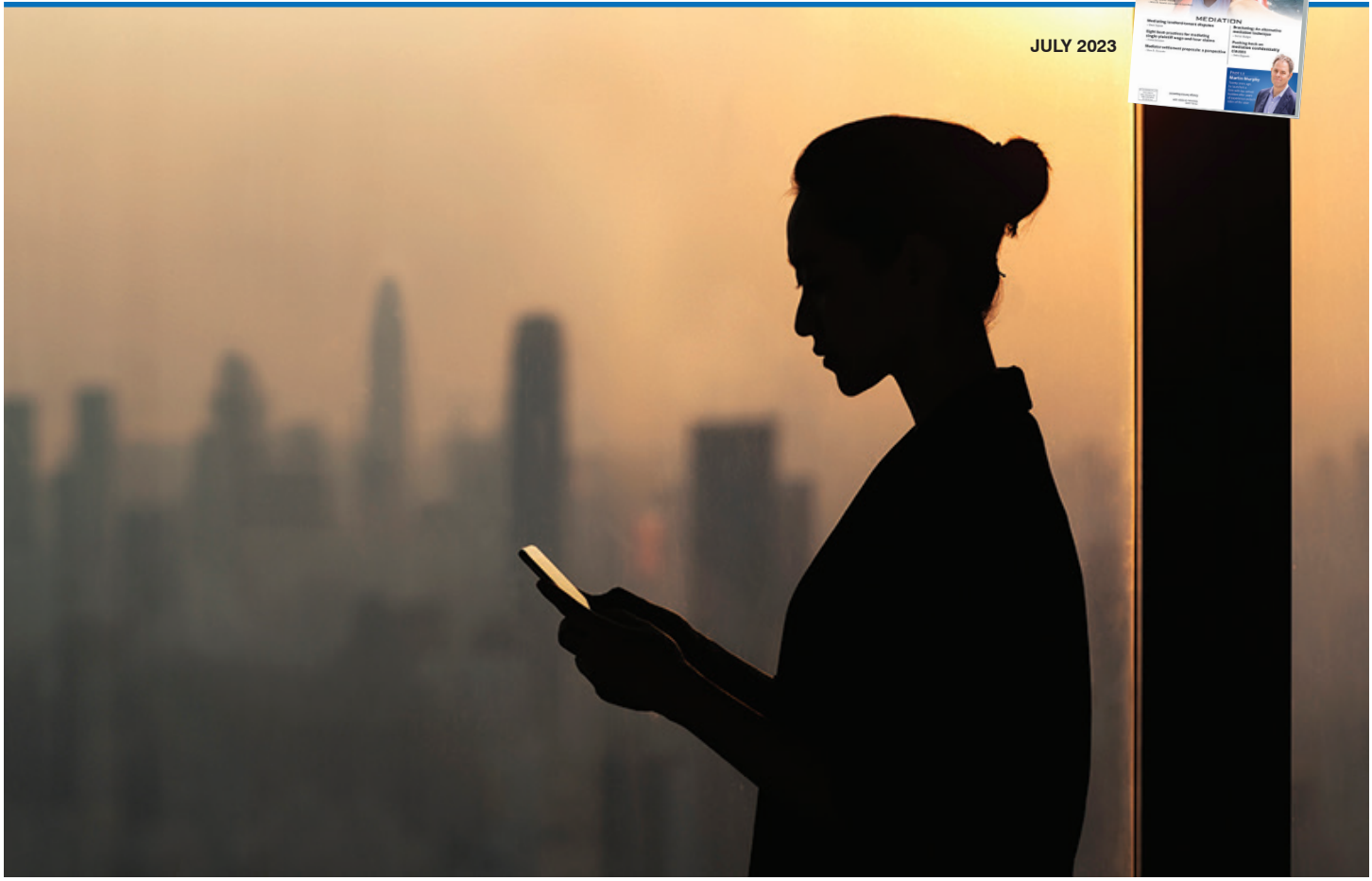


Don't let the defense misuse social media to depict your client

How defendants misrepresent a plaintiff's condition through social media

By Shana M. Nazarian and Eustace de Saint Phalle

Social media has become a fundamental part of modern-day life. Social media platforms promote information exchange, facilitate connections, and keep users informed of the latest fads. The universe of social media comprises a variety of platforms, each tailored to fulfill distinctive interaction needs.

Social networks form the backbone of the digital universe by enabling users to share information across networks and create connections. Messaging applications promote real-time communication among users. Media-sharing platforms provide a channel for users to share, engage with, and admire photos, videos, and audio. Traditional blogging platforms offer users a space to publish extensive content, while microblogging platforms allow for the sharing of brief content.

Unfortunately, social media has created a culture of artificial representation wherein users often resort to projecting an idealized version of their lives that may not reflect their actual experiences. The dynamics of these social media platforms, with an emphasis on engagement and popularity, further drive this need to create content that is aimed at gaining likes and followers, at the cost of genuineness. Individuals craft misleading identities for social validation, leading to a pattern of inauthentic conduct.

This practice of inauthenticity is not limited to personal interactions; it can have legal consequences as well. For instance, a defendant's counsel could exploit the plaintiff's social media content to misrepresent the plaintiff to a jury. It is essential for the plaintiff's attorney to understand these defense strategies, be aware of their potential misuse, recognize the limitation in litigation, and formulate ways to address these issues.

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Common tactics

Defense lawyers frequently employ several strategic tactics while constructing their case. One of the first steps often involves examining the plaintiff's social media. The aim is to find instances where the plaintiff may have inadvertently said or done something that could be misconstrued to benefit the defense.

In personal injury cases, for example, the defense might use the plaintiff's social media activity to distort their actual condition, thereby downplaying the severity of their injuries and their damages. These manipulative tactics often encompass conducting surveillance through social media, cherry-picking posts to draw a specific narrative, misinterpreting online activity to suit their case, introducing expert testimony to cast doubt on the plaintiff's claims, and utilizing cross-examination to further question the plaintiff's credibility.

A defense attorney will often hire an investigator to research social media on your client. Therefore, you must advise your client and be aware of what content is being posted.

Misuse of these common tactics

Digital surveillance: The defense might hire a private investigator to carry out digital surveillance on the plaintiff. This investigator observes their social media engagement for any content that could be used to challenge their allegations. This may involve the posting of images or videos of the plaintiff performing activities which imply that their injury is not as extreme as they have claimed.

Cherry-picking: The defense may opt to present only specific posts from the plaintiff's social media profiles that represent plaintiff negatively or contradict plaintiff's contentions as to injury, and exclude posts that portray the plaintiff in a favorable light.

Misrepresentation: The defense may attempt to misrepresent the plaintiff's social media. A defense lawyer might review the plaintiff's social media content for any posts that dispute their assertions regarding their injuries or status. For instance, if the plaintiff states they have a back injury inhibiting their ability to work but shares videos of themselves lifting hefty items, the defense might use these posts to propose that the plaintiff's injury is not as severe as they claim.

Expert evidence: The defense may hire medical experts to provide evidence that the plaintiff's social media activities do not align with their alleged status or that they are not as incapacitated as they have claimed.

Cross-examination: The defense may attempt to use the plaintiff's social media in cross-examination to question their credibility and suggest that they are being dishonest about the extent of their injuries or health status.

Limitations in litigation

Social media activity has increasingly become an important source of evidence in litigation. However, the use of social media in litigation has certain limitations, particularly in the areas of discovery, motions in limine, and voir dire. It is crucial for both parties to be aware of these limitations when producing or requesting social media content throughout the litigation process.

Discovery limitations

The discovery process involves the exchange of information that is relevant to the case. This can include information from social media accounts. However, the discovery of social media is not without limitations:

Relevance: In discovery, the requested social media information must be relevant to the defenses or claims in the case at hand.

Only evidence that is relevant to some issue to be decided at trial is admissible. (Evid. Code, §§ 210, 350.) Relevant evidence is defined by Evidence Code section 210 as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (See, *People v. Kelly* (1992) 1 Cal.4th 495, 523 [only relevant evidence is admissible]). Where an issue is agreed by the parties and is undisputed, evidence on that issue is irrelevant and inadmissible. "It is a well-settled rule of evidence that evidence is irrelevant and, hence, inadmissible, when it is offered to prove an undisputed issue of fact." (*People v. Swearington* (1977) 71 Cal.App.3d 935, 948; see, *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, 1168-1169 [certain evidence bearing on an undisputed issue was irrelevant and inadmissible]. Social media content that is not relevant to the case may not be discoverable.

Proportionality: Even if social media content is relevant, the burden of the proposed discovery should not outweigh its benefit.

The court may exclude evidence whose probative value is "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; see, *People v. Cargenas* (1982) 31 Cal.3d 897, 904 [if prejudicial effect of admitting evidence outweighs the probative value, trial court should exclude the evidence].) The court has discretion to exclude evidence that is potentially misleading unless explanation is provided. (*Huber, Hunt & Nichols, Inc. v. Moore* (1977), 67 Cal.App.3d 278)

Additionally, the evidence should be excluded if it would necessitate time-consuming hearings on remote, collateral issues where the probative value is minimal. (Evid. Code § 352; *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 950; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1550; *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 760-761.) Discovery requests related to social media can be

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burdensome and time-consuming, and there must be a proportionality between the amount of effort required to obtain the content and its potential relevance to the case.

Privacy rights: The courts have generally held that a party does not have a reasonable expectation of privacy for information posted on public social media accounts. However, private social media information is more protected. To gain access, the requesting party typically must show that the requested information is reasonably calculated to lead to the discovery of admissible evidence.

If a party fails to comply with a discovery request involving social media data, a motion to compel can be initiated. In deciding whether to grant the motion, the court will ensure that the requested information is relevant to the case at hand.

Motions in limine limitations

Motions in limine are used to request the court to exclude certain evidence before a trial begins. When dealing with social media data, there are limitations to what can be excluded.

Relevance and prejudice: The court may exclude evidence from social media if it determines that the probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, wasting time, undue delay, or needlessly presenting cumulative evidence.

Authentication: The court may exclude evidence from social media if the party offering the evidence cannot properly authenticate it or the party cannot prove that the content is what they claim it to be. In the context of social media evidence, authentication can be a particular challenge due to the ease with which such evidence can be manipulated.

Voir dire limitations

Some limitations when considering social media include:

Juror privacy: While attorneys may research prospective jurors' public social media profiles, they cannot invade a juror's privacy by attempting to access private profiles. Also, courts may restrict the use of information acquired from social media in questioning jurors to avoid unfairly prejudicing or embarrassing the juror.

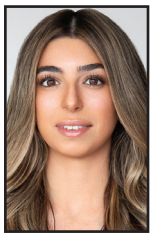
Instructions to jurors: Jurors must be instructed not to research or communicate about the case on social media. Courts have the authority to control the courtroom and ensure a fair trial. Courts may restrict the use of social media by jurors during the trial to prevent extrajudicial information from influencing the juror's decision.

Questions to jurors: During voir dire, jurors may be asked about their social media presence and whether their online persona accurately represents them. For example, they might be questioned, "Has anybody here ever posted anything on social media?" Jurors may also be asked about their awareness of how individuals might project an idealized version of themselves on social media, typically highlighting only positive aspects rather than revealing hardships, such as a recent injury. They might be asked, "In your own social media posts, do you tend to share the challenging aspects of your life, or do you primarily present a more upbeat version of yourself?"

Summary

Social media has significantly impacted the process of litigation, with litigants strategically utilizing it to their advantage. It can serve as crucial evidence, supporting a case or potentially undermining it. The admissibility of social media data in court follows the rules of evidence, which ensure both relevance and fairness. While social media provides a rich source of possible evidence in litigation, its use is subject to limitations to ensure fair proceedings.

Social media has the ability to distort our perceptions of reality and foster an unhealthy pattern of seeking validation and comparison. In the context of personal injury lawsuits, plaintiffs need to exercise caution and discretion with their social media engagement. Any post or activity that might be interpreted adversely could be used against them, potentially undermining their case. Therefore, it is critical to navigate social media mindfully, particularly when involved in legal actions.


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