

Your Instagram just tanked your lawsuit

Social media and discovery in the age of oversharing

By Elliot Eslamboly

Post now, regret later

In the age of Instagram stories, TikTok trends, and Facebook check-ins, it has never been easier to document every facet of your life – your morning smoothie, your skydiving trip, your "light day" at the gym. But for personal-injury plaintiffs, those innocent updates can have not-so-innocent consequences in court.

What many clients do not realize is that when they file a lawsuit, they put their physical and emotional well-being at issue. This means that defense attorneys can (and absolutely will) comb through their social-media presence, looking for contradictions. If you have claimed you cannot lift groceries, but your Instagram shows you deadlifting 185 pounds, your case is likely in serious trouble.

The discovery minefield

Under both federal and state rules of civil procedure, discovery is intentionally broad. In California, for example, Code of Civil Procedure section 2017.010 allows parties to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or that is reasonably calculated to lead to the discovery of admissible evidence.

This means that social media content – yes, even "private" posts – can be discoverable. Courts have consistently held that once a party puts their physical or emotional condition at issue, the opposing side has a right to probe those claims. Nothing makes that easier than a plaintiff who turns their life into a real-time highlight reel.

California Code of Civil Procedure section 2020.410 – Subpoenas for



Electronically Stored Information (ESI) states, "A person subpoenaed to produce electronically stored information shall produce it in the form in which it is ordinarily maintained or in a form that is reasonably usable." This statute applies when social media data is subpoenaed from third parties (e.g., Facebook, Instagram) or individuals.

While courts are cautious in compelling production directly from social media platforms due to the Stored Communications Act (SCA), parties are often ordered to produce their own content in a usable format. However, there are limits on invasiveness.

While California law allows broad discovery, it is *not without limits*. Courts have held that:

- Requests must be *specific*, not generalized demands for all content from a social media account.
- Discovery must be *relevant and proportional* to the needs of the case, as per *Mailhoit v. Home Depot* (C.D. Cal. 2012) 285 F.R.D. 566.
- Courts will *balance privacy interests* under the California Constitution (Article I, § 1) against the need for discovery.

For example, in *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, the California Supreme Court held that privacy rights must be carefully weighed when requesting personal electronic data.

Exhibit A: The gym selfie

Many clients claim they suffered a debilitating back injury in a car accident. Their complaint states they have difficulty walking, lifting, or performing basic physical activities.

Then opposing counsel produces a post from two weeks after the alleged injury: your client, flexing in the mirror at a 24 Hour Fitness, tagged #BeastMode with a caption that reads, "Back day, let's go!"

That post might as well be Exhibit A in a motion for summary judgment or, at best, will severely limit your damages. Even if your client insists they were just posing and did not actually lift anything, the damage is done. Jurors (and judges) tend to believe what they see, not what they hear.

Even if the activity in the photo is consistent with their medical restrictions – say, a light stretch or a physical therapy exercise – the optics are terrible. A single out-of-context post can unravel months of carefully prepared medical records, depositions, and testimony.

Exhibit B: Skydiving and supermarkets

Social media is rarely chronological or curated for accuracy; it is curated for attention. Platforms like Instagram, Facebook, and TikTok are designed to reward engagement, not truthfulness. As a result, the content user's post is often carefully selected to present a particular image – one that attracts likes, shares, and approval from their followers. This

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means clients may share moments or statements that cast them in the best possible light, regardless of whether those portrayals align with reality. In legal contexts, this becomes particularly problematic. A client's social media activity might directly contradict their sworn testimony, revealing inconsistencies that can be used against them in court. Moreover, because these posts are often taken out of chronological context or edited to be more appealing, they can give a distorted view of events, making it harder to establish a clear timeline or assess credibility. Understanding the performative nature of social media is critical when evaluating its content in any legal or investigative setting.

Consider my prior client, who claimed to suffer from chronic pain and anxiety due to a collision, but then posted a video while skydiving over San Diego. To the client, it was just a one-time event done to "feel normal again." To the defense attorney, it was gold. It suggested mobility, adrenaline tolerance, and emotional resilience – not exactly the image of someone suffering from debilitating trauma.

Then there is the supermarket saga. A client testifies that they cannot shop alone or carry household items. But a few scrolls into their feed reveal them pushing a fully loaded shopping cart at Costco and joking about buying in bulk. Another post shows them carrying a case of bottled water to their trunk. None of these things prove the client is not injured, but they raise enough doubt to damage credibility and invite aggressive cross-examination.

Discovery battles: "But my account is private!"

Clients often believe they are protected if their social media is set to "private." That is wishful thinking.

In *Nucci v. Target Corp.* (Fla. Dist. Ct. App. 2015) 162 So. 3d 146, the plaintiff alleged injuries from a slip-and-fall at a Target store. The defense sought access to private Facebook photos to challenge her injury claims. The court ruled that the photos were relevant to her physical and emotional condition and not protected by privacy rights, reinforcing the principle that social media content is not privileged once a plaintiff puts their condition at issue. The court allowed discovery of the plaintiff's private Facebook photos, finding that the photos were relevant not only to claims of physical injury but also to loss of enjoyment of life. The court emphasized that social-media content, even when set to private, is not privileged.

In *Reid v. Ingerman Smith LLP* (E.D.N.Y. Dec. 27, 2012) No. 2012 WL 6720752, the court held that discovery of private content must be supported by evidence of relevance. The court limited social-media discovery in an employment case, emphasizing that the defendant must show a factual predicate that the private content likely contains relevant information.

On the other hand, in *Tompkins v. Detroit Metropolitan Airport* (E.D. Mich. 2012) 278 F.R.D. 387, the court denied a defendant's request for full access to the plaintiff's private Facebook content in a personal-injury lawsuit. The plaintiff claimed substantial injuries, and the defense sought to obtain private social-media posts to challenge those claims. However, the court ruled that such discovery was not warranted without evidence showing that the private content was likely to contain relevant information. The court emphasized that merely assuming potentially damaging material might exist in a plaintiff's private social media account is insufficient; a factual basis must be established to justify invading the user's privacy. This case reinforces the principle that discovery must rely on more than speculation or a mere fishing expedition.

More importantly, in *Facebook, Inc. v. Superior Court* (2018) 4 Cal.5th 1245, the California Supreme Court addressed the extent to which social-media content can be subpoenaed in legal proceedings. The court emphasized the need to balance users' privacy rights with the necessity of obtaining evidence in legal cases, setting guidelines for subpoenas.

California courts have followed a similar trend. In *Mailhoit v. Home Depot U.S.A., Inc.*, *supra*, 285 F.R.D. 566, the court addressed the limits of social-media discovery in civil litigation. The plaintiff alleged gender discrimination and emotional distress stemming from her employment at Home Depot. The defense in that case sought broad access to her social-media accounts, including private messages (yes, be careful what you put in your DMs) and posts not directly referencing the lawsuit. The court held that while certain social-media content could be discoverable, such as communications referencing emotional distress or the events underlying the lawsuit, the requests must be narrowly tailored and not amount to a blanket demand for access to all content. The court ultimately permitted limited discovery of social-media content where the plaintiff had put her emotional and physical condition at issue.

The takeaway: if relevant, it's discoverable

The takeaway is that once you file a personal-injury lawsuit, your social media is discoverable to the extent it may contain relevant evidence. "Private" does not mean "protected." Defense lawyers will request access. Courts may compel it.

In sum:

- **Relevance is key:** Courts generally require a showing that the social media content is relevant to the claims or defenses in the case.
- **No blanket access:** Overbroad requests for entire social media accounts are typically denied.
- **Expectation of privacy is limited:** Courts routinely hold that there is no reasonable expectation of privacy for relevant content, even if it is posted privately.

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• **Specificity matters:** Discovery requests must be narrowly tailored to seek specific kinds of content, such as posts about physical activities, emotional distress, or discussions of the incident or lawsuit.

Ethical duties: Counsel your clients before they post

Rule 3.3 and Rule 3.4 of the ABA Model Rules of Professional Conduct (adopted with variation in most states) emphasize a lawyer's duty of candor to the court and fairness in discovery. That involves an obligation to ensure clients do not destroy or tamper with evidence, including digital evidence.

Telling a client to delete incriminating posts after a lawsuit has been filed can amount to spoliation of evidence and lead to sanctions. Instead, clients should be advised early and often about how their posts may be interpreted and used against them.

The best practice? Tell clients to stop posting altogether. Better yet, issue a formal litigation hold that includes social media content. That way, there is a clear paper trail showing you have advised them to preserve all potentially relevant evidence.

Case strategy: Using posts as leverage

Of course, this sword cuts both ways. If you represent a defendant or insurer, social-media surveillance can be an incredibly powerful tool.

Public posts showing a plaintiff traveling, partying, or engaging in physically demanding activities are not only useful in trial, they are also excellent leverage in mediation. When faced with contradictory online evidence, plaintiffs may be far more willing to settle or reduce their demands.

Do not forget the nuance. Even LinkedIn, showing your client "Open to Work," might be used against your client's loss-of-earnings claim. Such content could suggest that your client is capable of working and might even be used to portray your client as a malingerer.

Some defense firms even hire social-media investigators and perform sub rosa investigations, combing through not just the plaintiff's accounts but also those of friends and family, looking for tagged photos and videos. It is all fair game under current discovery rules.

Not all is lost: Context matters (sometimes)

Social media is not always a death sentence for plaintiffs. If properly contextualized, some posts can be explained away. A gym photo might have been from a medically supervised rehabilitation session. A Costco trip might have involved help from a friend off-camera. A smiling vacation selfie might have been taken during a rare "good day."

It is critical to proactively explain any social-media posts that appear to show physical activity in order to preserve credibility with the jury. Jurors must understand that a single photo or short video clip does not tell the whole story.

For example, a plaintiff who posts a smiling photo at a park or a short clip from the gym may have been having a rare "good day" or following a doctor-recommended physical therapy regimen. These moments do not negate the existence of pain or injury. Rather, they reflect attempts at rehabilitation or brief efforts to maintain normalcy amidst ongoing limitations.

It is also important to emphasize that social media is often curated to project positivity and does not reflect the daily struggles, flare-ups, or the need for rest that occur outside the frame. Plaintiffs are human beings seeking to live their lives as best they can, and isolated posts should not be misinterpreted as a full picture of their physical condition.

Still, explaining context is a hard sell when the image alone contradicts the narrative of pain and impairment. Having a treating physician testify to his report, only to be shown a picture of the client doing jumping jacks at the gym just days later, can be the end to your client's case. Once the seed of doubt is planted, jurors often assume exaggeration – or worse, fraud.

It is not about whether the post definitively disproves the injury; it is about whether it undermines the plaintiff's credibility. As we know, credibility is everything when closing with a jury.

The new normal: Digital hygiene for litigation

In today's litigation landscape, social media awareness is no longer optional; it is essential.

Here is what all litigants should do the moment a claim is contemplated:

• **Audit existing content:** Review all posts from the date of injury forward. Really look through the eyes of a jury, and ask yourself, "Would they believe my client's claim if they saw this post? Does my client still come across as credible?"

• **Pause new posts:** Encourage clients to take a social media break. I personally have my clients sign a Social Media Form, listing all their usernames and @handles, and encouraging them to stop posting on social platforms until the resolution of their case. I also include a stark warning that anything they post can be used against them in court and may become public.

• **Preserve everything:** Do not delete posts – just archive and protect them.

• **Educate your client:** Explain how even a harmless post can be used against them. This is essential from the outset.

I have had countless mediations where the mediator has been shown an Instagram post and suddenly it appears that even the mediator is casting doubt on my client's injuries.

• **Anticipate discovery:** Be ready to produce social media content if requested. Clients often resist this advice. They say, "It's just for my friends," or "that picture was from before the accident." Remind them that anything they post

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can be screenshotted, shared, and subpoenaed. Their digital life is now part of the evidentiary record.

Conclusion: Think before you post

In personal injury litigation, perception matters as much as fact. A client who claims to be in constant pain but posts daily gym selfies and adventure pictures does not just hurt their case – they can destroy it. Instagram, Snapchat, TikTok, and Facebook are not your client's friends in litigation. They are potential exhibits. They are impeaching evidence. They are tools for cross-examination. As an attorney, your job is to protect your client's interests. In today's world, that includes protecting them from themselves and their camera rolls.

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