

Dealing with social-media evidence in trial

You can try to keep it out, but that "impeachment" evidence is probably going to get in

By Sevy Fisher

As I begin to write this article, I am currently dealing with some very damaging social-media evidence in trial. Most of this article was written after the trial, so I know that what I am telling you is effective. This article will show you how I was recently able to prove causation for my client despite many unfavorable social-media photographs and videos.

You can try and get social-media evidence excluded before trial on various legal grounds (i.e., not impeachment, or not produced in discovery), but 99% of the time it gets in anyway. This article assumes that you will be unsuccessful in excluding any evidence of social media before trial.

The dreaded "drop" of your client's social media

As a side note, it's important when taking any case, to ensure that your client's social-media accounts are either deactivated or put on private. I would recommend that they be deactivated. However, if you aren't so fortunate, or if for some reason your client did not heed your advice, you find yourself in the situation I am currently and often in.

It is the last day to respond to supplemental discovery, and you receive responses from the defense that include over 300 pages from an investigation company containing your client's social-media photographs and videos. The photographs do not seem to comport with your client's condition as noted in the medical records during their treatment. However, it is not all about what social media shows. I like to think about what social media does not show.

"Instagram v. reality"

It is helpful to first step back and think about the purpose of social media. For most people, it is a way for their distant friends and relatives to stay connected and experience the joys in each other's lives – the vacations, celebrations, watching children grow, grandchildren grow, and the things that make people happy. Social media is not typically used to show friends and family our struggles or how miserable we are. You must frame your case and the "impeaching" social-media evidence in a way that reinforces this purpose to your jury.

In my case, I had a client who was reporting 10-out-of-10 pain in medical records in the weeks leading up to his wedding. This was many months after the crash. The same records also showed that he was in so much pain that he was recommended a three-level neck surgery, which he had not yet had. The social-media photographs and videos, however, showed him dancing like Patrick Swayze in *Dirty Dancing* – sweating, laughing, and moving his neck in all ways imaginable.

There was another video that showed him and his wife being hoisted up in their chairs over and over as everyone shouted in laughter. These videos and photographs did not show a man in 10-out-of-10 pain that looks in need of surgery. Not good, right? Well, when life gives you lemons, find someone whose life gave them vodka, and have a party. Stay positive, adapt, and make the best out of the situation. You have no other choice!

Look to the medical records for help

When first receiving all this social-media "impeachment" evidence, the immediate thought was to match it up with the medical records and see what we could find. Sometimes you will find some little nuggets that can help explain how your client was able to do something that does not appear doable given the pain they were experiencing.

In this case, it just so happened that my client had a conservative procedure one month prior to his wedding that "temporarily" made the pain more manageable – though it was disputed how long that pain relief lasted. While it was not the greatest explanation in the world, it certainly was something. The most important thing about bad evidence at trial is getting ahead of it offensively.

Mini opening

You must address social-media evidence right from the start. That is the time to get the "bad" facts out in the open. In our mini opening, we did just that. We told the jury that our client got married. "You are going to hear that despite the pain and treatment they were going through Mr. and Mrs. Clients got married. They danced at their wedding, and they had the night of their lives. After their wedding they even went on a honeymoon in Hawaii."

For the mini opening, we stopped right there and did not do any further explaining. We did not want to give the jury the justification for why, or how they were able to go to their wedding and honeymoon while still being in pain and receiving treatment. This helps identify the bad jurors who did not understand my explanations for the social-media evidence. For this reason, I would recommend that counsel wait until their opening statement to introduce the first explanation or justification for the social-media evidence.

In our opening statement, we told our story. We told the jury that our client got married and described the struggles he faced to ensure he gave his wife the marriage she deserved. "You're going to hear that Mr. and Mrs. Clients got married, went on their honeymoon, and it was the best time of their lives. You're also going to hear what they had to go

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through to make this incredible night happen."

At this point, we stopped explaining. If you explain too much, it looks like you are over-explaining and you may end up drawing too much attention to the bad facts. We also believed our clients and doctors could provide a better explanation on direct examination. It was more important that the jury heard this evidence directly from witnesses as opposed to their attorneys. Often, attorneys forget that this is your clients' story to tell and that you, as their counsel, must thoughtfully strategize the most effective way to allow your clients the opportunity to be heard.

Direct exam of plaintiff

Again, make the social-media evidence part of your client's story. We had our client explain how he wanted his wife to have the wedding she deserved and that nothing was going to stop him from giving her that. Our client testified that he had a conservative procedure to help minimize the pain and, although he was dancing and looking happy at his wedding, that night in the hotel room was a different story. The photographs and videos on social media didn't tell that story. Our client went to his room, where he suffered as a result of pushing his limits at the wedding. Our client had to ice and take more medication immediately after leaving his own wedding. He owned the photographs and videos and even looked emotional while they were being shown. At one point when asked by the defense what the photos depicted, he said, "the happiest day of my life."

You must adequately prepare your clients to not be afraid of this evidence, but to embrace it and make it a part of their damages story.

Direct exam of treating doctors/ retained experts

Have your doctors prepared to discuss your client's limitations. At the end of the day, a lot of the surgeries and procedures our clients undergo are "elective." Elective does not mean they are not reasonable and necessary, but the defense likes to paint a picture for the jury that when our clients need surgery from a trauma, it needs to be immediate or life-threatening. As if our clients' lives should stop and they should be in bed 24/7 until it is fixed.

In reality, many people learn to deal with the pain and live with it for months and years before undergoing a scary procedure. Their lives do not pause for their pain. They continue to live, work, and experience things with their families. That is what humans do in the real world. The treating doctors and experts can explain this, and how it is very common for their patients to continue living their lives while managing their pain until they can no longer handle it. Their patients elect for surgery because the pain becomes unmanageable.

Do not let the defense tell a false story about your clients and twist common sense. They love to push defenses that are completely illogical and contradict common sense. The good defense lawyers are particularly effective at twisting the truth to paint your client in an unflattering light. It is our job to put things in perspective for the jurors and remind them what common sense really is by using real-world examples and analogies.

Bringing it all together in closing/rebuttal

My closing and rebuttal arguments on social-media evidence were, in essence, something like this:

"The defense is telling you that my clients are liars because they got married. They were damned if they do and damned if they don't. If my clients canceled their wedding, then they would be 'milking' their injuries and over-selling it. But getting married shows that they are healthy and pain free and somehow lying. The defense can't have it both ways.

Some of you may have heard the phrase 'Instagram v. reality.' That's what this is. You know what you don't see in my client's social media? Selfies of my clients icing their bodies after trying to do the best they can to live their lives and move on from this horrible crash.

You also don't see them posting photographs of the procedures they were having during treatment. The giant needles in their spines. The burning of nerve endings in an operating room just so they could reduce their pain and get married and try to live. More than 200 doctors' appointments due to no fault of their own. The three-level surgery where a surgeon essentially replaced portions of my client's spine. The days and nights spent icing, medicating, and feeling like they had no way out.

Social media is one small piece of a much bigger puzzle called life. We don't post when our children are sick with the flu and puking all over the place, or when a loved one is on hospice or suffering in a hospital bed. We don't post when we get in arguments with our family or friends. You don't see our angry faces on social media when we are mad at life or dealing with pain. Social media isn't entirely real life. It's a piece of life that we selectively choose for others to see.

I'm not telling you that what you see in those photographs and videos is not real. It is real. The reality that you can see in these photographs and videos is that this is a couple that loves each other more than anything. A proud father. A proud mother. A great husband. A great wife. A couple that chose to fight on and make an attempt at some sort of normalcy despite the hell they were dealt, through no fault of their own."

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