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Legal ethics in the age of social-media discovery

THE KEY IS TO BE PROACTIVE, NOT REACTIVE

From the launch of Six Degrees, considered the first true social-media platform nearly 30 years ago, to the current popularity of platforms such as Instagram, TikTok, and X, the evolution of social media and its widespread use by all age groups has increased exponentially. In the last decade alone, global social-media use has grown from nearly one billion users to 5.31 billion (almost 65% of the world population) as of April 2025. Statistically, this number is expected to surpass 5.85 billion users by 2027.

Alongside its increased popularity over the years came a corresponding rise in the different ways users engaged with social media. What began as a way to connect with friends and family on Facebook in the mid-2000s has evolved into opportunities for networking, socializing, content creation, and marketing. As we all know, social media is now connected to every single client, and perhaps future plaintiff, who walks through our doors with a case. Social media has become so deeply embedded in the daily fabric of our clients' lives that it often reflects their identity more than anything else.

For plaintiffs' attorneys, addressing social media early and often is no longer optional; it is a necessity that must be built into our case strategy from the outset. The casual nature with which clients use these platforms often contrasts starkly with how those same posts are scrutinized and weaponized in litigation. Innocuous photos, celebratory captions, or even third-party tags can all be stripped of context and reassembled by defense counsel to create a narrative that undermines your client's credibility, exaggerates inconsistencies, or downplays the severity of their injuries.

We must train ourselves to view social media the same way we do medical records, surveillance footage, or deposition transcripts – each post is a potential exhibit, each image a piece of evidence that may either support or weaken a claim. Advising clients not only to be cautious, but also to understand why content may be used against them, is the only path forward.

Importantly, our ethical obligations do not permit us to scrub digital history – but they do allow us to prepare, educate, and anticipate. We must document what exists, preserve what is relevant, and proactively navigate discovery so that trial is not the first time we are confronting a smiling photo from a beach trip that defense counsel is trying to use to discredit a chronic-pain claim. The key is to be proactive, not reactive. Through early intervention, ethical guidance, and rigorous discovery practices, we can protect our clients' narratives and preserve the integrity of their claims – on and offline.

How to advise your client

During the intake process or initial meeting with a client, it is imperative to ask about all social media accounts linked to them, whether or not they are currently active on those sites. To take it a step further, it is equally important to search those accounts to see what type of content your client has posted in the past. This helps you better understand their social media presence and how to advise them on the topic. For example, do they post daily? Do they share every thought that comes to mind? Do they use their page(s) as a source of income? While meeting with your client, you must discuss how the nature of the content they post on social media, especially post-incident, can impact their credibility and case through litigation and trial.

How can you ethically advise your client about their social media content? The California Rules of Professional Conduct, Rule 3.4(a), mirrors the ABA Model Rule 3.4(a), which prohibits lawyers from unlawfully obstructing another party's access to evidence, or unlawfully altering, destroying, or concealing a

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document or other material having potential evidentiary value. The intent behind this rule is to promote fairness to the opposing party and counsel, and to maintain the integrity of the legal process by preventing either side from engaging in legal tactics that can unjustly influence the outcome of a case.

With this in mind, attorneys may advise their clients to be mindful about what they post, including any content depicting or discussing the incident or injuries related to it. Attorneys may also caution their clients that even photos or videos of seemingly innocent events like a family barbecue, for example, can be taken out of context by opposing counsel and used to downplay the severity of claimed damages, especially in front of a jury. However, to remain within ethical parameters, attorneys should always advise their clients to not remove social media posts that are related to their claims. If a client independently chooses to remove such content, not at the attorney's direction, the attorney must advise the client not to delete it entirely, but to preserve it in a way that it remains accessible for purposes of litigation. Otherwise, if relevant content is not preserved, sanctions for spoilation of evidence may be imposed.

Clients may choose to make their social-media accounts private, meaning they are not accessible to the general public without the user's permission. However, as discussed below, content within private accounts can still be compelled by opposing counsel. It has become increasingly difficult to advise clients to refrain from posting, as social media has evolved into a form of self-expression, especially in the past decade among younger clients. Nevertheless, if an attorney has a case from its inception, the best approach to managing social media is through client education about its potential impact on litigation and trial.

What's ethically discoverable by defense?

While opposing counsel can freely search your client's public social media profiles to access and download content to use in litigation (See *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125), they may not do so under the guise of a fake friend request to access private content. For example, if your client's Instagram account is set to private, only users they have affirmatively accepted as followers can view their content.

Opposing counsel cannot attempt to follow your client by submitting a request to do so, whether under a fake account or not. In California, Rule 4.2, which mirrors the ABA Model Rule 4.2, prohibits lawyers from directly or indirectly communicating with a person known to be represented by another lawyer about the subject of the representation, unless they have consent. California Rule 4.1 further prohibits lawyers from knowingly making false statements of material fact or law to third persons. These rules also extend to situations where opposing counsel directs third parties (e.g., investigative companies) to send plaintiffs fake friend requests in an effort to gain access to their private social media page.

Why is this important? If all of your client's social media accounts are set on private since the inception of the case and during your client's deposition, for example, opposing counsel shows them a photo for impeachment purposes that was not exchanged through formal written discovery, this should raise a red flag. It may suggest that unethical contact has been made with your client to gain access to their private account, which would be a serious issue to raise with the court and grounds to bar use of that content at trial.

Keeping this example in mind, ensure that any known content obtained by opposing counsel has been acquired through ethical means, specifically, via written discovery, if your client's accounts have been set to private since the inception of their case.

How private is private?

Pursuant to California Code of Civil Procedure section 2017.010, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." The broad scope of relevance under California law extends to social media postings, whether or not the account is set to private, so long as the discovery requests are narrowly tailored to the claims or issues in the case.

Courts that have addressed this very issue have generally ruled that a plaintiff's privacy settings cannot be used as a shield to prevent opposing counsel from accessing and using information relevant to the case. A frequently cited case on this issue is *Mailhoit v. Home Depot U.S.A. Inc.* (C.D. Cal. 2012) 285 F.R.D. 566, an employment discrimination case in which the plaintiff employee claimed to have suffered emotional and mental distress due to the defendant employer's alleged wrongdoing.

During written discovery, the defendant served the following document requests: (1) "Any profiles, postings or messages . . . from [Plaintiff's] social networking sites that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff . . .; (2) [t]hird-party communications to Plaintiff that place her own communications in context; (3) [a]ll social networking communications between Plaintiff any . . . [defendant] employees . . . which pertain to [Plaintiff's] employment . . .; or, (4) [a]ny pictures of Plaintiff taken during the relevant time period and posted on Plaintiff's profile or tagged or otherwise linked to her profile." (*Mailhoit*, *supra*, 285 F.R.D. at p. 569).

The plaintiff objected to these requests, and the defendant moved to compel the requested documents. The court denied the defendant's motion as to requests one, two and four, finding them overbroad and not reasonably particularized. The court agreed with the plaintiff's argument that the defendant employer should not be able to access all of the plaintiff's social media profiles and com- munications in the "hope of concocting some inferences about

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[plaintiff's] state of mind." (*Id*. at p. 569).

However, the court found that the third request was permissible because it "adequately places Plaintiff on notice of the material to be produced and is reasonably calculated to lead to the discovery of admissible evidence." (*Id.* at p. 572.) While case law across jurisdictions differs in varying degrees on this issue, it is important to keep in mind that, at least in California, the more narrowly tailored the request, the more likely a court will grant a defendant's motion to compel the sought-after social media content from a plaintiff.

What if your case goes to trial?

With the boom in social media, we have found that many clients enjoy having public profiles and sharing their lives on social media, even when advised against it after an incident. We have also seen the rise of clients who are social media influencers and feel compelled to post publicly and frequently, sometimes multiple times a day, because it is one or the sole source of income for them. In these situations, plaintiffs face a serious issue in litigation: the public accessibility of their social media content, which provides opposing counsel with unfettered access to photos and videos, often depicting plaintiffs on trips or enjoying seemingly innocent activities like brunch with friends. As attorneys, we know where this can lead to with the defense, who will undoubtedly use these personal moments to portray plaintiffs as malingerers to discredit their claims.

In many cases, opposing counsel readily presents photos or videos downloaded from a plaintiff's social-media page and cross-examines them with these exhibits during deposition. Prior to a plaintiff's deposition, cross-examination of public social media content should always be anticipated, and the plaintiff should be thoroughly prepared to answer questions about the respective content.

But there are circumstances in which opposing counsel opts not to reveal their knowledge of the plaintiff's social-media activity during depositions. In these situations, the plaintiff may not be shown any social-media photos until the exhibit list is served, shortly before leaving their counsel to address the issue at the last minute. Ultimately, it will be the trial court that decides whether to allow the defendant to use social-media photos or videos during the plaintiff's cross-examination, even for the limited purpose of impeachment. A motion in limine should always be filed in these scenarios, but good discovery practices should be followed during litigation to maximize the chances of success on the motion.

Throughout the discovery phase, it is essential to serve the defendant with formal requests for information regarding any investigation and surveillance of the plaintiff, as well as any photographs and videos depicting the plaintiff. While the former request pertains to sub rosa footage, the latter encompasses social media content. With respect to sub rosa footage, defendants cannot claim work product or attorney-client privilege to refuse production of this material and then later use it as evidence at trial. (See, e.g., *Suezaki v. Super. Ct.* (1962) 58 Cal.2d 266 [holding that surveillance is not a privileged attorney-client communication]; *Dwer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1432 [upholding order excluding admission or use of evidence and documents to which a party asserted privilege objections during discovery]; *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co*. (1993) 12 Cal.App.4th 501, 569 ["A party cannot have it both ways: He or she cannot assert the privilege in discovery and then, having as a practical matter denied the adversary's legitimate discovery rights, waive the privilege and offer the proof at trial without taking or suffering steps appropriate to cure the prejudice to the adversary"].)

As to social-media content, if the defense initially claims that it does not possess any documents responsive to the discovery request and later chooses not to supplement but then springs the content on the eve of trial, Code of Civil Procedure section 2023.030 authorizes sanctions for misuse of the discovery process. This includes the ability to prohibit the offending party from introducing designated matters into evidence. Moreover, Evidence Code section 1101, subdivision (a) prohibits the admission of evidence of a person's character "when offered to prove [their] conduct on a specified occasion." This effectively means that the defendant's proposed exhibits represent an impermissible attempt to use the plaintiff's social media presence and lifestyle choices to tarnish their credibility and claimed injuries.

While there is ample case law supporting motions to exclude sub rosa footage of a plaintiff during trial, the same cannot yet be said about social-media content. Therefore, aside from making arguments in favor of exclusion due to discovery abuse, relevance arguments under Evidence Code sections 350 and 352 should always be made.

Conclusion

Social media is no longer just personal – it is potentially probative. As long as jurors carry smartphones and opposing counsel can issue subpoenas and craft exhibit lists, strategic oversight of social media must be part of every case plan. Researching every aspect of a plaintiff's social-media presence has become a fundamental part of a defense counsel's litigation strategy. While educating your clients about the discoverability and potential use of their social media content in their civil case is essential, navigating the ethical considerations and balancing them with tactical litigation techniques has become equally, if not more, vital.

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