



ALPS

Practice Management Pointers

Social Media and the Attorney-Client Privilege Warning

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I do believe as attorneys we all have a pretty good handle on the ins and outs of attorney-client privilege. It's not been an issue for me. What concerns me more is in not knowing how many attorneys know if their clients get it. Stated another way, are you certain that your clients truly understand how easily the attorney-client privilege can be lost or are you running with assumptions?

The reality is that we live and work in a world of instant gratification and instant communication. Why run to the rental store when we can instantly stream movies, music, and TV any time of the day or night? Heck, by the time a news story is reported on the evening news, it's old news because the story broke on Twitter hours before. Want to share how cute your kids look or the scenic view currently before you while on vacation? Due to the ever present smart phone, computer tablet, or pocket digital camera, photos and video can be taken and posted for the world to see in a matter of seconds. Just look at the success of Instagram! Our ability to share and consume information on a grand scale has never been greater. Certainly reasonable minds will disagree as to whether this is a good thing; but that's not the point. My desire is to look at one unintended consequence, which is the ability of clients to lose attorney-client privilege faster and easier than ever.

Is this a problem that lawyers should be concerned about? Absolutely! Clients have already shared what they discussed with their attorney on a variety of social media sites to include Facebook and Twitter. Given that the younger generation seems to have stopped caring about privacy at all, I suspect that the frequency of such missteps will only continue to grow. While you can't and shouldn't have to continuously monitor what your clients do online, you must not forget what being in the role of an attorney means. Among other things, it means you're to reasonably consult with clients about the means by which the client's objectives are to be

accomplished and you are to explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation.

Of course, the above is in reference to Rule 1.4 of our Rules of Professional Conduct, which is the rule regarding communication with clients. I view this rule as reminding lawyers of the importance of seeing that their clients are fully informed about all aspects of their matter. This includes making certain that your clients understand how their own actions or inactions outside of your law office might impact their case. Again, you are the lawyer and your clients expect you to tell them all that they need to know, which in this day and age includes making sure that they don't do stupid when it comes to participating in social media during the course of representation. With this in mind, I offer the following thoughts as a starting point toward bringing this concern into focus for your own practice. You should consider making sure that your clients know the following at a minimum and, of course, there is value in documenting such.

First, remind your clients that there should be no talking about their case with others. Let them know that if they share in a post on Facebook; in an email to a friend; or simply tell a family member, their coworker or neighbor that you said one aspect of their case is particularly weak then their opponent's lawyer could force you and your client to reveal all communications about that aspect of the matter. This could even be worse if your client, be it an individual or entity, actually took a letter, email or other communication to an ad agency, accountant, or financial planner to discuss the ramifications of the advice you have given them. By the same token make certain that your clients understand that a problem is created if you and your client discuss their legal issue in the presence of someone who is not a client in the same matter, be it a friend, parent, or business consultant of some sort. Think this through as discussions are occurring more and more in very nontraditional ways. For example, consider discussions that occur via text message, email, or on Skype. Who might be viewing these? Was anyone blind copied in? It is so easy to hit forward and send to keep the family up to speed on the latest spin in an ongoing divorce saga. These kinds of missteps should not happen and, as the lawyer, it is your responsibility to make certain your clients at least understand the potential fallout if they do these things.

Clearly a simple statement to your client along the lines of "don't talk to others about this legal matter" no longer cuts it. Things your clients post to Facebook or any other social media site can and will be used against them in a court of law and they need to be made fully aware of that reality. One quick aside here, do not try to circumvent the issue by simply encouraging potential or actual clients to delete accounts or remove damaging information, particularly if no copies will be preserved. I call that spoliation and this can make matters far worse. I have no problem educating clients about how to tighten down privacy settings but in my mind this is where it should stop.

Clients should also be told to not use anyone else's computer to communicate with you. A client's work computer, tablet, or company supplied smart phone do not belong to the client and the employing company has the right to monitor communications that occur on its systems. Thus, there should be no emails to and from a work email address and no communications on the work cell phone. Security issues aside, a similar concern arises with the use of public Wi-Fi systems or public computers such as those found in a hotel or resort business center. When a client is logged on as a guest, the terms of service for some of these systems permit monitoring of the communications. Clients should only use private email accounts that are password protected and accessed from their personal smart phones or computers. Finally, make certain that clients do not have shared email accounts or a shared smart phone with a spouse or someone else. If they do, they may need to establish an independent email account that is password protected with a password that only they will know.

Document these discussions as called for given the specific circumstances in any particular matter. In many situations this could be accomplished with the use of a social media warning statement in an engagement letter. A sample notice might read as follows:

We strongly encourage you to refrain from participating in social media (Facebook, Twitter, Tumblr, Flickr, Skype, Instagram, Pinterest, and the like) during the course of representation. Information found on social media websites is not private, can be discoverable, and may be potentially damaging to your interests. Understand that information shared with others be it verbally; in writing via email, text message or letter; or even posted online could lead to the loss of attorney client privilege were that information to relate in any way to the legal matter that we are handling for you. In addition, do not attempt to delete any of your social media accounts in an attempt to avoid having anything posted there used against you as doing so can also lead to serious consequences such as sanctions for destroying potentially relevant evidence.

Finally, we also advise you to refrain from communicating with us on any device provided by your employer or any computer, smart phone, or other device that is shared with someone else. In addition when communicating with us, do not use your work email address or a shared email account. You should only use a private email account that is password protected and only accessed from your personal smart phone or computer.

The use of this what some are now calling the "don't do stupid warning" can be useful; but don't rely on this type of notice alone. In the end it will be client education coupled with periodic monitoring in some circumstances that will make the difference.



Risk Management Questions?

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