

Social Media Warning as Part of Fee Agreement

I would like to append to my attorney-client fee agreements a warning to the client not to use social media to discuss their cases.

If you have language for this that you are willing to share with me (with Solosez) I would appreciate your sharing it.

This would not be over-sharing.

11. Social Media: *It is very important that all communications about court cases come through your attorney. *Do not comment about any imminent or pending court case on any social media site (Facebook, Twitter, etc.)* The Firm insists on this policy in order to avoid giving your opponent an advantage and to prevent you from being accused of interfering with the privacy of others or prejudicing legal proceedings.

Timothy A. Gutknecht, Illinois

I would actually suggest going further and having the client temporarily suspend / shut down all social media accounts during the pendency of litigation.

Eugene Lee, California

I think that's going too far, unless there's a meaningful reason to think that the client just can't be disciplined about social media use.

People live on social media these days. (Well, an awful lot of people, not literally everyone.) Litigation will last at least months, often years. Asking a client to abandon social media completely during the pendency of litigation is a good recipe for losing the client.

James S. Tyre, California

I take your point. Ultimately, I think it depends on the case. But if the case is a serious six figure claim or more, I would seriously consider it.

As an example, if the case involves a plaintiff alleging clinical depression as a result of work-related events and plaintiff posts even one picture of themselves smiling (at dinner with family, at a party)

during the pendency of the suit, the defense lawyer is almost certainly going to make that an exhibit at trial and parade that to the jury.

When I post on listservs, I tend to be too terse. This particular topic is a complicated one (not to mention very interesting) and probably deserves an entire seminar or legal practice article.

Eugene Lee

I agree with James, Gene. I would note there is a significant difference in the types of cases and clients each of you represent, but I think the bulk of the things I see included in fee agreements are designed for the attorney's benefit, particularly CYA, and often adverse to the client's interest which is likely to be unenforceable. My agreement is less than two pages in plain English. Whether or not you want to represent a client is a personal choice, but trying to restructure the client's life is an abuse of your position in the relationship. When you draft your agreement, it would be wise to look at it from the perspective of a malpractice attorney who is preparing to sue you on behalf of a former client.

Duke Drouillard, Nebraska

Duke, I think reasonable minds can differ on this point. In any case, I'm going to stick with my guns here. I had a case where my client was being surveilled by the defendants after we filed suit. I had told him I strongly suspected he would be surveilled and he agreed with me when he started noticing strange people hanging around his house. I also suggested he shut his social media down as I believed defendant would be monitoring his social media closely through coworkers who he had friended. Lo and behold, during discovery, defense counsel informed me they had surveillance tapes and social media pages from my client's account. They didn't end up using any of them at trial because they were completely useless. On the other hand, I've had clients continue to use social media during litigation against my advice, and those became key defense exhibits at trial, leading to very depressed awards. A lawyer can't "order" a client to shut down their social media accounts, but a lawyer can certainly "recommend" it, which is what I do. I think it would be irresponsible *not* to recommend it when the case warrants it.

Anyhoo, I need to get back to writing a brief that's due on Monday, so I'm done chiming in on this thread. Have a great weekend all!

Eugene Lee

Monday is a court holiday in CA state courts.

Thanks to those who have responded to my post so far.

On a somewhat related topic I am listening to a podcast now, San Harris making sense, number 152, which he interviews a guest who explains, among other things, why social media is addictive, how the giant companies involved capture data about us such that, distinguished from Wikipedia, if you and I put the same search into google, we get different results based upon our prior histories. Also social media encourages hate and tribalism because reptile brain activating information (fear of the other) keeps a user's attention, so those types of stories, inputs, are prioritized on social media.

Roger M. Rosen, California

Gene, good luck with the brief.

Your concern is not misplaced and I tell clients to be extremely cautious if not step away from social media when I represent personal injury and employment plaintiffs.

As defense counsel, pulling up social media pages was the first thing I did when I got a new case. It's amazing how many cases had their values adjusted drastically downward as a result of my showing the plaintiff these things in deposition or at mediation. For example, a kid whose parents claimed he was disabled with a TBI posted pictures of him winning the award for best all-around student athlete in his school. A woman who claimed she was paralyzed and couldn't leave bed posted a photo guzzling a bottle of vodka in the front seat of a pickup partying with friends. A guy who claimed he couldn't walk, sit or work due to back pain posted photos of himself dancing crazy at his wedding, jumping off a cliff into a pool of water and running 5k/10k races. I could go on and on and on. The lawyers didn't do their due diligence with their clients and were in some cases suborning perjury in my opinion and I never would have known any of it if the social media didn't exist. I do always ask for social media in discovery, so locking it down isn't always effective and deleting posts is super risky.

These same pages are always the subject of motions in limine here because they can be so damaging.

My 2 cents!

Deena Buchanan, New Mexico
