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Good Privilege And Confidentiality Habits For Remote Attys

By **Andrew Strickler**

Law360 (March 26, 2020, 5:30 PM EDT) -- An unprecedented public health crisis has driven lawyers and just about everyone else indoors.

With lawyers scattered, working with unfamiliar tools and under acute stress, the coronavirus pandemic is also raising the chance of serious errors of judgment being made on social media. Others may simply let good privilege and confidentiality habits fall to the wayside while trying to manage both personal and professional upheaval.

"It's a perfect storm of variables for people to make real mistakes," said Jan Jacobowitz, who heads the professional responsibility and ethics program at the University of Miami School of Law.

"In this particular moment, it's more important than ever that we just pause to think about what we're doing before we do it, and not act from an emotional place."

Here are four tips for shoring up privilege and client confidentiality.

Cement Your Client Relationships

As you may remember from your last ethics CLE, you don't normally need a formal written engagement to create an attorney-client relationship and privilege-protect your communications.

But these are abnormal times, times that are unsuited for leaving any uncertainty about what will or will not be deemed privileged in the future.

The safe move during this crisis, ethics experts say, is to get every engagement in writing, even in circumstances that might not otherwise call for it. That also applies to making sure that any changes being made in the scope of ongoing matters are also being updated and approved.

In-house lawyers should also pay extra attention to whether or why they might be giving legal advice to company affiliates and subsidiaries, and adjust as needed.

With a huge swath of the legal community suddenly working remotely, "we're about to see a huge new proliferation of written and electronic communications, more conference calls, and a lot less personal check-ins," said privilege expert and blogger Todd Presnell of Bradley Arant Boult Cummings LLP.

That will effectively create a bigger written record of client-lawyer communications during the virus period, and thus make a fatter target for privilege challenges down the road.

"We're doing things in new ways and in new environments, and that could lead to some undisciplined conduct and a greater risk of failures in this area," he said.

Practice Discipline in Meeting Invites and Email

Anyone with an email account knows the dangers of the "reply all," whether it's inadvertently forwarding an insensitive remark to a friend or blasting a client's entire file to a team of opposing counsel.

And with most of the legal profession now reliant on virtual meetings and group emails, now is the time to consider what client information is being shared with whom and why. That's particularly true for stressed-out partners and practice leaders who may be trying to save effort by doubling up management-focused directives with client work.

The quick advice: Double-check "cc:" lines and attachments, cut down on virtual meeting invitations, and don't eschew one-to-one phone calls.

"In the remote work world right now, it's natural that some people will start copying in people on things they might not need to have," Presnell said. "And when we invite too many people onto conference calls or to our Zoom or WebX meetings, and with all that copying, you could see privilege waivers happening in some of these instances."

Check Your Social Media Output

Perhaps more than any other crisis, the global COVID-19 outbreak has pulled our attention to screens and online news.

And with an increasing number of lawyers and judges getting comfortable sharing opinions on Twitter and other social media platforms, ethics experts see the potential for trouble amid the current crisis.

Jacobowitz, who co-authored a 2017 study of legal ethics and social media, said the stress of the virus could lead some to overshare, or to lash out in response to a news item or professional challenge.

Others will be understandably anxious about their businesses, and could end up venting on social media. Others could also turn to unethical self-promotion by posting about a professional "win" without the client's consent.

Add in the profession's well-documented problems with depression and substance abuse, Jacobowitz said, and it's clear now is not the time to toss caution aside while online. She also cautioned well-meaning lawyers who might be inspired to offer free or unsolicited legal advice online related to the crisis.

"Lawyers can give general advice not specific to anyone's particular facts and be fine," she said. "But lawyers have been warned from the beginning of social media that even if it's on a blog or in a Facebook chat, once you start getting into the specifics of someone's case, they're a prospective client, so you ought to be careful with that."

Take Modest — Not Extreme — Steps to Work Privately

For many of us, the flip side of social distancing is being in tight quarters with our partners, kids, pets or assorted roommates.

A blessing though they may be, all that togetherness can put cracks in client confidentiality. Unsurprisingly, many in BigLaw are mulling what counts as "reasonable care" under Rule 1.6 on protecting client confidences in this newly crowded context.

But in practical terms, lawyers can make commonsense adjustments — heading outside to make a sensitive call or just closing doors, for example — and still be on solid ground in terms of confidentiality and protecting privilege.

Many firms and other businesses are also sending remote employees directions about using business laptops and secure virtual private networks, or VPNs, and reminders not to use personal email accounts to communicate about client matters. Risk management and insurance firm Aon PLC has urged firms to alert remote workers that downloading business data onto personal devices can cause issues with security tools in firm systems.

"It's unlikely that a judge a month or a year from now is going to say that someone lost the privilege in these circumstances just because the lawyer's spouse was in the room and overheard something," Presnell said. "That said, it's not unlike having a private conversation at the water cooler at the office, so isolate yourself as much as possible and just do what you can."

--Editing by Brian Baresch and Alanna Weissman.

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