

Attorney Ethics in the Social Media Realm

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John G. Browning

PASSMAN & JONES, P.C.

1201 Elm Street, Suite 2500

Dallas, Texas 75270

Phone: 214-742-2121

Email: browningj@passmanjones.com

I. An Introduction to Ethical Concerns with Social Media Use

By now, most lawyers know that practicing in the Digital Age is rife with ethical minefields. With over 2.3 billion people worldwide on Facebook, a billion tweets processed on Twitter every 48 hours, and over 800 million users Instagramming and Snapchatting away, social media is impossible to ignore. Changes to Model Rule of Professional Conduct 1.1 have ushered in new expectations of digital competence as attorneys are now held to a higher standard of being conversant in the benefits and risks of technology. Ethics opinions across the country are addressing issues like the limits of advising clients about what to “take down” from their Facebook pages, contact with witnesses via social media, and even researching the online profiles of prospective jurors. By forgetting that posts on Facebook or Twitter are just as subject to ethical prohibitions as more traditional forms of communication, lawyers nationwide have found themselves facing disciplinary actions.

Take, for example, the recent case of Florida plaintiff’s personal injury lawyer David Singer, who began a jury trial in a case over whether a passenger had been permanently injured by walking on the hot deck of a Carnival cruise ship, only to have the federal judge presiding over the case refer him to a disciplinary committee over his Facebook posts. Carnival’s counsel argued that Singer should be disqualified for “inexcusable” conduct in posting photos and “willfully improper” statements on Facebook to warn passengers of “outrageously high temperatures” on the cruise ship deck. Among other statements on Singer’s Facebook page right before trial were allegations that Carnival “knew that their fake Teakwood deck heated up” so as “to burn the feet of a passenger who ended up having all 10 toes and parts of both feet amputated,” as well as admonishments to a defense medical expert that “Doc, your buddies at Carnival knew of the problem because there were nine previous cases of burns on their deck—many of them kids.” Carnival’s lawyers also claimed that Singer had violated court orders by allegedly publishing private information about a mediation in the case. Although Singer apologized to the court, federal judge Joan Leonard referred the Facebook conduct to a disciplinary committee.

Lawyers have to understand that civility and professionalism are expected not just in the courtroom, or in traditional avenues of communication, but on social media platforms as well. On many occasions, a lack of civility can put a lawyer at risk of disciplinary action or even criminal charges. In In re Gamble in 2014, the Kansas Supreme Court imposed a six-month suspension on a lawyer for his “egregious” and “over the top” messages on Facebook to an unrepresented unwed mother while representing the baby’s biological father during an adoption proceeding. The court felt that the lawyer’s communications, trying to make the mother feel guilty about consenting to give the child up, violated both Rule 8.4(d) (conduct prejudicial to the justice system) and Rule 8.4(g) (conduct reflecting adversely on the lawyer’s fitness to practice).

Beyond civility concerns, lawyers need to be aware of how their use of social media in handling a case can raise ethical issues. This includes such tasks as case investigation, evidence preservation, and even jury selection. A number of jurisdictions around the country have already begun holding attorneys to a higher standard when it comes to making use of online resources, including demonstrating due diligence, researching prospective jurors and even locating and using

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