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PROFESSIONALISM DOWN THE TUBE: THE USE OF SOCIAL NETWORKING BY AND AGAINST LAWYERS

by JANEA RAINES

#127409 - This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because he's no snitch. . . My client is in college. Just goes to show you that higher education does not imply that you have any sense.

- The Bardd Before the Bar: Irreverent Adventures in Life, Law, and Indigent Defense

Kristine Ann Peshek used to be an assistant public defender in Winnebago County, Illinois, protecting indigent clients accused of crimes.¹ Based on

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her experiences as a public defender, she authored a blog – “The Bardd Before the Bar: Irreverent Adventures in Life, Law, and Indigent Defense” – which she published for a little less than a year.² In April 2008, when her supervisor discovered her blog, along with its stories about her difficult clients, she was fired.³

Peshek’s license to practice law was also suspended until June 8, 2010.⁴ That same year, the Illinois Supreme Court suspended 26 other attorneys, for infractions ranging from illegal drug use to fraud to theft.⁵ The inclusion of Peshek’s online statements with this list of crimes only illustrates how seriously the legal disciplinary authorities are taking social media indiscretions.

SOCIAL MEDIA CAN PLACE CLIENT CONFIDENCE IN JEOPARDY

More attorneys are using the rich archives available on social networking sites such as Facebook, Twitter and blogs to investigate the backgrounds of parties, witnesses, opposing counsel, jurors and judges.⁶

However, the same tools that lawyers are using to win cases are also being used against them in ethics violation investigations. New technologies force attorneys to a crossroads where professional responsibility, discovery, evidence and privacy converge.⁷ As this convergence continues to surface, the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC) has had to combat unprecedented ethical issues.

For example, on Feb. 6, 2012, the ARDC filed a complaint against Jesse Raymond Gilsdorf, an attorney that represented a client charged with the unlawful delivery of a controlled substance in Pike County, Illinois.⁸ Within a month of receiving a DVD copy of a video of his client engaged in an undercover drug buy from the state’s attorney, Gilsdorf showed it to 20 people unrelated to the case.⁹

He then uploaded the two-part video, entitled “Cops and Task Force Planting Drugs - Part I and II,” to YouTube.¹⁰ Shortly thereafter, Gilsdorf posted a link to the YouTube video on his Facebook page.¹¹

Melissa Smart of the ARDC observes that this form of attorney misconduct is appearing more and more often.¹² “It’s one thing that the misconduct is hap-

pening, but the only reason it has come to light is because it is done in such a public medium."¹³

THE LEGAL PROFESSIONAL PRIVILEGE CALLS CLIENT RIGHTS INTO QUESTION

The misuse of social networking by attorneys begs the question: If clients cannot trust their lawyer, who can they trust? A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.¹⁴ This contributes to the trust that is the hallmark of the client-lawyer relationship.¹⁵

Legal professional privilege, as it is now called, has its origins in the concept of confidence.¹⁶ A person or his legal counsel should be free to speak about matters regarding their litigation without fear that it will subsequently be used against him.¹⁷ This legal professional privilege is an important safeguard of a client's legal rights.¹⁸

Misconduct like blogging about a client or posting a revealing video on YouTube is a clear violation of not only the client's trust, but also the client's legal rights.

In reality, the privilege to defend the client is eliminated if the client's secrets are disclosed in public without the client's approval, because it is a breach of the mutual agreement to keep the client's secrets entrusted to the lawyer absolutely confidential.¹⁹ Not only does such a breach of client confidentiality undermine the importance of the relationship between attorneys and their clients, it undermines the professionalism of the law.

CONCLUSION FOR ILLINOIS

As the popularity of social networking sites like Facebook and Twitter grows, so does their importance in litigation.²⁰ Not only has the law had to advance to permit using social media as tools on behalf of clients, but now ethics enforcement agencies must use these mechanisms to ensure good behavior among practicing attorneys.

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As the ARDC's Smart advises, "While Illinois has not yet affirmatively outlined this particular area, don't be the test case."²¹ What Illinois has outlined within its Professional Code of Ethics is that, "even when not acting within the scope of your profession as a lawyer, you are always an attorney."²²

Nevertheless, the ARDC has increasingly had to discipline Illinois attorneys for publicly revealing the private information of their clients. In the cases of Peshek's blog and Gilsdorf's video, what they released into cyberspace was used against them in a court of law.

Given the pervasive nature of social media, explicit guidance about how social media sites can be used by Illinois lawyers, as well as against Illinois lawyers, is critical. Without it, a lot more lawyers may find themselves with a suspended license – and a lot more time on their hands for blogging about new hobbies instead of clients.

NOTES

1 Debra Cassens Weiss, *Blogging Assistant PD Accused of Revealing Secrets of Little-Disguised Clients*, ABA J., Sept. 10, 2008, available at www.abajournal.com/news/article/blogging-assistant_pd_accused_of_revealing_secrets_of_little-disguised_client.

2 *Id.*

3 *Id.*

4 Melissa Smart, Litigation Manager, Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, Presentation at the Chicago Bar Association Cyber Law & Data Privacy Committee: Being Too Social with Social Media? New Technologies and the Rules of Professional Conduct (Nov. 15, 2011).

5 Chris Bonjean, *Illinois Supreme Court Disbars 12, Suspends 26*, ILL. LAWYER NOW, May 18, 2010, available at <http://iln.isba.org/2010/05/18/illinois-supreme-court-disbars-12-suspends-26>.

6 *Id.*

7 Smart, *supra* note 4.

8 In re Jesse Raymond Gilsdorf, No. 6225020 (Ill. ARDC, filed Feb. 6, 2012).

9 *Id.*

10 *Id.*

11 *Id.*

12 Interview with Melissa Smart, Litigation Manager, Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois (Apr. 19, 2012).

13 *Id.*

14 MODEL CODE OF PROF'L CONDUCT R. 1.6 cmt. (1983).

15 *Id.*

16 Frans H. Winarta, *Lawyer-Client Confidentiality Often Violated*, JAKARTA POST, Apr. 21, 2012, available at www.thejakartapost.com/news/2012/03/29/lawyer-client-confidentiality-often-violated.html.

17 *Id.*

18 *Id.*

19 *Id.*

20 Beth Boggs & Misty Edwards, *Does What Happen on Facebook Stay on Facebook? Discovery, Admissibility, Ethics and Social Media*, ILL. BAR J. (July 2010).

21 Interview with Melissa Smart, Litigation Manager, Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois (Mar. 5, 2012).

22 *Id.*