Social Media: A Double-Edged Sword For Defense Counsel

Law360, New York (July 31, 2012, 1:20 PM ET) -- If you have been following the national news, you know that Florida prosecutors have charged George Zimmerman, a Florida neighborhood watch volunteer, with second-degree murder in the shooting death of an unarmed teenager, Trayvon Martin. You may have also seen images of the injuries Zimmerman purportedly received during his struggle with Martin prior to the shooting, and you may have heard conflicting arguments and conclusions as to whether the images are consistent with Zimmerman’s claim of self-defense.

What you may not know, however, is that Zimmerman’s counsel, Mark O’Mara, is engaged in a social media campaign to manage a flood of incoming inquiries and to provide real-time damage control for negative reports and publicity against his client. As part of that effort, O’Mara has launched Facebook and Twitter accounts and created a blog about the case.

While the use of social media may provide additional information about the defendant and his side of the case and assist with damage control, O’Mara’s approach also creates risks and obligations. The risks include violating restrictions placed on attorneys related to commenting on an active legal matter, potentially in violation of state ethics rules. In addition, O’Mara risks tainting the jury pool (although this could be a calculated risk if O’Mara believes the jury pool is already contaminated against his client to a point where he could not reasonably expect an unbiased jury of his peers). Further, while one of O’Mara’s goals may be to manage or balance adverse publicity, his social media efforts may actually generate new evidence in the case, some of which could be damaging to Zimmerman’s defense.

In addition to risk, O’Mara has created some obligations under state ethics rules. Now O’Mara is obligated to monitor the online content he posts and remove misleading information. According to The Florida Bar Guidelines for Networking Sites, he is also obligated to monitor content posted by third parties on his site, he must remove information that does not comply with lawyer advertising rules, he may not use third parties to circumvent such advertising rules, and he is responsible for content he prompts third parties to post on his site. O’Mara has a duty to preserve potentially relevant data related to the litigation, which could be interpreted to extend to new evidence created by his social media sites. Also, O’Mara may have had a preexisting duty to preserve Zimmerman’s personal My Space site, which Zimmerman has taken offline.

O’Mara’s blog and Zimmerman’s personal sites have already proven to be of interest to the prosecution and the court, as illustrated by the contretemps around his legal defense fund. Subsequently, Zimmerman’s spending of the defense funds came under scrutiny, not because it appeared the funds were used primarily for personal expenses, but because the judge in the case, Kenneth Lester Jr., felt it indicated he was a potential flight risk.
As a result, he raised Zimmerman’s bond to $1 million. The existence of the previously undisclosed legal defense fund and evidence of Zimmerman’s spending pattern appeared to damage his credibility with the court. The whole affair may also have damaged Zimmerman’s public image. Donors to the defense fund who presumably sided with Zimmerman were afforded visibility into how the funds were spent; those who felt that spending was inappropriate may have been converted from supporters into critics.

In response to the additional negative attention drawn to Zimmerman’s online fundraising and the resulting discovery reviewed at the subsequent bail hearing, O’Mara filed a motion requesting that Judge Lester withdraw and be replaced because the judge could no longer grant a fair hearing. Judge Lester allegedly criticized Zimmerman’s character during the bail hearing when considering legal defense fund spending evidence to determine whether Zimmerman was a flight risk. That was not the first time Zimmerman’s counsel has made this argument.

Back in April, Judge Jessica Recksiedler, the former trial judge in this case, stepped down after a similar motion for recusal because her husband worked for a law firm that was frequently contacted by CNN to comment on the case. As the Zimmerman trial attracts more media attention through both social media and traditional media outlets, it will likely become even more difficult to identify unbiased jurors and court officials with no ties to the case.

Zimmerman’s online statements have also attracted negative media attention as they allegedly demonstrate racial bias and describe his pursuit of Martin prior to the shooting. If such allegations are true, O’Mara will likely downplay any racially charged statements made online by his client, and Zimmerman’s own descriptions of his pursuit of Martin, which are central to his defense under Florida’s "Stand Your Ground" statute, and could potentially be entered into evidence at trial. A new graphic video of Zimmerman reenacting the events was publicly released on June 21.

Mark O’Mara faces many obstacles ahead — both inside the courtroom and in managing his client’s public image. Zimmerman’s own use of social media has already directly and adversely impacted his ability to make bond. O’Mara’s blog may help his client sway public opinion in his client’s favor, but it appears at this stage that its impact has not yet counterbalanced the impact of his client’s social media postings, which are distracting from the key issues of the case.

Many of the risks and obligations presented in the Zimmerman case arising from the social media campaign are the same or similar to those all counsel face when making public statements about cases in traditional media outlets. However, O’Mara’s use of social media puts a new twist on the issues.

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