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Production of Non-Privileged Materials

InfoWars host Alex Jones was recently found liable for defamation based on statements he made on his show claiming the shooting at Sandy Hook Elementary School was a hoax. In a surprise twist at trial, on cross-examination, the plaintiffs' attorney confronted Jones with a trove of non-privileged text messages and emails from Jones's phone that were relevant to the claims at issue, in order to prove that Jones had lied at his prior deposition when he testified that he had searched his phone and did not have any such texts or emails. As it turns out, just before trial, Jones's lawyer had "accidently" sent the plaintiff's counsel an entire digital copy of Jones's phone, but did not take any steps to claw them back. Although the dominant narrative has been that Jones's lawyers "messed up" by producing these materials, it begs the question why they had not been produced previously.

Under ABA Model Rule 3.4, attorneys have an ethical obligation to comply with the rules of any tribunal in which they appear, including the rules governing discovery, and attorneys cannot "obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value [or] counsel or assist another person to do any such act." As such, assuming that the plaintiffs had served written discovery on Jones and assuming that the texts and emails were responsive and non-privileged, Jones's lawyers had an ethical obligation to produce the materials at the time they were requested or, at a minimum, when they learned of the materials.

Moreover, if Jones's lawyers were aware of the texts and emails before Jones's deposition and knew that he had perjured himself by testifying that those materials did not exist, they had an ethical obligation to take reasonable steps to correct the false testimony. ABA Model Rule 3.3 provides that "[i]f the lawyer's client . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal." In such situations, the lawyer's proper course is to "to advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence." Id. at cmt. 10. If that fails, a lawyer is ethically required to either withdraw if that will cure the false evidence or "make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6." Id. Here, given that Jones did not correct his false deposition testimony before his disastrous trial testimony, his lawyers may have violated their duty of candor to the tribunal by failing to withdraw or make a reasonable disclosure to the court.

To avoid such a scenario, at the outset of each engagement, an attorney should explain to the client (preferably in writing in the engagement letter) that the client has an obligation to identify and preserve all relevant documents and communications and request that the client send a copy of everything in their possession, custody, and control. This protocol will allow the attorney to get their arms around the universe of relevant material and ethically respond to opposing counsel's written discovery requests when the time comes.

Hinshaw Contact: Robert Buchholz - https://www.hinshawlaw.com/professionals-robert-buchholz.html

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