



ETHICAL LIMITS ON INVESTIGATING JURORS' SOCIAL MEDIA SITES

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The American Bar Association's Standing Committee on Ethics and Professional Responsibility recently advised on the ethics of investigating jurors' social media webpages in Formal Opinion 466. While a juror's public pages online are fair game, attorneys may not request non-public information and must take "reasonable remedial measures" should they discover criminal or fraudulent conduct. The opinion reminds trial lawyers to tread carefully when researching jurors, as the ethics rules struggle to keep up with technology.

PERMISSIBLE INVESTIGATION VERSUS IMPROPER EX PARTE COMMUNICATION

The committee focused on blogs and "electronic social media" (ESM), such as Facebook, MySpace, LinkedIn, and Twitter. It considered three types of attorney review: (1) passive review of public ESM where the juror is unaware that the page has been viewed; (2) active review where the attorney requests access to the juror's nonpublic ESM; and (3) passive attorney review of public ESM where the juror becomes aware of the attorney review through web notification. It also weighed the public interest in identifying jurors with improper bias or prejudice and the prohibition on ex parte communications with jurors set forth in Rule 3.5(b) of the ABA Model Rules of Professional Conduct.

The committee concluded that an attorney may not request access to a juror's nonpublic ESM, either personally or through another, as that would constitute an ex parte communication. By contrast, review of a juror's public ESM without making an access request and without the

juror's knowledge is not a prohibited communication because it is "observing that which is open to the public." Where the juror learns that an attorney has reviewed his public ESM due to website features that notify the user when his page is viewed, and by whom, the committee concluded the ESM notice was not a communication because it came from the ESM, not the attorney. The committee added the caveat that attorneys should understand the terms of use of the ESM site and be aware of review notification features, in accordance with their obligation "to be current with technology" under Model Rule 1.1, Comment 8. Lawyers should also ensure their research does not "embarrass, delay, or burden" the juror under Model Rule 4.4(a).

Two other bar associations previously came to the opposite conclusion with respect to whether ESM review notifications are communications. The Association of the Bar of the City of New York's Committee on Professional Ethics found that an ESM viewer notification

LAWYERS NEED TO KNOW WHERE THE LINE SHOULD BE DRAWN BETWEEN PROPERLY INVESTIGATING JURORS AND IMPROPERLY COMMUNICATING WITH THEM. IN TODAY'S INTERNET-SATURATED WORLD, THE LINE IS INCREASINGLY BLURRED.

—ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466, at p. 2.

is a communication, since it “[brought] an idea, information, or knowledge to another’s perception—including the fact that they have been researched.” It also opined the viewer notification would violate ethical rules if the attorney knew such a notice would be sent, but the notice was silent on the propriety of an “inadvertent” communication. The New York County Lawyers’ Association Committee on Professional Ethics went further, opining that a juror’s knowledge of an attorney’s website review alone may be an impermissible communication, “as it might tend to influence the juror’s conduct with respect to the trial.”

DISCOVERY OF JUROR MISCONDUCT

The ABA found that discovery of criminal or fraudulent juror conduct requires the attorney “to take remedial measures including, if necessary, reporting the matter to the court” under Model Rule 3.3(b) and Comment 12 thereto. The duty to remediate is triggered once the lawyer learns of the juror misconduct. For non-criminal, non-fraudulent conduct, a lawyer’s duty “will depend on the lawyer’s assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes.”

UNRESOLVED QUESTIONS

Section of Litigation leaders agree that Formal Opinion 466 strikes the right balance between jurors’ privacy expectations and attorneys’ duty of candor to the tribunal and competent representation of their clients. Questions remain, however, given the variety of features available in social media technology.

“One glaring example is where an attorney gains access to a juror’s nonpublic information through a third person who does have access. A person on Facebook can allow “friends of friends” to see his or her nonpublic information. Under the opinion, an attorney arguably could send a friend request to a mutual friend of the juror and gain access to the juror’s nonpublic information,” observes Rudy R. Perrino, Los Angeles, CA, cochair of the ABA Section of Litigation’s Commercial & Business Litigation Committee.

An attorney who already has a friend in common with the juror may view non-

WHERE FORMAL OPINION 466 DRAWS THE LINES

LAWYER'S INVESTIGATIVE ACTIVITY	PERMITTED	PROHIBITED	EX PARTE COMMUNICATION
Passive review of public ESM without attorney making an access request	X		No
Active review when attorney requests access to nonpublic ESM		X	Yes
Passive review of public ESM when juror becomes aware through a system notification of viewer's identity	X		No

public information without sending a friend request. “On the one hand, it is not a new communication, and it would seem to be permissible to use the existing relationship to see the information,” says Courtney E. Ward-Reichard, Minneapolis, MN, social media chair of the Section of Litigation’s Technology for the Litigator Committee and Mass Torts Committee. “On the other hand, the opinion is trying to set that line on the expectation of privacy that jurors may have with respect to their data,” she notes.

Social media sites such as Twitter or Google Plus also present questions about whether “following” a person is the type of prohibited communication contemplated by the opinion, according to Ward-Reichard. “On those sites, users may follow a person without their permission, but the individual will be notified. This kind of activity would seem to be permitted under the opinion since the notification is still coming from the site, not the attorney. However, following someone on these sites is a step beyond simply viewing their profile on a site like LinkedIn,” she explains.

Further, though the committee declined to opine on whether the standard of care necessitates Internet research on juror backgrounds, it suggested in a footnote that Comment 8 to Model Rule 1.1 may so require. Comment 8 states that an attorney “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” The committee noted that a state supreme court and two other ethics committees that had considered the issue concluded that attorneys had a duty to make reasonable efforts to obtain juror information, which may include using social media to do so.

The nature and extent of juror research attorneys should undertake “depends on the nature of the case,” says Ward-Reichard. “You don’t expect an attorney to be researching jurors in-depth for a case that may last half a day, but the opinion recognizes that having technological prowess and using Internet resources is a part of an attorney’s ethical obligation,” she explains. The standard of care likely also includes monitoring jurors’ activities on social media sites for potential misconduct after the jury is empaneled and during trial, says Perrino.

Due to the evolving technology, attorneys may seek to obtain a court order clarifying the boundaries of permissible juror research to avoid confusion, recommends Ward-Reichard. “This approach also protects the litigants, who may not want jurors to find out they have been investigating them by receiving a notification from a website. It would be preferable for the judge to explain that their online presence may be examined by the parties in the case.”

RESOURCES

- ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 (Apr. 24, 2014), available at <http://bit.ly/aba-ethics-466>.
- Association of the Bar of the City of New York Comm. on Prof’l Ethics, Formal Op. 2012-2, available at <http://bit.ly/ny-opinion-2012-2>.
- New York County Lawyers’ Association Comm. on Prof’l Ethics, Formal Op. 743 (May 18, 2011), available at <http://bit.ly/nycla-opinion-743>.
- Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010).