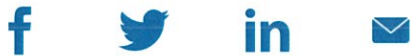


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Ethics Tip - February 2017

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In 2014, the ABA Standing Committee on Ethics and Professional Responsibility issued [Formal Opinion 466 *Lawyer Reviewing Jurors' Internet Presence*](#). In that opinion, the Committee addressed the ethical issues involved when both during the jury selection process and the course of a trial, lawyers monitor jurors' postings on Electronic Social Media (ESM) in order to get a sense of their background and proclivities in particular matters.

At the outset of the Opinion, the Committee noted that in view of the public interest in protecting jurors from ex parte communications from either parties to the case or their lawyers, judges and lawyers are strongly encouraged to discuss the court's expectations regarding lawyers' monitoring of jurors activities on the internet, and that any order or local court rule will in addition to the applicable rules of professional conduct govern the conduct of the lawyers in such matters.

Communications with jurors raise issues under both Rules *3.5 Impartiality and Decorum of the Tribunal* and *4.4 Respect for Rights of Third Persons* of the ABA Model Rules of Professional Conduct.

Opinion 466 stated that a lawyer may not send an access or “friend” request to a juror or potential juror to access information that is not generally available to the public nor may the lawyer do so through dissemblance or through the acts of another.

Some ESM platforms have a feature that automatically notifies the ESM website owner of the identities of all visitors to their website. If a lawyer were to visit a juror’s ESM site that had such a feature, would the fact that the juror was notified that the lawyer had visited their website constitute an impermissible communication with the juror? The Committee addressed this issue and concluded that this was not a communication from the lawyer to the juror since it was the social media platform and not the lawyer that initiated the notification to the juror, analogizing the situation to that of a neighbor who reports to the juror that he saw the lawyer’s car driving down the juror’s street.

The Committee cautioned however that lawyers should educate themselves about the features of the different ESM sites and that “lawyers who review juror social media

should ensure that their review is purposeful and not crafted to embarrass, delay or burden the juror or the proceeding.”

Earlier opinions from New York disagreed with the ABA analysis, stating that notifications from the social media website that the lawyer had visited the site had the potential to harass and intimidate the juror and constituted an impermissible communication with the juror in violation of Rule 3.5, and that lawyers have an obligation to familiarize themselves with the features of a particular ESM platform so as to avoid any inappropriate communications with a juror. See, [New York State Bar Opinion 2012-2](#) and [New York County Bar Opinion 743 \(2011\)](#).

For a summary of these opinions, see the November 2015 Eye on Ethics column, [Lawyer review of jurors' presence on the Internet](#).

In 2015, the New York State Bar Association has issued [Social Media Ethics Guidelines](#) that included a section on monitoring Juror's social media sites. An excerpt from these guidelines states:

...A lawyer must take measures to ensure that a lawyer's social media research does not come to the attention of the juror or prospective juror. Accordingly, due to the ethics opinions issued in New York on this topic, a lawyer in New

York when reviewing social media to perform juror research needs to perform such research in a way that does not leave any “footprint” or notify the juror that the lawyer or her agent has been viewing the juror’s social media profile.

The New York opinions cited above draw a distinction between public and private juror information. They opine that viewing the public portion of a social media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror’s profile and assuming other ethics rules are not implicated. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.

State Bar Ethics Opinions

Since the issuance of Opinion 466 there have been at least three comprehensive state bar ethics opinions that have been issued on a very wide variety of issues as they relate to ESM including monitoring juror’s presence on the internet. Two of them follow the analysis of the ABA Opinion. *See*, [Colorado State Bar Opinion 127 Use of Social Media for Investigative Purposes, 09/2015](#) (2015) that agreed with the ABA Opinion stating

...[T]he Committee realizes that some social media networks automatically notify a person when someone views his or her profile. In these circumstances, the person whose profile is viewed may also receive information concerning the individual who viewed the profile. Some bar association committees have opined that it is proper for a lawyer to view a juror's social media profile *only* so long as the juror remains unaware that such investigation is occurring. The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility expressed its disagreement with this view, reasoning that in such circumstances, the lawyer is not communicating with the juror. Rather, the social media service is communicating with the juror based on a technical feature of the particular social media, consistent with agreements between the provider and the subscriber.

See Also Pennsylvania State Bar Opinion 214-300 (2014) that states as follows:

...There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed. Additionally, a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.

This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5's

prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

Finally, West Virginia State Bar Opinion 2015-02 [L.E.O. 2015-02 SOCIAL MEDIA AND ATTORNEYS](#)_(2015) concluded that a lawyer may view the publicly available sections of the site, but may not attempt to access the private sections, as this would violate Rule 3.5, but did not address the passive communication issue.

Bar Journal articles, Court Orders and Local Rules

Two very recent bar journal articles provide a broad overview of the issues involved, *See*, [David J. Beck](#) [Jacqueline M. Furlow](#), *The Ethical Boundaries Of Reviewing Jurors' Internet Presence: The Need For A Rule In Texas* 76 *The Advoc. (Texas)* 52 (2016) and 41 No. 3 *Law Prac.* 16 and [Courtney Ward-Reichard](#) *Who's In The Box? Ethical Considerations In Researching Jurors* 41 No. 3 *Law Prac.* 16 (2015).

The Texas bar journal article also summarizes recent case law on this topic, and in particular summarized an order entered in [Oracle Am., Inc. v. Google, Inc., No. 3:10-cv-03561-WHA, Dkt. No. 1573](#) (Mar. 25, 2016) that addressed the passive monitoring issue. The article summarized the relevant portion of the order as follows:

...Importantly, Judge Alsup acknowledged that Formal Opinion 466 sanctioned “passive” Internet searches on prospective jurors, but concluded that, despite the ABA’s opinion, the fact “[t]hat such searches are not unethical does not translate into an inalienable right to conduct them.”⁴⁰ In reaching this conclusion, the court emphasized that while the ABA determined that certain activities are “permitted without violating a professional duty,” the ABA also “cautioned that judges may limit the scope of the searches that counsel could perform regarding the juror’s social media ‘[i]f a judge believes it to be necessary, under the circumstances of a particular matter’”⁴¹ Judge Alsup ultimately decided that the circumstances of the *Oracle* case warranted a complete ban on Internet research of prospective and empaneled jurors.

The U.S. District Court for the District of Idaho has also weighed in on this issue in the form of its local Rule 47.2, subpart (a)(4) of which states as follows:

(a) Attorneys may use websites available to the public, including social media websites, for juror or prospective juror research, so long as:

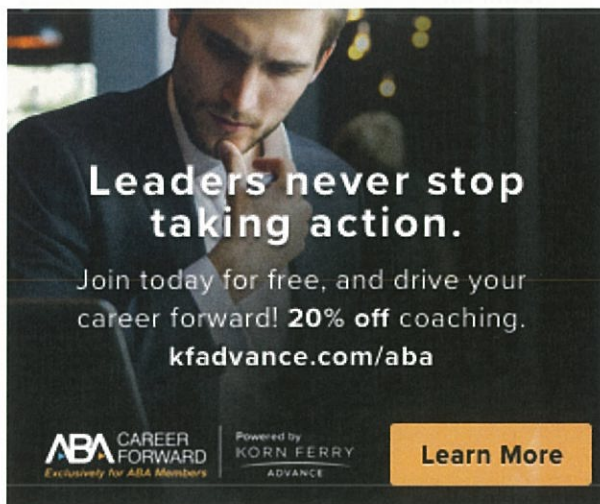
... (4) Social media research is done anonymously. For example, a search on a social media site must not disclose to the juror who is making the inquiry, and it must only seek information available and accessible to the public and

not the result of an attorney's account on said social media site; ...

The question of whether a notification that is automatically triggered by a visit to the juror's ESM website constitutes a communication with the juror is an unsettled question, and lawyers should familiarize themselves with the idiosyncrasies of the various ESM websites that they visit.

Lawyers should also be careful not to engage in conduct that has the potential to harass or intimidate.

Should questions occur as to what is or is not appropriate consider consulting with the court for appropriate guidelines or orders and as always, consult the applicable case law, ethics opinions and rules of professional conduct of the jurisdiction.



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