

Monitoring Jurors' Social Media Presence



ABA FORMAL OPINION 466

Drawing a Line in the Digital Sand

Jury consultants and lawyers are continually tapping into troves of public information put on the Internet by prospective jurors. Proponents of the practice cite the invaluable information elicited for purposes of voir dire and discovering juror misconduct during trial. However, a debate persists among federal and state ethics committees and courts as to whether monitoring jurors' Internet presence fits within the confines of Model Rule 3.5(b) and comparable state rules (i.e., Fla. R. Prof. C. 4-3.5(d)) prohibiting a lawyer from communicating with a potential juror leading up to or during trial.

[Formal Opinion 466](#) draws a line between properly investigating jurors and improperly communicating with them via the Internet and electronic social media ("ESM"), including Facebook, MySpace, LinkedIn and Twitter. The ABA opinion specifically provides that lawyers can look up jurors on social media sites but cannot connect with them.

As you may be aware, some ESM networks have a feature that notifies the subscriber when his or her web page has been clicked on/passively viewed and by whom; the notice to the subscriber is generated by the ESM network and not by the viewer, who has no control over such feature. The danger of subscriber notifications is that they may alert jurors to the fact that a lawyer, or someone acting on his or her behalf, is looking at the juror's web page. In its latest opinion, the ABA expressly sanctions this type of passive lawyer review, noting that the lawyer is not directly communicating or connecting with the juror. Rather, the ABA opines, the ESM network is communicating with the juror based on a technical feature of the ESM.

The ABA opinion likens passive lawyer review via an automated subscriber notification to "a neighbor's recognizing a lawyer's car driving down the street and telling the juror that the lawyer had been seen driving down the street." The ABA distinguishes this type of communication from active review, in which the lawyer requests permission to obtain access to the subscriber's protected, nonpublic ESM (by, for example, issuing a "friend request" on Facebook, or an invitation to "connect" on LinkedIn). The ABA Ethics and Professional Responsibility Committee views active review as a clear communication with a juror asking for information that the juror has not made public, and, thus, a violation of Model Rule 3.5(b). Using the same analogy, the Committee compares active review to "driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."

DISAGREEMENT & BACKLASH

Why Some States Think the ABA Opinion Falls Short

Not all state ethics committees agree that allowing passive lawyer review of jurors' digital footprint appropriately protects jurors. Recently, the Association of the Bar of the City of New York Committee on Professional Ethics and the New York County Lawyers' Association Committee on Professional Ethics issued formal opinions providing that a network-generated subscriber notice to a juror that a lawyer has passively reviewed the juror's web page constitutes an active and, thus, prohibited communication if the lawyer is aware that his or her actions will send such notice to the juror. The reasoning behind the opinion is that, if a juror becomes aware of an attorney's efforts to see the juror's web page, this type of contact might influence the juror's conduct with respect to the trial.

In response to the latest ABA opinion, the Social Media Committee of the New York State Bar Association's Commercial & Federal Litigation Section stood behind its prior state opinions, noting that "[r]eceiving multiple notifications indicating that individuals from a law firm or investigative agency are poring over one's social media profile surely would be disconcerting to most jurors, at best, and could result in a mistrial."

RECOMMENDATIONS

Think Before Your Click

The ethical line between properly investigating jurors and improperly communicating with them appears to be a moving target. Because ESM privacy settings and technological advances change frequently, the ABA recommends that lawyers be aware of automatic subscriber notification features and remain current with ESM user agreement terms and conditions.

While an automated notification that a juror's profile has been viewed by a lawyer is now a permitted communication according to the ABA, attorneys and their agents would be well-advised to think before they click. Not only should lawyers and their staff be familiar with acceptable digital investigation practices, but an attorney should also be certain that any trial consultant he or she hires is sufficiently familiar with EMS technology and privacy settings as well. The missteps of an overzealous and uninformed jury consultant will have far-reaching and potentially severe ethical consequences on the lawyer and his or her trial team.

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