

We all know how pervasive the Internet has become in our lives, and among the most significant aspects of the Internet are social media sites like Facebook, LinkedIn, and Twitter. To what extent can and should lawyers use these tools to obtain information in litigation about parties, witnesses, and jurors?

Several basic principles govern a lawyer's conduct. In dealing with other participants in a proceeding, lawyers must not engage in misrepresentation. SCRPC 4.1(a). The rules prohibit lawyers from communication with a person represented by counsel in the matter without the consent of that counsel. SCRPC 4.2. With regard to judges and jurors, lawyers may not communicate *ex parte* with such people during the pendency of a proceeding unless authorized by law or court order. SCRPC 3.5(b). Lawyers cannot do indirectly through the acts of another, such as an investigator, what they cannot do directly. SCRPC 8.4(a). In representing clients lawyers have a duty of competency. SCRPC 1.1. The duty of competency, according to recent revisions to the ABA Model Rules, requires lawyers to keep up to date regarding technology:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ABA Model Rule 1.1, comment 8.

While this comment has not yet been adopted in South Carolina, it was intended by the drafters of the Model Rules to be a statement of existing obligations rather than the imposition of a new duty; therefore,

lawyers in South Carolina have the obligation to be "tech-savvy" even without this comment.

ABA Formal Opinion 466, issued April 24, discusses the issue of access to juror electronic social media (ESM). The committee drew a distinction between three types of lawyer access:

1. passive lawyer review in which the lawyer obtains publicly available ESM without requesting access to the information and without the juror knowing that the lawyer has reviewed the juror's ESM;
2. active lawyer review in which the lawyer requests access to the juror's ESM;
3. passive lawyer review in which the juror becomes aware through a feature of the site of the identity of the viewer.

The committee concluded that the first form of review was ethically permissible because it did not involve any form of communication with the juror in violation of Rule 3.5(b), while the second was improper because the lawyer communicated directly with the juror. Opinions across the country agree. See ABA Formal Op. 466 at ns. 5 and 6.

Ethics opinions differ, however, on the ethical propriety of lawyer review in the third category. Some opinions have taken the position that a network-generated notice to the subscriber of the ESM identifying a person who has viewed the subscriber's ESM amounts to a communication in violation of Rule 3.5(b). Both the New York City and County Bar Ethics Committees have taken this position, although the New York City opinion indicated that a lawyer might not commit an ethical violation if the lawyer did not know

that the platform informed the subscriber of the lawyer's review. See NY City Bar Formal Op. #2012-2; NY County Bar Formal Op. 743 (2012). However, the ABA Committee disagreed:

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

I agree with the conclusion of the opinion on this point but for a different reason. The analogy used by the committee seems strained if not outright inapplicable. When a lawyer drives by the juror's home the possibility of contact with the neighbor is remote, and vehicles driven by lawyers do not normally indicate who the driver is or that the driver is a lawyer. When a lawyer accesses certain jurors' sites (for example, LinkedIn), it is much more likely that the access will be communicated to the juror, and if it is, the juror can easily determine whether the reviewer is a lawyer. For discussion of ABA Formal Opinion 466 and references to state opinions on the issue, see www.technethics.com/passive-lawyer-review-jurors-internet-presence/.

I would give a different reason for allowing passive review when the juror becomes aware of the review through a feature of the site. It may be difficult if not impossible for a lawyer to know the privacy set-

tings of a person whose site the lawyer is viewing. In addition, even in case of social networking sites like Facebook or What's App that do not reveal the viewers of the profile, it might be possible for subscribers to learn who viewed their profiles by using other tools. For example, a number of applications claim to allow users to see who accessed their profile. If the rule prohibiting communication with a juror is interpreted to prohibit review of the juror's ESM whenever the juror or prospective juror is informed of the lawyer's review, then lawyers might be effectively precluded from reviewing juror ESM because they cannot know if the communication will be reported to the juror and cannot run the ethical risk that this might happen.

The opinion made several other points that are useful to lawyers who are considering using ESM to investigate jurors. First, the opinion encourages lawyers and judges to discuss the court's expectations regarding use of ESM to investigate jurors. Under Rule 3.5(b), a local rule, standing court order, or case management order will govern the propriety of such contacts.

Second, as part of the lawyers' duty of competency, lawyers need to be aware of the terms and conditions of various ESM that they use or that they access in order to obtain information about jurors. In this regard, it is worthwhile for lawyers to know that Facebook, the most widely used social network, does not permit subscribers to be informed when someone views their page:

Can I know who's looking at my Timeline or how often it's being viewed?

No. Facebook doesn't let you track who views your Timeline or posts (ex. photos). Third party apps are also unable to do this. If you come across an app that says it can show you who's viewing your Timeline or posts, please report the app.

Thus, lawyers can be reasonably confident, at least unless Facebook changes its policy, that a passive

review of a juror Facebook ESM will not be disclosed to the juror. The duty of competency would require lawyers, however, to review Facebook policy in this regard before directing a review of the juror's Facebook site. LinkedIn, on the other hand, has a different policy. LinkedIn subscribers are notified of views of their pages. However, LinkedIn allows viewers to make their viewing anonymous. Therefore, if a lawyer directs a review of a juror's LinkedIn page, the reviewer should be instructed to make the review anonymous. www.linkedin.com/static?key=pop/pop_more_wvmp

ABA Formal Opinion 466 discusses another issue that may arise with regard to review of ESM of jurors. Suppose a lawyer discovers misconduct by the juror, for example posting of comments about the case on the juror's Facebook page. What should the lawyer do?

SCRPC 3.3(b) states:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Of course, if the post is unfavorable to the lawyer's client or if the juror seems unreceptive to the client's case, reporting would be in the client's interest regardless of whether reporting is ethically required under Rule 3.3(b).

Suppose, however, that the post or the juror seem favorable to the client? Under the Code of Professional Responsibility, which preceded the Rules of Professional Conduct, lawyers were required to report to the court juror "misconduct." Rule 3.3(b) applies to jurors, but it is limited to criminal or fraudulent conduct by the juror. As Opinion 466 points out, most judges will probably give instructions about such matters, but some jurors may not follow the court's

directions. If the court has issued an instruction to jurors not to discuss the case on ESM, then in my opinion any posting by a juror of information about the case is tantamount to fraudulent conduct toward the judge and the proceeding and must be reported.

Suppose that the court has not issued such an order. Then the issue is more difficult. Rule 3.3(b) does not appear to apply and none of the exceptions to the duty of confidentiality under Rule 1.6(b) seem applicable. On the other hand, in my opinion the overwhelming majority of judges would believe that lawyers who know of juror misconduct must report it to the court to protect the integrity of the adversarial system. I agree with that view, regardless of whether the juror seems favorable or unfavorable to the client. Juror use of ESM raises a wide number of legal issues. For an excellent article on the subject, see Hayes Hunt & Brian Kint, *Juries and Social Networking Sites*, *The Champion* (December 2013). ■

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