

Management Alert



American Bar Association Ethics Opinion Greenlights Attorneys' Review of Jurors' "Internet Presence"

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Introduction

During jury selection and trial, the parties and attorneys are eager to get a read on the jurors: Who are they? What do they like or dislike? What biases might they harbor?

The instant availability of online information about jurors offers a tempting window into who the jurors really are, but also presents many ethical and practical risks for trial counsel and parties.

A recent American Bar Association (ABA) Opinion provides guidance as to when counsel can review potential and empaneled jurors' "Internet presence," including accounts on social media sites like Facebook, LinkedIn and Twitter, as well as blogs and websites.

The ABA Opinion

The ABA's *Formal Opinion 466*, issued by its Standing Committee on Ethics and Professional Responsibility, provides that unless limited by law or court order, an attorney may review an empaneled or potential juror's "Internet presence," including postings before or during trial. The Opinion reasons that doing so is the equivalent of driving down the juror's street to obtain publicly available information that might inform jury selection decisions.

At the same time, the Opinion recognizes that Model Rule of Professional Conduct 3.5 holds that a lawyer may not communicate with a potential juror unless authorized by law or court order. Applying this rule, the Opinion holds that counsel may not send, directly or indirectly, an "access request" to a juror through social media. An access request is a communication asking a juror for information the juror has not made public. The opinion analogizes such a request to a lawyer asking a juror to see *inside* the juror's house, to obtain non-public information.

The Opinion also addresses the issue that when counsel reviews a social media account, the juror may become aware that the lawyer has done so, through a setting on the social media account (such as LinkedIn) that tells the juror who has viewed the profile. The Opinion holds that such an alert does not constitute a communication to the juror from the lawyer. Instead, any communication is between the site and the juror based on a technical feature of the account.

Finally, the Opinion cautions that the lawyer must report to the Court evidence of juror misconduct that is learned via social media.

The Opinion provides several notes of caution for counsel who elect to review jurors' social media accounts. The Opinion recommends that lawyers be aware of any automatic subscriber-notification features of the social media sites being reviewed. Second, the Opinion reminds counsel to be aware of any jurisdiction-specific rules regarding review of jurors' Internet presence, and encourages courts to develop orders governing this issue. Third, the Opinion warns that any review of a juror's Internet presence must not run afoul of the rules prohibiting any action with "no substantial purpose other than to embarrass, delay or burden a third person."

Practical Concerns & Strategies

As a practical matter, counsel must exercise caution to stay within the bounds of this Opinion, which requires fluency in how social media sites operate. For example, counsel must be sure only to view information available to the public at large, and not anything that requires a special password or status as a "friend" or "connection." Counsel must also be sure that no access request (such as a request to link, "follow" or "poke") is sent to the juror, even inadvertently. The Opinion does not address future technological capabilities, which means that attorneys must stay cognizant of any ethical questions that arise with ever-evolving technological changes.

Counsel must give careful instructions about the ethical boundaries to anyone doing the research on the attorney's behalf, such as a jury consultant or staff member. Having a jury consultant conduct such research, while more expensive, may offer the benefit of additional online expertise, a faster turnaround time, and greater anonymity if the juror sees the profile view. Attorneys should counsel clients and witnesses not to conduct their own juror research.

Counsel should also consider whether to request an instruction to jurors that they may properly be investigated by lawyers. The Opinion advises judges to consider giving such an instruction during juror orientation.

The ABA Opinion is not the final word on this issue, as state bar associations may have their own ethics opinions, and individual jurisdictions and courts may draw their own ethical boundaries. As such, counsel should consider whether to request a specific ruling from the Court as to what research is or is not permissible.

Perhaps most crucially, trial attorneys and parties should consider not only whether they *can* research a juror's Internet presence, but whether they *should*. If the juror does see that counsel has viewed a profile, how might that change the juror's view about counsel, his or her client, or the case? How can counsel be sure it is the right person's social media account, especially if the juror has a common name? What if counsel learns certain protected classification information about the juror and is then accused of trying to dismiss the juror based on that classification? At the same time, can counsel afford not to know information about a juror that is readily available on the web, particularly if opposing counsel knows it?

Seyfarth's National Trial Team will continue to monitor the fast-moving developments in the intersection between social media and trial practice.

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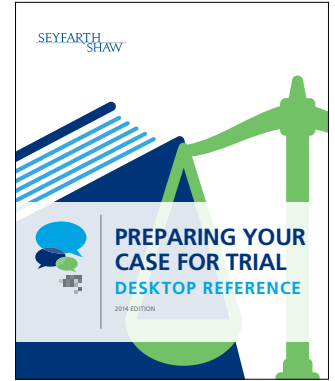
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