

Advocate's View: The use of social media to learn about jurors and juror misconduct

By: Mary Jo S. Korona | June 21, 2017 | 0



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The availability and lure of social media to quickly find information about individuals involved in the legal system, and in particular prospective or sitting jurors, can overshadow the need to be aware of the ethical considerations imposed by the New York Rules of Professional Conduct. Valuable guidance on this topic is available in the Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association, recently updated in May 2017, (SM Guidelines). This article will offer guidance about the use of social media to research the internet presence of prospective and sitting jurors.

Relative to prospective jurors, an attorney may—and indeed might be expected to—research a prospective juror's social media profile because there is a strong public interest in identifying jurors who might be tainted by the improper bias or prejudice. This interest, however, must be balanced with the duties and restrictions imposed by 3.5 (4) of the Rules of Professional Conduct, which prohibits a lawyer from communicating or causing another to another to communicate with a member of the jury venire.

As noted in the SM Guidelines, the lawyer must: recognize the client's interest in obtaining information about a prospective juror, be familiar with the ever-changing capabilities of electronic social media and be knowledgeable about the differences between the person's public internet presence versus the person's private internet presence.

The comment to SM Guideline 6.B observes that it would be prohibited for a lawyer, or the lawyer's agent, to send an "Access Request" to view the private portion of a juror or a potential juror's internet presence. Indeed, at least two opinions by bar associations in New York have observed that even inadvertent contact with a prospective or sitting juror caused by an automatic notice generated by a social media network maybe considered a technical violation.

Equally, if perhaps not more important, are the issues to be considered in the event there is a decision to monitor the social media profiles or posts of a sitting juror. Rule 3.5 (d) of the New York Rules Professional Conduct provides that the lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has “knowledge.” Knowledge is defined in Rule 1.0 (k) as “actual knowledge of the fact in question.” This disclosure duty, the aim of which is maintaining and preserving the impartiality of jurors, applies irrespective of whether the juror’s misconduct benefits the client. Once discovered, the attorney must discuss the information with the client and disclose the misconduct to the court.

Examples of juror misconduct include deliberate lying in response to a question during voir dire; visiting an accident scene; discussion of a case before reaching a verdict; the use of professional expertise to insert medical opinions into jury deliberations and disregard of jury instructions. A survey of decisions involving claims of juror misconduct demonstrate the financial costs incurred by clients when juror misconduct is discovered ranging from costly and time consuming hearings and appeals and the setting aside of verdicts. The foregoing establishes the need to develop a well-thought-out strategy concerning the possible risks, costs and/or benefits of researching the social media presence of sitting jurors.

In conclusion, the potential for committing an ethical violation and the possibility of an unintentional consequence, such as having to disclose juror misconduct that negatively impacts a client’s interests, strongly encourages the lawyer to be fully informed about the use of social media relative to juror research. A best practice would be consideration of the New York Rules of Professional conduct in conjunction with the SM Guidelines. The later provides valuable insights about the ways in which the use of social media research implicates the lawyer’s ethical obligations in the form of comments drawn from research of ethics opinions issued by various bar associations. Also, the SM Guidelines include an Appendix of Social Media Definitions concerning Social Technologies (e.g., Instagram, Pinterest, Reddit) and Social Terminologies (e.g., “Automatic Notification,” “Direct Message” and “Privacy Settings”).

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