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Why ABA Opinion on Jurors and Social Media Falls Short

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We write in response to ABA Formal Opinion 466 entitled, "Lawyer Reviewing Jurors' Internet Presence," issued April 24, 2014. It provides in relevant part that it is not an ethically prohibited communication if "a juror or potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such."

We suggest that the ABA opinion does not appropriately protect jurors and insulate them from outside influences such as contact by counsel. We believe that the appropriate way to proceed when seeking to investigate jurors is set forth in the "Social Media Ethics Guidelines" issued on March 18, 2014 by the Commercial and Federal Litigation Section of the New York State Bar Association. Guideline 5.B provides that: "[a] lawyer may view the social media ... of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, agent or automatically generated by the social media network) with the juror."

This guideline is based on the well-reasoned New York County Lawyers' Association Formal Opinion No. 743 (May 18, 2011) and New York City Bar Association Formal Opinion 2012-02. Specifically, the city bar opinion provides: "[a] request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the 'sender' was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated."

The ABA opinion, however, does make two recommendations: (1) that lawyers "be aware of these automatic, subscriber-notification procedures," and (2) "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." We agree with these recommendations, but believe that they do not go far enough.

The ABA opinion draws the following analogy: an automatic subscriber notification 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."

The analogy proves the error of the ABA opinion's conclusion. We believe a more apt analogy is this: A lawyer purposefully drives down a juror's street, observes the juror's property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial, knowing that a

neighbor will see the lawyer and will advise the juror of this drive-by and the signage.

Might that communication or visit infect the juror's thought processes or the proceeding? We think so! Indeed, just last year, a juror in New York complained that an attorney had cyberstalked him on LinkedIn and the court considered declaring a mistrial and admonished counsel after the juror sent a note to the judge complaining "the defense was checking on me on social media."

In this age of limited digital privacy, we believe that social media interactions between jurors and lawyers should not occur and the ABA opinion does not sufficiently seek to ensure that this prohibition does not occur. Receiving 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.

The ABA opinion suffers from a second, and perhaps more significant, flaw. It is inconsistent with a lawyer's duty of competence. Comment 8 to ABA Model Rules of Professional Conduct 1.1 provides that, "[t]o 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

Granted, the ABA opinion noted that social media technologies change frequently and did acknowledge a lawyer's duty of competence but, as written, where the opinion provides that such automatic message is not a prohibited "communication," it encourages lawyers, and their agents, including investigators and jury consultants, not to be diligent in understanding the social media platform that they are using.

The opinion leaves attorneys and their agents with no affirmative obligation to minimize their "communications" with jurors, as long as the "communication" is not a "friend" request or connection request, but is just an automated notification that a juror's profile has been viewed.

We believe that lawyers who conduct juror research through social media need to ensure that their research will not come to the attention of a juror or prospective juror. The approach of the guidelines, which is elegant in its simplicity, establishes a better standard.

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