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Mr. Charles L. Babcock, Esq.
JACKSON WALKER LLP
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Re: Texas Supreme Court Advisory Committee

Dear Chip:

As a follow up to our recent conversation, attached is a copy of an article published in the State Bar Litigation Section's publication, The Advocate, entitled "The Ethical Boundaries of Reviewing Jurors' Internet Presence: The Need for a Rule in Texas." There is an issue whether the ethical boundaries of a Texas attorney's obligation should be set forth by a new Texas disciplinary rule, or new rule of civil procedure. I submit this to the Advisory Committee for its consideration.

Please let me know if you have any questions.

Sincerely,

David J. Beck

cc: Honorable Nathan L. Hecht
SUPREME COURT OF TEXAS
P.O. Box 12248
Austin, TX 78711-2248

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THE ETHICAL BOUNDARIES OF REVIEWING JURORS' INTERNET PRESENCE: THE NEED FOR A RULE IN TEXAS

DAVID J. BECK & JACQUELINE M. FURLOW

THE PERCENTAGE OF THE POPULATION UTILIZING electronic social media ("ESM")[1] is significant and continues to grow.[2] As a result of this significant growth, lawyers now have "a digital treasure trove of information right at their fingertips," for nearly instantaneous research on prospective jurors.[3] This fact makes increasingly relevant the question of whether trial lawyers may ethically investigate and monitor juror Internet activity, and if so, to what extent.

ESM poses an ethical concern for lawyers because it can be a form of direct communication, and lawyers are ethically prohibited from conducting *ex parte* communications with jurors or potential jurors, unless authorized by law or court order.[4] This prohibition also extends to anyone acting on a lawyer's behalf.[5] About two years ago, these ethical concerns spawned a question to the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "ABA Committee"): "whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors' presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review."[6]

The ABA Opinion

On April 24, 2014, the ABA Committee issued Formal Opinion 466, which concludes that review of a juror's *public* Internet activity is permissible, but requesting access to review a juror's *nonpublic* information is not. In so concluding, ABA Opinion 466 seeks to strike a balance between the "strong public interest in identifying jurors who might be tainted by improper bias or prejudice"[7] and the "equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents."[8] The Opinion specifically addresses "three levels of lawyer review of juror Internet presence":

1. Passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;
2. Active lawyer review where the lawyer requests access to the juror's ESM; and
3. Passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer.[9]

The question of whether a particular review of juror Internet activity is permissible depends on whether the "review" constitutes or becomes a prohibited *ex parte* communication. This determination is influenced by the fact that ESM sites typically provide for varying degrees of privacy settings. Privacy settings "allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access."[10] In turn, many ESM sites require a person seeking access to a user's information to request permission to view private, nonpublic information, by becoming, for instance, a Facebook "friend" or Twitter "follower."

Additionally, there is a risk that even if a lawyer searches for a juror's public information, that search will cause a network-generated message to be sent to the juror informing the juror that his or her profile has been viewed. For example, members of LinkedIn searched by fellow members of LinkedIn can see that their profile has been viewed.[11] Depending on the privacy settings of the searching member and the searched member, the notification might state the name of the member running the search, or it might state that the searching member wishes to be "anonymous."[12] Similarly, certain web analytics software can allow website or blog creators to track information about who has visited their sites or blogs.[13] These features could create a risk that a lawyer inadvertently "communicates" with a juror simply by searching for a juror's public information.

ABA Opinion 466 draws the line at requesting access to *nonpublic* information. The Opinion provides that (1) passive review ("without making an access request") of which the juror is not aware does not violate Model Rule 3.5; (2) active review (by making an access request) amounts to an *ex parte* communication prohibited by Model Rule 3.5; and (3) passive review through which a juror becomes aware of the review by "ESM-generated notice" is not a "communication" from lawyer to juror and thus does not violate Model Rule 3.5.[14]

The ABA Committee summarized its conclusions as follows:

> Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror. A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).[15]

Suggestions for Trial Judges and Lawyers

The ABA Committee also offered guidance to trial judges and lawyers on the procedure for reviewing juror Internet activity. Regarding management of juror expectations, the Committee suggested that judges discuss the "likely practice of trial lawyers reviewing juror ESM during the jury orientation process" to "dispel juror misperception" of impropriety, especially when jurors might receive electronic notifications from ESM networks that lawyers have passively reviewed jurors' public Internet activity.[16] In the same vein, the ABA Committee suggested that judges consider issuing local rules, standing orders, or case management orders to define appropriate limits on review of juror ESM, depending on factors such as the likelihood that jurors or potential jurors would receive notifications that their ESM is being viewed.[17]

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The ABA Committee's advice to lawyers was twofold. First, the ABA Committee recommended that lawyers "be aware of...automatic, subscriber-notification features."[18] The ABA Committee emphasized that by reading the terms and conditions associated with such networks, lawyers could better ensure that they are complying with Model Rule 1.1's requirement that lawyers stay up to date on benefits and risks associated with using technology.[19] The ABA Committee cautioned that "[b]y accepting the terms of use, the subscriber-notification feature is not secret," and "[w]hile many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network."[20] The ABA Committee's second suggestion was that lawyers reviewing juror Internet activity "ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding" in violation of Model Rule 4.4(a).

The Need for a Rule in Texas

Notably, Texas has not yet squarely addressed these issues. It is time to do so. As the ABA Committee acknowledged in Formal Opinion 466: "[J]urisdictions differ on issues that arise when a lawyer uses social medial in his practice."[21]

A few state bar associations, including West Virginia, Colorado and Oregon have followed and, in the case of the Oregon State Bar, expanded upon, Formal Opinion 466. In September 2015, the Lawyer Disciplinary Board of West Virginia issued new guidelines for lawyers' use of social media. The opinion concluded, in relevant part, that lawyers may review public sections of a juror's social networking websites, but "are prohibited from attempting to access the private sections of a juror's social media page, as doing so would violate Rule 3.5 of the Rules of Professional Conduct."[22] The Lawyer Disciplinary Board also concluded that lawyers may not utilize third parties to contact jurors through social media or social networking websites to gain access to private information, as doing so would constitute an *ex parte* communication in violation of Rule 3.5.[23]

The Colorado Bar Association Ethics Committee also issued an opinion in September 2015, which similarly concluded that lawyers may "always view the public portion of a person's social media profile and any public posts made by a person through social media," but may not "request permission to

view a restricted portion of a social media profile or website of a prospective or sitting juror."[24] The opinion also reiterated that "[a] lawyer must never use any form of deception to gain access to a restricted portion of a social media profile or website."[25]

The Oregon State Bar has gone a step further than West Virginia and Colorado. In Formal Opinion 2013-189, the Oregon State Bar concluded that a lawyer may affirmatively request access to private information on a juror's or prospective juror's social media websites as long as the lawyer accurately represents his or her role in a case if and when asked by the juror.[26]

In addition, the U.S. District Court for the District of Idaho has instituted a comprehensive local rule regarding investigation of juror social media. District Local Rule 47.2 provides:

> (a) Attorneys may use websites available to the public, including social media websites, for juror or prospective juror research, so long as:
>
> (1) The website or information is available and accessible to the public;
>
> (2) The attorney does not send an access request to a juror's electronic social media;
>
> (3) No direct communication or contact occurs between the attorney and a juror or prospective juror as a result of the research, including, but not limited to Facebook "friend" requests, Twitter or Instagram "follow" requests, LinkedIn "connection" requests, or other forms of internet and social media contact;
>
> (4) Social media research is done anonymously. For example, a search on a social media site must not disclose to the juror who is making the inquiry, and it must only seek information available and accessible to the public and not the result of an attorney's account on said social media site; and
>
> (5) Deception is not used to gain access to any website or to obtain any information.
>
> (b) Third parties working for the benefit of or on behalf of any attorney must comply with all the same restrictions as set forth above for attorneys.
>
> (c) If an attorney becomes aware of a juror's or prospective juror's conduct that is criminal or fraudulent, IRPC 3.3(b) requires the attorney to take remedial measures including, if necessary, reporting the matter to the court.
>
> (d) If an attorney becomes aware of a juror's posting on the internet about the case in which she or he is serving, the attorney shall report the posting to the court.[27]

Notes to Rule 47.2 from the Advisory Committee on the Idaho District Court Local Rules *require* that jurors be advised during orientation that their backgrounds will be of interest and lawyers may investigate their backgrounds on internet and social media websites, and that if there is no method of conducting internet research that will prevent a juror or prospective juror from discovering the identity of the person doing the research, then the research may not be done because it would constitute an improper communication.[28] The Advisory Committee notes also emphasize that lawyers must maintain their familiarity with internet tools they use to run searches, and the impact of using those tools.[29]

Unlike West Virginia, Colorado, Oregon and Idaho, a few New York bar associations have taken a position contrary to that of the ABA on the issue of network-generated notices. While ABA Opinion 466 concluded that network-generated notices informing jurors that their ESM has been viewed by a lawyer do *not* constitute prohibited *ex parte* communications between lawyer and juror, New York ethics opinions have contrastingly concluded that under certain circumstances they *do*.[30] In ABA Opinion 466, the ABA Committee considered two prior New York ethics opinions. The first opinion, Formal Opinion 2012-2 from the Association of the Bar of the City of New York Committee on Professional Ethics ("ABCNY"), concluded that a network-generated notice constituted a "communication" with the juror when the lawyer *knew* the notification would be sent.[31] The ABCNY did not opine on whether an inadvertent communication would violate the ethical rules. The second opinion, Formal Opinion 743 from the New York County Lawyers' Association Committee on Professional Ethics, agreed with the ABCNY and further opined that if a juror became aware of a lawyer's efforts to review the juror's Internet activity through ESM, "the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[32] Disagreeing with the two New York opinions, the ABA Committee instead concluded that it is the ESM service that is "communicating" with the juror, not the lawyer, and the communication does not constitute an improper *ex parte*

communication between lawyer and juror.[33]

Since publication of ABA Opinion 466, the New York State Bar has reiterated the position of its fellow New York bar associations. In June of 2015, the New York State Bar Association ("NYSBA") published its "Social Media Ethics Guidelines," in which the NYSBA concluded that "a lawyer in New York when reviewing social media to perform juror research needs to perform such research in a way that does not leave any 'footprint' or notify the juror that the lawyer or her agent has been viewing the juror's social media profile."[34] In so concluding, the NYSBA noted that "[t]he American Bar Association's view has been criticized on the basis of the possible impact such communication might have on a juror's state of mind..."[35]

In addition to certain New York bar associations, a few courts, including the U.S. District Court for the Northern District of California, have preemptively prohibited juror internet research before trial. In the high-profile copyright case of *Oracle Am., Inc. v. Google, Inc.*, Judge William Alsup urged, and the parties ultimately consented to, a complete ban against Internet research on the venire persons and the empaneled jury until trial was over.[36] Emphasizing that the area of researching jurors' social media presents "an emerging and developing concern," Judge Alsup identified three reasons why researching jurors was problematic. First, if jurors learned that they had been searched while being prohibited from conducting research themselves, it would decrease the likelihood that the jurors would heed the court's admonition and continue to refrain from doing their own Internet research.[37] Second, permitting such research would facilitate the lawyers appealing improperly to particular jurors in their arguments and witness examinations.[38] And third, permitting such research risked violating the privacy of the venire persons.[39]

Importantly, Judge Alsup acknowledged that Formal Opinion 466 sanctioned "passive" Internet searches on prospective jurors, but concluded that, despite the ABA's opinion, the fact "[t]hat such searches are not unethical does not translate into an inalienable right to conduct them."[40] In reaching this conclusion, the court emphasized that while the ABA determined that certain activities are "permitted without violating a professional duty," the ABA also "cautioned that judges may limit the scope of the searches that counsel could perform regarding the juror's social media '[i]f a judge believes it to be necessary, under the circumstances of a particular matter....'".[41] Judge Alsup ultimately decided that the circumstances of the *Oracle* case warranted a complete ban on Internet research of prospective and empaneled jurors.[42] The divergence in opinion regarding Formal Opinion 466 leaves lawyers with muddled guidance in this rapidly developing area. At the very least, this inconsistency among different jurisdictions' ethics opinions, underscores the need for a Texas rule on these issues.[43]

The desirability of a Texas-specific rule is particularly warranted in light of the fact that Rule 3.06 of the Texas Disciplinary Rules of Professional Conduct, which addresses *ex parte* communications with jurors, differs in some respects from the Model Rules. Rule 3.06 *prohibits* a lawyer from (1) conducting harassing investigations of veniremen; (2) seeking to influence veniremen by means prohibited by law or applicable rules; (3) communicating or causing another to communicate *ex parte* with veniremen or jurors; or (4) asking jurors post-trial questions that are merely calculated to harass or influence future service.[44]

> **Disagreeing with the two New York opinions, the ABA Committee instead concluded that it is the ESM service that is "communicating" with the juror, not the lawyer, and the communication does not constitute an improper ex parte communication between lawyer and juror.**

The comments to Rule 3.06 emphasize that the purpose of the rule is to safeguard impartiality of the judicial process by protecting veniremen and jurors from "extraneous influences."[45] Moreover, Rule 3.06(e) and (f) extend the Rule's protections to family members of jurors. The Model Rules, at least on their face, do not. Rule 3.06(e) and (f) constitute the most significant difference between the Texas Rules and the Model Rules, and could justify a rule scheme different than that of the Model Rules.

Conclusion

ABA Formal Opinion 466 has elicited mixed reactions from state and local bar associations and courts across the country. Given this divergence in opinion regarding Formal Opinion 466, and the differences between the Texas Rules and Model Rules, a new Texas rule or a formal ethics opinion on this issue would be helpful for Texas trial lawyers.

For Texas practitioners, Formal Opinion 466 presently provides some helpful ethical guidance. However, until

Texas promulgates a rule or formal opinion on the matter, practitioners should exercise caution in reviewing juror Internet activity. In the meantime, trial judges should facilitate transparency by communicating their expectations to the lawyers, advise jurors during orientation of the potential for their ESM to be reviewed by lawyers, and actively monitor and regulate lawyer review of juror ESM through local rules, standing orders, or case management orders.

David J. Beck, a Founding Partner of Beck, Redden & Secrest, L.L.P., is a Past President of the American College of Trial Lawyers as well as the Past President of the State Bar of Texas.

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[1] "ESM" stands for "electronic social media" and is defined as "Internet-based social media sites that readily allow account-owner restrictions on access." *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 466 (hereinafter "ABA Opinion 466" or the "Opinion"). Examples include Facebook, MySpace, LinkedIn, and Twitter.

[2] According to the Pew Research Center's Internet Project, as of January 2014, 74% of adults online use social networking sites. "Social Networking Fact Sheet," PEW RESEARCH CENTER (updated Jan. 2014), *available at* http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/. As of September 2014, 71% adults online use Facebook, 23% use Twitter, 26% use Instagram, 28% use Pinterest, and 28% use LinkedIn. *Id.*

[3] John G. Browning, *Should Voir Dire Become Voir Google? Ethical Implications of Researching Jurors on Social Media*, 17 SMU SCI. & TECH. L. REV. 603, 604 (2014).

[4] *See* MODEL RULES OF PROF'L CONDUCT R. 3.5(a), (b).

[5] MODEL RULES OF PROF'L CONDUCT R. 8.4(a) ("It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another..."). The inclusion of those acting on the lawyer's behalf is important because lawyers sometimes employ professional juror monitoring services to collect background information, monitor juror internet activity during trial, and assist in predicting juror behavior based on Internet activity. *See, e.g.*, "juryscout," http://www.juryscout.com/ (last visited May 18, 2015).

[6] *See* ABA Opinion 466, at 1.

[7] Some courts have even *required* lawyers to research potential jurors on the Internet as part of meeting their standard of care for competent performance, but the ABA Committee expressly did "not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process." ABA Opinion 466, at 2 n. 3 (citing *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010) (requiring lawyers to use "reasonable efforts" to find potential jurors' litigation history on the court's database and raise nondisclosure issues prior to empanelment)); *see also* Mo. Sup. Ct. R. 69.025 (same).

[8] *See* ABA Opinion 466, at 2.

[9] *Id.*

[10] *Id.*

[11] *See* "How to See Who Has Viewed a Profile on Linkedin," wikiHow, http://www.wikihow.com/See-Who-Has-Viewed-a-Profile-on-Linkedin (last visited May 18, 2015).

[12] *See* "Who's Viewed Your Profile – Frequently Asked Questions," LinkedIn Help Center (updated Jan. 7, 2015), *available at* https://help.linkedin.com/app/answers/detail/a_id/47992/ft/eng.

[13] *See* "Web analytics," webopedia, http://www.webopedia.com/TERM/W/Web_analytics.html (last visited May 18, 2015).

[14] *See* ABA Opinion 466, at 4-5.

[15] *Id.* at 1.

[16] *Id.* at 3. The ABA Committee reasoned that such electronic notifications amount to the "ESM service...communicating with the juror based on a technical feature of the ESM," not the lawyer, "who uses a shared ESM platform to passively view juror ESM," communicating with the juror. *Id.* at 5.

[17] The Committee emphasized that, despite approving lawyer review of juror ESM activity, lawyers must still comply with Model Rule 4.4(a), which prohibits any conduct calculated to "embarrass, delay, or burden a third person." ABA Opinion 466, at 6. The ABA Opinion also explained the process of "tak[ing] reasonable remedial measures" to address instances of discovered juror misconduct, "including, if necessary, disclosure to the tribunal." *Id.* at 9.

[18] *Id.* at 5.

[19] *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt. 8).

[20] *Id.* at 6.

[21] *Id.* at 5.

[22] Lawyer Disciplinary Board of W. Va., *Social Media and Attorneys*, L.E.O. 2015-02, at 18 (Sept. 22, 2015).

[23] *Id.* at 19.

[24] Colo. Bar Ass'n Ethics Comm., *Use of Social Media for Investigative Purposes*, Formal Op. 127 (Sept. 2015).

[25] *Id.*

[26] Or. St. Bar, *Accessing Information about Third Parties Through a Social Networking Website*, Formal Op. 2013-189 (Feb. 2013).

[27] Loc. Civ. R. 47.2.

[28] *Id.*

[29] *Id.*

[30] *See* N. Y. St. Bar Ass'n Comm. & Fed. Litig. Sec., *Social Media Ethics Guidelines* (updated June 9, 2015) (acknowledging various New York ethics opinions diverging from the rule announced in ABA Opinion 466).

[31] *Id.* (citing Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2012-2).

[32] *Id.* (citing N.Y. Cnty. Lawyers' Ass'n, Formal Op. 743 (2011)).

[33] *Id.* at 5.

[34] *See Social Media Ethics Guidelines*, *supra* note 30, at 27.

[35] *Id.* (citing Mark A. Berman, Ignatius A. Grande, and Ronald J.

Hedges, *Why American Bar Association Opinion on Jurors and Social Media Falls Short*, N.Y.L.J. (May 5, 2014)).

[36] *Oracle Am., Inc. v. Google, Inc.*, No. 3:10-cv-03561-WHA, Dkt. No. 1573 (Mar. 25, 2016); *Id.* at Dkt. No. 1589 (Mar. 31, 2016) (Google's response); *Id.* at Dkt. No. 1590 (Mar. 31, 2016) (Oracle's response).

[37] Dkt. No. 1573, at 3.

[38] *Id.* at 4.

[39] *Id.*

[40] *Id.* at 10-11.

[41] *Id.* at 11.

[42] In support of his conclusion, Judge Alsup cited *United States v. Norwood*, No. 12-CR-20287, 2014 WL 1796644 (E.D. Mich. May 6, 2014), in which Judge Mark A. Goldsmith rejected defendants' argument that they needed jurors' information to monitor the jurors' social media accounts during trial to ensure compliance with the court's instruction not to discuss the case. Judge Alsup noted Judge Goldsmith's reasoning that banning monitoring was important to both protecting the jury from intimidation in the context of a criminal case and avoiding the likely effect of "unnecessarily chill[ing] the willingness of jurors summoned from [the] community to serve as participants in our democratic system of justice." *Id.* at 12 (citing *Norwood*, 2014 WL 1796644, at *4) (internal citations omitted).

[43] Jurisdictions also have issued inconsistent opinions regarding the proper scope of review of an unrepresented non-party's ESM. *Compare* Phila. Bar Ass'n Prof'l Guidance Comm. Op. 2009-02 (opining that, in the context of a lawyer inquiring whether the lawyer could ask a third person to "friend" an unrepresented non-party witness, such a request would be deceptive and impermissible) *with* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2010-2 (opining that, in the context of a lawyer's agent sending a "friend" request to unrepresented non-party without revealing affiliation with a lawyer, a lawyer or his or her agent could permissibly send a request, as long as the lawyer or agent identified him or herself by his or her real name and profile). On the other hand, the opinions on lawyers' review of an opposing party's ESM have more consistently limited such review to public information only, similar to the ABA Committee's Formal Opinion 466. *See e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 843 (2010).

[44] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(a)-(d).

[45] *Id.* cmt. 1-4.