

## Memorandum

To: Texas Supreme Court Advisory Committee

From: Social Media Subcommittee (TEX. R. CIV. P. 216-299a)  
Professor Elaine A. Carlson, Chair  
Judge David Peeples  
Alistair Dawson  
Bobby Meadows  
Tom Riney  
Kent Sullivan  
Kennon Wooten  
Justice Tracy Christopher  
Justice Bill Boyce

Re: Revised Subcommittee Recommendations

Sept. 21, 2018

### ATTORNEY USE OF SOCIAL MEDIA TO INVESTIGATE A JUROR

#### **Issue:**

To what extent may an attorney ethically use electronic social media (ESM) to investigate a prospective juror?<sup>1</sup>

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<sup>1</sup> Throughout this comment, the term “social media” refers to “the wide array of Internet-based tools and platforms that increase and enhance the sharing of information,” the “common goal [being] to maximize user accessibility and self-publication through a variety of different formats.” See *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States, Administrative Office of the United States Courts, April 2010, at 9, available at <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct>. ESM includes, but is not limited to, Facebook, Myspace, LinkedIn, Twitter, blogs, etc.

**Analysis:**

Texas Disciplinary Rule of Professional Conduct 3.06 addresses communications with venire members and jurors and provides as follows:

a) A lawyer shall not:

(1) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror; or

(2) seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.

(b) Prior to discharge of the jury from further consideration of a matter, a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected or any juror or alternate juror, except in the course of official proceedings.

(c) During the trial of a case, a lawyer not connected therewith shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.

(d) After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(e) All restrictions imposed by this Rule upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(f) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

(g) As used in this Rule, the terms “matter” and “pending” have the meanings specified in Rule 3.05(c).

Comments:

1. To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is not prohibited by this Rule so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Contacts with discharged jurors, however, are governed by procedural rules the violation of which could subject a lawyer to discipline under Rule 3.04. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

2. Vexatious or harassing investigations of jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

3. Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

4. Because of the extremely serious nature of any actions that threaten the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct. If such improper actions were taken by or on behalf of a lawyer, either the reporting lawyer or the court normally should initiate appropriate disciplinary proceedings. See Rules 1.05, 8.03, 8.04.

On April 24, 2014, the American Bar Association (ABA) issued Formal Opinion 466 on *Lawyer Reviewing Jurors' Internet Presence*. The opinion addresses the following three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or electronic social media that is available without making an access request where the juror is unaware that a website or electronic social media had been reviewed;
2. passive lawyer review where the juror becomes aware through a website or electronic social media feature of the identity of the viewer; and
3. active lawyer review where the lawyer requests access to the juror's electronic social media.

The ABA concluded that passive lawyer review of a juror's website or ESM without making an access request, where the juror is not aware of the review, is permissible. Specifically, such conduct does not constitute a prohibited "*ex parte* communication" with a juror or an improper attempt to influence a juror and thus does not violate ABA Model Rule 3.5(b). The ABA analogized this type of review to an attorney "driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions."

Nor are ethical constraints violated by passive lawyer review when the juror becomes aware of the lawyer's identity through the social media provider, according to the ABA. *Accord* Pennsylvania State Bar Opinion, a. St. Bar Ass'n, Op. 2014-300 (2014) (concluding it is not a communication provided it is the website, not the attorney, that provides this information to the juror). The ABA reasoned that "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." This could occur, for example, when a person views another person's LinkedIn page, as the person whose page was reviewed is informed by LinkedIn of the identity of reviewers.

Several jurisdictions and ethic opinions have reached the contrary conclusion, determining that this conduct constitutes an improper *ex parte* communication with a juror. *See, e.g.*, Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2012-2 (concluding that, if a juror discovers that an attorney has viewed their profile, this constitutes a communication *regardless of whether the attorney knew about it*); *accord* New York County Lawyers' Association Committee on Professional Ethics Formal Opinion 743; *see also* California, Rule 5-320: Contact with Jurors (providing in subpart (A) that “[a] member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case”). The full subcommittee of the SCAC voted at the December 1-2, 2017 meeting that this behavior constitutes an improper *ex parte* communication by a lawyer with a juror or prospective juror.

As to the third scenario—active lawyer review where the lawyer requests access to the juror’s ESM—nearly all jurisdictions that have addressed the issue have concluded that this constitutes an improper *ex parte* communication with a juror. In Formal Opinion 466, the ABA opinion suggested, “This would be akin to driving down the juror’s street, stopping the car, getting out, and asking the juror for permission to look inside the juror’s house because the lawyer cannot see enough when just driving past.” *See also* N.Y. Cnty. Lawyers’ Ass’n, Formal Op. 743 (2011); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, Formal Op. 2012-2; Or. St. Bar Ass’n, Formal Op. 2013-189 (Feb. 2013); Pa. St. Bar Ass’n, Op. 2014-300 (2014); N. Y. St. Bar Ass’n Comm. & Fed. Litig. Sec., *Social Media Ethics Guidelines* (updated June 9, 2015); Lawyer Disciplinary Board of W. Va., L.E.O. 2015-02, at 18 (Sept. 22, 2015); Colo. Bar Ass’n Ethics Comm., Formal Op. 127 (Sept. 2015); *see also* U.S. Dist. Ct. Rules D. Id. L. Civ. R. 47.2; U.S. Dist. Ct. Rules N.D.N.Y., L.R. 47.6. The full subcommittee of the SCAC voted at the December 1-2, 2017 meeting that this behavior also constitutes an improper *ex parte* communication by a lawyer with a juror or prospective juror.

### **Recommendations of Subcommittee:**

Based upon the votes of the full committee at the December 1-2, 2017 SCAC meeting, the subcommittee suggests the addition of the following comment to current Texas Disciplinary Rule of Professional Conduct 3.06

5. A lawyer's review of a prospective juror's or juror's website or electronic social media (ESM) that is publicly available without making an access request, is not an improper communication, contact, or an attempt to influence a juror. However, review by a lawyer or someone acting for the lawyer of a prospective juror's or a juror's ESM is improper where the lawyer knew or should have known the prospective juror or juror could become aware through a website or ESM feature of the identity of the viewer. [Counsel should use available technology to remain anonymous when viewing or causing another to view a prospective juror or juror's social media.<sup>2</sup>]

A lawyer or someone acting for the lawyer may not request access to the prospective juror's or juror's ESM (e.g., by making a friend request) or comment on the prospective juror's or juror's electronic social media or otherwise communicate with the prospective juror or juror [during the course of the official proceeding] through ESM.

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<sup>2</sup> The ABA adopted Comment 8 to Model Rule 1.1, which pertains to competence, to read as follows:

#### Maintaining Competence

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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

A majority of states have adopted this approach. *See* <http://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html>;

## **Other Issues:**

Other issues arising from counsel's use of ESM encountered but not addressed as outside the charge to subcommittee:

- A. Should counsel, in undertaking the permissible review of a venire member's or juror's ESM, discover improper conduct by that individual, what is the obligation of counsel to advise the court?  
Example: A Facebook page of a venire member suggests prior service on a jury but voir dire response is inapposite. (See Texas Disciplinary Rule 3.03(a)(2) ("A lawyer shall not knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act") and Texas Disciplinary Rule 3.06(f) "A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge" assuming jurors have been instructed not to discuss the case on social media.)
  
- B. May attorneys ethically advise their client to delete or change content on the client's ESM or websites? See *Lester v. Allied Concrete Co.*, 736 S.E.2d 699, 285 Va. 295 (2013), wherein the Virginia Supreme Court affirmed the lower court's sanctions requiring counsel to pay \$544,000 for instructing his client to remove photographs from his Facebook page and also utilized a spoliation instruction to the jury. The client was suing for wrongful death of his spouse resulting from a car accident. One of the photos depicted the surviving husband holding a beer and wearing a tee shirt with "I (heart) hot moms."
  
- C. May attorneys ethically advise their clients not to comment on pending litigation or otherwise restrict the use of their ESM? Is there a duty to do so?
  
- D. May attorneys ethically advise their client to change their privacy settings, for example, from public to private, until litigation is concluded? For example, NYCLA Ethics Opinion 745 concludes that New York attorneys may advise clients as to what they should not post on social media; what existing postings they may or may not

remove; the implication of social media posts; and to adjust privacy settings to the highest level of security. The opinion also addresses penalties for spoliation and concludes it is permissible for counsel to review what a client plans to publish on a social media page to guide the client. However, according to the opinion, counsel may not participate in the creation of presentation of false or misleading information.

- E. May attorneys ethically investigate the ESM of other parties or witnesses? Members of the petite jury's family during trial?
- F. Does a lawyer's familiarity with and abilities relating to technology, including ESM affect the lawyer's competence?

The ABA adopted Comment 8 to Model Rule 1.1, which pertains to competence, to read as follows:

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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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

A majority of states have adopted this approach. See <https://www.lawsitesblog.com/2017/03/another-state-adopts-duty-technology-competence-canada-may-also.html>; <http://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html>; *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010) (affirming grant of new trial as juror falsely denied that he had prior juror service; suggesting party should exert reasonable efforts, including internet research, to examine potential jurors' litigation history).