

Trial Ethics: ABA Issues New Decision on #juryresearch

by Keith A. Call

Who hasn't researched a potential client, witness, or juror on social media? If you haven't done this, you are missing out on a great research tool. A few years ago, I used this forum to confess my practice of secretly sleuthing my children on Facebook. See Keith A. Call, *Confessions of a Facebook Sleuth*, 24 UTAH B. J. 18 (May/June 2011).

The ABA Standing Committee on Ethics recently issued an important opinion on the ethics of using social media to research jurors and potential jurors. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 466 (Apr. 24, 2014). The opinion includes some helpful "green lights," at least one "red light," and some unexpected and potentially dangerous twists.



Passive Review of Juror's Internet Presence Is Okay

The ABA's opinion begins with Model Rule 3.5, which, in general, prohibits *ex parte* communications with jurors and prospective jurors. According to the ABA, a lawyer's passive review of a juror's public presence on the Internet is not a communication with the juror and therefore does not violate

Rule 3.5. This includes passive review of a juror's social media websites, blogs, and any other publicly viewable Internet sites. In a sweeping, privacy-eroding analogy, the ABA likened reviews of such websites to "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." *Id.* at 4.

Some social media websites, such as LinkedIn, have settings that can allow a user to see who has viewed his or her social media profile. The ABA opinion concludes that a social media platform that notifies the juror that the lawyer may be reviewing the juror's Internet presence is not a "communication" within the meaning of Rule 3.5. Thus, according to the ABA, it is ethical to review a juror's social media profile even if the social media platform notifies the juror that the lawyer is doing the review. This opinion is not universal. See, e.g., *id.* at 5 (citing contrary ethics opinions from other jurisdictions). In any event, lawyers should consider the potential impact on a juror when the juror learns a lawyer is sleuthing them!

Seeking to "Connect" Is Not Okay

Some social media platforms allow subscribers to restrict access to information they post on the Internet. Such information can be restricted to certain identified "friends," "links," "followers," or other specified and approved groups.

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