

NEW HAMPSHIRE BAR ASSOCIATION

Juror Investigation Using Social Media

Ethics Committee Opinion #2019-20/03

ABSTRACT:

Under Rule 3.5, a New Hampshire lawyer may review a juror's public social media presence online but may not contact the juror and must avoid any notification that the juror's social media platform has been accessed by the lawyer. While a lawyer must exercise care, a review of a juror's social media presence may be ethically required in providing competent representation under Rule 1.1.

ANNOTATIONS:

Under Rule 3.5, a lawyer may review the social media platforms of jurors before and during trial but may not reach out to make contact with the juror.

A lawyer must avoid any communication with the juror, including any automatic notification that his or her social media page is being accessed by a lawyer on the case.

The practice of reviewing a juror's online presence is an important part of current day trial work and in many instances could be required in providing competent representation. See NH Rule of Professional Conduct Rule 1.1.

Juror Investigation Using Social Media

A competent lawyer in today's culture of over-sharing on social media will rightly consider when and how to research jurors online. This research can be vital both before jury selection and throughout the duration of trial. This opinion addresses the ethical considerations in this area.

Our starting point in analyzing the issue is Rule 3.5. The Rule prohibits *ex parte* contact with a juror during a proceeding unless specifically authorized by law or a court order. See Rule 3.5 (a) and (b).¹ Note that this prohibition is distinguished from contact with a juror *after* the proceeding. See Rule 3.5 (c). An access request through social media (friend request, request to connect, etc.) sent by a lawyer to a juror is considered a "communication" prohibited by the rule. See "Lawyer Reviewing Jurors' Internet Presence", ABA Formal Opinion 466. Finally, Rule 8.4 (a) extends these limitations to anyone acting on the lawyer's behalf, such as an investigator.

While proactive communication, including a request for access to a social media page, is prohibited, a lawyer is not prevented from viewing online information regarding a juror that is publicly available. See ABA Formal Opinion 466 at pg. 4. By analogy, while driving past a juror's house to gather publicly available information about the juror is permissible, knocking on the door and asking to look into the house is not. Id.

The question of what constitutes a "communication" is more complicated. Jurisdictions are conflicted as to whether automatically generated notifications from a social media platform to a juror constitute

¹ This ethical rule is consistent with the procedural rules that limit contact with jurors. See NH Rules of Civil Procedure 38 (e), NH rules of Criminal Procedure 28 (a) and Superior Court Administrative Order 2016-006 (requiring a motion to obtain juror contact information). Note that the procedural rules specifically authorize the Court to issue sanctions and protective orders as necessary for violations.

communication and therefore objectionable contact with the juror. See NYSBA “Social Media Ethics Guidelines”, pg. 34 (June 2019).

The ABA, the Colorado Bar Association and the DC Bar hold the view that the automatic notification is triggered by the social media platform and therefore is *not* a communication from the lawyer to the juror. Id. Instead, it is a communication between the platform and the juror and therefore not prohibited under the rule. Id.

In contrast, the NY City Bar concluded that even an automatic notification sent by a social media platform *could* be a communication particularly if the lawyer knew that the automatic notice was going to be sent. See NYCBA, Formal Op. 2012-2 (2012). At least one federal jurisdiction has concluded that there is no recognized right to view the social media platform of a juror and doing so could threaten a juror’s willingness to participate in the democratic process. See “*Voir Dire* Becomes *Voir Google*: Ethical Concerns of 21st Century Jury Selection”, (ABA February 18, 2016)

The Committee adopts the latter position. In the Committee’s view, any notification of a lawyer’s access to a juror social media platform, even if it is sent via an automated website notification, is a violation of the Rules. It is a lawyer’s obligation to understand what “footprint” the lawyer’s access is leaving behind for the juror, particularly in light of the risk to a juror’s sense of security when participating in the trial process. For example, if a lawyer is using LinkedIn to view publicly available information about a juror, the LinkedIn service will automatically send a notice to the juror that someone has viewed the page. Whether or not the identity of the viewer is visible to the juror depends on the settings of the viewer’s account. A competent lawyer will be familiar with the notification settings of a social media platform before researching a juror. See Rule 1.1, ABA comment 8 (a competent lawyer should remain “abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”).

Notably, there is elevated risk presented by inadvertent contact with a juror *during* trial versus contact with a juror *before* the juror is seated. While objectionable contact during the selection process could cause disqualification of one juror, objectionable contact during the trial could cause a mistrial. See NYCBA Formal Opinion 2012-2 (2012). It is advisable to speak to the client about the risks and benefits of juror investigation at each stage in the case. Depending on the case, particularly if the jury is seated and the evidence has begun, it may be strategically prudent to not engage in any jury investigation through social media.

A lawyer viewing jurors’ online presence should also be aware of the requirement to report fraud by a juror if discovered. NH Rule of Professional Conduct Rule 3.3 (b) states:

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Significantly, Rule 3.3 (b) does not include an exception in situations where disclosure of the information you encounter is to the disadvantage of your client. For example, defense counsel may find that a juror seated on a domestic violence case has written lengthy columns on a public social media platform regarding his belief that victims in domestic violence cases typically exaggerate abuse. This information was not disclosed during *voir dire*. While clearly indicative of a juror favorable to the client, the information would need to be turned over to the court and could risk a mistrial. The current language of Rule 3.3 (b) also supersedes prior guidance from this Committee relating to a lawyer’s obligation to report fraud committed by third party non-clients. See Rule 3.3 (b), comment 3.

Conclusion:

The Committee stresses that vigorous juror research can be an important element of trial strategy. However, a careful balance must be struck that avoids unethical contact with the juror while still providing appropriate access to the wealth of public information available. This information not only educates the lawyer on the jury generally, it could lead to discovery of juror misconduct. See Sluss v. Commonwealth, 381 S. W. 3d 215 (KY. 2012)(where post trial, it was revealed that two of the jurors were Facebook “friends” with the

victim's mother and did not provide this information during *voir dire*.); see generally "*Voir Dire* Becomes *Voir Google*: Ethical Concerns of 21st Century Jury Selection." (ABA February 18, 2016)

A lawyer should consider the following practical points when deciding how or whether to investigate the public online presence of a juror:

- Familiarize yourself with the notification system of the specific online platform you intend to use. Does the online platform provide an automatic notification of public "views" to the juror? If so, consider whether it is possible to block the viewer's identity to prevent the risk of a report of intimidation if the juror recognized the person viewing the public page.
- Speak to your client about the risks and benefits of investigation via social media. Explaining the risk of a mistrial at certain stages of litigation may convince the client that the risk is not worth the benefit.
- Consider whether you should ask the judge to notify the jurors that the lawyers are permitted to view public facing information on social media. This would help reduce the damage to your client if a juror did find out that you had viewed their information.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 3.5

Rule 3.3

Rule 1.1

SUBJECTS:

Competence

Impartiality and Decorum of the Tribunal

Juror Contact

Duty to Report Fraud

BY THE NHBA ETHICS COMMITTEE

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