NYCLA COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION

No.: 743

Date Issued: May 18, 2011

TOPIC: Lawyer investigation of juror internet and social networking postings during conduct of trial.

DIGEST:

It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send tweets to jurors or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but must not "friend," email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly comply with Rule 3.5(d) and bring such misconduct to the attention of the court before engaging in any further significant activity in the case.

RULES:

RPC 3.5, 4.1, 8.4

QUESTION:

After voir dire is completed and the trial commences, may a lawyer routinely conduct ongoing research on a juror on Twitter, Facebook and other social networking sites? If so, what are the lawyer's duties to the court under Rule of Professional Conduct 3.5?

OPINION:

This opinion considers lawyer investigations of jurors during an ongoing trial. With the advent of internet-based social networking services, additional complexities are introduced to the traditional rules barring contact between lawyers and jurors during trials.

New York RPC 3.5(a)(4) and (a)(5) provide that a lawyer shall not:

> 4. communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case, or, during the trial of a case with any member of the jury unless authorized to do so by law or court order;
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> 5. communicate with a juror or prospective juror after discharge of the jury if (i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service . . . .

Thus, the rules proscribe any direct or indirect communication with a juror or potential juror during trial, and prohibit certain categories of communication after the jury service is complete. It should also be noted that the RPC prevent a lawyer from doing indirectly, such as through a proxy, that which is directly proscribed for the lawyer. (RPC 8.4(a); 3.5).

A. Impermissible Communication

The RPC explicitly draw a distinction between conduct during trial, which is governed by RPC 3.5(a)(4), and conduct after discharge of the jury, which is regulated less strictly under RPC 3.5(a)(5). In fact, a lawyer's contact with jurors is divided, at least in practice, into three distinct areas. These are voir dire or jury selection, actual conduct of the trial, and post-verdict contact with jurors. As mentioned, any contact, direct or indirect, is proscribed as a matter of attorney ethics during the conduct of the trial, but permitted with certain conditions after discharge pursuant to RPC 3.5(a)(5).

Some authorities have examined a lawyer's use of internet resources to investigate potential jurors in the voir dire stage. For example, one recent Missouri decision considered and set aside a jury verdict in which a juror had specifically denied (falsely) any prior jury service. See Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010). In holding that the juror had acted improperly, the Court observed that a more thorough investigation of the juror's background would have obviated the need to set aside the jury verdict and conduct a retrial. The trial court chided the attorney for failing to perform internet research on the juror, and granted a new trial, observing that a party should use reasonable efforts to examine the litigation history of potential jurors. 306 S.W. 3d at 559. A New Jersey appellate court similarly held that the plaintiff counsel's use of a laptop computer to google potential jurors was permissible and did not require judicial intervention for fairness concerns. See Carino v. Muenzen, No. A-5491-08T1, N.J. Super. Unpub. LEXIS 2154, at *26-27 (App. Div. Aug. 30, 2010); see also Jamila A. Johnson, "Voir Dire: to Google or Not to Google" (ABA Law Trends and News, GP/Solo & Small Firm Practice Area Newsletter, Fall 2008, Volume 5, No. 1).

In another context, the New York State Bar Association Committee on Professional Ethics, in Ethics Opinion 843, recently considered whether a lawyer could ethically access the publicly available social networking page of an unrepresented party or witness for use in litigation, including possible impeachment. The NYSBA concluded that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither

"friends" the other party nor directs someone else to do so."[1] Drawing an analogy to jurors, we conclude that passive monitoring of jurors, such as viewing a publicly available blog or Facebook page, may be permissible.

During a trial, however, lawyers may not communicate with jurors outside the courtroom. Not only is direct or indirect juror contact during trial proscribed as a matter of attorney ethics, as a matter of law (which is outside the scope of this committee's jurisdiction), the courts proscribe any unauthorized contact between lawyers and sitting jurors.

Significant ethical concerns would be raised by sending a "friend request," attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog or "following" a juror's Twitter account. We believe that such contact would be impermissible communication with a juror.

Moreover, under some circumstances a juror may become aware of a lawyer's visit to the juror's website.[2] If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial.

B. Reporting Juror Misconduct

Lawyers who learn of impeachment or other useful material about an adverse party, assuming that they otherwise conform with the rules of the court, have no obligation to come forward affirmatively to inform the court of their findings. Such lawyers, absent other obligations under court rules or the RPC, may sit back confidently, waiting to spring their trap at trial.[3] On the other hand, a lawyer who learns of juror impropriety is bound by RPC 3.5 to promptly report such impropriety to the court. That rule provides that: "A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge." RPC 3.5(d).

The standard jury charge in a civil or criminal case instructs jurors not to discuss the case with anyone outside the courtroom, not to conduct any independent investigation, not to view the scene of the incident through computer programs such as Google Earth, and not to perform any independent research on the internet. See PJI 1:10, 1:11. According to the New York pattern jury instruction:

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[1] See NYSBA Ethics Op. 843, http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208 at 2-3

[2] For example, as of this writing, Twitter apparently conveys a message to the account holder when a new person starts to "follow" the account, and the social networking site LinkedIn provides a function that allows a user to see who has recently viewed the user's profile. This opinion is intended to apply to whatever technologies now exist or may be developed that enable the account holder to learn the identity of a visitor.

[3] Lawyers should keep in mind that RPC 3.4 provides that a lawyer shall not "disregard or advise the client to disregard a standing rule of a tribunal. . .."

> It is important to remember that you may not use any internet services such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties or the lawyers or the court.

Jurors have sometimes ignored instructions. For example, a New York juror googled defense counsel during trial, and discussed it at a social dinner.[4] A prominent television newscaster was criticized for tweeting on his Twitter account about his own jury service.[5] In a recent South Dakota case, a jury verdict was set aside after a juror performed his own internet research, which he shared with the other jurors.[6]

Any lawyer who learns of juror misconduct, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court. This is so even should the client notify the lawyer that she does not wish the lawyer to comply with the requirements of RPC 3.5. Of course, the lawyer has no ethical duty to routinely monitor the web posting or Twitter musings of jurors, but merely to promptly notify the court of any impropriety of which the lawyer becomes aware.

Further, the lawyer who learns of improper juror deliberations may not use this information to benefit the lawyer's client in settlement negotiations, or even to inform the lawyer's settlement negotiations. The lawyer may not research a juror's social networking site, ascertain the status of improper juror deliberations and then accept a settlement offer based on that information, prior to notifying the court. Rather, the lawyer must "promptly" notify the court of the impropriety—*i.e.*, before taking any further significant action on the case.

CONCLUSION:

It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not "friend" the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly

[4] People vs. Jamison, 24 Misc. 3d 1238A, 243 N.Y.L.J. 42 (2006).

[5] Michael Hoenig, Juror Misconduct on the Internet, N.Y.L.J. October 8, 2009.

[6] Russo vs. Takata Corp., 2009 S.D. 83, 2009 S.D. Lexis 155 (Sept. 16, 2009).

comply with RPC 3.5(d) and bring such misconduct to the attention of the court, before engaging in any further significant activity in the case.