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LegalLOOP

Lawyers' use of social media during trials

As social networking use becomes mainstream, social media sites are proving to be an incredibly useful source of information for attorneys. Postings on social media sites are being used to disprove allegations made by a party or witness. Lawyers are also mining social media sites during voir dire to locate background information about potential jurors or to monitor juror postings during the course of a trial.

Of course, mining social media creates an ethical minefield for lawyers and, for that reason, ethics committees are beginning to establish guidelines for lawyers seeking to obtain evidence online.

For example, in January, I wrote about Formal Opinion No. 743, issued by the New York County Lawyers' Association Committee on Professional Ethics, which addressed the issue of how lawyers can ethically use social media for juror research during trials. The committee concluded that pursuant to RPA 3.5 it is ethically permissible for attorneys to conduct research and follow jurors' social media interactions only if the jurors are unaware of the monitoring.

More recently, the New York City Bar Association's Committee on Professional Ethics addressed a similar issue in Formal Opinion 2012-2 (online : tinyurl.com/NYCSocMed-Eth). The specific issue addressed was: "What ethical restrictions, if any, apply to an attorney's use of social media websites to research potential or sitting jurors?"

The committee reached the same conclusion as the New York County Ethics Committee and concluded that lawyers can use social media to research jurors, so long as the jurors remain unaware that the research is occurring.

The committee explained that it was important to ensure that a juror did not learn of the attorney's actions, whether in the form of a notification from the social media site or otherwise. If the attorney knew a juror would be aware of the monitoring, then it would be unethical to conduct the research on that particular site. Furthermore, even if the attorney was unaware that a notification would be sent, if the juror subsequently learned of the

monitoring, then it could still qualify as a prohibited communication in violation of RPE 3.5.

The committee cautioned that attorneys and their agents must refrain from using deception, "such as pretending to be someone else," when attempting to obtain information about a juror. Additionally, the committee advised that lawyers who learn of juror misconduct while researching social media have an obligation to inform the court of their knowledge.

And, last but not least, the committee addressed the overarching impact of easy access to information online and offered advice for attorneys seeking to use online tools during trial: "Just as the Internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research ... In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research."

Thus, the committee acknowledged that the increasing availability of online tools for factual research is a double edged sword, with both benefits and downfalls, while at the same time emphasizing the need for lawyers to stay abreast of the rapidly changing technological landscape. In other words, avoiding social media is no longer an option, so you may as well learn as much as you can about it so that you can effectively use it to your clients' advantage.

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