Lawyers and Social Media: Ethical Considerations, Problems and Pitfalls

By John A. Tarantino

Social media provides an extraordinary means not only to communicate and share information, but also to obtain information that may lead to incriminating, exculpatory and impeachment evidence for use in discovery and at trial. Social media can help an attorney obtain information about opponents, witnesses, experts and jurors (potential or sitting). One of the principal problems with trying to apply the Rules of Professional Conduct (as well as prior case law) to social media issues, is that the rules and legal precedents relied upon to instruct and define lawyer behavior were drafted and decided well before recent technological advances. This means that lawyers today face an ethical dilemma. For example, if a lawyer fails adequately to investigate a crime or a witness' background, such failure may be a violation of a client's right to counsel and due process. Today, a surreptitious online investigation may be the best, and in some cases, the only way to uncover crucial information that otherwise might not be available, or to safeguard evidence that otherwise might be deleted or compromised. Consequently, if a lawyer fails to make appropriate use of social media and the Internet, he or she may risk accusations of ineffective advice of counsel, malpractice, or both.

Lawyers have certainly used online resources, such as Google, as well as various databases, to search for information about witnesses, parties and experts. Social networking sites, such as Facebook, have both public and private areas; and while a visitor may be able to search the public segment unconstrained, in order to go further and view the person's profile, both membership (*i.e.*, membership in Facebook) and an agreement to Facebook's terms of services are required. "Friending" is a form of contact; and with respect to an opposing party, witness, complainant, prospective juror, or judge "friending" may cross the line against communicating with a represented party, may be construed as an attempt to influence or intimidate a witness, or may constitute an *ex parte* contact with a juror or judge.

The ABA and Telephone Technology

Forty years ago, the ABA issued Formal Opinion 337 (1974). There, the analysis addressed telephone technology and concluded that "[w]ith certain exceptions spelled out in this opinion, no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 337 (1974). The most common situations that were identified in that Ethics Opinion were ones that included the recording of conversations with clients or witnesses. The Ethics Opinion relied principally on what was then Canon No. 9 of the Code of Professional Responsibility, which required lawyers to avoid the appearance of impropriety, as well as DR1-102(A)(4), which prohibited "dishonesty, fraud, deceit or misrepresentation." However, there was a law enforcement exception to the general prohibition against recording conversations without the other person's consent. The Opinion noted that in certain "extraordinary circumstances" the Attorney General of the United States, or the principal prosecuting attorney for the state or local government, or law enforcement attorneys or officers

acting at the direction of the Attorney General or such state prosecuting attorneys, might ethically make and use secret recordings if they were acting within strict statutory limitations that conformed to constitutional requirements.

The ABA Changes Course

In 2001, the American Bar Association Standing Committee on Ethics & Professional Responsibility re-examined its position with respect to the propriety of a lawyer recording a phone conversation without the other party's knowledge. This time, the Committee came to the opposite conclusion in Formal Op. 337, and also withdrew the earlier precedent. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

Why did this change take place? First, the change in position followed the issuance of the Model Rules of Professional Conduct, which omitted Canon 9's "appearance of impropriety" admonition. Although fraud and deceit language is still contained in Model Rule 8.4(c), the practice of, and perspective on recording conversations had changed over time. A belief that non-consensual taping of conversations was inherently deceitful was no longer universally accepted. In fact, the majority of states allow recording by consent of only one party to a conversation. Second, surreptitious recording of conversations is now considered a wide-spread and accepted practice by law enforcement, private investigators, as well as journalists. Many courts accept evidence that is obtained and acquired by such techniques. Therefore, although the recording of the conversation without disclosure may appear to be unprofessional or may offend a sense of fair play, it is at least questionable whether anyone today could justifiably rely on an expectation that a conversation he or she is having would not be recorded by the other party. This change in view by the ABA caused some commentators to conclude that the same factors

that changed the bar on surreptitious recording would tend to favor a lawyer's access to another person's social media. *See* Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 Pace L. Rev. 228, 268 (2011).

A third reason to support the ABA's changed view on recording were the various exceptions to Opinion 337's proscription found in state bar committee opinions, which often focused on the need for criminal defense lawyers to record conversations, particularly because the law enforcement exception would otherwise give prosecutors an unfair advantage; and the constitution requires a level playing field. *See*, *e.g.*, Bd. of Prof'l Responsibility of the Sup.Ct. of Tenn., Formal Ethics Op. 86-F-14(a) (1986); Ky. Bar Ass'n, Ethics Op. KBA E-279 (1984); N.Y.C. County Lawyers Ass'n, Formal Op. 737 (2007).

Fourth, the ABA generally wanted to avoid what would be considered as *per se* rules and, thus, concluded that it was better to decide each case on its merits rather than have an overall bar against recording conversations with many exceptions to the bar, which, in effect, could ultimately swallow up the bar.

Finally, even though the ABA reversed course and eventually allowed for non-consensual phone recordings, it distinguished situations where an attorney misrepresented whether a conversation was being recorded. For the ABA, the problem was not the act of recording the call, but rather the accompanying false statement to a third person, which violated Rule 4.1. Another concern is that the laws of various states differ. Rule 4.1 prohibits violating the rights of a third party under the applicable state law in conducting discovery or investigation. This provision can be problematic whenever a lawyer uses social media for discovery and information-gathering purposes. A lawyer has to be versed in federal and various applicable

state laws on computer fraud, cyber bullying, harassment and, of course, ethics, because Internet communication, like telephone communication, crosses state boundaries.

May A Lawyer "Friend" A Witness, Party Or Juror?

What does this mean for purposes of "friending" a witness, party or juror? While an argument could be made that "friending" is itself lawful and generally ethical, if a lawyer is being secretive about it, its true purpose or who he or she is, such a form of surreptitious conduct could mislead the "friending" request recipient and amount to a false representation. "Friending" may also lead to other ethical concerns for lawyers. For example, attempting to "friend" an opposing party would likely be considered an *ex parte* contact with someone whom the lawyer knows is represented by counsel.

Additionally, attempting to "friend" jurors or prospective jurors, or to follow a juror or prospective juror, or to "link in" with him or her through an access request, is akin to a communication by which a lawyer is asking the juror for information that the juror has not made public and would be considered the type of *ex parte* communication prohibited by Rule 3.5(b). *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (April 24, 2014).

In Formal Opinion 466, the ABA Standing Committee recognized that jurors and prospective jurors often will have Internet presences through electronic social media, websites, blogs and the like, and that the nature and extent of general public access to such Internet presence will often vary. Blogs, websites and other various electronic media may be easily and readily accessed by anyone through the Internet. In other cases, Internet-based social media sites, including Facebook, LinkedIn and Twitter, allow account owner restrictions on access, that, when activated, require one to make or access request in order to obtain access. If the

request is accepted, then information about the member that is not available to the general public can be obtained.

The Opinion addressed three levels of lawyer review of juror Internet presence:

1. Passive review, where a lawyer merely reviews a juror's website or electronic social media information that is available without making an access request, and where the juror is unaware that a website or the form of electronic social media has 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 (here, the lawyer).

3. Active lawyer review, where the lawyer requests access to the juror's electronic social media through a friending request, following on Twitter, or asking to become a part of a LinkedIn network.

These issues are not as clear as they might initially seem to be. First, there is a strong public interest in identifying jurors that might be tainted by bias or prejudice. Second, there is also a strong public policy in protecting and preventing jurors from being approached *ex parte* by parties, their lawyers or their agents. Lawyers need to know where the line should be drawn because it is improper and unethical for lawyers to communicate *ex parte* with jurors or prospective jurors. For this reason, it makes sense for judges and lawyers to discuss the court's expectations about how, if at all, the lawyers may review jurors' and prospective jurors' presence and information on the internet. Therefore, in addition to whatever the Rules of Professional Conduct may say about the conduct of counsel, a lawyer would be best served if he or she raises this issue in a pretrial conference or case management conference and obtains clear direction from the court.

Some Things A Judge Should Consider With Respect To Requests To Review Juror Information

Similarly, a judge should consider advising jurors that their backgrounds may be of interest to the litigants and to the attorneys, and that there is nothing wrong with a general background review, including information that is available on the Internet. However, if a judge believes, under the circumstances, that it may be necessary to limit a lawyer's review of even publicly available juror website and electronic social media information (particularly where it may be likely the jurors would be notified that the information is being reviewed by the lawyer), then the judge should consider informing and instructing not only the lawyers, but the jurors, about the court's expectations in this regard.

General Principles Of Reviewing Juror Internet Presence

In the absence of a court order, or other direction by the court, lawyers may review juror internet presence, both before, during and after trial, as long as the lawyer is not "friending" or "linking in" with the juror or prospective juror, or otherwise obtaining access to non-public information. The passive review of the juror's website or electronic social media information that is available without making an access request does not, according to Formal Opinion 466, violate Rule 3.5(b). The Committee, made it clear, however, that, in its view, the lawyer may not personally or through another (*e.g.*, an agent) send an access request to a juror or prospective juror. That would be the type of *ex parte* communication prohibited by Rule 3.5(b). The Committee analogized it to being "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." *Id.* at 4. If a juror has the ability to learn that someone has viewed his or her publicly available information (website or electronic social media), and that person is the lawyer, such conduct does not necessarily violate the rules of ethics because the lawyer is not having any direct contact with the juror. Rather, the juror's

service provider is having the contact, and notice to the subscriber (juror) is generated by the network based on the identity profiling of the subscriber.

Two recent ethics opinions have addressed this particular issue. In the first, a network-generated notice to a juror advising that the lawyer had reviewed the juror's social media was considered by the City of New York Committee on Professional Ethics to be a communication from the lawyer to a juror, even though it was an indirect one generated by the network. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics Formal Op. 2012-2. Although the Committee found that the communication would constitute a prohibited communication if the attorney knew that her actions would send such a notice, the Committee ultimately concluded by taking no position on whether an inadvertent communication would be a violation of the rules.

In another opinion, the New York County Lawyers Association Committee on Professional Ethics went further and explained as follows: "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." N.Y.Cnty. Lawyers' Ass'n 743 (2011).

The ABA Committee concluded otherwise: A lawyer who uses a shared platform to passively view juror electronic social media does not communicate with the juror because the lawyer is not communicating with the juror, but rather the service is doing so based on a technical feature. The ABA Committee analogized this situation as being "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 driving down the street." Formal Opinion 466 at 5.

As a practical matter, at a pretrial conference the trial judge and counsel should discuss what is allowed and not allowed. The court should then advise the prospective jurors of what they may expect with respect to lawyers' social media review and information gathering. In most cases, any potential for juror misperception that a lawyer might be acting improperly merely by reviewing what the juror has revealed publicly to others will thereby likely be avoided.

Even though the Committee concluded that a network-generated notice to a juror that a lawyer had reviewed the juror's information is not a "communication" from the lawyer to the juror, it made two additional recommendations:

- The Committee suggested that lawyers be aware of the automatic subscriber notification features; and that by accepting the terms the subscriber notification feature is not secret. Therefore, the lawyer should review carefully the network's terms and conditions, including its privacy features (which may change frequently) before using the network.

- Lawyers need to be aware that Rule 4.4(a) prohibits a lawyer from taking any action that would have no substantial purpose other than to embarrass, delay or burden a third person; and, therefore, a lawyer who reviews a juror's social media needs to make sure that the review is purposeful and not intended or designed to embarrass, delay or burden the juror or the proceeding.

Juror Instructions and Jury Misconduct

What happens if there is an accusation of juror misconduct? Jurors are almost always strictly prohibited by the trial judge from using the social media to communicate about their jury experience or their service on the pending case, or to do any research about the case, the parties, the witnesses or the lawyers, including Internet research. These warnings and instructions have often become explicit because jurors have discussed trial issues on social media and they also have obtained information about witnesses, litigants and lawyers. Moreover, in some circumstances, jurors have conducted personal research on specific trial issues by using the Internet.

The Court Administration and Case Management Committee of the Judicial Conference of the United States recommended the use of a Model Jury Instruction that deals specifically with juror use of social media and, moreover, mentions a number of social media by name. Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case, uscourts.gov (June 2012). The Model Instruction, in relevant part, is as follows:

> I know that many of you use cell phones, Blackberrys, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case … You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging or on Twitter, through any blog or website, including Facebook, Google Plus, MySpace, Linked-In or YouTube … I expect you will inform me as soon as you become aware of another juror's violations of these instructions.

The instruction was given by a federal district court judge and a state criminal court judge, respectively, over the course of a three-year study on juries and social media. The research concluded that "[j]ury instructions are the most effective tool to mitigate the risk of juror misconduct with social media." *Id.* at 66. The authors of the study recommended that jury instructions on social media should be made both early (and often) and, in fact, daily in lengthy trials.

The authors also concluded that approximately 8% of the jurors admitted to being "tempted" to communicate about the case using social media and the jurors who chose not to talk or write about the case did so because of the specific jury instructions not to do so.

The ABA Opinion on lawyers reviewing juror websites and electronic information, did not specifically deal with juror misconduct and social media, but did address the circumstance where a lawyer becomes aware of misconduct. Rule 3.3, its commentary and legislative history, note that a lawyer has an obligation to take appropriate remedial measures, which may include informing the tribunal when a lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. What is less clear, however, is whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in some form of improper conduct that falls short of criminal or fraudulent behavior. Under the former DR7-108(G), a lawyer who knew of "improper conduct" by a juror or a venire person, was required to report the matter to the tribunal. However, under Rule 3.3(b), the obligation to act arises only when the juror or venire person engages in conduct that is fraudulent or criminal.

Improper conduct is not defined in the Model Code, but it appears to be a broader duty to take remedial action than exists under the Model Rules. Accordingly, this, too, should be a

subject of a discussion with the court and counsel so that everyone is clear about what should be done if the lawyer discovers what may be perceived as improper juror conduct, even if it is not fraudulent or criminal in nature. For example, conduct that violates a court instruction to the jury may not necessarily rise to the level of criminal or fraudulent conduct, but it certainly could be considered to be improper conduct. Rule 3.3(b) does not specifically set forth what the lawyer must do in such a situation. Here, clarity is preferred; so to the extent the lawyers can obtain clear direction from the court on what should be done if any information about juror misconduct is obtained, the lawyer will better know whether he or she has a duty to take remedial action, including reporting the juror's conduct to the court.

Internet Postings

Finally, Internet postings or communications about the case by a juror during trial likely will violate the court's instructions. The obligation of the lawyer to report will depend on the lawyer's assessment on the postings based on the court's instructions, as well as on the elements of civil contempt (under case law) or the applicable criminal statutes. The ABA Committee noted that there can be certain postings about jury service that are not necessarily substantive enough to report. Consequently, even though they might violate a court order they might not be reportable. For example, a juror might comment on the "food served at lunch." This certainly would not warrant a finding by the court that the juror is in criminal contempt. The ABA Committee concluded that "[t]he materiality of juror internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by the lawyer's belief that the court will not choose to address the conduct as a crime or fraud." *Id.*

CONCLUSION

Social media is here to stay. Lawyers need to know as much as they can about social media, including the good, the bad and the ugly, if they are to be properly prepared to represent their clients with an appropriate skill set for modern times.