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Legal LOOP

Researching social media for evidence (Part 2)

Last week I covered the first part of an opinion issued by the Colorado Bar Association Ethics Committee, Formal Opinion 127 (online: http://www.cobar.org/tcl/tcl_articles.cfm?articleid=9073). I discussed the committee's conclusions regarding lawyers mining social media for evidence and then promised to address the second half of the opinion this week. So, today I'll be covering the portion of the opinion where the committee discusses whether it's ethical for lawyers to connect with or research jurors and judges online.

At the outset, the committee explained that online communications with jurors are no different than offline communications: "Essentially, communications between a lawyer and a juror through social media are no different than face-to-face communications or telephonic communications between a lawyer and a juror."

Next the committee opined that lawyers may view jurors' public social media profiles without triggering any ethical issues, even in cases where the social media platform notifies the juror that the lawyer accessed his or her public profile. The committee noted that it agreed with the American Bar Association's take on this issue, since "in such circumstances, the lawyer is not communicating with the juror. Rather, the social media service is communicating with the juror based on a technical feature of the particular social media, consistent with agreements between the provider and the subscriber."

The committee likewise concluded that the same rationale applies to judges' public social media profiles. Accordingly, lawyers may view the public profiles of judges before whom they have a case



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pending: "Judges who maintain a presence on social media should expect that attorneys and parties appearing before them will view the public portion of the judge's profile. Similarly, lawyers should advise their clients to expect opposing counsel or their agents to view the public portions of their social media profiles."

Next the committee turned to issue of whether lawyers or their agents may request to view restricted portions of the social media profiles of jurors. The committee concluded that doing so was impermissible: "Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper ex parte communication, whether a lawyer or someone else acting on the lawyer's behalf initiates the communication."

Finally, the committee addressed the issue of whether lawyers may request to connect with judges presiding over a case in which the lawyer is involved as counsel or as a party. This type of online behavior was also determined to be impermissible: "(Lawyers may participate) on social networking sites with judges... However, Colo. RPC 3.5 prohibits a lawyer from actively communicating ex parte with a judge during the period the lawyer is appearing as counsel or as a party before a judge, concerning or relating to

the matter before that judge... A lawyer generally should not send a "friend request" to a judge while the judge is presiding over a case in which the lawyer is appearing as counsel or a party... At least one commentator has recommended that to eliminate any risks and to comply with Rule 3.5, a lawyer and judge who know they are part of the same restricted social network, and who learn that the lawyer is to appear in a matter before the judge, should "un-friend" one another.. While the Committee does not believe such steps are mandated, lawyers must be cautious about what they post on any social media network of which they know a judge is a member while they have legal matters pending before that judge."

All in all this was a well-reasoned opinion that tackled a host of important ethical issues faced by 21st century lawyers. It's well worth a read, even if you don't practice law in Colorado, since it provides lots of background information on social media and sound conclusions regarding the ethics of lawyers interacting online with witnesses, parties, jurors, and judges.

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