

REPORT BY
THE COMMITTEE ON DISCIPLINARY RULES AND REFERENDA
August 21, 2019

The Texas Committee on Disciplinary Rules and Referenda (“Committee”) submits this report to the Texas Supreme Court (“Court”). This report addresses a recommendation for a proposed comment to Rule 3.06, Texas Disciplinary Rules of Professional Conduct (“TDRPC”) regarding lawyer access to juror or prospective juror social media activity.

Background

On June 3, 2019, the Court asked the Committee to study and make recommendations regarding a comment to Rule 3.06, TDRPC. In 2014, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 466, which addresses three categories of lawyer review of a juror’s electronic social media (ESM) presence:

1. Passive lawyer review of a juror’s website or ESM that is available without making an access request, so that the juror is unaware that a website or ESM has been reviewed.
2. Active lawyer review where the lawyer requests access to the juror’s ESM; and
3. Passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer.

The ABA Standing Committee concluded that category 2 violates ABA Model Rule 3.5(b), which prohibits lawyer communications with a juror or potential juror, which is the equivalent to Rule 3.06(b), TDRP, but that categories 1 and 3 do not violate the ABA rule.

The Court solicited the recommendations of the Supreme Court Advisory Committee (SCAC), which considered the matter in December 2017 and in September 2018. The SCAC subcommittee on this issue recommended a comment to Rule 3.06 that provides that passive review of a juror’s social media without making an access request is not in violation of the Texas rule. However, “review by a lawyer or someone acting for the lawyer of a prospective juror’s or juror’s ESM is improper where the lawyer knew or should have known the prospective juror or juror could become aware through a website or ESM feature of the identity of the viewer. [Counsel should use available technology to remain anonymous when viewing or causing another to view a prospective juror or juror’s social media.]”

A majority of the full SCAC membership voted in favor of permitting lawyers to review jurors’ ESM without making a request to follow, friend, or connect with the juror. However, SCAC members were split on whether it was proper for a lawyer to conduct a passive review of a juror’s ESM if the juror could become aware of the review. In other words, SCAC members could not agree on whether the lawyer has a duty to not be discovered reviewing the juror’s social media content. Some SCAC members noted the difficulty of having to prove whether the lawyer knew or should have known that the juror would discover such passive review. That would require the fact finder to look into the mind of the lawyer, which would be a subjective standard.

Proposed Change

After considering the ABA opinion, SCAC's discussion, a Texas federal court's standing order, and other jurisdictions' treatment of the issue, the Committee proposes the following comment to Rule 3.06:

5. There is a strong public interest in preventing jurors from being approached *ex parte* by parties to the case or their agents in order to protect the integrity of the justice system. The prohibitions of this Rule broadly apply to communications by a lawyer, regardless of the method of communication. A lawyer's review of a venire member's or a juror's Internet presence, including their electronic social media, that is publicly available without making an access request is not an improper *ex parte* communication. However, a request to access a venire member's or a juror's electronic social media, whether sent by the lawyer or someone acting for the lawyer, is a communication subject to the prohibitions of this Rule. The fact that a venire member or a juror may become aware that a lawyer has reviewed their Internet presence when a network setting notifies the venire member or juror of such passive review does not constitute a communication from the lawyer that would be in violation of this Rule.

Discussion

The proposed comment to Rule 3.06 follows the ABA opinion by expressly prohibiting access requests made to a juror's or prospective juror's social media while permitting a lawyer to review a juror's or prospective juror's ESM which is generally available to the public. And, like the ABA opinion, the comment does not put a duty on the lawyer to avoid being discovered making this passive review. The ABA analogized this type of review to an attorney "driving down the street where a prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions."¹

The capabilities of ESM and its users frequently vary in sophistication. Some third-party social media platforms enable a user to see if someone is viewing their social media without the reviewer sending an access request. Many of these third-party platform applications require a paid subscription. However, such platforms change daily and their accuracy varies depending on consumer reviews. Notwithstanding Comment 8, Rule 1.01, TDRPC, it is beyond the call of duty for a lawyer to have to be aware of every possible third-party platform application, paid subscription required or not, which may enable a user to see who is viewing their publicly available ESM content. However, it is important for a lawyer to be current with technology and be aware that these automatic, subscriber-notification features may exist, and that the features may change daily and for no known reason. Thus, it is unreasonable to expect a lawyer to be aware of all existing third party platform notification features on a day-to-day basis.

The Committee also considered other jurisdictions' treatment of this issue when reaching this decision. For example, Pennsylvania also concludes that ethical constraints are not violated by passive lawyer review when the juror becomes aware of the lawyer's identity through the social media provider (Pennsylvania State Bar Opinion, a. St. Bar Ass'n, Op. 2014-300 (2014) (concluding it is not a communication provided the website, not the attorney, that provides this

information to the juror.)² We reviewed a Texas federal court’s “standing order” which also allowed for passive review of social media but did not put a duty on a lawyer to avoid being discovered. That standing order still prohibited making access requests to jurors or prospective jurors.³

Although there are some jurisdictions and ethics opinions that have reached a contrary conclusion by determining that if a juror discovers that an attorney has viewed their profile, that in itself, constitutes an impermissible communication regardless of whether the attorney even knew about it⁴, we agree with the ABA Standing Committee. The ABA Standing Committee concludes that ESM-generated notices to a juror that a lawyer has reviewed the juror’s information is not communication from the lawyer to the juror and therefore not considered an *ex parte* communication. Furthermore, where Texas can follow the ABA Rules and Ethics Opinions, the Court has advised doing so.

Nearly all jurisdictions that have addressed the second scenario—active lawyer review where the lawyer requests access to the juror’s ESM—have concluded that this constitutes an improper *ex parte* communication with a juror. We agree. In Formal Opinion 466, the ABA opinion likened this 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.” And notably, the full subcommittee of the SCAC voted at the December 1-2, 2017 meeting that this behavior also constitutes an improper *ex parte* communication by a lawyer with a juror or perspective juror.

Conclusion

Based on our research of SCAC discussions and other jurisdictions’ treatment, including a Texas federal court’s standing order, the Committee recommends inserting the aforementioned comment, which follows the ABA Formal Opinion 466.

¹ ABA Formal Op. 466 (2014).

² *See also* Or. State Bar Ass’n, Formal Op. 2013-189 (“Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website”); Ky. Bar Ass’n, Op. E-434 (2012) (“If the site is ‘public’, and accessible to all, then there does not appear to be any ethics issue”).

³ <http://www.txed.uscourts.gov/sites/default/files/judgeFiles/Standing%20Order%20--%20Juror%20Research%20%28signed%29.pdf>

⁴ Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics Op. 2012-2 (concluding that "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"); *see also* California, Rule 5-320: Contact with Jurors (providing in subpart (A) that "[a] member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from the which the jury will be selected for trial of that case").

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