

# BACK STORY

## INTERNET CONTACT WITH JURORS

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Increasingly, lawyers are doing more and more to find out about jurors or potential jurors. The goal, of course, is to find out as much as one can about the juror, in order to select a good juror for your case. However, there are rules and strong public policies prohibiting ex parte contact with jurors. So, attorneys need to be careful when doing this kind of research. In our Internet-saturated world, the lines can be blurred.

Although there have been no formal opinions issued by the Nevada Standing Committee on Ethics and Professional Responsibility, there are some basic guidelines to be found in the Nevada Rules of Professional Conduct (NRPC) and the recent ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 466.

NRPC3.5 (Impartiality and Decorum of the Tribunal and Relations with Jury) provides that:

- a. A lawyer shall not seek to influence a judge, juror, prospective juror or other official by means prohibited by law.
- b. A lawyer shall not communicate ex parte with a judge, juror, prospective juror or other official except as permitted by law.
- ...
- e. Before the jury is sworn to try the case, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided that a lawyer or the lawyer's employees or independent contractors may not, at any time before the commencement of the trial, conduct or authorize any investigation of the prospective jurors, through any means which are calculated or likely to lead to communication with prospective jurors of any allegations or factual circumstances relating to the case at issue. Conduct prohibited by this rule includes, but is not limited to, any direct or indirect communication with a prospective juror, a member of the juror's family, an employer, or any other person that may lead to direct or indirect communication with a prospective juror.

The rule prevents lawyers from communicating with potential jurors leading up to, or during, trial, unless authorized to do so by law or court order. Such communication must not take place even indirectly, i.e. through a third party.

Based on the above, a lawyer is free to passively access and review a juror's publicly accessible Internet presence, which may be available in various forms, including accounts held with Facebook, MySpace, LinkedIn or Twitter.<sup>1</sup> However, some or all of a juror's Internet presence may be subject to certain privacy settings, and may require parties unknown to the account holder to send an access request. Lawyers may not send access requests to jurors or potential

jurors, nor may they have a third party do so for them. Such an action would qualify as an ex parte communication.

Also, lawyers should be aware that some electronic social media (ESM) networks allow jurors to identify fellow members of a given network who have passively viewed their ESMs. Two New York ethics opinions have addressed this situation. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2, deemed this a prohibited communication, if the lawyer is aware that his or her actions will generate such a notice, but set forth no opinion as to whether or not the action violated the rules. The New York County Lawyers' Association Committee on Professional Ethics, in Formal Opinion 743, agreed and stated that if a juror becomes aware that an attorney has been viewing his or her EMS, the contact may be considered an impermissible communication, as it might have an impact on the juror's conduct during the trial. Therefore, it is important to be aware of automatic, subscriber notification procedures that users agree to by accepting the terms of the ESM network. Also, be sure to review those procedures regularly as they are subject to change.

What obligation does a lawyer have to report the discovery of juror misconduct? Courts instruct jurors on prohibitions against accessing media and using ESM to communicate about their jury service or the pending trial, or doing their own research into the case. NRPC 3.3(b) (Candor Toward the Tribunal) provides:

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Lawyers have an obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. If a lawyer discovers such conduct, he or she might be required to take remedial measures, including reporting the matter to the court. The question becomes: what does a lawyer do when he or she discovers a juror has violated court instructions? The lawyer must analyze the conduct in relation to the instruction and determine if the conduct is criminal, and/or if it displays criminal contempt. There has been only one Nevada case on juror misconduct involving an Internet search for information, but it does not address the issues raised here.<sup>3</sup> **NL**

1. See ABA Formal Opinion 466, 2014, p. 4.

2. See *Zana v State*, 125 Nev. 541, 216 P.3d 244 (2009).

**AUTHOR'S BIOGRAPHY ON PAGE 15.**