

Facebook Peeks Risk Luring Attys Into Jury Selection Abuses

By Allison Grande

Law360, New York (April 28, 2014, 10:01 PM ET) -- The American Bar Association last week finally clarified that attorneys can use Facebook and other social media sites to research potential jurors, but the new treasure trove of data contains pitfalls, potentially luring attorneys into classic voir dire violations such as excluding candidates based on race or gender.

In a **formal written opinion** issued Thursday, the ABA's Standing Committee on Ethics and Professional Responsibility concluded that while attorneys may not attempt to "friend" potential jurors to access private profiles, "passive review" of information posted publicly to sites like Facebook, LinkedIn and Twitter is allowed.

"These days, it's arguably a breach of duty to ignore the wealth of information publicly available to attorneys through the Internet, including on social media sites," Cohen & Gresser LLP intellectual property practice chair Karen Bromberg told Law360. "This wealth of information, however, may slow down voir dire, inasmuch as more information on a prospective juror may raise the possibility of additional challenges."

The ABA committee's opinion clearly lays out how attorneys can collect data on potential jurors, so the main dangers will likely have to do with how they use that information once they've gathered it, according to attorneys.

For instance, while attorneys are permitted to scan publicly available social media sites for information that might reveal a bias that could be harmful to a case, seeking a juror's dismissal based on protected biographical information such as race, gender, religion, sexual orientation or political affiliation could land an attorney in hot water.

"What lawyers have to be careful about is that the more information they have, the more risk there is that some impermissible grounds or inappropriate elements will creep into the jury selection process," said Scott Vernick, Fox Rothschild LLP's privacy and data security practice leader. "So that means attorneys need to be careful in their decision making."

Allowing irrelevant facts gleaned from public profiles to influence jury selection outcomes could not only violate long-standing prohibitions but also result in a major setback like a mistrial, attorneys say.

"Having greater access to information related to factors such as race, religion and nationality does not allow for that data to be used to make decisions," Butzel Long PC attorney Jennifer Dukarski said. "Ethical considerations still apply, and the ABA's opinion doesn't change that."

The ABA committee's endorsement of vetting jurors using publicly available social media profiles also leaves attorneys with some uncertainties about their obligations to tell the court about potentially troublesome data their searches turn up.

"The real thorny question is one the opinion leaves somewhat open: What if the lawyer sees

the juror communicating about the case in violation of the court's order?" Montgomery McCracken Walker & Rhoads LLP partner Ellen Brotman asked.

The ABA's Model Rules of Professional Conduct require that attorneys disclose fraudulent or criminal conduct to the court, Brotman points out — but if the potential jurors' words fall short of that, could the lawyer safely avoid bringing them up to keep the candidate in the jury pool?

Attorneys may also be doing their clients a disservice by sitting on information that could taint the jury pool, such as discovering a juror being vetted for a race discrimination case has ties to a white separatist group, lawyers say.

"Existing case law tells us that you can't sit there and wait to get a second bite of the apple if the trial doesn't go well," Tripp Scott Director Paul Lopez said. "If you as a trial lawyer know about information that could potentially be damaging to the case, that likely needs to be out there."

Another potential issue is that some sites alert users about who is viewing their information.

"Attorneys need to be careful, because many social media sites, such as LinkedIn, will let the account holder know who has been snooping around their profile, which could come off a bit creepy to a juror or potential juror. And the last thing you want to do is come off scary, weird or strange when seeking to curry favor from a juror," said Pryor Cashman LLP digital media practice group Co-chair Robert J. deBrauwere.

Attorneys can minimize the risk by asking the court to instruct the jury that such probes are commonplace and proper or by using the anonymizing functionality available on some sites to avoid alerting jurors to their identities, attorneys say.

Despite the potential pitfalls, attorneys overwhelmingly welcomed the committee's opinion, which they characterized as consistent with general privacy expectations in the digital age.

"What the ABA opinion tells us is that there are certain lines that lawyers and anyone working on their behalf cannot and should not cross," Lopez said. "It makes a lot of sense that information that is generally accessible to the public is fair game and can be used if it is germane to the jury selection process."

Attorneys also applauded the opinion for clarifying that a social media notification that an attorney has viewed a user's profile does not count as a "communication" that would violate the ABA's Model Rule 3.5, which restricts communications between lawyers and jurors.

"That's a good thing, because there are so many variables at issue in the context of social media privacy settings and public, online research, no one could be expected to think that such a notification, generated by a third party, would violate 3.5(b) under these circumstances," said Fernando M. Pinguelo, chair of the cybersecurity and data protection group at Scarinci Hollenbeck LLC.

But attorneys caution that the clarification is unlikely to be the last word on the subject.

"Right now, this is good guidance that gives us some clarity," Lopez said. "But trying to come up with an all-inclusive opinion or road map when you don't know what technological advancement is next is difficult, and whatever new social media invention that comes out next will likely require the ABA or the courts to take another look at this."

--Editing by Kat Laskowski and Edrienne Su.