Going from Voir Dire to Voir Google: Ethical Considerations in Researching Jurors on Social Media

By John G. Browning

It is a familiar scene played out regularly in civil and criminal courtrooms nationwide. Attorneys on both sides probe with questions during voir dire in an effort to learn more about prospective jurors and whether or not they might empathize with that lawyer's side of the case, or whether or not the jurors might have a pre-existing leaning or bias on a particular issue. Everything from a panelist's body language during questioning to her television viewing habits to the bumper stickers on her car translates into more data to be taken into consideration during the jury selection process.[1] And in Texas, where the allotted time for voir dire can vary according to the whims of an individual judge and where the juror background information provided to lawyers is bare bones at best and usually last minute, it becomes more important than ever to find out as much as possible about potential jurors - and quickly. Now, thanks to the internet and the explosive growth of social networking sites like Facebook and Twitter, lawyers and litigants have a digital treasure trove of information right at their fingertips, accessible with the speed of a search engine. Welcome to jury selection in the Digital Age, where with a few mouse clicks an attorney can learn all kinds of things about a prospective juror - her tastes in movies and music, her hobbies, educational background, political causes and affiliations, and literally her "likes" and dislikes. Yet even with such a wealth of information available to assist in weeding out the "wrong" jurors and seating the "right" ones, lawyers and judges can still experience difficulty in distinguishing where the ethical boundary lines are drawn for attorneys engaging in such outline investigations. This article aims to illuminate these ethical concerns.

First, are there dangers in "Facebooking the jury?" Certainly - no lawyer wants to alienate a juror or potential juror by appearing invasive or disrespectful of that individual's privacy. And not all judges are receptive to the practice; some have denied lawyers the opportunity to engage in such online investigation, citing concerns for juror privacy or a potential chilling effect on people showing up for jury duty. A 2014 poll of judges by the Federal Judicial Center even revealed that 25% of the judges surveyed do not allow lawyers to do "voir Google." But in a New Jersey medical

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[1] Stephanie Clifford, "TV Habits? Medical History? Test for Jury Duty Gets Personal," New York Times (Aug. 20, 2014) at A1, http://www.nytimes.com/2014/08/21/nyregion/for-service-on-some-juries-expect-a-lengthy-written-test.html.

malpractice case, an appellate court reversed the trial judge's decision forbidding plaintiff's counsel from performing such online juror research, pointing out that the "playing field" was level "because Internet access was open to both counsel even if only one of them chose to utilize it."[2] Another potential danger can stem from what the attorney does with the information he or she discovers. For example, an assistant district attorney in Travis County was fired in 2014 for allegedly making "racially insensitive remarks" after his Facebook research led him to exercise a peremptory strike of an African-American woman on the panel - a strike that resulted in a successful Batson challenge.[3]

But there are bigger dangers in not conducting online juror research. The first obvious danger is the very real threat of jurors risking a mistrial or overturned verdict because of their own online misconduct, such as posting or tweeting about the case or engaging in improper online "investigation" of their own. Attorneys who choose not to research or monitor jurors online risk never learning of their misconduct, or of learning that a juror has lied about significant information bearing on her suitability as a juror, such as her litigation history or her opinions about issues central to the case. For example, in 2011 a prospective Oklahoma juror was questioned during voir dire in the murder trial of Jerome Ersland, a pharmacist who allegedly shot a would-be robber five times while the thief lay wounded and motionless on the floor. Although the panelist replied in the negative when asked if she had previously expressed any opinion on the case, the defense discovered a Facebook post she had made a few months before trial expressing very clear feelings about the defendant's supposed guilt, including the phrase "hell yeah he needs to do some time!"[4]

In another case, lawyers defending a vehicular homicide case learned belatedly that the foreman and another juror had not only been less than forthcoming during voir dire about knowing the victim's mother, they were actually Facebook friends of her and had communicated with her about the case.[5] In granting a new trial for the defendant, the Kentucky Supreme Court acknowledged that "the practice of conducting intensive internet vetting of potential jurors is becoming more commonplace."[6]

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[2] *Carino v. Muenzen*, 2010 WL 344807 (N. J. Super. Ct. App. Div. 2010).

[3] Jasmine Ulloa & Tony Plohetski, "District Attorney Lemberg Fires Key Lawyer in Her Office," Austin American - Statesman (June 12, 2014), at A1.

[4] Jeffrey T. Frederick, "Did I Say That? Another Reason to Do Online Checks on Potential (and Trial) Jurors," Jury Research Blog (Oct. 13, 2011), http://www.nlrg.com/blogs/jury-research.

[5] *Sluss v. Commonwealth of Kentucky*, 381 S.W. 3d 215 (Ky. 2012).

[6] *Id.*

So there are dangers in not conducting "voir Google," but how does one do so ethically? Several ethics bodies, as well as the ABA itself, have weighed in on this issue, and all have concluded that it is ethically permissible for a lawyer to view the publicly accessible social media profile of a juror or prospective juror. In May 2011, the New York County Lawyers Association Committee on Professional Ethics issued Formal Opinion 743.[7] In it, the Committee made it clear that "passive monitoring of jurors such as viewing a publicly available blog or Facebook page," is permissible so long as the lawyer has no direct or indirect contact with jurors.[8] However, the Committee ventures into a murkier area with its discussion of what constitutes impermissible contact. While certain forms of contact in the Digital Age are clearly forbidden, such as a direct message or a friend request, the Committee went further, opining that even a site-generated automatic notification that someone has viewed your LinkedIn profile or followed you on Twitter "may well consist of an impermissible communication, as it might tend to influence the juror's conduct with request to the trial."[9]

But does such a broad interpretation of "impermissible communication" make sense, not just with regard to the functionality of existing technology but of the features that future technologies may offer a user in terms of alerts? Is an auto-notification truly a "communication" from the lawyer researching a prospective juror? Not according to the American Bar Association and others. In April 2014, the ABA issued Formal Opinion 14-466, "Lawyer Reviewing Jurors' Internet Presence."[10] Opinion 466 holds that it is not unethical for a lawyer to review the internet presence of a juror or potential juror, so long as the lawyer refrains from communicating, either directly or indirectly, with the juror, and neither an applicable law nor a court order has limited such review.[11]

Opinion 466 identifies three levels of attorney review of juror's internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where 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 [profile]; and

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[7] NYCLA Comm. On Prof'l Ethics, Formal Opinion 743 (2011).

[8] *Id.*

[9] *Id.*

[10] ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

[11] *Id.*

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer[.][12]

As with ethics opinions in New York and Oregon, the ABA Opinion concludes that there is nothing ethically forbidden about passive review of a juror's public online profile. Analogizing this to driving down a prospective juror's street to see where he lives, the Opinion finds that "[t]he mere act of observing that which is open to the public" does not constitute an act of communication.[13] At the opposite end of the spectrum, the Opinion states that level (2) (active lawyer review where the lawyer requests access to the juror's profile) is ethically prohibited, because it constitutes communication to a juror seeking information that he has not made public. Continuing with the previous analogy, Opinion 466 considers this situation to be 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."[14]

With regard to level (3), Opinion 466 departs from the New York ethics opinion and holds that such auto-notifications do not amount to communication to the juror. The Opinion says "[t]he fact that a juror or potential juror may become aware that the lawyer is reviewing his Internet presence when a network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b)."[15] Returning to its earlier analogy, the Opinion states that the site - not the lawyer - is communicating with the juror, based on a purely technical feature of the site itself. As the Opinion describes it, "[t]his is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer ha[s] been seen driving down the street."[16]

Despite this divergent view of what constitutes an impermissible "communication," the ABA Opinion nevertheless has words of caution for lawyers who review juror social media profiles. First, hearkening back to the new standard of attorney competence that mandates being conversant in the benefits and risks of technology, the Opinion reminds lawyers to be aware of "these automatic, subscriber-notification features."[17] Second, the Opinion refers to Rule 4.4(a) on prohibiting lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person...," and admonishes lawyers reviewing juror social media profiles

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*

to "ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[18]

When it was issued, Formal Opinion 14-466 received national publicity and engendered some controversy, including criticism that it sanctioned the wholesale invasion of juror privacy.[19] But the very next state to consider the issue of researching jurors using social media followed the ABA approach. The Pennsylvania Bar Association, in early October 2014, issued Formal Opinion 2014-300.[20] Agreeing with every other jurisdiction to speak on the issue, the Pennsylvania Bar concluded that lawyers may ethically use online sites including social networking platforms to research jurors, so long as the information was publicly available and doing so did not constitute an ex parte communication. The Pennsylvania Bar broke ranks with New York, however, on the question of whether a passive notification sent by a site like LinkedIn to notify users that an individual has viewed their profile constitutes an *ex parte* communication. The Committee agreed completely with ABA Formal Opinion 14-466, explaining that "[t]here is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed."[21]

While Texas has yet to issue an ethics opinion or a reported appellate case formally approving of "Facebooking the jury," anecdotal evidence indicates that the practice of performing online research of prospective jurors is as widespread in the Lone Star State as it is nationally. Additionally, the relative ease of engaging in such investigation and the ready availability of juror research applications has leveled the playing field for solos and small firm practitioners who may not be able to justify the cost of trial consultants. However, a greater understanding of the ethical boundaries governing such research - for not only lawyers but the judiciary as well - is critical to ensuring that an already widespread practice is properly conducted.

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[18] *Id.*

[19] *See* Editorial, "A Troublesome Opinion Regarding Juror Internet Research," CONN. LAW TRIBUNE, June 24, 2014. ("The combination of allowing lawyers to do internet research on jurors and requiring the reporting of potential inconsistencies has the potential to make jury selection more adversarial and less pleasant for the citizens who are doing their civic duty.").

[20] Pa. Bar Ass'n, Formal Op. 2014 - 300 (2014).

[21] *Id.*

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The BRIEF
TORT TRIAL & INSURANCE PRACTICE SECTION

Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection

Vol. 45 No. 2

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Although lawyers may have many persuasive reasons for wanting to use social media to perform research about prospective jurors, ethical considerations and potential dangers make it essential for every trial lawyer to know the risks and rewards of such online investigations.

> *Commit the oldest sins the newest kind of ways.*
>
> —William Shakespeare, *Henry IV, Part 2* (4.5.)

Week in and week out, in both civil and criminal cases, attorneys on both sides of the docket probe with questions during voir dire as they seek to learn more about the prospective jurors. Will they be more likely to align with that lawyer's side of the case? Do they have a preexisting bias on a particular issue? Today, everything from a venireperson's body language during questioning to his or her television viewing habits translates into more data to be factored into the jury selection process.[1] And while most cases don't feature the lengthy, detailed questionnaires used in high-profile or complex litigation, the importance of weeding out the "wrong" jurors and seating the "right" jurors has spawned an effort to find out as much about potential jurors as possible and driven the growth of fields like jury consulting.

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However, thanks to the Internet and the explosive growth of social networking sites like Facebook and Twitter, lawyers and litigants now have a digital treasure trove of information right at their fingertips accessible with the speed of a research engine. In a world where 74 percent of all adult Americans have at least one social networking profile and in which Twitter processes over a half a billion tweets every day, there's a strong likelihood of finding out whatever you want about your jury pool. Welcome to jury selection in the digital age, where, with a few mouse clicks, an attorney can learn all about a prospective juror—his or her taste in movies and music, political affiliations, education, hobbies, and literally his or her "likes" and dislikes. But where are the ethical boundary lines drawn for attorneys engaged in such online investigations?

This article will look at the ethical considerations for lawyers pondering whether to "Facebook the jury," and examine ethics opinions and cases from around the country that have weighed in on this issue. It will also discuss some of the leading reasons why attorneys would want to conduct such online juror research, as well as the potential dangers for attorneys in doing so. As voir dire increasingly incorporates "voir Google," knowing the risks and rewards of such research becomes vital for any trial lawyer.

Dangers of Conducting Online Investigations of Jurors

The most obvious reason that online investigation of jurors can be dangerous is that no trial lawyer wants to alienate a juror or prospective juror by appearing invasive or disrespectful of that individual's privacy. In the high-profile 2013 "Hustle" mortgage fraud trial in the Southern District of New York, for example, a juror notified the judge when he received an automatic notification from LinkedIn that a junior member of one of the defense teams had viewed his profile on that social media networking site.[2] Although there were no sanctions dispensed, this incident no doubt made for some uncomfortable moments for that lawyer.

Courts and legislators also have concerns about the privacy of a juror's social networking profile. In Michigan, one federal judge concluded that there is no recognized right to monitor jurors' use of social media, opining that such efforts by lawyers could intrude on the "safety, privacy, and protection against harassment" to which jurors are entitled, and "unnecessarily chill" the willingness of jurors to participate in the democratic system of justice.[3] In the penalty phase of the high-profile Jodi Arias murder trial in Arizona in December 2013, the presiding judge denied the defense's motion to order jurors to reveal Twitter account information, ruling that juror privacy concerns outweighed the defense's desire to monitor jurors to discover if any were communicating about the case on Twitter.[4]

Another potential danger for attorneys "Facebooking the jury" can stem from what the attorney does with that information. For

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example, an assistant district attorney (ADA) in Texas was fired in 2014 for allegedly making "racially insensitive remarks" after his Facebook research led him to exercise a peremptory strike of an African American woman on the panel—a strike that resulted in a *Batson* proceeding.[5] During jury selection for the robbery trial of convicted murderer Darius Lovings, ADA Steve Brand struck the panelist because she had been vocal in her desire to be on the jury and because his Facebook research revealed that she was a member of the NAACP and had posted on her Facebook page a comment and link referring to the *Negro Motorist Green Book* (a travel guide for African Americans during the Jim Crow era).[6] Brand argued that the prospective juror "appeared to be an activist."[7] The judge did not agree that this was a race-neutral reason for striking the juror, and sustained defense counsel's *Batson* challenge.

Dangers of Not Conducting Online Juror Research

But while the dangers of inadvertent contact with jurors, violating juror privacy, and risking revelations of an improper basis for peremptory strikes are genuine, these concerns are outweighed by the dangers of *not* conducting online research. The first obvious danger is the very real threat of jurors risking a mistrial or overturned verdict due to their own online misconduct. The legal landscape is littered with the many instances in which the hard work of a judge, lawyers, and other jurors has been undone by the actions of a single juror who has taken it upon himself or herself to venture online and "research" the issues, parties, and even evidence in a case, or to communicate with third parties (sometimes even one of the litigants themselves) about the case.[8] In 2011, the Arkansas Supreme Court overturned a capital murder conviction because of a juror's tweets from the jury box.[9] In 2012, the Vermont Supreme Court set aside a child sexual assault conviction after the revelation that a juror had gone online to research the cultural significance of the alleged crime in the Bantu culture of the Somali defendant.[10] Jurors have posted on Facebook about their deliberations, sent "friend" requests to parties, and even courted mistrials by communicating with a party on the social networking site. Equally disturbing is the very real possibility that—despite being warned not to engage in such online misconduct by the judge—some jurors may nevertheless do so and even lie about their actions.[11] With the palpable threat of online juror misconduct, attorneys who choose not to research or monitor jurors online risk never learning of such misconduct in the first place. The result is a disservice to their clients and to the administration of justice.

Besides not learning of actual online misconduct, another potential consequence for lawyers who pass up online juror research is the danger of seating a juror who has lied about significant information bearing on his or her suitability as a juror, such as his or her

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litigation history or opinions about issues central to this case. For example, in 2011, a prospective Oklahoma juror was questioned during voir dire in the murder trial of Jerome Ersland, a pharmacist who allegedly shot a would-be robber five times while the thief lay wounded and motionless on the floor.[12] The panelist was asked if she had previously expressed any opinion on the case, and she replied no. The defense then discovered a Facebook post she had made six months before trial, which read: "First hell yeah he need to do sometime!!! The young fella was already died from the gun shot wound to the head, then he came back with a diffrent gun and shot him 5 more times. Come let's be 4real it didn't make no sense!"[13] The panelist (who claimed to have forgotten making the comments in question) was dismissed from the jury pool, found in contempt, and sentenced to 100 hours of community service.

Indeed, juror dishonesty during voir dire—and its consequences for all involved in the justice system—is an issue commanding increasing attention. Recently, a judge in Florida proposed that online searches of jurors' backgrounds be required so that trial lawyers can bring any withheld information to the court's attention before the start of actual trial.[14] Pinellas Circuit Judge Anthony Rondolino made the comments while denying a motion for new trial in the case of an 84-year-old woman who fell and died in the stairwell of an assisted living facility. The woman's estate sought $15 million, only to have a six-person jury find no negligence on the part of the facility. After trial, the plaintiff's lawyers did online research and found that all six jurors had failed to disclose their own civil litigation history. Collectively, this included three bankruptcies, two foreclosures, an eviction, a child support action, a paternity suit, five domestic violence cases, a declaratory judgment, an appeal, and a contract lawsuit.[15] Observing that there was "plenty of time to gather the information" during the two-week trial (including a three-day period when the court was recessed), Judge Rondolino proposed that lawyers be required to conduct online research and raise any objections after jury selection, but before trial. Such a process would avoid handing lawyers a "gotcha card" in which they could wait and see how the verdict turned out before choosing to come forward with the results of online research.

Perhaps no case demonstrates both the potential risks of not "Facebooking the jury" and the uncertainty displayed by courts about the issue of allowing such online investigation quite like *Sluss v. Commonwealth*.[16] In *Sluss*, appellant Ross Brandon Sluss had been convicted of (among other charges) murder and driving under the influence of intoxicants after crashing his pickup truck into a SUV with several passengers. One of the passengers, 11-year-old Destiny Brewer, died. The tragedy and ensuing criminal case garnered tremendous publicity, including extensive discussion online on sites like Facebook and Topix. The trial court, sensitive to

the amount of attention the case had received, engaged in extensive voir dire procedures.

After his conviction, Sluss sought a new trial based on juror misconduct, arguing that two jurors, Virginia Matthews and jury foreperson Amy Sparkman-Haney, were Facebook "friends" of the victim's mother, April Brewer. During voir dire, both Matthews and Sparkman-Haney had been silent when the jurors were asked if they knew the victim or any of the victim's family. Moreover, during individual voir dire, Matthews replied unequivocally that she was not on Facebook, and though Sparkman-Haney acknowledged having a Facebook account and being vaguely aware that "something" had been set up in the victim's name, she did not share anything beyond that.[17]

While the court analyzed the nature of Facebook "friend" status and ultimately held that fact alone would be insufficient grounds for a new trial, it was clearly more troubled by the jurors' misstatements during voir dire, especially because it was unknown "to what extent the victim's mother and the jurors had actually communicated, or the scope of any actual relationship they may have had."[18] In what it acknowledged was "the first time that the Court has been asked to address counsel's investigation of jurors by use of social media," the Kentucky Supreme Court then turned to whether or not defense counsel should have discovered the online evidence of juror misconduct prior to the verdict.[19]

The court ultimately held that there was juror misconduct that warranted, at minimum, a hearing to determine the nature and extent of the Facebook interaction, if not an actual new trial. It also excused the attorney's failure to discover the misconduct earlier, because the jurors' answers during voir dire had given him "little reason . . . to think he needed to investigate a juror's Facebook account or that he even could have done so ethically given the state of the law at the time of trial."[20] But, the court did go on to an extensive discussion of the ethical parameters surrounding counsel's investigation of jurors on social media sites, and conceded that "the practice of conducting intensive internet vetting of potential jurors is becoming more commonplace."[21] The court observed that while much of the information being sought "is likely public, a reasonable attorney without guidance may not think this investigatory tactic appropriate, and it is still such a new line of inquiry that many attorneys who themselves are not yet savvy about social media may never even have thought of such inquiry."[22]

The *Sluss* case would not be the last case in which lawyers failed to discover, during voir dire, a juror's Facebook ties to a party, witness, or victim; the Kentucky Supreme Court encountered the issue the following year in *McGaha v. Commonwealth*, and so have other courts around the country.[23]

Judicial Attitudes toward Researching Jurors Online

Courts around the country have exhibited varying attitudes toward the concept of attorneys performing online research on prospective jurors. For example, in the 2013 state court criminal trial of a defendant accused of child sexual abuse, Montgomery County (Maryland) Judge Richard Jorden banned such research during voir dire, saying it could have "a chilling effect on jury service, by jurors, to know 'I'm going to go to the courthouse. . . . I'm going to be Googled. They're going to find all kinds of stuff on me,' and it feels kind of uneasy, at least."[24]

Federal judges have displayed similar reticence. In a May 2014 survey of judges conducted by the Federal Judicial Center, 25.8 percent of the respondents admitted that they banned attorneys from using social media during voir dire (nearly 70 percent of the judges responded they never addressed this issue with lawyers).[25] When asked to explain why they didn't permit attorneys to engage in such research, those judges who answered accordingly pointed to both concerns for juror privacy and logistical considerations. Twenty percent of the judges wanted to protect juror privacy, while another 4 percent were worried about jurors feeling intimidated. Another 17 percent felt that allowing such research would be distracting, while 16 percent were concerned about the practice prolonging voir dire. Another third of the respondents considered such online research unnecessary, reasoning that attorneys could conduct it before court or that the information provided during "regular" voir dire was sufficient.

But increasingly, courts are not only recognizing a right to perform such research, but even imposing—in one jurisdiction (Missouri)—an affirmative duty to do so. In *Carino v. Muenzen*, a New Jersey medical malpractice case, the appellate court considered the plaintiff's attorney's request for a new trial after the lawyer had been prevented by the trial judge from conducting online research on the venire panel.[26] As jury selection began, defense counsel objected when he noticed his adversary accessing the Internet on his laptop. After acknowledging to the court that he was Googling the potential jurors, and pointing out "we've done it all the time, everyone does it. It's not unusual," the plaintiff's attorney was stunned when the court refused to allow it. The trial judge felt that allowing such juror research would jeopardize maintaining "a fair and even playing field."[27]

Although the appellate court affirmed the defense verdict on other grounds, it explicitly recognized the right to use the Internet to investigate potential jurors during voir dire, and concluded that the trial judge had acted unreasonably in preventing use of the Internet by the plaintiff's counsel. The court held:

> There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the

> foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining "a level playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it.[28]

In a federal court personal injury case, the defense appealed the unfavorable verdict on the grounds of its posttrial Internet research into two jurors who had failed to disclose material injuries and lawsuits involving themselves and relatives in response to questions posed in a juror questionnaire and voir dire.[29] The online research was performed using public records databases to get information that included lawsuits filed. The court rejected the defense's argument of recently discovered evidence of juror bias, finding instead that the "defendant waived its present objections because the basis of the objections might have been known or discovered through the exercise of reasonable diligence."[30] In other words, no new trial was warranted because online resources were widely available to the defense long before the actual verdict, and the defense had an obligation to explore them.

And in the 2010 case of *Johnson v. McCullough*, the Missouri Supreme Court came up with a new standard in providing competent representation in the digital age—the duty to conduct online research during the voir dire process.[31] During the voir dire phase of a medical malpractice trial, the plaintiff's counsel inquired about whether anyone on the venire panel had ever been a party to a lawsuit. While several members of the panel were forthcoming, one prospective juror, Mims, did not disclose that she had been a party to litigation, and was selected as a jury member. Following a defense verdict, the plaintiff's counsel researched Mims on Missouri's PACER-like online database, Case.net, and learned of multiple previous lawsuits involving the juror. The trial court granted a motion for new trial based on Mims's intentional concealment of her litigation history, but the Missouri Supreme Court reversed. The court reasoned:

> [I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search . . . when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.[32]

In light of this, the court imposed a new affirmative duty on lawyers, holding that "a party *must* use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial."[33]

The *Johnson* standard was codified in Missouri Supreme Court Rule 69.025, which became effective January 1, 2011. It mandates background Internet searches on potential jurors, specifically Case.net searches of a potential juror's litigation history. However, the first reported case interpreting Rule 69.025 and the *Johnson* standard would soon raise more questions about the scope and timing of such Internet searches by trial counsel.[34]

In *Khoury v. ConAgra Foods, Inc.*, the plaintiffs brought suit against ConAgra for personal injury and loss of consortium damages, claiming that Elaine Khoury suffered from a lung disease, bronchiolitis obliterans, allegedly caused by exposure to chemical vapors during her preparation and consumption of ConAgra's microwave popcorn. After a voir dire in which the members of the venire panel were questioned about their prior litigation history, both sides conducted searches of Missouri's automated case record service. The parties exercised both their peremptory strikes and their strikes for cause, and a jury was empaneled. The next morning, ConAgra's counsel brought to the court's attention that, separate and apart from litigation history information, their Internet research had uncovered Facebook postings by one juror, Piedimonte, indicative of bias and intentional failure to disclose information. Piedimonte, they said, was "a prolific poster for anti-corporation, organic foods."[35] ConAgra moved for a mistrial or, alternatively, to strike Piedimonte from the jury. The court denied the motion for mistrial, but did strike Piedimonte from the jury and proceeded with 12 jurors and three (instead of four) alternate jurors. After a defense verdict, the Khourys appealed, arguing, among other things, that the trial court erred in removing juror Piedimonte, maintaining that ConAgra's broader Internet search was not timely. The appellate court rejected this argument, observing that the *Johnson* standard and the subsequent Supreme Court Rule 69.025 were limited to Case.net searches of potential jurors' litigation history, not a broader search for any alleged material nondisclosure.

The court also acknowledged the potential in the digital age for a revisiting of Rule 69.025, stating that "the day may come that technological advances may compel our Supreme Court to re-think the scope of required 'reasonable investigation' into the background of jurors that may impact challenges to the veracity of responses given in voir dire *before* the jury is empanelled," including sites like Facebook or LinkedIn.[36]

Ethics Opinions Discussing Researching Jurors Online

In addition to actual case authority granting some measure of precedential value and judicial perspective, the ethics opinions promulgated by various local or state ethics bodies as well as the American Bar Association (ABA) itself provide much-needed guidance for lawyers contemplating "Facebooking the jury." The first of these was New York County Lawyers' Association (NYCLA) Committee on Professional Ethics Formal Opinion 743, which examined not only lawyer online research into prospective jurors, but also the ramifications of New York Rule of Professional Conduct 3.5 and the investigation of jurors during the ongoing trial.[37] The committee divided its discussion into two distinct phases: the pretrial phase, in which there are only prospective, not actual, jurors; and the evidentiary or deliberation phase.

In both phases, the committee made it clear that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page," is permissible so long as the lawyer has no direct or indirect contact with jurors.[38] Referencing not only the *Johnson v. McCullough* decision and the *Carino v. Muenzen* holding but also the New York State Bar Association's previous Ethics Opinion 843 on accessing publicly available social networking pages of witnesses or unrepresented parties, Opinion 743 analogized that purely passive monitoring of jurors was comfortably within ethical bounds. However, the committee ventured into a murkier area with its discussion of impermissible contact. The opinion cautions lawyers to not "act in any way by which the juror becomes aware of the monitoring."[39]

The committee went even further in its concern about what might be categorized as indirect contact, such as the automatic notification sent by a site to its user alerting him or her that a third party has viewed or accessed the user's profile. As the committee opined, "[i]f 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."[40]

But does such a broad interpretation of "impermissible communication" make sense, not just with regard to the functionality of existing technology but also of the features that future technologies may offer a user in terms of alerts? Is an autonotification truly a "communication"? A terse, automatically generated notification lacking any substantive content should not reasonably be considered a "communication." Equally important, it should not be treated as an impermissible communication by the attorney because it is not sent consciously or otherwise by the attorney himself or herself.

Following the NYCLA, the Committee on Professional Ethics for the New York City Bar Association (NYCBA) issued its own ethics opinion the following year.[41] Citing cases like *Johnson* and *Carino*, along with cases detailing lawyers' awareness of online juror

misconduct, the NYCBA committee agreed with the earlier ethics opinion and held that an attorney may conduct juror research using social media services and websites. And, like the NYCLA opinion, the NYCBA opinion made it clear that attorneys performing such research could not engage in communication with a juror. However, this opinion proceeded to address the broader issue of what exactly constitutes an impermissible, ex parte communication with a juror.

"Communication," the committee ruled, should be understood in its broadest sense as "the process of bringing an idea, information or knowledge to another's perception."[42] This would include not only sending a specific, substantive message, but also any notification to the other person being researched that he or she has been the object of a lawyer's search. The paramount issue, in the eyes of the committee, is that the juror or potential juror not learn of the attorney's actions. As the opinion states, "the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research."[43]

Like its NYCLA counterpart, the NYCBA opinion discusses an attorney's obligation to reveal improper juror conduct to the court. But it also addresses other issues, such as the potential for deception or misrepresentation when researching jurors on social networking sites. Citing New York Rule of Professional Conduct 8.4's prohibition on deception and misrepresentation, the opinion states that—in the jury research context—attorneys may not misrepresent their identities, associations, or memberships in order to access otherwise unavailable information about a juror. So, for example, an attorney "may not claim to be an alumnus of a school that she did not attend in order to view a juror's personal webpage that is accessible only to members of a certain alumni network."[44]

Another issue that troubled the NYCBA committee was the impact on jury service of lawyers using social media sites to research jurors. Echoing the concerns of some judges who have banned this practice by lawyers, the committee admitted that "[i]t is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives."[45] But, the committee pointed out, viewing a public posting is similar "to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption."[46] The committee also added that "[t]he potential juror is aware that her information and images are available for public consumption."[47]

These two ethics opinions are not the only source of guidance from the New York Bar. In March 2014, the Commercial and Federal

Litigation Section of the New York State Bar Association issued a comprehensive set of *Social Media Ethics Guidelines*.[48] These guidelines address a variety of issues impacting a practitioner's use of social media. Guideline 6 addresses various aspects of "researching jurors and reporting juror misconduct."[49] Relying on and citing the two New York ethics opinions, these guidelines reaffirm that: (1) lawyers can conduct social media research; (2) lawyers may view a juror's social media website as long as there is no communication with the juror; (3) lawyers may not use deceit to view a juror's social media profile; (4) lawyers may view or monitor the social media profile or posts of a juror during trial, provided that there is no communication; and (5) lawyers must promptly inform the court of possible juror misconduct the lawyer discovers by viewing a sitting juror's online postings.

Oregon was the next state to address the issue of "Facebooking the jury," as the Oregon Bar Association Ethics Committee examined lawyer investigation of the social networking profiles of jurors, witnesses, and opposing parties in Formal Opinion No. 2013-189.[50] With respect to jurors, Oregon's key holding followed its New York counterparts. Oregon affirmed that lawyers may access a juror's publicly available social networking information, but neither a lawyer nor the lawyer's agent may send a request to a juror to access nonpublic personal information on a social networking site.

Oregon, however, ventured into uncharted territory by further advising that Oregon Rule of Professional Conduct 8.4(a)(3), which prohibits deceitful conduct, does *not* automatically preclude a lawyer from enlisting an agent to deceptively seek access to another person's social networking profile. It held that while a lawyer "may not engage in subterfuge designed to shield [his or her] identity from the person" whose profile he or she is seeking to access, an exception exists.[51] Oregon Rule 8.4(b) (which has no analog in the ABA Model Rules) creates an exception permitting lawyers "to advise clients and others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with [other] Rules of Professional Conduct."[52] Under such "limited instances," the Oregon ethics authorities concluded that a lawyer "may advise or supervise another's deception to access a person's nonpublic information on a social networking website" as part of an investigation into unlawful activity.[53] Could this language be used to justify having a trial consultant, investigator, or other agent pose as someone else or otherwise be deceptive in order to gain access to a juror's privacy-restricted profile if there is a suspicion of juror misconduct? While the language is vague by referring only to "persons," the wiser course of action would be to adhere to the opinion's earlier mandate: "a lawyer may not send a request to a juror to access

non-public personal information on a social networking website, nor may a lawyer ask an agent to do so."[54]

In April 2014, the ABA weighed in with Formal Opinion 14-466, "Lawyer Reviewing Jurors' Internet Presence."[55] Like the New York and Oregon ethics opinions, Opinion 466 held that it is not unethical for a lawyer to review the Internet presence of a juror or potential juror, so long as the lawyer refrains from communicating, either directly or indirectly, with the juror, and neither an applicable law nor a court order has limited such review. Noting the strong public interest in identifying jurors who might be tainted by improper bias or prejudice (à la *Sluss*), the ABA's Standing Committee on Ethics and Professional Responsibility sought to balance this interest with the equally strong public policy in preventing jurors from being approached ex parte by either the parties to a case or their agents. Opinion 466 identifies three levels of attorney review of a juror's Internet presence:

> passive lawyer review of a juror's website or ESM [electronic social media] that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;
>
> active lawyer review where the lawyer requests access to the juror's ESM; and
>
> passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer[.]56

As with earlier state ethics opinions, the ABA opinion concludes that there is nothing ethically forbidden about passive review of a juror's public online profile. Analogizing this to driving down a prospective juror's street to see where he or she lives, the opinion finds that "[t]he mere act of observing that which is open to the public" does not constitute an act of communication.[57] At the opposite end of the spectrum, the opinion states that level two (active lawyer review) is ethically prohibited, because it constitutes communication to a juror seeking information that he or she has not made public. Continuing with the previous analogy, Opinion 466 considers this situation to be 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."[58]

With regard to level three, Opinion 466 departs from the New York ethics opinions and holds that such autonotifications do not amount to communication to the juror. The opinion states, "The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of [Model] Rule 3.5

(b)."[59] Returning to its earlier analogy, the opinion states that the site—not the lawyer—is communicating with the juror, based on a purely technical feature of the site itself. As the opinion describes it, "[t]his is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer ha[s] been seen driving down the street."[60]

Despite this divergent view of what constitutes an impermissible "communication," the ABA opinion nevertheless has words of caution for lawyers who review juror social media profiles. First, hearkening back to the new standard of attorney competence that mandates being conversant in the benefits and risks of technology, the opinion reminds lawyers to be aware of "these automatic, subscriber-notification features."[61] Second, the opinion refers to Model Rule 4.4(a) on prohibiting lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person."[62] It admonishes lawyers reviewing juror social media profiles to "ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[63]

When it was issued, Opinion 466 received national publicity and engendered some controversy, including criticism that it sanctioned the wholesale invasion of juror privacy.[64] But the very next state to consider the issue of researching jurors using social media followed the ABA approach. The Pennsylvania Bar Association, in early October 2014, issued Formal Opinion 2014-300.[65] Agreeing with every other jurisdiction to speak on the issue, the Pennsylvania Bar concluded that lawyers may ethically use online sites including social networking platforms to research jurors, so long as the information was publicly available and doing so did not constitute an ex parte communication. The Pennsylvania Bar broke ranks with New York, however, on the question of whether a passive notification sent by a site like LinkedIn to notify users that an individual has viewed their profile constitutes an ex parte communication. The committee agreed completely with ABA Formal Opinion 14-466, explaining that "[t]here is no ex parte communication if the social networking website independently notifies users when the page has been viewed."[66] Additionally, "a lawyer may be required to notify the court of any evidence of juror misconduct the lawyer discovers on a social networking website."[67]

Conclusion

Given human nature and how some percentage of the population will react when plucked from the anonymity of their personal lives by a jury summons and subjected to probing questions by attorneys, it is inevitable that some people will lie during voir dire. And despite revised jury instructions that specifically warn against online investigation or communications about a case using social media, instances of tweets and Facebook posts causing mistrials, threatening to overturn and overturning convictions, and resulting

in increasingly stiff punishments for errant jurors continue to crop up regularly on the legal landscape.[68]

Researching the social media activity of prospective jurors, and continuing to monitor social media activity during trial, can be vital to seating an honest, unbiased jury and to ensuring that any online misconduct is promptly brought to the court's attention. The practice of such investigation has not only become a key part of the role played by modern jury consultants,[69] it has also been immortalized in pop culture in television courtroom dramas like *The Good Wife* and *How to Get Away with Murder*. It has become an important tool in documenting juror misconduct,[70] and the ready availability of juror research applications and affordable, user-friendly software has leveled the playing field for solos and small firm attorneys who may not be able to afford trial consultants.[71] A greater understanding of the ethical boundaries governing such research, however—on the part of not only lawyers but the judiciary as well—is critical to ensuring that an already widespread practice is properly conducted. n

Notes

1. Stephanie Clifford, *TV Habits? Medical History? Tests for Jury Duty Get Personal*, N. Y. TIMES, Aug. 21, 2014, at A1, *available at* www. nytimes. com/2014/08/21/nyregion/for-service-on-some-juries-expect-a-lengthy-written-test. html.

2. *LinkedIn Search in Spotlight at Bank of America Trial*, WALL ST. J. , Sept. 27, 2013, http://blogs. wsj. com/law/2013/09/27/linkedin-search-in-spotlight-at-bank-of-america-trial/.

3. United States v. Kilpatrick, No. 10-20403, 2012 WL 3237147, at *3 (E. D. Mich. Aug. 7, 2012) (rejecting the arguments made against the empaneling of an anonymous jury, because an anonymous jury would prevent the lawyers from monitoring the jurors' use of social media during the trial in order to determine if the jurors were engaging in online misconduct).

4. Steve Stout, *Judge Denies Arias Motion for Change of Venue, Jurors' Twitter Names*, CBS 5 KPHO (Dec. 23, 2013), www. kpho. com/story/24070733/judge-sherry-stephens-has-ruled-the-sentencing-phase-retrial-of-convicted-murderer-jodi-arias-will-stay-in-phoenix.

5. Jasmine Ulloa & Tony Plohetski, *District Attorney Lehmberg Fires Key Lawyer in Her Office*, AUSTIN AM. -STATESMAN, June 12, 2014, at A1.

6. *Id.* at A9.

7. *Id.*

8. *See, e. g.* , State v. Abdi, 45 A. 3d 29, 36–37 (Vt. 2012).

9. Dimas-Martinez v. State, 385 S. W. 3d 238, 248–49 (Ark. 2011).

10. *Abdi*, 45 A. 3d at 36–37.

11. *See, e. g.* , State v. Dellinger, 696 S. E. 2d 38, 40, 44 (W. Va. 2010). For example, in one recent Florida case, juror Alexander Sutton made comments on his Facebook page that reflected disdain for jury service and arguably demonstrated bias, and then compounded the wrongdoing by lying to the judge about it, resulting in contempt charges. *See* Jane Musgrave, *Palm Beach County Juror Removed in Handcuffs, Faces Contempt Charge over Facebook Posting*, PALM BEACH POST, June 2, 2014, www. mypalmbeachpost. com/news/news/crime-law/local-juror-removed-in-handcuffs-faces-contempt-ov/ngBDL/.

12. Jeffrey T. Frederick, *Did I Say That? Another Reason to Do Online Checks on Potential (and Trial) Jurors*, JURY RES. BLOG (Oct. 13, 2011), www. nlrg. com/blogs/jury-research/bid/69503/Did-I-Say-That-Another-Reason-to-Do-Online-Checks-on-Potential-and-Trial-Jurors.

13. *Id.*

14. Stephen Nohlgren, *Pinellas Judge: New Process May Be Needed to Screen Jurors*, TAMPA BAY TIMES, July 8, 2014, www. tampabay. com/news/courts/civil/pinellas-judge-new-process-may-be-needed-to-screen-jurors/2187689.

15. Stephen Nohlgren, *Jurors Who Didn't Reveal Personal Legal History Could Cause New Trial in Pinellas Assisted Living Facility Death*, TAMPA BAY TIMES, Jan. 12, 2014, www. tampabay. com/news/courts/civil/jurors-who-didnt-reveal-personal-legal-history-could-cause-new-trial-in/2160715.

16. 381 S. W. 3d 215 (Ky. 2012).

17. *Id.* at 222.

18. *Id.* at 223–24.

19. *Id.* at 226.

20. *Id.*

21. *Id.* at 227.

22. *Id.*

23. 414 S. W. 3d 1 (Ky. 2013); *see also* Slaybaugh v. State, No. 79A02-1411-CR-798, 2015 WL 5612205 (Ind. Ct. App. Sept. 24, 2015); State v. Webster, 865 N. W. 2d 223 (Iowa 2015).

24. St. John Barned-Smith, *Montgomery Judge Denies Internet Searches for Jury Selection*, GAZETTE. NET (May 15, 2013), www. gazette. net/gazettecms/story. php?id=23317.

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26. No. L-0028-07, 2010 WL 3448071, at *7, *9 (N. J. Super. Ct. App. Div. Aug. 30, 2010).

27. *Id.* at *4.

28. *Id.* at *10.

29. Burden v. CSX Transp. , Inc. , No. 08-cv-04-DRH, 2011 WL 3793664, at *1 (S. D. Ill. Aug. 24, 2011).

30. *Id.* at *9.

31. 306 S. W. 3d 551 (Mo. 2010) (en banc).

32. *Id.* at 558–59.

33. *Id.* at 559 (emphasis added).

34. Khoury v. ConAgra Foods, Inc., 368 S. W. 3d 189, 202 (Mo. Ct. App. 2012).

35. *Id.* at 193.

36. *Id.* at 203.

37. NYCLA Comm. on Prof'l Ethics, Formal Op. 743, at 1 (2011), *available at* www. nycla. org/siteFiles/Publications/Publications1450_0. pdf.

38. *Id.* at 2–3.

39. *Id.* at 4.

40. *Id.* at 3.

41. N. Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012), *available at* www. nycbar. org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

42. *Id.* (emphasis omitted).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. COMMERCIAL & FED. LITIG. SECTION, N. Y. STATE BAR ASS'N, SOCIAL MEDIA ETHICS GUIDELINES (2015), *available at* www. nysba. org/socialmediaguidelines/.

49. *Id.* at 25–30.

50. Or. State Bar, Formal Op. 2013-189, at 577 (2013), *available at* www. osbar. org/_docs/ethics/2013-189. pdf.

51. *Id.* at 581.

52. *Id.*

53. *Id.* at 582.

54. *Id.* at 578 n. 2.

55. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

56. *Id.* at 2.

57. *Id.* at 4.

58. *Id.*

59. *Id.* at 9.

60. *Id.* at 5.

61. *Id.*

62. *Id.* at 6 (quoting MODEL RULES OF PROF'L CONDUCT R. 4. 4(a)).

63. *Id.*

64. *SeeEditorial:A Troublesome Opinion regarding Juror Internet Research*, CONN. LAW TRIB. , June 24, 2014 ("The combination of allowing lawyers to do internet research on jurors and requiring the reporting of potential inconsistencies has the potential to make jury selection more adversarial and less pleasant for the citizens who are doing their civic duty. ").

65. Pa. Bar Ass'n, Formal Op. 2014-300 (2014).

66. *Id.*

67. *Id.*

68. *See, e. g.* , JOHN G. BROWNING, THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW (2010); THADDEUS A. HOFFMEISTER, SOCIAL MEDIA IN THE COURTROOM: A NEW ERA FOR CRIMINAL JUSTICE? 49–54 (2014).

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