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## Trial Conduct

# Jury Selection 2.0: Ethical Use of the Internet to Research Jurors and Potential Jurors

BY ROB CARY

Social media can be a rich source of information for lawyers who wish to learn more about prospective jurors during jury selection. Lawyers are also using the internet to learn about what actual jurors are doing during the evidentiary and deliberation phases of trial. As one bar association has observed, “the internet appears to have increased the opportunity for juror misconduct and attorneys are responding by researching not only members of the venire but sitting jurors as well.” See New York City Ethics Op. 2012-2, at 1 (2012). This article addresses the ethics rules that apply to lawyers who use social media for jury research.

## Is Juror Research Universally Allowed?

Not all courts allow attorney use of social media to research jurors. A 2014 Federal Judicial Center report found that roughly 26 percent of the judges surveyed barred attorneys from using social media to investigate prospective jurors, citing jury privacy as well as logistics issues. See “Jurors’ and Attorneys’ Use of Social Media During Voir Dire, Trials, and Deliberations, A Report to the Judicial Conference Commission on Court Administration and Case Management” (May 1, 2014).

*Rob Cary is a Fellow of the American College of Trial Lawyers and Co-Chair of the Williams & Connolly LLP's Lawyer Liability Practice Group. He focuses his civil practice on representing law firms, having represented over a dozen law firms and successfully trying a multi-month legal malpractice trial. In addition to representing law firms, Rob's civil litigation experience includes a trial against the Federal Trade Commission and a number of State Attorneys Generals, as well as cases ranging from real estate to securities to contracts to products liability to allegations of civil fraud.*

One recent case that garnered headlines is *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100 (N.D. Cal. 2016). In *Oracle*, the parties agreed to forego researching potential jurors' social media accounts before and during a copyright infringement trial, after the presiding judge advised against it. The court was concerned about protecting the privacy of potential jurors; enabling counsel to make “improper personal appeals” to individual jurors; and encouraging a tit-for-tat juror investigation on social media of the lawyers and the case itself. *Id.* at 103.

The ABA “strongly encourage[s] judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. ABA Formal Ethics Op. 466, at 3 (“Lawyer Reviewing Jurors’ Internet Presence”) (“ABA Op. 466”) (Apr. 24, 2014). “If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers’ review of juror websites and [electronic social media], including on [electronic social media] networks where it is possible or likely that the jurors will be notified that their [electronic social media] is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.” *Id.*

## Do the Ethics Rules Require Lawyers to do Internet Research on Jurors?

According to ABA Model Rule 1.1, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment 8 to that rule provides that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” The D.C. Bar has advised that “[b]ecause of society's embrace of technology, a lawyer's ignorance or disregard of it, including social media, presents a risk of ethical misconduct.” District of Columbia Ethics Op. 371, at 2. The New York State Bar Association, in its *Social Media Ethics Guidelines*

(updated May 11, 2017), observed that “standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.” See also New Hampshire Ethics Op. 2012-13/5 (lawyers “have a general duty to be aware of social media as a source of potential useful information in litigation.”).

In *Jonson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010) (en banc), the Missouri Supreme Court required trial lawyers to search the state’s case management system to determine whether any potential jurors had been a party to litigation or waive any objection to their service based on that litigation. This holding is now codified by Missouri Supreme Court Rule 69.205, which states that a court “shall give all parties an opportunity to conduct a reasonable investigation as to whether a prospective juror has been a party to litigation.” Cf. *King v. Sorensen*, No. WD 80196, 2017 BL 302732 (Mo. App. W.D., Sept. 29, 2017) (applying the rule).

In *United States v. Daugerdas*, 867 F. Supp. 2d 445, 479 (S.D.N.Y. 2012), a federal court in the Southern District of New York observed that “a defendant waives his right to an impartial jury if defense counsel were aware of the evidence giving rise to the motion for a new trial or failed to exercise reasonable diligence in discovering that evidence.” And in *Carino v. Muenzen*, No. A-5491-08T1, 2010 BL 212504 (N.J. Super. Ct. App. Div., Aug. 30, 2010), a New Jersey appellate court held that the trial judge acted unreasonably by preventing counsel from researching potential jurors during voir dire.

Lawyers, accordingly, should be aware of the applicable case law in their jurisdiction, including local rules, standing orders, case management orders, and the relevant ethics opinions of the ABA and their state bar associations.

Assuming, arguendo, that social media research of jurors is permitted, the following are some of the rules governing that research.

### **A. Lawyers Can Review Public Juror Information on Social Media**

Merely looking at what individuals have made public online does not contravene ABA Model Rule 3.5, which prohibits a lawyer from communicating ex parte with a juror. The ABA, in Formal Op. 466, found “a strong public interest in identifying jurors who might be tainted by improper bias or prejudice,” and concluded that “[p]assive review of a juror’s website or [electronically stored media], that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b).” *Id.* at 4. Recent state bar ethics opinions have also concluded that so long as social media pages are open to all members of the public, lawyers may access them. See, e.g., Pennsylvania Formal Ethics Op. 2014-300 at 16 (“During jury selection and trial, an attorney may access the public portion of a juror’s social networking website.”); Oregon Ethics Op. 2013-189 (same).

### **B. In Most Jurisdictions Lawyers May Not Send a Request to a Juror to View Non-Public Juror Information on Social Media**

The ABA, in Formal Opinion 476, observed that a lawyer cannot “personally or through another send an

access request to a juror” for permission to view private information, since this would be “the type of ex parte communication prohibited by Model Rule 3.5(b).” This is the rule in most jurisdictions. See, e.g., Colorado Ethics Op. 127 (2015) (“[R]equesting permission to view a restricted portion of a social media profile of a prospective or sitting juror involves a communication with that person. 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.”); San Diego Ethics Op. 2011-2 (“requesting permission to view a restricted portion of a social media profile of a prospective or sitting juror involves a communication with that person . . . [and without] express authorization from the court,” is an improper ex parte communication); New York County Ethics Op. 743 (2011) (“significant ethical concerns would be raised by sending a ‘friend request’ attempting to connect via LinkedIn . . . or following a juror’s Twitter account”). See also Oregon Ethics Op. 2013-189, n. 2 (“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”).

Accordingly, the rule in most jurisdictions forbids “friending” as a means of reaching private social media sites, but there are significant variations from state to state.

### **C. There is a Dispute as to Whether an Automatic Message Generated by a Website is an Ex Parte Contact with a Juror**

The ABA has opined that an automatic notification generated by a website is *not* a communication with a juror. See ABA Op. 466 at 5 (“The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).”) The Colorado Bar Association, the District of Columbia Bar Association, and the Pennsylvania Bar Association (among others) have adopted the ABA’s position. See District of Columbia Ethics Op. 371, at 6 (“[S]ome social media networks automatically provide information to registered users or members about persons who access their information. In the Committee’s view, such notification does not constitute a communication between the lawyer and the juror or prospective juror.”); Pennsylvania Formal Ethics Op. 2014-300, at 16 (“There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed.”); Colorado Ethics Op. 127 (same).

The rule in New York differs. In 2012, the New York City Bar Association advised that an automatic notification is a communication, even when the communication is unintended. See New York City Ethics Op. 2012-2, at 4 (“if an attorney views a juror’s social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile, even when an attorney has not requested the sending of that message or is entirely unaware of it, the attorney has arguably ‘communicated with the juror.’”). See also New York State Bar Association, So-

*cial Media Ethics Guidelines* (updated May 11, 2017), at 30 (“A lawyer may view the social media profile of a prospective or sitting juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.”) (Emphasis added). Accord: New York County Ethics Op. 743, at 3 (“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.”).

#### **D. Lawyers Cannot Use Deception, Third Persons, or Agents to Do What Would Otherwise Be Illegal**

A lawyer may not use deception, such as pretending to be someone else, to gain access to a juror’s social media site. See, e.g., District of Columbia Ethics Op. 371 (“[i]n using social media for representation . . . a lawyer must at all times stay within the ‘bounds of the law,’ including for example the general prohibition on misrepresentation by pretexting and the duty of truthfulness.”); Colorado Ethics Op. 127 (“donning an alias and ‘friending’ someone on Facebook to gain access to restricted information is prohibited”). The New York State Bar Association, in its *Social Media Ethics Guidelines* at 32, also states that “[a] lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or sitting juror, nor may a lawyer direct others to do so.”

Indeed, “[s]ubordinate lawyers and non-lawyers performing services for the lawyer must be instructed that they are prohibited from using deception to gain access” to social media accounts not otherwise accessible to lawyers. Colorado Ethics Op. 127. See also ABA Model Rule 8.4 (it is always unethical for an attorney to attempt to circumvent a rule by having a non-lawyer do what the lawyer is prohibited from doing).

Additionally, as the ABA and state bar associations have recognized, lawyers who access juror social media postings must be aware of Model Rule 4.4(a) which prohibits lawyers from actions “that have no substantial purpose other than to embarrass, delay or burden a third person,” and that lawyers must “ensure that their review is purposeful and not crafted to embarrass, delay or burden the juror or the proceeding.”

#### **E. The Lawyer, Faced With Juror Misconduct, Must Consult the Applicable Ethics Opinions in His or Her Jurisdiction**

An attorney who finds juror misconduct should review the ethics opinions of his or her jurisdiction, since the nature of the duty to report misconduct varies by jurisdiction. In New York, “if a lawyer learns of juror misconduct through a juror’s social media activities, the lawyer must promptly reveal the improper conduct to the court.” New York City Ethics Op. 2012-2, at 10. See also New York County Ethics Op. 743 (if lawyer learns of jury misconduct on social media, he must not unilaterally act on such knowledge to benefit the client but

must promptly bring the misconduct to the attention of the court “before engaging in further significant activity in the case”). In New York, therefore, juror misconduct learned through social media is a matter for the court. ABA Formal Ethics Op. 466 only addresses criminal and fraudulent conduct. It provides that “if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.”

### **The Take-Away**

The ABA has observed that “[t]here is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice,” and there is “a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn,” but “[i]n today’s Internet-saturated world, the line is increasingly blurred.” ABA Formal Ethics Op. 466, at 2. Here are several principles that should guide the trial lawyer contemplating internet research of jurors.

1. Check to see if there is a court order or decisional law in your jurisdiction governing reviewing the social media of jurors, and review relevant bar association decisions.

2. To the extent it is consistent with other obligations and there is sufficient time, trial lawyers should diligently learn what they can from public sources on the internet. Not doing so promptly risks waiving an objection to an unqualified juror.

3. It should go without saying that trial lawyers should not violate the law by accessing private information on the internet.

4. Trial lawyers may never misrepresent who they are or why they seek information. This goes for their agents as well.

5. Trial lawyers should use great care to avoid doing any internet research that might be considered a communication with jurors. Communicating with jurors, even inadvertently, poses the risk of an ethical violation and is potentially offensive to jurors. This means not viewing a person’s LinkedIn profile unless the notification function is disabled. Great care should be taken not to visit other social media that sends an automatic notification regarding who has visited. If the trial lawyer does not understand the technology, he needs to hire somebody who does or forgo using the technology.

6. Like almost everything that happens at trial, whether and how much to research jurors is ultimately a matter of judgment. A trial lawyer must balance her desire for information about jurors with competing priorities such as preparation of witness examinations and arguments. And a trial lawyer must balance her desire for information with the risk of offending a juror who may feel offended if the juror learns that the lawyer has accessed publicly available information that the juror nevertheless considered private.

7. If a lawyer finds juror misconduct, he or she should consult the relevant ethics opinions of the jurisdiction. Given the other demands of trial, it probably makes sense to have the relevant ethical decisions on hand and at the ready in the event that juror misconduct is discovered.