

SOCIAL MEDIA IN COURT

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CHAPTER 4

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SOCIAL MEDIA IN COURT

I. USE OF DISCOVERY

With 78 percent of adult Americans maintaining at least one social networking profile,¹ and use of social media at ever-growing rates, it is certainly not surprising that attorneys have discovered the litigation value of information contained in a party's postings on social media sites like Facebook and Twitter. But regardless of what a lawyer or party may be able to discover informally on a publicly viewable profile, formal requests for this information must still conform to traditional discovery rules. Recent decisions nationwide confirm that while, generally, objections based on privacy concerns are likely doomed from the start, the availability of social media content does not open the door to a fishing expedition. While there are cases in which a party has been compelled to turn over her entire profile or even produce her social networking password and login credentials, the trend among courts nationally is to refrain from such unfettered discovery.² Just because information has been posted on Facebook or Twitter and may be relatively easily produced doesn't mean that standards are relaxed when it comes to requests that are overly broad or seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

For example, requests for a party's entire social networking profile's content or, alternatively, that party's Facebook password are usually going to be viewed as overly broad. Courts have held that while content on a social networking site is discoverable, the discovering party is not entitled to "rummage at will" through its opponent's Facebook profile.³ A party seeking discovery will still have the burden of showing that the information sought is relevant. In many jurisdictions, this comes down to establishing a factual predicate--some reason to believe that the private portion of a profile contains information relevant to the case. Court after court have rejected a blanket request for "all social media content" or a request that rests on some hope of relevant evidence. Instead, parties seeking discovery should have some basis for a belief that privacy-restricted portions of a profile will contain, information relevant to the litigation. "Absent such a showing, [defendant] is not entitled to delve carte blanche into the nonpublic sections of Plaintiffs' social networking accounts."⁴ In many instances, it is information that is publicly viewable and that contradicts some aspect of the party's claims or defenses that forms the basis for such a predicate. For example, in one personal injury case, the defendant's motion to compel was granted when the plaintiff's claims that he "never [wore] shorts because he [was] embarrassed by his scar" were contradicted by photos on his Facebook and Myspace pages depicting him in shorts.⁵ In other cases, it may be "plaintiff's own testimony at his deposition as to the alleged impact of the claimed accident and his alleged injuries" that establishes a basis for compelling the production of Facebook content.⁶

Moreover, even in cases where what is sought is clearly relevant to some aspect of the party's claims or defenses--such as discovery seeking social media content demonstrative of the party's emotional state in a case where emotional distress is alleged----courts may still rein in discovery. For example, in one employment discrimination case in which emotional distress was alleged, the defendant sought any social media content that "reveals or relates to plaintiff's emotion, feeling, or mental state." The court held that was too broad and ordered the plaintiff to produce any posts that "reveal, refer, or relate to ... any significant emotion, feeling, or mental state allegedly caused by defendant's conduct."⁷ Parties on both sides are invariably better off propounding more narrowly-tailored discovery requests when seeking social media content, as opposed to sending overly broad requests, seeking the entire contents of a social networking profile, asking for a Facebook password, or similarly unrestricted access to a profile.

Unlike courts in Pennsylvania or New York (which have been hotbeds of judicial activity related to issues pertaining to the discoverability of social media content), Texas courts have been relatively silent on the subject. Only two reported appellate decisions have confronted the issue of discoverability of social networking evidence. In one, defendants in an underlying personal injury case sought to obtain, via depositions on written questions directed to both Facebook and Myspace, plaintiff Cody Karl's social networking profile contents and to compel the continuation of his

¹ See Joanna Brenner & Aaron Smith, *72% of Online Adults are Social Networking Site Users*, Pew Research Internet Project (Aug. 5, 2013), www.pewinternet.org/2013/08/05172-of-online-adults-are-social-networking-site-users/.

² See, e.g., John G. Browning, *With "Friends" Like These, Who Needs Enemies? Passwords, Privacy, and the Discovery of Social Media Content*, 36 Am. J. Trial Advocacy 505 (2013); John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU Sci. & Tech. L. Rev. 465 (2011).

³ See, e.g., *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012)

⁴ *Keller v. National Farmers Union Property & Casualty Co.*, No. CV 12-72-M-DLC-JCL, 2013 WL 27731, at *4 (D. Montana Jan. 2, 2013)

⁵ *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410 (Pa. Comm. Pl. May 19, 2011)

⁶ *Bianco v. North Fork Bancorporation, Inc.*, No. 107069/2010, 2012 WL 5199007 (N.Y. Sup. Ct. Oct. 10, 2012)

⁷ *Robinson v. Jones Lang Lasalle Americas, Inc.*, No. 3:12-cv-00127-PK, 2012 WL 3763545, at *2 (D. Ore. Aug. 29, 2012); see also *Mailhoit v. Home Depot USA, Inc.*, 285 F.R.D. 566 (C.D. Cal 2012).

deposition until such documents were produced. The trial court granted plaintiff's motion to quash and denied the motion to compel, prompting a mandamus action. In a one-sentence per curiam opinion that sheds no light whatsoever on the reasoning behind it, Houston's First District Court of Appeals denied the petition for writ of mandamus.⁸

The other discovery dispute came in a medical malpractice case regarding wrongful death in which the surviving family members were asked to produce copies of any social media postings that pertained to the decedent, Arthur Lowe, or to his death. The plaintiffs objected, calling the request "an invasion of privacy and any such information would be unreliable and constitute hearsay and a fishing expedition and this request is meant for the purpose of harassment."⁹ The trial court denied the hospital's motion to compel, but there was no reporter's record of the hearing. The appellate court found that the requests seeking posts about the decedent before he died were not limited in time and that the requests for the social networking posts should have been more limited in time. While the court explicitly rejected the plaintiff's arguments as to privacy and found that they would be clearly relevant to the issue of mental anguish, nevertheless, the court concluded that "a request without a time limit for posts is overly broad on its face."¹⁰ Consequently, it held that the trial court's denial of the defendant's motion to compel was not an abuse of discretion.

The paucity of reported Texas caselaw on discovery issues involving social media will no doubt end as use of social networking content becomes more wide-spread and discovery disputes naturally follow. In the meantime, the lessons learned from the *Christus Health* case are consistent with trends that can be observed from courts around the country. Privacy objections are largely futile, and relevant social media content should be produced in response to narrowly tailored discovery requests that are limited in time and scope of what is being sought.

II. EVIDENTIARY ISSUES

If a picture is worth a thousand words, then a YouTube video that impeaches the opposing party must be priceless. Welcome to the beauty of social media content as evidence: with people posting anything and everything, right down to the minutiae of their daily lives, trial lawyers have a greater resource than ever imagined with which to portray a person in his unguarded moments in contrast to after he has been coached and prepared in everything from word choice to body language. But all of the incriminating tweets and Facebook posts will do a party little good if they can't be admitted into evidence.

Certainly, one of the best ways to authenticate social media content is to do so directly; that is, through a direct admission of authorship by the party or witness who created the content. Asking a party to confirm that a particular social networking profile is his or that he uploaded the photos in question or authored the Facebook post is definitely preferable. In a number of states, including Maryland, Connecticut, New York, and Massachusetts, this direct authentication is the rule, and courts in these states are distrustful of other means of authentication. In Texas, however (as well as in other states), there is a recognition that due to the highly individualized nature of social networking profiles, sufficient assurance exists that the social media content is indeed what it purports to be, even without direct authentication by the creator of the content. One Texas court even permitted authentication by a witness who reportedly read the statements in question on the defendant's Myspace page-without any personal knowledge that the defendant herself had typed that admission.¹¹

Rule 901 allows a party to authenticate evidence by "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Tex. R. Evid. 901(b)(2). No Texas case exemplifies the principles of such circumstantial authentication quite like *Tienda v. State* in which the Texas court of criminal appeals upheld the murder conviction of Ronnie Tienda, Jr.-a conviction based not on forensic evidence or eyewitness testimony but instead on postings from various Myspace accounts of the defendant.¹² A jury convicted Tienda of murder following an altercation with the victim, David Valadez, at a nightclub. On Tienda's Myspace pages (found and testified to by the victim's sister) there was a photo of the appellant with the caption "You ain't BLASTIN/You ain't Lastin" and the notation "Rest in Peace, David Valadez."¹³ There were also an embedded link to an audio recording of a song played at the victim's memorial service, statements referring to people "snitchin on me" and "it's cool if I get off," photos of Tienda's tattoos, references to his nickname "Smiley," as well as photos of Tienda's electronic monitoring bracelet and the fact that he was "str8 outta jail and n da club."¹⁴ The Dallas court of appeals had been persuaded by all of these (and more) indications of authenticity, observing that "the inherent nature of social

⁸ *In re Magellan Terminals Holdings, L.P.*, No. 01-11-00373-CV, 2011 WL 2150422, at *1 (Tex. App.-Houston [1st Dist.] May 13, 2011, orig. proceeding) (mem. op.).

⁹ *In re Christus Health Southeast Texas*, 399 S.W.3d 343, 346 (Tex. App.-Beaumont 2013, orig. proceeding).

¹⁰ *In re Christus Health*, 399 S.W.3d at 348.

¹¹ *See In re J.W.*, No. 10-09-00127-CV, 2009 WL 5155784, at *4 (Tex. App.-Waco Dec. 30, 2009, no pet.) (mem. op.).

¹² 358 S.W.3d 633 (Tex. Crim. App. 2012)

¹³ *Tienda*, 358 S.W.3d at 643.

¹⁴ *Tienda*, 358 S.W.3d at 644-45.

networking websites encourages members who choose to use pseudonyms to identify themselves by posting profiles and pictures or descriptions of their physical appearance, personal backgrounds, and lifestyles.”¹⁵ This type of individualization, the court went on, “is significant in authenticating a particular profile page as having been created by the person depicted in it. The more particular and individualized the information, the greater the support for a reasonable juror’s finding that the person depicted supplied the information.”¹⁶ The court of criminal appeals, after similarly describing several dozen messages, photos, and other details, upheld the conviction as well, concluding that “[t]his is ample circumstantial evidence-taken as a whole with all of the individual, particular details considered” that the “MySpace pages belonged to [Tienda] and that he created and maintained them.”¹⁷

Circumstantial authentication of social media has been followed by subsequent Texas cases. In *Campbell v. State*, an individual convicted of aggravated assault appealed his conviction, claiming that Facebook messages admitting that he should not have put his hands on the victim were wrongly attributed to him.¹⁸ The *Campbell* court acknowledged that there were hurdles to overcome in considering social media evidence:

Facebook presents an authentication concern that is twofold. First, because anyone can publish a fictitious profile under any name, the person viewing the profile has no way of knowing whether the profile is legitimate. Second, because a person may gain access to another person’s account by obtaining the user’s name and password, the person viewing communications on or from an account profile cannot be certain that the author is in fact the profile owner. Thus, the fact that an electronic communication on its face purports to originate from a certain person’s social networking account is generally insufficient standing alone to authenticate that person as the author of the communication.¹⁹

However, the court went on to discuss the multiple Facebook messages alleged to have been sent by Campbell, each of which bore a banner and date stamp at the top with Campbell’s name and the date. Not only did Campbell’s victim confirm that Campbell had an account and that she received the messages, the court also took note of certain “internal characteristics” that tended to confirm Campbell as the author.²⁰ These included unique speech patterns in the messages that matched Campbell’s Jamaican dialect, as well as references to the incident and potential charges (which, at the time, few people would have known about). Taking all of this into consideration along with the victim’s testimony that she and Campbell were the only ones with access to the Facebook account (and that, at the time of the incident, she did not have such access), the court held that the Facebook evidence was properly admitted.

Yet another Texas case upheld the use of circumstantial authentication, although the court also noted that there was other, stronger evidence admitted without objection and which supported the same conclusion.²¹ In *Rene*, the circumstantial authentication of the defendant’s Myspace photos included depictions of his gang tattoos, references to his nickname “Lo,” and photos of a small boy and girl identified as the defendant’s children.²² The conviction was affirmed.

Other states, including Georgia, Kentucky, Mississippi, Arizona, and California, have embraced circumstantial authentication of social media content, and several have cited *Tienda* in doing so. When it comes to evidentiary issues and social media, it is fair to say that Texas has been on the cutting edge of an already cutting-edge issue.

III. ETHICAL IMPLICATIONS OF RESEARCHING JURORS ON SOCIAL MEDIA

May lawyers ethically research the social media profiles and online postings of perspective jurors. The answer to this question is generally “yes,” but with some qualifiers and caveats. It’s certainly understandable why lawyers all over the country routinely engage in this practice. After all, in civil and criminal cases, attorneys on both sides probe with their questions during voir dire, seeking to learn more about the prospective jurors and whether or not they might be likely to align with that lawyer’s side of the case, or whether or not the jurors might have a pre-existing bias on a particular issue. Everything from a panelist’s body language during questioning to her television viewing habits translates into more data to be factored into the jury selection process.²³ And while most cases don’t feature the lengthy,

¹⁵ *Tienda v. State*, No. 05-09-00553-CR, 2010 WL 5129722, at *5 (Tex. App.- Dallas, pet. granted).

¹⁶ *Tienda*, 2010 WL 5129722, at *5.

¹⁷ *Tienda*, 358 S.W.3d at 645.

¹⁸ 382 S.W.3d 545 (Tex. App.- Austin 2012, no pet.).

¹⁹ *Campbell*, 382 S.W.3d at 550 (citations omitted).

²⁰ *Campbell*, 382 S.W.3d at 55 1.

²¹ See *Rene v. State*, 376 S.W.3d 302 (Tex. App.-Houston [14th Dist.] 201 2, pet. denied).

²² See, e.g., *Domville v. State*, 103 So.3d 184 (Fla. Dist. Ct. App. 2012), *rev.denied*, *State v. Domville*, 110 So.3d 441 (Fla. 2013)

²³ Stephanie Clifford, *TV Habits? Medical History? Test for Jury Duty Get Personal*, N.Y. Times, Aug. 20, 2014, at A1, available at <http://www.nytimes.com/2014/08/21/nyregion/for-service-on-some-juries-expect-a-lengthy-written-test.html>.

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.²⁴ 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.²⁵ Welcome to jury selection in the Digital Age, where, with a few mouse clicks, an attorney can learn all about a prospective juror— her taste in movies and music, her political affiliations, education, hobbies, and literally her “likes” and dislikes. But where are the ethical boundary lines drawn for attorneys engaged in such online investigations?

In this section we’ll examine the ethical considerations for lawyers pondering whether to “Facebook the jury,” and will discuss not only ethics opinions, but also cases from around the country that have weighed in on this issue. We’ll 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.

A. The 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.²⁶ Although there were no sanctions dispensed, this incident no doubt made for some uncomfortable moments for that lawyer.²⁷

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.²⁸ 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.²⁹ And in February 2014, California became the first state in the country to introduce legislation that would safeguard a juror’s social media username and password.³⁰ A.B. 2070, introduced by State Representative Nora Campos, would prohibit a court from revealing or requesting a juror or prospective juror to disclose a username or password “for the purpose of accessing personal social media,” or requiring the juror or prospective juror to access personal social media “in the presence of the judge, counsel for either party, or any other officer of the court.”³¹

Another potential danger for attorneys “Facebooking the jury” can stem from what the attorney does with that information. For example, an assistant district attorney in Texas was recently fired 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.³² During jury selection for the robbery trial of convicted murder Darius Lovings, assistant D.A. 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

²⁴ *See id.*

²⁵ *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/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *United States v. Kilpatrick*, No. 10–20403, 2012 WL 3237147, at *3 (E.D. Mich. Aug. 7, 2012) (rejecting the arguments made against the empanelling of an anonymous jury, since 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).

²⁹ Steve Stout, *Judge Denies Arias Motion for Change of Venue, Jurors’ Twitter Names*, CBS 5 KPHO, Dec. 23, 2013, <http://www.kpho.com/story/24070733/judge-sherry-stephens-has-ruled-the-sentencing-phase-retrial-of-convicted-murderer-jodi-arias-will-stay-in-phoenix>.

³⁰ A.B. 2070, 2013–14 Leg., Reg. Sess. (Cal. 2014).

³¹ *Id.*

³² Jasmine Ulloa & Tony Plohetski, *District Attorney Lehmborg Fires Key Lawyer in Her Office*, AUSTIN AM.-STATESMAN, June 12, 2014, at A1.

African-Americans during the Jim Crow era).³³ Brand argued that the prospective juror “appeared to be an activist.”³⁴ The judge did not agree that this was a race-neutral reason for striking the juror, and sustained defense counsel’s *Batson* challenge.³⁵

B. Dangers of Not Conducting Online Juror Research

While the dangers of inadvertent contact with jurors, violating juror privacy, and risking revelations of an improper basis for peremptory strikes are genuine, they are outweighed by the dangers of *not* conducting online research.³⁶ The first obvious danger is the very real threat of jurors risking a mistrial or overturned verdict due to their own online misconduct.³⁷ 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 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.³⁸ In 2011, the Arkansas Supreme Court overturned a capital murder conviction because of a juror’s tweets from the jury box.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴² With the palpable threat of online juror monitor 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 her suitability as a juror, such as her litigation history or her opinions about issues central to this case.⁴³ 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.⁴⁴ The panelist was asked if she had previously expressed any opinion on the case, and she replied no.⁴⁵ The defense then discovered a Facebook post she had made six months before trial, which read: “First hell yeah he needs to do sometime (sic)!! The young fella (sic) was already dead from the gunshot wound to the head, then he came back with a different (sic) gun and shot him 5 more times. Come on let’s be for real it didn’t make no (sic) sense!”⁴⁶ The panelist (who claimed to have forgotten making the comments in question) was dismissed from the jury pool, found in contempt, and sentenced to one hundred hours of community service.⁴⁷

Indeed, juror dishonesty during voir dire, and its consequences for all involved in the justice system, is an issue commanding increasing attention. In 2015, the U.S. Supreme Court decided the case of *Warger v. Shauers*, in which the central issue was whether Federal Rule of Evidence 606(b) (the juror anti-impeachment rule) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made

³³ *Id.* at A9.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See, e.g., *State v. Abdi*, 191 Vt. 162, 174–75 (2012).

³⁷ See, e.g., *id.*

³⁸ See, e.g., *id.*

³⁹ *Dimas-Martinez v. State*, 385 S.W.3d 238, 248–49 (Ark. 2011).

⁴⁰ *Abdi*, 191 Vt. at 174–75.

⁴¹ See, e.g., *State v. Dellinger*, 696 S.E.2d 38, 40, 44 (W. Va. 2010).

⁴² For example, in one recent Florida case, juror Andrew 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*, THE PALM BEACH POST (June 2, 2014), <http://www.mypalmbeachpost.com/news/news/crime-law/local-juror-removed-in-handcuffs>.

⁴³ See *id.*

⁴⁴ 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.nlr.com/blogs/jury-research>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

during deliberations that tend to show the alleged dishonesty.⁴⁸ And 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.⁴⁹ Pinellas Circuit Judge Anthony Rondolino made the comments while denying a motion for new trial in the case of an eighty four year old woman who fell and died in the stairwell of an assisted living facility.⁵⁰ The woman's estate sought fifteen million dollars, only to have a six-person jury find no negligence on the part of the facility.⁵¹ After trial, the plaintiff's lawyers did online research and found that all six jurors had failed to disclose their own civil litigation history.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵

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 of Kentucky*.⁵⁶ 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.⁵⁷ One of the passengers, eleven year old Destiny Brewer, died.⁵⁸ The tragedy and ensuing criminal case garnered tremendous publicity, including extensive discussion online on sites like Facebook and Topix.⁵⁹ The trial court, sensitive to the amount of attention the case had received, engaged in extensive voir dire procedures.⁶⁰

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.⁶¹ 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.⁶² 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.⁶³

While the court analyzed the nature of Facebook "friend" status and ultimately held that that fact alone would be insufficient grounds for a new trial,⁶⁴ it was clearly more troubled by the jurors' misstatements during voir dire, especially since 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."⁶⁵ 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 the defense counsel should have discovered the online evidence of juror misconduct prior to the verdict.⁶⁶

⁴⁸ *Warger v. Shauers*, 721 F.3d 606, 610 (8th Cir. 2013) *cert. granted*, 134 S. Ct. 1491 (2014). The Court held that a party seeking a new trial cannot use a federal juror's comments during deliberations to demonstrate that she lied about her ability to be fair during voir dire.

⁴⁹ Stephen Nohlgren, *Pinellas Judge: New Process May Be Needed to Screen Jurors*, TAMPA BAY TIMES (July 8, 2014), <http://www.tampabay.com/news/courts/civil/pinellas-judge-new-process-may-be-needed-to-screen-jurors/2187689> [hereinafter Nohlgren, *Pinellas Judge*].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 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), <http://www.tampabay.com/news/courts/civil/jurors-who-didnt-reveal-personal-legal-history-could-cause-new-trial-in/2160715>.

⁵⁴ Nohlgren, *Pinellas Judge*, *supra* note 27.

⁵⁵ *See id.*

⁵⁶ *Sluss v. Commonwealth*, 381 S.W.3d 215 (Ky. 2012).

⁵⁷ *Id.* at 217.

⁵⁸ *Id.*

⁵⁹ *Id.* at 221.

⁶⁰ *Id.*

⁶¹ *Id.* at 222.

⁶² *Sluss*, 381 S.W.3d at 221.

⁶³ *Id.* at 222.

⁶⁴ *Id.* at 223.

⁶⁵ *Id.* at 223–24.

⁶⁶ *Id.* at 226.

The Court ultimately held that there was juror misconduct that warranted, at minimum, a hearing to determine the nature and extent of the Facebook conduct, if not an actual new trial.⁶⁷ It also excused the attorney's failure to discover the misconduct earlier, since 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 could have even done so ethically given the state of the law at the time of trial."⁶⁸ But, the Court did go on to an extensive discussion of the ethical parameters surrounding counsel's investigation of jurors on social media sites, referencing with approval the position advocated by the New York County Bar Association Ethics Committee.⁶⁹ Although it conceded that "the practice of conducting intensive internet vetting of potential jurors is becoming more commonplace," the Court declined to go as far as the Missouri Supreme Court and impose an affirmative duty on attorneys to do so.⁷⁰ 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."⁷¹

The following year, the Supreme Court of Kentucky had the opportunity to revisit the issue of jurors being less than forthcoming during voir dire about Facebook relationships and the consequences of an attorney's belated discovery of such connections.⁷² In *McGaha v. Commonwealth of Kentucky*, Jeffrey McGaha appealed his conviction for murder, citing among other grounds, the fact that a juror had failed to disclose during voir dire that she was Facebook "friends" with the victim's wife.⁷³ "Juror 234," as the opinion refers to her, was directly asked if she was related to anyone involved in the case.⁷⁴ She acknowledged knowing some of the victim's family, "not close, but I do know them," and described any relationship as "casual."⁷⁵ As the court pointed out, "No one asked Juror 234 about any social media relationship she may have with any of the participants in the case," she was "not challenged for cause by either side, and she was eventually seated on the jury to try the case."⁷⁶ It was only after trial that McGaha learned that the victim's wife, Charlene Cowan, was one of Juror 234's 629 Facebook "friends."⁷⁷

In denying McGaha's appeal, the Supreme Court of Kentucky hearkened back to its earlier opinion in *Sluss*, saying that Facebook "friendships" do not carry the same weight as live friendships or relationships in the community.⁷⁸ Moreover, the fact that this juror had 629 "friends" makes it even less likely that she could have had a "disqualifying relationship with each one of them."⁷⁹ Importantly, the court found Juror 234's answers to questions during voir dire to be both responsive and truthful, saying that there was no indication that she was attempting to be deceptive or attempting to conceal the social media relationship.⁸⁰ The court pointed out that counsel could have delved deeper "to discover the depth and scope of her acquaintances within the Cowan family," but declined to do so.⁸¹ So, while it stopped short of requiring that lawyers research the jury panel's social media presence in *Sluss*, in *McGaha*, the Kentucky Supreme Court seems to say that while it may behoove an attorney to do so, it won't necessarily result in game-changing findings.⁸²

There is a growing body of case law from around the country that support your right to research jurors online. Here are snapshots of some of the most important cases.

C. Cases Upholding The Right And Duty To Research Jurors Online

1. Carino v. Muenzen

In this New Jersey medical malpractice case, the appellate court considered the plaintiff 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.⁸³ As jury selection began on May 14, 2009, defense counsel objected when he noticed his adversary accessing the internet

⁶⁷ *Id.* at 228–29.

⁶⁸ *Sluss*, 381 S.W.3d at 226.

⁶⁹ *Id.* at 227–28.

⁷⁰ *Id.* at 227.

⁷¹ *Id.*

⁷² *McGaha v. Commonwealth*, 414 S.W.3d 1 (Ky. 2013).

⁷³ *Id.* at 4.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 5.

⁷⁷ *Id.*

⁷⁸ *McGaha*, 414 S.W.3d at 6.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See id.*

⁸³ *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071, at *7, *9 (N.J. Super. Ct. App. Div. 2010).

on his laptop.⁸⁴ 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 attorney was stunned when the court refused to allow it.⁸⁵ The trial judge felt that allowing such juror research would jeopardize maintaining “a fair and even playing field.”⁸⁶

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 plaintiff’s counsel.⁸⁷ 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.⁸⁸

2. Burden v. CSX Transportation, Inc.

In this federal court personal injury case, the defense appealed the unfavorable verdict on the grounds of its post-trial 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.⁸⁹ The online research was performed using public records databases to get information that included lawsuits filed.⁹⁰ The court rejected the defense’s argument of recently-discovered evidence of juror bias, finding instead that “defendant waived its present objections because the basis of the objections might have been known or discovered through the exercise of reasonable diligence.”⁹¹ 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.⁹²

3. Johnson v. McCullough

In 2010, 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.⁹³ During the voir dire phase of a medical malpractice trial, plaintiff’s counsel inquired about whether anyone on the venire panel had ever been a party to a lawsuit.⁹⁴ 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.⁹⁵ Following a defense verdict, plaintiff’s counsel researched Mims on Missouri’s PACER-like online database, Case.net, and learned of multiple previous lawsuits involving the juror.⁹⁶ The trial court granted a motion for new trial based on Mims’ intentional concealment of her litigation history, but the Missouri Supreme Court reversed. The court reasoned that:

However, in 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 could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.⁹⁷

⁸⁴ *Id.* at *4.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at *10.

⁸⁸ *Id.*

⁸⁹ *Burden v. CSX Transp., Inc.*, No. 08-cv-04-DRH, 2011 WL 3793664, at *1 (S.D. Ill. Aug. 24, 2011).

⁹⁰ *Id.* at *6–8.

⁹¹ *Id.* at *10.

⁹² *See id.*

⁹³ *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010).

⁹⁴ *Id.* at 554.

⁹⁵ *Id.* at 554–55.

⁹⁶ *Id.* at 555.

⁹⁷ *Id.* at 558–59.

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 of a prospective juror on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial.”⁹⁸

The *Johnson* standard was codified in Missouri Supreme Court Rule 69.025, which became effective January 1, 2011.⁹⁹ It mandates background internet searches on potential jurors, specifically Case.net searches of a potential juror’s litigation history.¹⁰⁰ 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.

In *Khoury v. ConAgra Foods*, 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.¹⁰¹ 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.¹⁰² The parties exercised both their peremptory strikes and their strikes for cause, and a jury was empanelled.¹⁰³ 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, Mr. Piedimonte, indicative of bias and intentional failure to disclose information.¹⁰⁴ Piedimonte, they said, was “a prolific poster for anti-corporation, organic foods.”¹⁰⁵ ConAgra moved for a mistrial or, alternatively, to strike Piedimonte from the jury.¹⁰⁶ The court denied the motion for mistrial, but did strike Piedimonte from the jury and proceeded with twelve jurors and three (instead of four) alternate jurors.¹⁰⁷ 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.¹⁰⁸ 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 juror’s litigation history, not a broader search for any alleged material nondisclosure.¹⁰⁹ As the court pointed out:

The rule could have similarly required “reasonable investigation” into other areas of “possible bias” and could have required such “reasonable investigation” to include a search of Internet social and business networking sites such as *Facebook*, *MySpace*, or *LinkedIn*, to name a few. And, the rule could have similarly required “reasonable investigation” of potential jurors via Internet search engines such as *Google* or *Yahoo!*, to name a few. Or, the rule could have simply required a blanket “Internet search” on “any and all issues of prospective juror bias.” But, clearly, it does not.¹¹⁰

Although the appellate court limited itself to the plain text of the rule, it did acknowledge 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 rethink 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.”¹¹¹

D. Judicial Concerns Regarding Attorney Use of Social Media During Voir Dire

The trial judge in *Carino v. Muenzen* is by no means alone in his reservations about attorneys performing online research on prospective jurors. In a 2013 state court criminal trial of a man accused of child sexual abuse, Montgomery County (Maryland) Judge Richard Jordan banned such research during voir dire, saying that it would discourage people from performing their civil duty of reporting for jury duty.¹¹² “There’s a real potential for a chilling effect on jury

⁹⁸ *Id.* at 559.

⁹⁹ *Khoury v. Conagra Foods, Inc.*, 368 S.W.3d 189, 202 (Mo. Ct. App. 2012).

¹⁰⁰ *Id.* at 192–93.

¹⁰¹ *Id.* at 193.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Khoury*, 368 S.W.3d at 193.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 199.

¹⁰⁹ *Id.* at 202–03.

¹¹⁰ *Id.* at 203 n.12.

¹¹¹ *Khoury*, 368 S.W.3d at 203.

¹¹² St. John Barned-Smith, *Montgomery Judge Denies Internet Searches for Jury Selection*, GAZETTE.NET (MAY 15, 2013), <http://www.gazette.net/article/20130515/NEWS/130519448/>

1122/Montgomery-judge-denies-Internet-searches-for-jury-selection&template=gazette.

service, by jurors, to know ‘I’m going to go out 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,” said Judge Jordan.¹¹³

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).¹¹⁴ 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.¹¹⁵ Twenty percent of the judges wanted to protect juror privacy, while another 4% were worried about jurors feeling intimidated.¹¹⁶ Another seventeen percent felt that allowing such research would be distracting, while 16% were concerned about the practice prolonging voir dire.¹¹⁷ 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.¹¹⁸ A small fraction of the judges responding pointed to concerns with creating an unfair advantage for one side as the basis for their opposition, while an even tinier fraction cited the inability to verify the accuracy of the information gathered.¹¹⁹

With regard to the potential ethical dangers of attorneys engaging in inappropriate use of such networking information gathering, only five percent of the responding judges reported experiencing a problem with a lawyer’s conduct.¹²⁰ According to the survey, this was limited to attorneys following prospective jurors on Twitter.¹²¹ There were no reports of improper “friending,” pretexting, or other efforts to get past a would-be juror’s privacy settings.¹²² Of course, some judges’ concerns may be specific to a particular social networking platform. In one New York federal case, the judge, responding to a motion in limine, forbade attorneys from engaging in searching jurors on LinkedIn and other sites in which the account holder could receive a notification as to who looked at his page, but allowed searches on other sites.¹²³ The truth is, most judges don’t seem to know how regular the practice is of using the internet to investigate prospective jurors or simply haven’t addressed the issue with lawyers appearing before them. This same 2014 survey by the Federal Judicial Center reported that about 90 percent of the judges responding don’t even know whether attorneys are accessing potential jurors’ social media profiles during voir dire.¹²⁴ But the better practice is to make sure in advance that the judge is aware of your intention to perform such research, and to determine if the judge wishes to set any parameters for doing so. After all, judges in both state and federal courts typically enjoy broad discretion in overseeing courtroom behavior, including conducting examination of jurors. Being upfront with the judge is a good idea. In one recent Florida case, the appellate court vacated a \$74,000 sanction levied against a lawyer who had allegedly given “evasive” and “dishonest” answers when she was asked how she discovered a Facebook connection between a juror and a litigant in the trial.¹²⁵ The wife of attorney Petia Tenev’s client found the jury list in her husband’s, jacket pocket, researched the jurors online, discovered that one juror was a Facebook friend of a witness, and asked Tenev to strike the juror. When the trial judge inquired how Tenev learned of this connection, she allegedly gave three different answers. Concerned about what he considered “dishonesty” and an attempt “to make improper contact with the juror,” the trial judge sanctioned Tenev and granted a mistrial.¹²⁶ But the appellate court disagreed, pointing out there actually was no finding of any contact with the juror and that Tenev – while not being candid with the tribunal – was fulfilling her duty as an officer of the court to “notify the court of a potentially biased juror.”¹²⁷ Moreover, the appellate court noted, “There is no prohibition in Florida against an attorney researching jurors before, during, and throughout a trial so long as the research does not lead to contact with a juror.”¹²⁸

^{113.} *Id.*

^{114.} MEGHAN DUNN, FED. JUDICIAL CTR., JURORS’ AND ATTORNEYS’ USE OF SOCIAL MEDIA DURING VOIR DIRE, TRIALS AND DELIBERATIONS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION CASE MANAGEMENT 13 (2014).

^{115.} *Id.*

^{116.} *Id.*

^{117.} *Id.*

^{118.} *Id.* at 13–14.

^{119.} *Id.* at 14.

^{120.} DUNN, *supra* note 92.

^{121.} *Id.*

^{122.} *Id.*

^{123.} *United States v. Watts*, 934 F. Supp. 2d 451, 494–95 (E.D.N.Y. 2013).

^{124.} DUNN, *supra* note 92.

^{125.} *Tenev v. Thurston*, 2016 BL 70906, Fla. Dist. Ct. App. 2nd Dist., No. 2D14-4566, March 9, 2016.

^{126.} *Id.*

^{127.} *Id.*

^{128.} *Id.*

And some judges will restrict lawyers from researching prospective jurors online. Consequently, attorneys who choose to disregard such bans risk sanctions, including contempt of court. In an August 2016 healthcare antitrust trial involving hundreds of millions of dollars, the lead plaintiffs' lawyer used internet research during jury selection despite U.S. District Judge Roy Dalton, Jr.'s pretrial order banning the practice.¹²⁹ He was found in contempt and fined \$500.¹³⁰ Perhaps the most high-profile example of such a ban came in the recent patent infringement trial between tech giants Oracle and Google. Judge William Alsup of the U.S. District Court for the Northern District of California had serious doubts before trial about whether the lawyers should be allowed to use social media to research prospective jurors.¹³¹ After denying the parties' joint request to collect questionnaires from potential jurors before voir dire and suspecting that both sides wanted "to conduct extended internet investigations on the venire," Judge Alsup indicated that he was considering imposing a ban on both sides "on any and all internet research on the jury prior to verdict."¹³² The reasons for his concern included worries about dragging out the voir dire procedure; the possibility of the lawyers' sitting on what they discover and using it strategically as post-verdict challenges to jurors' answers to voir dire questions; and the concern that jurors admonished by the court not to conduct their own internet research might be tempted to disregard this instruction if they find out the lawyers are allowed to do it. So Judge Alsup asked both sides to brief the issue of "how far" the parties and their counsel could go.

Predictably, both Oracle and Google pointed Judge Alsup to many of the same cases and ethics opinions discussed in this chapter, arguing that passive review of publicly-viewable social media profiles was ethically permissible. However, this didn't satisfy Judge Alsup, who issued a series of follow-up orders seeking more details. In one, for example, he asked how both sides' attorneys planned to use information about potential jurors' relationship status, as well as their political or religious ties. He also demanded that each side provide "three concrete examples of information you expect to find" that "would lead to a for-cause challenge that would be unlikely to surface during normal voir dire."¹³³ In other orders, Judge Alsup directed the parties to address the extent to which their investigation would involve accessing Twitter accounts of prospective jurors, or asking a potential juror's Facebook friends or LinkedIn connections to access more private levels of postings. He even inquired into how each party would handle a scenario in which an investigator happened to have a "friend" or "friend of a friend" connection to a prospective juror, enabling that investigator to have access to information not disclosed to the public.

Clearly, from the detailed questions posed and information sought, Judge Alsup was troubled by the practice of online juror investigation. Even after the reassurances from both Oracle and Google about the ethical permissibility of "Facebooking the jury," Judge Alsup ordered that if the parties wanted to conduct any such internet research of the panel, they would be required to disclose that they did so and be prepared to share with each juror the results of their investigations. Not surprisingly, when faced with such a Hobson's choice, both Oracle and Google decided that they could somehow live without online investigations of potential jurors.

There is another good reason to check with a court in advance. Given the prevalence of the practice of researching prospective jurors online, courts are just beginning to articulate and implement specific rules governing this process. For example, the Local Rules of the U.S. District of the Northern District of New York were recently amended to add Civil Rule 47.6, providing guidance on using social media to investigate prospective jurors. The rule specifically permits attorneys to use "websites available to the public" (including social networking sites) to research jurors or prospective jurors, as long as they adhere to certain conditions:

- The website or information must be available and accessible to the public;
- The attorney may not send an access or "friend" request to a juror's social media profile;
- No direct communications or contact between the attorney and juror/prospective juror may occur, including any "friend" requests, "follow" requests, or "connection" requests;
- The attorney must do the social media research anonymously, seeking only publicly-accessible information and not disclosing to the juror who is conducting the inquiry;
- Deception must not be used to gain access to a profile or to information;
- Any third parties (like paralegals or investigators) working for an attorney in doing such research are subject to the same restrictions as attorneys; and
- If the lawyer becomes aware of a juror's posting online about the case in which he/she is serving, the lawyer must report it to the court.¹³⁴

¹²⁹ Nathanhale, "Attorney Fired for Using Internet During Health First Antitrust Trial," Law 360 (August 19, 2016)

¹³⁰ *Id.*

¹³¹ Oracle Am., Inc. v. Google, Inc., N.D. California, No. 3:10-cv-03561 (order filed 3/14/16)

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Local Rules of Practice for the U.S. District Court for the Northern District of New York, Civil Rule 47.6

The U.S. District Court for the District of Idaho, Civil Rule 47.2 on “Social Media Juror Inquiries,” is nearly identical. It adds a requirement that if an attorney through her online research, learns of a juror’s conduct that is criminal or fraudulent, the lawyer must take remedial measures, including reporting such conduct to the court if necessary.¹³⁵ In short, lawyers would be well-advised to check with the court first, including consulting any case management or pre-trial orders, before embarking on a “voir Google” campaign.

A growing number of ethics opinions nationwide are confronting the subject of researching prospective jurors online. The first to do so was New York County.

E. Ethics Opinions Addressing “Facebooking The Jury”

On May 18, 2011, the New York County Lawyers Association Committee on Professional Ethics issued Formal Opinion 743, which considered not only lawyer research online into prospective jurors, but also considered the ramifications of New York Rule of Professional Conduct 3.5 and the investigation of jurors during the ongoing trial.¹³⁶ It divided its discussion into two distinct phases: the pretrial phase in which there are only prospective, not actual, jurors; and the evidentiary or deliberation phases of a trial.¹³⁷ There are common ethical concerns in both phases, including, avoiding communications with the jurors and taking care not to engage in any misrepresentations or act with deceit.¹³⁸ However, as to the later phases, there is the additional ethical concern of how a lawyer must react if he or she learns of jury misconduct.¹³⁹

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.¹⁴⁰ 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.¹⁴¹ However, the Committee ventures 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.”¹⁴² Clearly, this would include actual substantive communications, such as an attorney sending a Facebook message to the juror. And, according to the Committee, other “communications” typical of the digital age would be similarly proscribed:

Significant ethical concerns would be raised by sending a “friend request,” attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror’s blog or “following” a juror’s Twitter account. We believe that such contact would be impermissible communications with a juror.¹⁴³

This approach is consistent with courts around the country that have held that even such relatively minimal contacts, such as friend requests or “pokes,” constitute communications sufficient to constitute a violation of a court’s “no contact” order or restraining order.¹⁴⁴ However, the Committee goes even further in its concern about what might be categorized as indirect content, such as the automatic notification sent by a site to its user alerting him that a third party has viewed or accessed his profile.¹⁴⁵ 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.”¹⁴⁶ This, of course, envisions the scenario at issue in the “Hustle” mortgage fraud trial discussed earlier, in which a juror complained after he received notification of his LinkedIn profile being viewed by a member of one of the defense teams.¹⁴⁷

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? The

¹³⁵ U.S. Dist. Ct. of Idaho, Civil Rule 47.2 (“Social Media Juror Inquiries”)

¹³⁶ NYCLA Comm. on Prof’l Ethics, Formal Op. 743, 1 (2011).

¹³⁷ *Id.* at 2.

¹³⁸ *Id.* at 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2–3.

¹⁴¹ *Id.*

¹⁴² NYCLA Comm. on Prof’l Ethics, Formal Op. 743, 2–3 (2011).

¹⁴³ *Id.* at 3.

¹⁴⁴ JOHN BROWNING, *THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW* 46–47 (2010).

¹⁴⁵ NYCLA Comm. on Prof’l Ethics, Formal Op. 743, 2–3 (2011).

¹⁴⁶ *Id.* at 3.

¹⁴⁷ *See supra* text accompanying note 6.

opinion refers specifically to Twitter's practice of messaging the account holder that someone is now "following" him as well as LinkedIn's auto-communication feature that one's profile has been recently viewed, but also states that it "is intended to apply to whatever technologies now exist or may be developed that enable the account holder to learn the identity of a visitor."¹⁴⁸ Nonetheless, is an auto-notification truly a "communication?" And even if it is, it is generated automatically by the site itself. A terse, automatically generated notification lacking any substantive content should not reasonably be considered a "communication," and equally importantly, it should not be treated as an impermissible communication by the attorney because it is not sent consciously or otherwise by the attorney herself.

The second aspect of the Committee's ruling that merits further consideration is its analysis of the obligation to report juror misconduct under Rule 3.5 (of the New York Rules of Professional Conduct as well as the ABA's Model Rules). This rule provides that "[a] lawyer shall reveal promptly to the court improper conduct by a member of a venire or a juror, or by another toward a member of the venire or a juror or member of his or her family of which the lawyer has knowledge."¹⁴⁹ Taking note of the prevalence of online misconduct by jurors, despite instructions prohibiting this behavior, the Committee held that:

Any lawyer who learns of juror misconduct, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court. This is so even should the client notify the lawyer that she does not wish the lawyer to comply with the requirements of RPC 3.5.¹⁵⁰

While the Committee acknowledged that a lawyer, "has no ethical duty to routinely monitor the web posting or Twitter musings of jurors," if he does elect to do so he will be under a duty to "promptly notify the court of any impropriety of which the lawyer becomes aware."¹⁵¹ This duty takes precedence over the lawyer's own duties to his client. As the opinion goes on to point out, a lawyer who learns of juror's improper conduct "may not use this information to benefit the lawyer's client in settlement negotiations, or even to inform the lawyer's settlement negotiations."¹⁵² So, a lawyer who, while monitoring a juror's online presence, learns of a juror venturing online in violation of the court's instructions must bring this to the court's attention, regardless of whether that online foray revealed something favorable to his client's case. This is consistent with other courts' approach to the primacy of the attorney's duty of candor to the tribunal.¹⁵³

Following the New York County Lawyers Association, the Committee on Professional Ethics for the New York Bar Association issued its own ethics opinion the following year.¹⁵⁴ Citing cases like *Johnson* and *Carino*, along with cases detailing the lawyers of juror online misconduct, the City's Committee agreed with the earlier ethics opinion and held that an attorney may conduct juror research using social media services and websites.¹⁵⁵ And, like the New York County Bar opinion, the New York City Bar opinion made it clear that attorneys performing such research could not engage in communication with a juror.¹⁵⁶ However, this opinion proceeded to address the broader issue of what exactly constitutes an impermissible, ex parte communication with a juror.¹⁵⁷

"Communication," the committee ruled, should be understood in its broadest sense. 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."¹⁵⁸

The Committee went on to state:

¹⁴⁸. NYCLA Comm. on Prof'l Ethics, Formal Op. 743, 3 n.2 (2011).

¹⁴⁹. N.Y. RULES OF PROF'L CONDUCT r. 3.5(d) (2009).

¹⁵⁰. NYCLA Comm. on Prof'l Ethics, Formal Op. 743, 4 (2011).

¹⁵¹. *Id.*

¹⁵². *Id.*

¹⁵³. *See* United States v. Daugerdas, 867 F. Supp. 2d 445, 484 (S.D.N.Y. 2012) (stating, "[a]n attorney's duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client. Any reluctance to disclose this information-even if it might jeopardize a client's position-cannot be squared with the duty of candor owed to the tribunal.").

¹⁵⁴. N.Y. St. Bar Ass'n Comm. Prof'l Ethics, Formal Op. 2012-2 (2012), available at 2012 WL 2304271.

¹⁵⁵. *Id.* at *2-3.

¹⁵⁶. *Id.*

¹⁵⁷. *Id.*

¹⁵⁸. *Id.* at *4.

if a juror were to (i) receive a “friend” request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended.¹⁵⁹

In other words, ignorance, or lack of familiarity with, a site's functions will not be an excuse in committing such an ethical violation. This position is consistent with the trend in cases around the country, as well as the relatively recent requirement under the Rule 1.1 of the Model Rule of Professional Conduct to be technologically conversant as part of providing competent representation, and of holding attorneys to a higher standard as far as technology is concerned.

The New York City Bar opinion reminds lawyers that “communication” will be understood in its broadest sense, and urges them to be mindful of the fact that a communication is “the process of bringing an idea, information or knowledge to another's perception.”¹⁶⁰ And, like its New York County counterpart, it discusses an attorney's obligation to reveal improper juror conduct to the court.¹⁶¹ But it addresses other issues, such as the potential for deception or misrepresentation when researching jurors on social networking sites.¹⁶² Noting Rule 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.¹⁶³ 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.”¹⁶⁴ With the proliferation of specialized subgroups on social networking sites (such as LinkedIn groups restricted to people in particular specialty area or with a specific affiliation), this can be a valid concern. Similarly, the opinion observes that a lawyer is forbidden from using a third party to do what he or she could not otherwise do.¹⁶⁵ Accordingly, just as other ethics opinions have held with regard to lawyers not being allowed to use those working under their supervision (such as a paralegal) to “friend” a witness or party under false pretenses, lawyers may not use third parties to surreptitiously gain access to a juror's profile.

Another issue that troubled the New York City Bar's Committee is 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.”¹⁶⁶ 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.”¹⁶⁷ The Committee also added that, “[t]he potential juror is aware that her information and images are available for public consumption.”¹⁶⁸ While some potential jurors might be “unsophisticated in terms of setting their privacy modes or other website functionality,” the Committee concedes, that does not change the ethical posture for the researching attorney.¹⁶⁹ In fact, the opinion states that “the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.”¹⁷⁰

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.¹⁷¹ These guidelines address a variety of issues impacting a practitioner's use of social media. Guidelines 5 A-E address various aspects of “[r]esearching [s]ocial [m]edia [p]rofiles or [p]osts of [p]ropective

¹⁵⁹ *Id.* at *2.

¹⁶⁰ N.Y. St. Bar Ass'n Comm. Prof'l Ethics, Formal Op. 2012-2 (2012), *available at* 2012 WL 2304271.

¹⁶¹ *Id.* at *1.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at *6.

¹⁶⁵ *Id.*

¹⁶⁶ N.Y. St. Bar Ass'n Comm. Prof'l Ethics, Formal Op. 2012-2, at *7 (2012), *available at* 2012 WL 2304271.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Gregory K. Arenson et al., *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section*, N.Y. ST. BAR ASS'N COMM. PROF'L ETHICS, Mar. 18, 2014, *available at* <http://www.nysba.org/workarea/DownloadAsset.aspx?id=47547>.

and [s]itting [j]urors and [r]eporting [j]uror [m]isconduct.”¹⁷² 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.¹⁷³

These Guidelines, with their citations to earlier ethics opinions, as well as specific provisions of the New York Rules of Professional Conduct, are quite useful. In addition, the Guidelines provide handy, practical pointers for lawyers seeking not to be identified through LinkedIn when viewing a juror’s public LinkedIn profile. They also raise an occasional unanswered question: “whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror’s view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members.”¹⁷⁴

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. 2013-189.¹⁷⁵ 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 her agent may send a request to a juror to access non-public personal information on a social networking site.¹⁷⁶ Oregon, however, ventured into uncharted territory by further advising that Rule 8.4(a)(3), which prohibits deceitful conduct, will *not* automatically preclude a lawyer from enlisting an agent to deceptively seek access to another person’s social networking profile.¹⁷⁷ It holds that while a lawyer “may not engage in subterfuge designed to shield [her] identity from the person” whose profile she is seeking to access, an exception exists.¹⁷⁸ Oregon Rule 8.4(b) (which has no analog in the ABA Model Rules) creates one 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.”¹⁷⁹ 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.¹⁸⁰ 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.”¹⁸¹

In April 2014, the American Bar Association weighed in with Formal Opinion 14-466, “Lawyer Reviewing Jurors’ Internet Presence.”¹⁸² 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.¹⁸³ Noting the strong public interest in identifying jurors who might be tainted by improper bias or prejudice (a 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.¹⁸⁴ Formal Opinion 14-466 identifies three levels of attorney review of a 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

¹⁷². *Id.*

¹⁷³. *Id.*

¹⁷⁴. *Id.*

¹⁷⁵. Or. State Bar, Formal Op. 2013-189 (2013).

¹⁷⁶. *Id.*

¹⁷⁷. *Id.*

¹⁷⁸. *Id.* at 581.

¹⁷⁹. OR. MODEL RULES OF PROF’L CONDUCT r. 8.4(b) (2015).

¹⁸⁰. Or. State Bar, Formal Op. 2013-189, 582 (2013).

¹⁸¹. *Id.* at 578 n.2.

¹⁸². ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-466 (2014).

¹⁸³. *Id.*

¹⁸⁴. *Id.*

- (3) passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer[.]¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ Continuing with the previous analogy, Opinion 14-466 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."¹⁸⁹

With regard to level (3), Opinion 14-466 departs from the New York ethics opinions and holds that such auto-notifications do not amount to communication to the juror.¹⁹⁰ 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)."¹⁹¹ 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.¹⁹² 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."¹⁹³

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."¹⁹⁴ 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. . . ."¹⁹⁵ 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."¹⁹⁶

One other area of Opinion 14-466 marked a departure from earlier state ethics opinions—the thorny issue of a lawyer's obligation to notify the court of information gleaned through his social media research that indicates juror misconduct. When the ABA Ethics 2000 Commission reviewed the Model Rules that year and proposed changes, one was not carried out. For Model Rule 3.3, the ABA House of Delegates adopted the Commission's recommendation for a new subsection (b), in which a lawyer's obligation to act upon discovering "improper conduct" arises only when the juror or prospective juror engages in conduct that is "fraudulent or criminal."¹⁹⁷ While the Commission intended that this subsection also include lesser wrongdoing—"improper conduct"—and thus impose a broader duty, this part was unfortunately "never carried out."¹⁹⁸ Because the ABA Committee only permitted itself to be guided by the actual language of Rule 3.3(b), rather than the intent reflected in its legislative history, Opinion 14-466 is not as broad. Rule 3.3(b) does not prescribe what a lawyer *must* do in the event he discovers juror conduct that violates a court order, but that does not rise to the level of criminal or fraudulent activity (such as a juror doing online research about the case or discussing it on Twitter). Opinion 14-466 nonetheless tries to provide guidance. It states that "applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b)."¹⁹⁹ As the Opinion points out, "[t]he materiality of juror internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently."²⁰⁰ In other words, it is not the lawyer's call to decide whether the juror misconduct

¹⁸⁵. *Id.*

¹⁸⁶. *Id.*

¹⁸⁷. *Id.*

¹⁸⁸. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

¹⁸⁹. *Id.* at 5.

¹⁹⁰. *Id.*

¹⁹¹. *Id.* at 1.

¹⁹². *Id.*

¹⁹³. *Id.* at 5.

¹⁹⁴. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466, 5 (2014).

¹⁹⁵. *Id.* at 6 (quoting MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (2002)).

¹⁹⁶. *Id.*

¹⁹⁷. *Id.* at 7.

¹⁹⁸. *Id.* at 8.

¹⁹⁹. *Id.*

²⁰⁰. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 14-466, 9 (2014).

he discovers rises to the level of “criminal or fraudulent”; the lawyer’s remedial duty, according to Opinion 14-466, is triggered by knowledge of the conduct itself, and “is not preempted by a lawyer’s belief that the court will not choose to address the conduct as a crime or fraud.”²⁰¹

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.²⁰² 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 2014-300.²⁰³ 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.²⁰⁴ 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.”²⁰⁵ Additionally, “a lawyer may be required to notify the court of any evidence of juror misconduct the lawyer discovers on a social networking website.”²⁰⁶

In 2015, the West Virginia Lawyer Disciplinary Board came out with Legal Ethics Opinions 2015-02, entitled “Social Media and Attorneys.” It was a sweeping opinion covering a host of attorney uses of and behavior on social networking websites, including such issues as “friending” judges and contacting witnesses on platforms like Facebook and LinkedIn. Subsection (9) of that ethic opinion stated that attorneys “may review the public sections of a juror’s social networking websites,” although it prohibited lawyers attempting to access the private portions of a juror’s social media page. Doing so, it observed, would violate Rule 3.5 of West Virginia’s Rules of Professional Conduct and its prohibition against communicating with or attempting to influence a member of a jury. The opinion also noted that it could be improper for attorneys to use the assistance of a third party (such as an investigator or jury consultant) in order to gain access to the private sections of a juror’s social media page.

Later in 2015, the Colorado Bar Association Ethics Commission added its voice to the chorus of bar ethics opinions that echoed the ABA’s position on researching jurors on social media.²⁰⁷ Like its counterparts, the Colorado ethics body opined that it was ethically permissible for lawyers to conduct a passive review of a juror’s publicly viewable social media profile. And consistent with the ABA perspective, it disagreed with early New York opinions that felt a passive review that resulted in an auto-alert to users that their profile had been viewed constituted a “communication.” Passive review of a social media profile, the Colorado opinion observed, was not “communicating” just because “a technical feature” of the site alerts users to hits on their profiles.²⁰⁸

Colorado’s Ethics Opinion 127 would go on to discuss other issues, like review of a judge’s profile, use of deception to gain access to the private portions of a witness’ profile, and contact with a represented party. However, the Colorado opinion’s analysis of lawyers reviewing jurors’ social media profiles also raised an interesting ethical concern for lawyers: can you do too much passive review, to the point where it has negative repercussions? The Colorado committee noted that “a lawyer might take improper advantage of the fact that a particular individual will receive automatic notification that the lawyer or someone on the lawyer’s behalf viewed the individual’s social media profile.”²⁰⁹ In such a scenario, the committee said, the lawyer might risk violating another ethical rule- Colorado’s Rule of Professional Conduct 4.4 (a), which bans a lawyer from using means “that have no substantial purpose other than to embarrass, delay or burden a third person.” Repetitive view of an individual’s social media profile, with the lawyer knowing that the other person would receive notice each time the lawyer viewed the profile, could rise “to the level of harassment or intimidation” the Committee said.²¹⁰ However, it’s hard to conceive of a situation in which a lawyer would be consciously engaging in such repetitive viewing of a profile hoping to have this harassing effect, and indeed the committee agreed it would have to be “an extreme situation.”²¹¹

²⁰¹. *Id.* at 9.

²⁰². 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.”).

²⁰³. Pa. Bar Ass’n Formal Op. 2014-300 (2014).

²⁰⁴. *Id.*

²⁰⁵. *Id.*

²⁰⁶. *Id.*

²⁰⁷. Colorado Bar Association Ethics Opinion 127 “Use of Social Media for Investigative Purposes” (September 2015).

²⁰⁸. *Id.*

²⁰⁹. *Id.*

²¹⁰. *Id.*

²¹¹. *Id.*

IV. 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. In some instances, the prospective juror may be a so-called “stealth juror,” someone with an agenda to serve who desires to be on a particular jury due to the issues or individuals involved or simply its high-profile nature. Such was the case with a juror dismissed from the murder trial of New England Patriots player Aaron Hernandez, after it was revealed that she had previously expressed interest in serving on that jury and had lied during voir dire about how many Patriots games she had attended.²¹² In other situations, the lying juror may be covering up past run-ins with the law, including ones which could impact that juror’s consideration of issues in the case. For example, in the recent New Jersey trial of Travis Hartsfield, Jr.—who was accused (and later convicted) of murdering his twenty month-old daughter—juror Wacoa Stanford was indicted for perjury for allegedly lying during jury selection about her criminal history and experience with New Jersey’s Division of Youth and Family Services (DYFS).²¹³ Stanford allegedly lied about a disorderly conduct conviction, and had not only been investigated by DYFS for child abuse but also discussed it with other jurors.²¹⁴

And given the pervasive nature of social networking communications in an era in which 78% of adult Americans have at least one social media profile, it is hardly surprising that some of the misconduct by jurors occurs via social media platforms, and that social media profiles continue to yield information important to lawyers’ jury selection considerations. In the Akron, Ohio murder trial of Shaun Ford, Jr. in October 2014, one juror was dismissed ten hours into deliberations over concerns about her Facebook “friends” list.²¹⁵ The juror, a paralegal, had a list of Facebook friends that included the county prosecutor and other high-level members of the prosecutor’s office. Interestingly, it was the prosecution that brought this to light, having researched her profile in detail during jury deliberations over concerns that she might be the lone holdout.²¹⁶ While the juror acknowledged being Facebook friends with many legal professionals due to the nature of her job, she stated that her online friendships had not impacted her judgment in the trial. Although the court denied a defense motion for a mistrial, it did dismiss her and seated an alternate in her place.²¹⁷

Jurors’ online misconduct has been a persistent problem in courtrooms nationwide.²¹⁸ 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. For example, Memphis, Tennessee juror Renita Scott was found in contempt of court in February 2015 and sentenced to ten days in jail after she communicated with defendant Markelvious Moore during his aggravated robbery trial.²¹⁹ Scott acknowledged that she and Moore were already Facebook friends before trial and that she had communicated with him during deliberations before joining her fellow jurors in returning a guilty verdict. In another recent case, an Iowa appellate court overturned the murder conviction of Tyler Webster because a juror had commented on or “liked” posts made by the mother of the victim, Buddy Frisbie.²²⁰ *State v. Webster* and its result underscores the importance of inquiring about prospective jurors’ connections, including social media contacts with parties and witnesses involved in a case and the need to conduct such social media investigation. After the defense rested, a court clerk and another court attendant approached the judge and expressed their surprise that the juror in question was in fact serving on the jury because of her connection to the Frisbies.²²¹ During a hearing on the defense’s motion for a new trial, the juror acknowledged being Facebook friends with both Frisbie’s mother and sibling, and having commented on Facebook

²¹² Lindsey Adler, *Aaron Hernandez Juror Released for Lying About How Many Patriots Games She’s Attended*, BUZZFEED (Feb. 3, 2015), <http://www.buzzfeed.com/lindseyadler/aaron-hernandez-juror-released-for-lying-about-how-many-patr#.hoDRIGnAo> (last visited Mar. 2, 2015).

²¹³ Bill Wichert, *Former Juror Indicted for Lying During Trial of Man Convicted of Murdering Baby Daughter, Prosecutor Says*, N.J.COM (Feb. 26, 2015), http://www.nj.com/essex/index.ssf/2015/02/former_juror_indicted_on_perjury_charges_related_t.html (last visited Mar. 2, 2015).

²¹⁴ *Id.*

²¹⁵ Dave Nethers *Juror in Murder Trial Sent Home Because of Facebook Friends List*, FOX8.COM (Oct. 21, 2014), <http://fox8.com/2014/10/21/juror-in-murder-trial-sent-home-because-of-facebook-friends-list/> (last visited Mar. 8, 2015).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See, e.g., JOHN G. BROWNING, *THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LEGAL SYSTEM* (2010); THADDEUS H. HOFFMEISTER, *SOCIAL MEDIA IN THE COURTROOM: A NEW ERA FOR CRIMINAL JUSTICE?* 49–54 (2014).

²¹⁹ *Juror in Memphis Communicated with Defendant on Facebook*, ASSOCIATED PRESS (Feb. 6, 2015), <http://www.knoxnews.com/news/state/juror-in-memphis-communicated-with-defendant-on-facebook> (last visited Mar. 8, 2015).

²²⁰ *State v. Webster*, Iowa Ct. of Appeals (Nov. 13, 2014).

²²¹ *Id.*

about the case as well as having “liked” Facebook posts by Frisbie’s mother about the trial.²²² Interestingly, when asked why she had not disclosed her connection with the family, the juror pointed out that the defense had simply not asked and that “I was going to say something then [during jury selection], but I thought we had to wait to be asked specific questions.”²²³ Although the trial judge found that the juror’s Facebook activity was “unnecessary, inappropriate, and inconsistent with the court’s admonitions,” it denied the motion for a new trial. The Iowa Court of Appeals reversed and remanded for a new trial.²²⁴ While the appellate court was not persuaded that the juror’s Facebook activities constituted misconduct warranting a new trial, it did believe that it was sufficient evidence of juror bias. The court held that

Due to her relationship with the victim’s family, evidenced by her own statements of her relationship with the family, her communication with the victim’s mother before, during, and after trial, particularly in light of her daughter’s close relationship with the victim’s family and Juror’s “wish” the victim’s mother had gotten a first-degree murder conviction, we must conclude Juror could not be impartial.²²⁵

Yet in other recent cases, the social media activity by jurors has not been found to be grounds to overturn a conviction. In *United States v. Liu, et al.*, a federal district court upheld the conviction of three defendants (two of whom were lawyers) for immigration fraud, even though two different jurors tweeted about the trial.²²⁶ One of the jurors, identified as “Juror 10,” acknowledged tweeting daily during trial, including the tweet “Add in just one song & dance number, and this federal case would rival anything I’ve seen on #broadway, #jurydutyrocks.”²²⁷ She was dismissed, with the court’s observation that “her tweeting had been improper.”²²⁸ Another juror (Juror 2) who had admitted being an aspiring crime fiction writer during voir dire also acknowledged her tweeting throughout the trial. Her tweets centered around either frustration with the commitment of serving on a long jury trial, or gaining potential ideas for future writing projects. The court rejected the defense’s argument that Juror 2 had failed to answer questions honestly about her social media activity, noting that she “was never asked specifically whether she had discussed the case with anyone on Twitter or other social media.”²²⁹ As to the defense’s argument that this juror had ignored the court’s instructions, the court noted that

When the embrace of social media is ubiquitous, it cannot be surprising that examples of jurors using platforms like Facebook and Twitter “are legion” Juror 2 was an attentive juror who, while engaging in banter with fellow Twitter users about her experience, was nonetheless careful never to discuss the substance of the case, as instructed by the Court.²³⁰

And in a true case of irony, former Cameron County, Texas district attorney Armando Villalobos—who himself had been an early proponent of “Facebooking the jury,” even issuing iPads to his prosecutors for the very purpose of juror social media research—challenged his own criminal racketeering and extortion conviction on grounds of juror online misconduct.²³¹ The Fifth Circuit affirmed his conviction, finding that the pre-trial and trial Facebook posts by the juror in question failed to show that the juror lied during voir dire, betrayed a bias toward law enforcement, or engaged in juror misconduct.²³²

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,²³³ 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,²³⁴ and the

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *U.S. v. Liu, et al.*, No. 1:12:CV-00934-RA (E.D.N.Y. Nov. 14, 2014).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* (quoting *U.S. v. Fumo*, 655 F.3d 288, 332 (3d Cir. 2011)).

²³¹ *U.S. v. Villalobos*, Case No. 14-40147 (5th Cir., Feb. 11, 2015).

²³² *Id.*

²³³ Marc Davis & Kevin Davis, *Jury Consultants Are Changing With the Times 20 Years After the OJ Verdict*, ABA J. (Jan. 2015).

²³⁴ Richard Raysman & Peter Brown, *Social Media Use as Evidence of Juror Misconduct*, N.Y.L.J. (Apr 11, 2013).

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.²³⁵

Researching jurors online is an already widespread practice, to the point where lawyers and jury consultants frequently add it to the discussion of digital competence. A lawyer who doesn't perform online juror research while his or her opposing counsel does is conducting voir dire with less insight and less information – akin to bringing a knife to the proverbial gunfight or worse, showing up unarmed. And while lawyers and judges who are uncomfortable with this practice, calling it “creepy” or “voyeuristic,” often cite juror privacy and juror uneasiness as reasons for not “Facebooking the jury,” today's juror may be less guarded than we think. A 2016 study by trial consulting firm Vinson & Company surveyed jurors about this practice, and it revealed that 82 percent of respondents expected the lawyers to conduct internet researches and background checks on prospective jurors.²³⁶ Only 18% were surprised to hear that it is done, and only 21 percent said they would consider it an invasion of privacy.²³⁷ The jurors responding to this survey also demonstrated a fairly sophisticated take on the advisability of performing online juror research when the stakes were high; for example, 76 percent of them felt that given the amounts and issues in controversy, corporate defense attorneys representing big companies would “always” conduct social media investigations of potential jurors. 63 percent indicated they not only considered the lawyers to be just “doing their job,” but they also respected them for doing the job discreetly.²³⁸

So what are some of the key takeaways for lawyers who wish to research prospective jurors online while remaining within the ethical boundaries? First, be aware of the ethics guidance already handed down by the ABA and state and local ethics bodies, and particularly any authority applicable to your jurisdiction. Second, raise the issue with your trial judge if it hasn't already been addressed in a pretrial order or local rule. Getting a sense for the court's comfort level with this practice can prove vital. Third, make sure you are comfortable with the features and functionality of the technology you'll be using, or make sure to obtain the assistance of someone who is (like a jury consultant or tech-savvy colleague). Social media offerings and a site's settings can change, and you want to avoid anything that could be construed as an impermissible communication, no matter how inadvertent. Fourth, remember that such online research is just one tool in a trial lawyer's toolbox, and isn't intended as a complete substitute for your own insight from conducting voir dire. People may share a version of themselves online, and that version may not be consistent with the picture painted by your carefully constructed voir dire and the responses it elicited. Keep in mind that – spoiler alert! – not everything found on the internet is true. Use any social media juror research as a supplement to, and not a substitute for, your own professional judgment. And, finally, remember that the discussion of your ethical obligations merely begins with the practice of researching prospective jurors online; it does not end with them. If your research uncovers improper conduct by a juror, your ethical duty to notify the court of such misconduct is triggered.

²³⁵ Robert D. Gibson & Jesse D. Capell, *Social Media and Jury Trials: Where Do We Stand?*, N.Y.L.J. (Dec. 1, 2014).

²³⁶ Vinson & Company, “*Using Social Media and Other Background Research in Voir Dire: Why Jurors Don't Care, But You Should*,” (Spring 2016), www.vinsoncompany.com

²³⁷ *Id.*

²³⁸ *Id.*