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As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn

by John G. Browning

Don't miss our trial consultant responses at the end of this article: Kacy Miller, Ellen Finlay, and Rosalind Greene, and a response to the consultants from the author.

I. Introduction

"So, Mr. Salinger, based on your previous responses to my questions, if you were selected to serve on this jury, you would be able to be impartial and reserve judgment on the claims against my client, Mammoth Corp., until you've heard all the evidence?" Yet even as the question is leaving the lawyer's mouth, and even as he takes in the panel member's ostensibly reassuring response, the attorney has noted the trial consultant's frenetic typing on a laptop and the hastily scrawled message being slid across the counsel's table. "Check this out," it reads, and as the consultant turns the laptop screen toward him, the lawyer observes Mr. Salinger's Facebook page in all of its glory, replete with anti-corporate rants and indications of causes that Salinger "likes." At least two of them castigate Mammoth Corp. for its overseas labor policies and its dismal environmental record. "Your Honor, may we approach?" the attorney begins with a glint in his eye.

Welcome to jury selection in the digital age, where voir dire is rapidly becoming "voir Google." With over 1 billion users on Facebook worldwide, over 400 million tweets processed daily by Twitter, and 72 hours of video being uploaded to YouTube each minute, the revolution in communication that social networking represents has provided attorneys and trial consultants with a vast digital treasure trove of information about prospective jurors. According to the 2012 Pew Internet Study, 65% of adult Americans maintain at least one social networking profile. With all of this information just a few mouseclicks away, it comes as no surprise that not only are lawyers making ever-increasing use of it in the discovery and trial phases of all kinds of cases, but also that evolving expectations of attorney competence now demand that lawyers explore social media and other online resources as a matter of course. The ABA Model Rules of Professional Conduct have been changed to reflect that competent representation now requires not only that a lawyer keep abreast of changes in the law and its practice, but also "the benefits and risks associated with technology" as well. In addition, there has been a trend among courts across the country to mandate some degree of tech proficiency by attorneys, where an attorney who doesn't avail herself of electronic resources like Google, Facebook, and Twitter is simply not living up to her duty of providing competent representation. Use of such online platforms during jury selection is no different. The real question becomes not

whether or not to Google or Facebook the jury, but how to do so within ethical boundaries.

II. An Affirmative Duty to Research the Jury

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.[i] 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.[ii] While several members of the panel were forthcoming, one prospective juror (Mims) was not. 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. 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.[iii]

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

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

In *Khoury v. ConAgra Foods*, the Plaintiffs were suing ConAgra for personal injury damages, claiming that Elaine Khoury suffered from a lung disease (e.g., bronchiolitis obliterans), allegedly caused by exposure to chemical vapors during her preparation and consumption of ConAgra's microwave popcorn.[v] After a voir dire in which the members of the venire panel were questioned about their prior litigation history, both sides conducted searches of Missouri's automated case record service. The parties exercised both their peremptory strikes as well as their strikes for cause, and a jury was empanelled. 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 an intentional failure to disclose information. Piedimonte, they said, was "a prolific poster for anti-corporation, organic foods."[vi] ConAgra moved for a mistrial or, alternatively, to strike Piedimonte from the jury. The court denied the motion for mistrial, but did strike Piedimonte from the jury and proceeded with 12 jurors and 3 (instead of 4) alternate jurors.[vii] 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 wasn't timely. The appellate court rejected this argument, observing that the *Johnson* standard and the subsequent Supreme Court Rule 69.025 were limited to Case.net searches of a potential juror's litigation history, not a broader search for any alleged material nondisclosure. As the court pointed out,

The rule could have similarly required "reasonable investigation" into other area 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.[viii]

Although the appellate court limited itself to the plain text of the rule itself, it did acknowledge the potential in the digital age for a re-visiting of Rule 69.025, stating that "the day may come that technological advances may compel our Supreme Court to re-think the scope of required 'reasonable investigation' into the background of jurors that may impact challenges to the veracity of responses given in voir dire *before* the jury is empanelled."[ix]

III. The Perspective of Other Courts and Ethics Committees

For years, lawyers and trial consultants have made increasing use of social media platforms to vet jurors. And, in an age in which many a trial has been derailed or verdicts overturned by the online misconduct of jurors, more and more lawyers are monitoring jurors online.[x] At least one court has explicitly upheld the practice of using the Internet to investigate potential jurors during voir dire. In *Carino v. Muenzen*, a New Jersey appellate court granted a new trial for a medical malpractice plaintiff whose lawyer had been prevented by the trial judge from conducting online research on the venire panel.[xi] But what about the ethical issues involved in monitoring the social networking activities of jurors and prospective jurors? To date, only three ethics opinions have addressed this question. In New York County Lawyers' Association Committee on Professional Ethics Formal Opinion 743 (May 18, 2011), the Committee held that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page" is permissible so

long as lawyers have no direct or indirect contact with jurors during trial.[xii] Significantly, the NYCLA cautioned lawyers to "not act in any way by which the juror becomes aware of the monitoring."[xiii] The Committee, perhaps cognizant of the fact that sites like Twitter and LinkedIn allow users to view who has recently accessed their profile, reminded attorneys that access of which a juror becomes aware may very well constitute "an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[xiv] In addition, the Committee took note of the prevalence of online misconduct by jurors. It concluded that if, during monitoring of jurors' social networking sites, a lawyer learns of juror misconduct, "the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must . . . bring such misconduct to the attention of the court, before engaging in any further significant activity in the case."[xv]

The second opinion, from the New York City Bar Association's Professional Ethics Committee, agreed with the 2011 opinion from the New York County Lawyers Association, but also addressed the broader issue of what exactly constitutes an impermissible ex parte communication with a juror.[xvi] "Communication," the committee ruled, should be understood in its broadest sense. This would include not only sending a specific message, but also any notification to the person being researched that he or she has been the subject of a lawyers' search. The paramount issue, in the eyes of the committee, is that the juror or potential juror not learn of the attorneys' actions. As the opinion states, "The central question an attorney must answer before engaging in jury research using a particular site or service is whether her actions will cause the juror to learn of the research."[xvii] As the committee went on to state,

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 (the Committee) further conclude that the same attempts to research the juror might constitute a prohibited communication even if inadvertent or unintended.[xviii]

In other words, ignorance or lack of familiarity 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 new requirement of being technologically-conversant as part of providing competent representation, to hold attorneys to a high standard insofar as technology is concerned.

The third, and most recent, ethics opinion comes from Oregon. The key holding in Oregon Ethics Opinion No. 2013-189 (February 2013) was that lawyers may always access the publicly available social networking information about parties or jurors and that neither a lawyer nor her agent may send a request to a juror to access non-public personal information on a social networking site. The Oregon ethics committee went beyond its New York counterparts, however, 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. It holds that while a lawyer "may not engage in subterfuge designed to shield [her] identity from the person" whose profile she's seeking to access, Oregon Rule 8.4(b) (which has no counterpart 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 ethical provisions." Under such "limited instances," the Committee concluded, a lawyer "may advise or supervise another's deception to access a person's non-public information on social networking websites" as part of an investigation into unlawful activity. Could this language be used to justify having a trial consultant pose as someone 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 (referring only to "persons"), the better 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."

Of course, there are ways to avoid making jurors aware that they are being followed on Twitter. Companies like X1 Social Discovery, for example, offer a specialized public follow feature that enables access to all the past tweets of a specific user (up to 3,200 past tweets) and any new tweets in real-time without generating a formal follow request that results in a notification to the juror you're following. As far as concerns for jurors' privacy go, it's good to keep in mind that virtually all social networking sites remind their users of the public nature of what they're sharing. As Twitter's Terms of Service state, "What you say on Twitter may be viewed all around the world instantly. You are what you Tweet!"

Another product, Jury Scout, monitors a prospective juror's public social media profile in order to help decide whether that individual is likely to agree or disagree with the client's case. Jury Scout searches approximately 50 different social media sites (including not just Facebook and Twitter, but also Yelp, Pandora, and others), scouring them for information that may prove helpful in jury selection—at $295 a search. Does the prospective juror "like" a particular TV show, band, or cause that makes him or her more likely to embrace your arguments or empathize with your client? That information can now be conveyed to the trial team in real time.

Not everyone has embraced, even cautiously, the concept of attorneys' online investigation and/or monitoring of jurors' social media activities. One federal court concluded that there is "no recognized right to monitor jurors' use of social media," and in fact opined that such efforts by lawyers could intrude

on the "safety, privacy, and protection against harassment" to which jurors are entitled and "potentially chill the willingness of jurors to participate in the democratic system of justice."[xix]

The earlier discussion of *Johnson v. McCullough* illustrated the trend of lawyers being held to a higher professional standard insofar as the use of technology in juror selection is concerned. A recent case from the Kentucky Supreme Court reveals the potential dangers lurking in this area for the unwary.[xx] In *Sluss v. Commonwealth of Kentucky*, appellant Ross Brandon Sluss had been convicted of (among other charges) murder and driving under the influence of intoxicants after crashing his pickup truck into a SUV with several passengers. One of the passengers, eleven-year old Destiny Brewer, died. The tragedy and ensuing criminal case garnered tremendous publicity, including extensive discussion online on sites like Facebook and Topix. The trial court, sensitive to the amount of attention the case had received, engaged in extensive voir dire procedures.

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

While the court analyzed the nature of Facebook "friend" status and ultimately held that this fact alone would be insufficient grounds for a new trial, 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."[xxi] In what it acknowledged was "the first time that the Court had 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.[xxii]

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. 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."[xxiii] 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. 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.[xxiv] 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."[xxv]

IV. Conclusion

In an age in which a few clicks of a mouse can reveal an abundance of information about prospective jurors (sometimes too much information) and in which people are revealing more than ever about themselves online, doing social media research during voir dire makes more sense than ever. Not only can you avoid having a juror with a hidden agenda sitting on your panel, but you might actually prevent a mistrial or overturned verdict on appeal. Exploring the online selves of prospective jurors has become routine in high profile cases like the Barry Bonds perjury trial, the first corruption trial of former Illinois governor Rod Blagojevich, and the murder trial of Casey Anthony in Florida (where prosecutors armed with Internet information on prospective jurors used challenges to dismiss an individual who allegedly posted the jury instructions on his Facebook page and also joked about writing a book, as well as one man who tweeted "Cops in Florida are idiots and completely useless."). But "Facebooking the jury" isn't just for high profile cases. Cameron County (Texas) District Attorney Armando Villalobos issued iPads to his prosecutors so that they can check out the Facebook profiles of potential jurors. And you never know what you may find. As jury consultant Jason Bloom of Dallas' Bloom Strategic Consulting explains, "Jurors are like icebergs—only 10 percent of them is what you see in court. But you go online and sometimes you can see the rest of the juror iceberg that's below the water line." In criminal cases, for example, lawyers and jury consultants have used online research to reveal that a juror who had professed to having no opinion on capital punishment had actually written an op-ed piece for his local paper on the death penalty.

Lawyers are increasingly being held to a higher standard of technological proficiency and, as the use of social media platforms becomes more widespread, clients—and not just courts and ethics committees—expect lawyers to avail themselves of every technological weapon in their arsenal. Doing so in an ethical manner is imperative.

Illustration by Sully Ridout of Barnes & Roberts

John G. Browning is a partner in the Dallas office of Lewis Brisbois Bisgaard & Smith, where he handles a wide variety of civil litigation in state and federal courts. He is the author of "The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law," as well as two forthcoming books on social media and the law. His works in the area of social media have been cited by judges, by dozens of law reviews throughout the country, and he has been quoted as an authority on social media and the law by such publications as TIME magazine, The New York Times, Law 360, and the National Law Journal. He serves as an adjunct law professor at SMU Dedman School of Law and Texas Wesleyan University School of Law.

References

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

ii Id.

iii Id.

iv Id.

v Khoury v. ConAgra Foods, Inc., 368 S.W. 3d 204, 2012 Mo. App. LEXIS 286 (Mar. 6, 2012).

vi Id.

vii Id.

viii Id.

ix Id.

x Amy J. St. Eve & Michael A. Zuckerman, Ensuring an Impartial Jury in the Age of Social Media, 11 Duke L. & Tech. Rev. 1, 35 (2012).

xi Carino v. Muenzen, 2010 WL 3448071 (N.J. Super. Ct. App. Div., Aug. 20, 2010).

xii New York County Lawyers' Association Committee on Professional Ethics, Forma Opinion 743 (May 18, 2011).

xiii Id.

xiv Id.

xv New York City Bar Association Committee on Professional Ethics, Formal Opinion 2012-2 (June 5, 2012).

xvi Id.

xvii Id.

xviii Id.

xix United States v. Kilpatrick, 2012 WL 3133939, at *19 (E.D. Mich. Aug. 1, 2012) (rejecting arguments made in response to arguments against the empaneling 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).

xx Sluss v. Commonwealth of Kentucky, 2010 Ky. LEXIS 144 (S. Ct. Ky. Sept. 20, 2012).

xxi Id.

xxii Id.

xxiii Id.

xxiv Id.

xxv Id.

We asked three trial consultants to respond to this paper. Kacy Miller, Ellen Finlay, and Rosalind Green respond below:

Kacy Miller responds:

Kacy Miller, M.Ed is the president of CourtroomLogic Consulting, a full-service trial sciences firm located in Dallas, Texas. Areas of expertise include pretrial research, theme development, witness preparation, graphic development and all aspects related to jury selection.

Admit it. Every attorney, jury consultant and client wants to know as much as possible about prospective jurors before seating a panel, and thanks to Google, peeking into a juror's private life has become as easy as pie.

Facebook, Twitter, web-based news, YouTube, blogs, personal websites, professional networking sites and who knows what else have– to the chagrin of many– enabled millions to gather around an electronic water cooler. With the click of a mouse, we can learn an awful lot about a prospective juror without them ever having to utter a spoken word.

Today's jurors are connected, and by connected, we mean CONNECTED! Make no mistake: connected jurors encompass all age ranges, all demographics and all backgrounds. Gone are the days when only the more affluent jurors had access to the Internet. And the days when an actual computer and DSL line were requirements for connectivity are things of the past. Connectivity is now a 24/7 possibility. Anyone. Anywhere. Anytime.

John Browning offers some fascinating statistics on the usage of social media. Here are a few more that might give you

pause:

- More than 750 million mobile phone users access Facebook every month;
- Twitter's fastest growing age demographic is 55-64-year olds;
- YouTube reaches more 18- to 34-year old U.S. adults than any cable network; and
- 27% of total U.S. Internet time is spent on social media sites. Is it any wonder that the Internet, social media and 24/7 connectivity have become such relevant and prevalent issues in the courtroom?

I've blogged a number of times about the "Voir Google" trend (*see* When Jurors Research, Voir Google, How Voir Google Is Playing Out in the Courtroom) and wholeheartedly agree with Mr. Browning's opinion that there is a new and exciting arsenal of technological tools available to litigators. But, like any weapon in our advocacy arsenal, we are ethically and morally bound to use them with the utmost care and respect.

It's important for lawyers and jury consultants alike to stay informed and current on this ever-changing and important issue. As a jury consultant, I have a professional obligation to keep abreast of case law, jurisdictional rulings, ethical guidelines and of course, professional standards within the jury consulting community.

> "Could this language be used to justify having a trial consultant pose as someone or otherwise be deceptive in order to gain access to a juror's privacy-restricted profile if there is a 'suspicion of juror misconduct?'" Regardless of how a court construes the language of the referenced ethics opinion, The American Society of Trial Consultants (ASTC) has addressed this very issue in its Professional Code of Conduct.
>
> "…Trial Consultants shall not use deception or falsely represent themselves to gain access to information that would not otherwise be available to them." Circling back to Mr. Browning's question about whether jury consultants could (or should) use deception to reveal potential misconduct? Although we are allowed to use social media sites to research prospective jurors, intentional deception is a big no-no. Period. End of story.

Here are a few practical tips for lawyers and their jury consultants as they navigate the uncertainties of Googling jurors.

1. **Do Your Homework Before You Google.** As evidenced by Mr. Browning and the case law he shared, there is no "magic" or "rigid" rule related to Voir Google as it relates to attorney conduct (and by proxy, jury consultant conduct). Jurisdictions around the country have ruled differently on the issue, and will likely continue to do so. What to do? Know your jurisdiction. Research the venue. Determine any preferences the trial court has for Googling jurors and/or conducting online research.

1. **Just Because Information Is Available Online Does Not Mean It's Ethical to Obtain.** Bear in mind that Googling a potential juror's litigation history or public criminal record may be considered quite different than Googling a juror's Facebook postings, Twitter "tweets" or reading her online blog. As Mr. Browning noted, the Missouri courts seemed to draw a clear distinction between the *type* of information that is searched and discovered. Be sure there are no local rules, standing orders or ethical opinions in your trial venue that allows one type of search but disallows another.

1. **Do Not "Friend", "Follow" or "Connect" with a Prospective Juror.** To me, this seems like a no-brainer, but it's worth reiterating. Although broad, ethical opinions throughout the country are pretty clear: if you're going to research a juror, keep your distance. If the information you seek would not otherwise be available to you but for a direct or indirect communication, steer clear. This means no "friending", "following" or "connecting" with prospective jurors (or friends of prospective jurors) with the intent of gaining access to information that is typically hidden or private.

1. **Be Familiar with Built-In "Stalker Features."** "Stalker feature" is my terminology for any sort of free, built-in or paid feature available to users (i.e., jurors) that enables them to see who has viewed their profile, who is following their feed, or who has signed up for their blog. LinkedIn has this feature. Most blog and/or newsletters have this feature. Facebook and Twitter have this feature (if you "Follow" or "Like"). In fact, if jurors have personal websites and have enabled Google Analytics, they even have the ability to see which servers have accessed their websites (which should be a big red flag to attorneys who conduct research from within the four walls of the law firm and use the law firm's server).

1. **Alert the Court If You Discover Something Untoward.** *If you're unfamiliar with the* Daugerdas_ tax fraud case, you may want to add that to your something-to-do-when-I-have-free-time list. For a Cliff's Note version, read our blog post. In a nutshell? Attorneys researched the jury panel and learned a little nugget that was helpful to their client, but potentially detrimental to the other side. Rather than sharing what they learned with the Court, they kept it secret. Eventually, opposing counsel discovered the nugget (after the verdict) and… well, you guessed it. Appeals were filed, and a new trial was granted. Lesson learned? If you discover something about a juror during your online research that could be construed as a threat to the integrity of the judicial process, the right to a fair and impartial jury, or the sanctity of the juror's oath, silence

is not an option.

Finally, if you're questioning on any level whether a certain search is ethical or not, it's probably best to err on the side of "not." Why risk it?

Simply ask what you're hoping to discover during good old-fashioned oral *voir dire*.

Ellen Finlay responds:

Before forming Jury Focus in 1998, Ellen Finlay, J.D., a 1986 graduate of the University of Texas School of Law, practiced law in Houston and was a shareholder in Thompson & Knight. Jury Focus provides trial consulting services throughout the U.S.

Picture this: You are sitting in a courtroom with a client when the court clerk hands you the venire list. The jurors are congregating in the hall and the clerk estimates that they will be brought into the courtroom in 15 minutes or less to begin voir dire. The venire list has 50 plus names. The list does not include the prospective jurors' addresses, dates of birth, levels of education, race or even names of employers. Instead, the list includes each prospective juror's name, the date he or she was issued a summons to appear for jury duty and a general reference to their job title (e.g., manager, administrative assistant, et cetera). When queried, the court clerk confirms that the judge does not believe it is appropriate to provide personal information about the prospective jurors. The clerk also informs the parties that the judge will limit each side to approximately 45 minutes of voir dire questioning.

The year is 2013. Welcome to just one day in the real world of jury selection.

I read Mr. Browning's survey of the current state of the law and development of professional guidelines related to the use of internet research and social media during and following jury selection and was struck yet again by the disconnect between the cases that make law in this area and the vast majority of cases that actually get tried to a jury. For twelve years in the 1980s and 1990s, I tried lawsuits. In a few of those cases, my clients allowed me to bring either an associate or a paralegal to trial. Sometimes I was not permitted to bring anyone to assist me. Needless to say, I did not bother asking for permission to hire a jury consultant to assist with jury selection. I was lucky if another attorney from my office would come help me "eyeball" the jurors since that attorney would not be able to bill for his or her time.

Fast forward 15 years. Some things are very different. Social media did not exist when I quit trying cases. We were just beginning to use trial software. Now almost all trial attorneys use trial software. Some can even assemble and operate a projector!

Nevertheless, despite the impression created by high profile cases that involve teams of lawyers and jury consultants, most cases are still tried the old-fashioned way: one attorney and one assistant. Sometimes a junior attorney is allowed to assist at trial as well, although a number of clients still require the attorneys to choose between the junior attorney and a paralegal. By now, most trial attorneys are familiar with the concept of social media and internet research, even if they do not choose to utilize Facebook or Linkedin themselves. But the last thing most trial attorneys think about when getting ready to start trial is whether or how to investigate potential jurors through social media web sites.

What non-trial lawyers forget is that trial attorneys are typically still doing battle over exhibits and pretrial motions right up to the time the prospective jurors walk into the courtroom for voir dire. It is not uncommon for trial attorneys to start trial without any directs or crosses prepared, although typically there are notes and maybe even an outline in their trial notebook. And trial attorneys often wait until the day before trial to begin the process of identifying topics to discuss during voir dire.

In their defense, these attorneys are often neither lazy nor procrastinators. Instead, they are caught up in the fog of war that surrounds the beginning of most trials. They are working sixteen plus hour days. They are juggling the last minute barrage of pretrial motions, never-ending fights over exhibits and deposition offers and ongoing discovery as well as the need to actually prepare their case for presentation to a jury. And let's not forget that their other clients still expect them to return emails and phone calls about other pending cases. Witness prep gets crammed into meetings at 9 pm at night during trial. Preparation of demonstrative evidence happens while the attorneys are doodling during days of pretrial hearings prior to trial.

Let me be clear. Work is being done. Hours are being billed. It's just that most of the trial attorney's thinking and time is not devoted to strategizing about how to research prospective jurors. If you stop most trial attorneys preparing to start trial in an average case and ask them what they have done to prepare for investigating potential jurors using internet sites such as Facebook et cetera, do not be surprised if their response is either a blank stare or a look of utter confusion. And then panic.

For all the hype about whether the failure to use every research tool possible (including internet research) to delve into the minds and attitudes of the prospective / empaneled jurors may constitute malpractice, the reality is most trial attorneys do not have the resources or even the opportunity to conduct this type of research in any meaningful way. Once voir dire commences, they are lucky if they have an assistant to spare who can try to do some quick internet searches in a back room of the court house while voir dire is in full swing in the court room.

> "*There are 5 James Rogers. W/o an address or DOB, I can't tell which. 1. How old does he look? 1 has a recent bankruptcy and 1 is on LinkedIn. ???"* It is even worse for the plaintiff's attorney whose forty-five minutes of questioning is concluded before he or she has an

opportunity to see the cryptic texts or emails from his or her assistant/ consultant. Depending upon the court, the plaintiff attorney's time to request additional questioning of any particular juror may have passed by the time the team doing the internet research gets to problem juror no. 32.

When I read articles or opinions about whether a trial team or jury consultant conducted sufficient internet research on prospective / empaneled jurors, I can't help but wonder whether those judges and authors have lost touch with the realities of the average case and a typical voir dire. I'm still friends with the attorneys who try 95% of their cases without the assistance of a trial consultant. And I am concerned that we may inadvertently throw those attorneys "under the bus" by not taking every opportunity possible to remind ourselves and the legal profession that no two voir dires are alike. Judges have different rules and styles. Clients have different rules, views and budgets. Attorneys have different demands on their time. Sometimes the best laid plans simply don't work. It just is what it is.

While I believe it is important to identify what constitutes intrusive or unethical research on prospective/ sitting jurors, I believe it is equally important to avoid trying to suggest or proffer standards or guidelines for what constitutes a reasonable voir dire and assistance with jury selection. It seems reasonable to discuss what is "too much" and when someone has gone "too far". It is much harder to assess what is too little and I believe we should avoid going down that path.

Rosalind Greene responds:

Rosalind Greene, J.D. (rrg@adjuryresearch.com) is a trial consultant with Advanced Jury Research, based in Tucson, Arizona. She works on both civil and criminal cases nationwide.

She has been working on the ASTC Standards Code and specifically on standards related to online research. Her comment focuses on the proposed language changes to the ASTC Standards Code rather than on specific practice issues surrounding use of online research.

According to George Bernard Shaw, *"[t]he single biggest problem in communication is the illusion that it has taken place*." Recent ethics opinions and court holdings suggest that even the illusion of communication with a juror through social media might be enough to raise ethical issues. From the perspective of a trial consultant, the ethical implications of "voir google" prompt two caveats:

1) understand that "communication" with jurors may be interpreted in the broadest sense and may include inadvertent contact; and

2) it is critical to engage in specific discussion with attorney/clients about any standards, guidelines, local rules, or case law in their particular jurisdiction regarding the use of social media for juror research or monitoring.

The Association of Trial Consultants' Professional Code provides standards and guidance in many areas common to trial consultants. The Professional Standards Committee has proposed updates to the section on Jury Selection, primarily in line with the 2012 New York City Bar Association Opinion. The Jury Selection Professional Standards already prohibit consultants from intentionally communicating or having contact with potential or seated jurors. Proposed language further instructs that *"[t]rial consultants shall not use deception or falsely represent themselves to gain access to information that would not otherwise be available to them."*

> *Unless otherwise restricted in the trial jurisdiction, trial consultants may* ***use social media sites for juror research as long as no communication*** *occurs between the consultant and the juror or prospective juror as a result* **of the research**. It further notes in the Commentary: "*Communication" should be interpreted broadly, including more than* sending a direct or specific message. For example, sending a "friend" **request or similar invitation to share information on a social network site** may constitute a prohibited communication.
>
> *Some social media sites may generate a notification to jurors when they* ***are being researched or monitored. The act or attempted act of viewing*** *pages, posts, or comments could also be deemed communication if the* **consultant was aware that his or her actions would cause the juror or** prospective juror to receive a message or notification alerting them to the *consultant's research.*
>
> *These same attempts to research or monitor the juror or prospective* ***juror might constitute prohibited communication even if inadvertent*** *or unintended. Therefore, trial consultants should consider the functionality,* **properties, privacy settings, and policies of a website or service before** conducting juror research. The ASTC Code applies to member-consultants practicing in all jurisdictions which is why our proposed language is softer than the New York City Opinion (sending a friend request or causing a notification *would* constitute prohibited communication in New York). So far, it looks like the New York City Opinion is well received, but these issues continue to evolve and other jurisdictions, or even the ABA may update their rules and standards differently. Our main purpose is to put consultants on alert that although the social media research of jurors is becoming very commonplace, they should carefully heed any limitations that may be controlling in their jurisdiction. While some jurisdictions, such as Missouri, now require some online research during voir dire, some judges still won't allow computers in their courtroom. Communication with local counsel, and perhaps

the court, about expectations and limitations can help avoid misunderstanding or confusion on these issues at trial.

In addition to keeping up with the emerging laws and opinions, consultants and their attorney/clients now also need to keep up with technology and how various social media sites function with respect to notifications and privacy settings. Perhaps the ASTC could create a sub-committee or task force to keep abreast of these ever changing technical aspects.

As with most ethical issues, any guidance or regulation is generally followed with a series of, "but, what ifs……?"

What if I Facebook "Friend" a friend of a juror?

What if I, or someone I know, already is a "Friend" or "LinkedIn" but don't actually know the prospective juror?

What if jurors change their settings or type of account after I have started monitoring?

What if the juror gets a generic notification that "someone" checked their site or is monitoring during voir dire or trial, but it doesn't identify me?

What if viewing a public page still generates some sort of notification?

The ASTC Professional Standards Committee will raise some of these and other related ethical dilemmas over the next several months as a catalyst for discussion among the ASTC membership. In the meantime, consultants beware of social media research which could leave a footprint or even the illusion of communication, and beware of any local or jurisdictional standards or guidelines regarding "voir google." Communication – knowing what it is as applied to jurors, and effectively engaging in it with attorney/clients – is key.

John Browning replies to the trial consultants:

I agree with the comments in the response by Kacy Miller. The connected juror is a modern fact of life, and lawyers and trial consultants alike must know where the ethical boundaries are. An excellent point is the reminder to keep a keep a sensible distance from the "online juror", while being sure to alert the court if improper activity by the juror is noted - regardless of whether it helps your client or the other side. This echoes the cautionary message of the NY Bar Ethics Committee. And I couldn't agree more with the comments by Rosalind Greene. Given the dangers of inadvertently "communicating" with a juror with the automatic notification features on sites like LinkedIn and Twitter, the questions raised by Rosalind and being considered by the ASTC Code are timely indeed. Jurisdictional peculiarities and notification features of particular sites must definitely be taken into consideration. Finally, as a trial lawyer for nearly 24 years who's made the transition from "trial by yellow pad to trial by iPad," I do identify with Ellen Finlay's comments and I know all too well about the limited time available for most voir dires. That being said, times are changing, as are client expectations, judicial attitudes, standards of attorney competence, and yes- even juror expectations of the privacy of their online selves. While not every trial may have the need or budget for a trial consultant, those that do mandate that we have a set of ethical guidelines in place. I feel the question of how trial consultants and lawyers' jury research practices will be governed is certainly a ripe one, and that guidance is critical for both professions.