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

By John G. Browning

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

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

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

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

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

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

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

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

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

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

[6] *Id.*

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

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

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

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;
2. active lawyer review where the lawyer requests access to the juror's [profile]; and

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

[8] *Id.*

[9] *Id.*

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

[11] *Id.*

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

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

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

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

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

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

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

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

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[18] *Id.*

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

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

[21] *Id.*

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