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Take This and Google That: The Ethics of Lawyers, Judges and Jurors Meeting in Cyberspace†

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I.
Introduction

"Social media" – which Miriam-Webster defines as "forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)"[1] – has transformed and will continue to transform the practice of law. Social media offers attorneys previously unimaginable outlets and resources for marketing, client development, collaboration, witness and juror research, and litigation and trial strategies. Like any powerful tool, however, social media must be used carefully and with a full appreciation of its concomitant risks and dangers. Social media is an ethical and legal minefield for unwary attorneys, clients, judges and jurors.

This Article reviews some of the issues currently confronting attorneys as they navigate these largely uncharted waters. We first consider the guidance currently offered by the Model Rules of Professional Conduct. While the Model Rules do not (and could not) anticipate all of the questions and challenges posed by the use of social media, we think that they remain the touchstone governing an attorney's conduct – in the real or virtual world.

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† Submitted by the authors on behalf of the FDCC Life, Health, and Disability section.

[1] Merriam-Webster, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/social%20media (last visited June 12, 2013).

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We next examine the most practical use of social media by trial attorneys – jury research. A juror's social media profile can offer invaluable information and insights into potential prejudices and bias, and a trial attorney would be remiss in not taking advantage of such resources – before, during, and after voir dire. Indeed, some decisions suggest an attorney is required to conduct juror research through social media. That said, trial attorneys should remain alert to ethical and privacy considerations, as well as any local rules or restrictions on such activities. Moreover, social media research is an addition to, and not a substitute for, a trial attorney's eyes, ears, and "gut" when assessing prospective and sitting jurors. Given the voluminous information available, trial attorneys must also be careful not to allow the chaff to obscure the wheat. Not everything a juror writes, tweets or posts online is significant to the matter at hand.

We conclude with a review of the issues presented by jurors' use and misuse of social media. Jurors who have access to social media and mobile devices are posting, "tweeting," and otherwise communicating their thoughts regarding proceedings, parties, attorneys, and judges before, during, and after trial. Jurors have also "friended" litigants and counsel. These types of communications and conduct are indisputably inappropriate, but what remedies and punishments should be imposed? We contend that a combination of clear and repeated directives from the court, prohibiting access to devices during proceedings, and meaningful

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sanctions, including criminal contempt, offer the best way to ensure a fair trial in the age of social media.

I.
Social Media and the Model Rules of Professional Conduct

More than a billion people actively use Facebook.[2] Four hundred million tweets are broadcast over Twitter daily.[3] Combine those numbers with the 225 million people who have connected over LinkedIn,[4] and social media has now reached pandemic status. In fact,

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[2] Facebook Ann. Rep. 5 (2012), *available at* http://investor.fb.com/secfiling.cfm?filingID=1326801-13-3. "We had 1.06 billion monthly active users (MAUs) as of December 31, 2012, an increase of 25% as compared to 845 million MAUs as of December 31, 2011." *Id.*

[3] Hayley Tsukayama, *Twitter Turns 7: Users Send Over 400 Million Tweets Per Day*, Wash. Post (Mar. 21, 2013), http://articles.washingtonpost.com/2013-03-21/business/37889387_1_tweets-jack-dorsey-twitter.

[4] Salvador Rodriguez, *LinkedIn Reaches 225 Million Users as it Marks its 10th Birthday*, L.A. Times (May 6, 2013), http://articles.latimes.com/2013/may/06/business/la-fi-tn-linkedin-turns-10-20130506.

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some reports have estimated that as many as 65% of online adults use at least one form of social media.[5] With these numbers, it is likely that most people you come in contact with on a daily basis are plugged into social media.

Lawyers, like the rest of society, are also showing interest in social networking. According to the American Bar Association, as of 2010, 56% of lawyers now maintain at least

[5] Mary Madden & Kathryn Zickuhr, *65% of Online Adults Use Social Networking Sites*, Pew Internet Report (Aug. 26, 2011), *available at* http://pewinternet.org/~/media//Files/Reports/2011/PIP-SNS-Update-2011.pdf

some virtual presence in social media.[6] As more lawyers use social media, they are connected more than ever before not only to other lawyers, but also potential clients, witnesses, and jurors. Those connections, if not handled appropriately, could lead to ethical violations for the unwary.

The ABA Model Rules of Professional Conduct were originally adopted by the ABA House of Delegates in 1983[7] – three decades before Facebook was born. As such, the Model Rules were not equipped with specific provisions that deal with the legal challenges of the technological world. While the Model Rules underwent a revision in 2002, social media remained but a glimmer of what it has become today. In response to the prevalence of social media, the ABA Commission on Ethics 20/20 released a draft proposal in 2011 to clarify the Model Rules.[8] At the 2012 Annual Meeting, the ABA House of Delegates approved a series of resolutions amending the Model Rules to accommodate changes in law practice related to the use of technology.[9] Nevertheless, new situations involving social media will continue to arise. However, all is not lost with the Model Rules. Just as religious texts are not discarded because their authors were never faced with twenty-first century challenges, many of the older Model Rules remain relevant and applicable to legal practice in the social media era.

A. *Ethical Implications of Using Social Media*

Lawyers use social media in a myriad of ways, to name a few: personal Facebook pages devoted to family and friends, legal blogs reporting on developments in the law or professional successes, Internet searches on parties and witnesses. Regardless of whether the activity appears to be "personal" or is business-related, lawyers must keep the Model Rules in mind when navigating across social media platforms.

1. The Duty of Confidentiality – Model Rule 1.6

Tweets, Facebook status updates, and blog posts give attorneys free reign to publish information visible to anyone logged onto the Internet. For some lawyers, social media becomes a platform to speak about their profession. Unfortunately, sometimes those casual

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[6] Release, ABA Legal Technology Survey Results Released, abaNOW (Sept. 28, 2010), *available at* http://www.abanow.org/2010/09/aba-legal-technology-survey-results-released/ [hereinafter ABA Release].

[7] Model Rules of Prof'l Conduct preface (2011).

[8] ABA Commission on Ethics 20/20 Initial Draft Proposals – Technology and Confidentiality (May 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_technology.authcheckdam.pdf.

[9] Debra Cassens Weiss & James Podgers, *Clean Sweep: House of Delegates Approves Ethics 20/20's Full Slate,* A.B.A. J. (Sept. 1, 2012), *available at* http://www.abajournal.com/magazine/article/clean_sweep_house_of_delegates_approves_ethics_20_20s_full_slate/ ; *see* ABA, August 2012 Amendments to Model Rules of Professional Conduct, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf.

legal posts include case-related information. Model Rule 1.6(a)[10] prohibits lawyers from revealing information "relating to the representation of a client" unless the disclosure is otherwise permitted by the rule. Publishing case information on a social media site is not among those listed exceptions. However, new subsection (c) of Rule 1.6 creates a duty to use "reasonable efforts to prevent … inadvertent or unauthorized disclosure of … information related to the representation of a client." Accordingly, a lawyer who chooses to use social media to speak about a case runs the risk of violating Rule 1.6 even if the post inadvertently includes client information that the lawyer is not authorized to reveal.

2. Legal Advertising and Solicitation – Model Rules 7.1, 7.2, 7.3

It may seem fairly obvious that publishing specific details about a case runs afoul of the ethical rules. Whether posting other legal-related information through social media violates an ethical rule may not be so clear. Social media can, and often does, implicate rules governing advertising and solicitation. Unfortunately, there are a lot of gray areas when deciphering whether particular communications trigger the Model Rules. For example, is a LinkedIn invitation that links to a lawyer's website an advertisement subject to regulation?[11] What about tweets and Facebook posts themselves? Is a tweet boasting of one's successful resolution of a case an advertisement of the lawyer's services?

Despite the blurred lines created by social media, the Commission on Ethics 20/20 did not recommended any changes to the rules on advertising and solicitation to address these questions. According to the Commission, there apparently is no need. As the Commission explained:

> Though the Model Rules were written before these technologies had been invented, their prohibition of false and misleading communications apply just as well to online advertising and other forms of electronic communications that are used to attract new clients today.[12]

In other words, the use of social media is subject to the same Model Rules regarding advertising and solicitation as more traditional communications.

According to Rule 7.2(a), lawyers may advertise their services through written, recorded or electronic communication, including public media. Thus, as a baseline matter, advertising through social media appears to be generally permissible. If all advertisements must

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[10] Model Rules of Prof'l Conduct R. 1.6(a). Unless otherwise noted, all rules cited are the Model Rules of Professional Conduct.

[11] Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging,* 28 Touro L. Rev. 149, 158 (2012).

[12] ABA Release, *supra* note 6.

abide by the same rules, however, doing so through social media may at times be difficult. For example, the Model Rules also state in Rule 7.2(c) that the name and office address of at least one lawyer in the firm should be included with every communication. If tweets and status updates are in fact considered advertisements, then they too must abide by the provisions of 7.2(c). This is unwieldy given the 140-character limit for tweets.

Rule 7.1 also indicates that lawyers must not communicate false and misleading information. Specifically, the rule states that a communication is false and misleading if it omits some necessary fact needed to make the statement, as a whole, not misleading. Again, painting a complete picture is difficult to do with a 140-character limit tweet. Even if full information is provided, lawyers may nevertheless run into ethical problems. For example, a lawyer may post on his Facebook page, "Successfully fought the insurance company and resolved another claim for my client." The statement may be accurate to the extent that a settlement was achieved. The lawyer, however, may have neglected to mention that the settlement was for an amount equal to that offered to his client by the insurer pre-suit. By omitting this information, the reader may conclude that a settlement was reached which would have been otherwise unobtainable without the lawyer's services. This kind of oversight is the focus of Rule 7.1.

Notwithstanding these limitations, attorneys may interact with prospective clients via social media. Rule 7.3, which governs the solicitation of clients, prohibits real-time electronic solicitation with a prospective client. The Ethics Committee of the Philadelphia Bar Association, however, has opined that social media contact with prospective clients may not violate the rule because a "recipient can readily and summarily decline to participate in the communication."[13] The Committee provided the following insight regarding Rule 7.3:

> The purpose behind this Rule is to prohibit what is referred to as "direct solicitation" because of the concern about an inherent potential for abuse where a non-lawyer is engaged by a trained advocate in a direct, interpersonal encounter and, potentially feeling overwhelmed and not able to fully evaluate all the available alternatives before immediately retaining the offending lawyer, feels pressured to engage the lawyer.[14]

While social media interactions with prospective clients may not be prohibited under Rule 7.3, the parameters of the advertising rules must be followed.

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[13] Phila. Bar Ass'n., Prof'l Guidance Comm., Op. 2010-6, at 5 (June 2010), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf.

[14] *Id.* at 2.

3. Attorney-Client Relationships – Model Rules 1.7, 1.18

A social media presence can invite greater interaction with the public. A reader can comment on a lawyer's page or post a message on a lawyer's Facebook page and trigger a dialogue between the reader and the lawyer. If a reader communicates with the lawyer over social media regarding a legal issue, an attorney-client relationship may be created along with a hotbed of potential ethical issues.

As an initial matter, Rule 1.7 requires screening potential clients to prevent any potential conflicts of interest. Dialogues via social media rarely undergo this process. Furthermore, Rule 1.18(b) requires that, even if no attorney-client relationship is formed, any information learned by the attorney must be kept confidential. Once an attorney engages in a dialogue over a social media forum, the information is no longer confidential.

An interesting example is presented with the increasingly popular use of Second Life, an online virtual world. Through Second Life, lawyers can create "avatars" and set up virtual law offices to interact the other residents of the online community. One intellectual property attorney who opened a Second Life office reportedly billed $20,000 in legal fees as a result of clients acquired through the program.[15] Obviously, this type of client interaction touches on a number of advertising and solicitation rules as well, including whether the use of an avatar is deceptive, like the use of an actor in a commercial in the absence of a disclaimer.[16] As is required in a traditional attorney-client relationship, there must be a system for checking potential conflicts in a virtual office as well. In the case of virtual worlds, both the avatar and real world names of the Second Life resident may need to be checked to avoid conflicts of interest with the lawyer's other clients.

B. *Ethical Implications of the Use of Social Media to Conduct Discovery*

Once litigation is underway, social media presents unprecedented opportunities for informal discovery. Never before has so much information about clients, opposing parties, and witnesses been accessible online. With so much information available, lawyers are missing out on a golden opportunity if they do not at least explore social media. An ethical conundrum arises, however, with the manner in which attorneys obtain such information.

1. The Duty of Competence – Model Rule 1.1

While the number of lawyers using social media continues to rise, many still refuse to access the wealth of available information. Pursuant to Rule 1.1, lawyers are required to provide competent representation to their clients. Competent representation requires the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the repre-

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[15] Jeffrey I. Silverberg, *Hanging Out Your Virtual Shingle: A Look at How South Carolina's Ethics Rules Concerning Attorney Communications, Advertising, and Solicitation Apply to Virtual Worlds,* 62 S.C. L. Rev. 715, 722 (2011).

[16] *See id.* at 727.

sentation." Comment 8 to Rule 1.1 instructs lawyers that in order to maintain the requisite knowledge and skill, they should "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Even though lawyers have provided competent representation to their clients for hundreds of years prior to the first tweet or Facebook status update, the world has changed. With a few clicks of a mouse, lawyers can now find out background information of a witness or, in some cases, the current activities of a personal injury plaintiff. It is arguable that Rule 1.1 requires lawyers to at least recognize the benefits and risks of this new technology in order to provide the most competent representation to their clients.

2. The Duty of Diligence – Model Rule 1.3

Even though an appreciation of the information accessible through social media may be sufficient to satisfy Rule 1.1, familiarity alone may not be enough to satisfy other standards found in the Model Rules. Rule 1.3 requires that lawyers act with reasonable diligence in representing their clients. Comment 1 of Rule 1.3 states that lawyers should take whatever lawful and ethical measures to vindicate a client's cause and should act with "zeal and advocacy upon the client's behalf." Zealous advocacy may mean viewing an opposing party's public Facebook profile if doing so could lead to evidence refuting the party's claims.

Interestingly, however, Comment 1 of Rule 1.3 also states that a lawyer is not required to press for every advantage that may be realized for a client. As such, if the lawyer finds that social media research presents an ethical conundrum in the absence of more specific guidance from the Model Rules, then Comment 1 may serve as a lifeline.

3. The Scope of Permissible Discovery

Much of the information on social media is available to the general public and is freely accessed through a basic Internet search. The discovery of such information usually does not result in ethical violations primarily because users can have no expectation of privacy regarding information made available to the public.[17] Guidance has been provided by the New York State Bar Association Committee on Professional Ethics:

> A lawyer who represents a client in a pending litigation, and who has access to the Facebook and MySpace network used by another party in litigation, may access and review the public social networking pages of that party to search for potential impeachment material.[18]

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[17] Hope A. Comisky &William M. Taylor, *Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas – Discovery, Communications with Judges and Jurors, and Marketing,* 20 Temp. Pol. & Civ. Rts. L. Rev. 297, 302 (2011) (citing Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010)).

[18] N.Y. State Bar Ass'n, Comm. on Prof. Ethics, Op. 843 (Sept. 10, 2010), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208 (last visited June 13, 2013).

Therefore, it appears that information posted on the public pages of social networking sites is fair game and may be discovered without placing the lawyers who access it in ethical peril.

a. Represented Parties – Model Rules 4.1, 4.2, 4.3, 5.3, 8.4

Some information on social media sites is not readily accessible to the general public because users can employ certain "privacy" settings which allow their posted information to be viewable only by the people they choose. Consequently, a lawyer would have to take some affirmative steps to gain access to this information such as becoming a Facebook "friend" or a Twitter "follower." Doing so likely runs afoul of the Model Rules.

Pursuant to Rule 4.2, lawyers are prohibited from communicating with represented parties without consent of the other lawyer or by court order. Accordingly, requesting permission from a represented party to access his or her non-public information is a violation of Rule 4.2. Comment 3 also indicates that Rule 4.2 applies even if the communication is initiated by the represented party. Therefore, attorneys are also prohibited from accepting a friend request from a represented party.

In addition, lawyers must avoid "pretexting" to uncover evidence. Pretexting is where the lawyer, or the lawyer's agent, conceals his or her identity to obtain information.[19] Pretexting implicates Rule 4.1 (prohibiting false statements of material fact), Rule 4.3 (prohibiting misleading statements to third parties), and Rule 8.4 (prohibiting lawyers from engaging in dishonest, fraudulent, or deceitful conduct). Moreover, in cases involving the actions of the lawyer's agent, Rule 8.4 expressly prohibits lawyers from attempting to violate the Rules of Professional Conduct through the acts of another or by engaging in deceit or misrepresentations. Under Rule 5.3, lawyers are responsible for the conduct of a non-lawyer employed, retained by, or associated with the lawyer. If it is unethical for the lawyer himself to "friend" a represented party, it is also unethical for the lawyer to encourage another person to do so on his behalf.

For example, two New Jersey lawyers were charged with violating Rules 4.2, 5.3, and 8.4 after their paralegal allegedly "friended" a personal injury plaintiff. The alleged violation was discovered after the lawyers asked very specific questions about the plaintiff's conduct during his deposition. Thereafter, the lawyers amended their discovery responses with the information they had obtained via Facebook. The lawyers are contesting the charges, claiming that while they directed the paralegal to conduct basic Internet research, they did not

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[19] Allison Clemency, *"Friending," "Following," and "Digging" Up Evidentiary Dirt: The Ethical Implications of Investigating Information on Social Media Websites,* 43 Ariz. St. L.J. 1021, 1036 (2011).

authorize her to friend the plaintiff. Although the matter was set for a hearing in Fall 2012, no further information was ever released regarding the disposition of the complaint.[20]

b. Unrepresented Persons – Model Rule 4.3

The Model Rules may not require the same constraints regarding pretexting to communicate with an unrepresented individual. Rule 4.3 states that "[i]n dealing with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." Several state ethics committees, however, have determined that this rule has little to do with social media and is not implicated when a lawyer or a third-party attempts to "friend" an unrepresented person.[21] Nonetheless, to avoid violating other ethical rules involving deceit and dishonesty (such as Rules 4.1, 5.3 and 8.4), lawyers should avoid pretexting, even when the party is unrepresented.

4. The Duty to Preserve Evidence

Just as social media provides a wealth of information regarding opposing parties, it likewise provides information regarding a lawyer's own client. Many lawyers will investigate their own client's social networking sites and, unfortunately, discover potentially harmful information. Upon making this discovery, the first reaction may be to instruct the client to modify or delete the harmful information. Doing so, however, may result in professional misconduct because Rule 3.4(a) prohibits the altering or destruction of evidence. Lawyers have an ethical duty to preserve electronically stored information, including social-networking profiles.[22] Instructing a client to delete his or her profile may be deemed spoliation of evidence which could result in sanctions against the lawyer. The more prudent response is to instruct the client to enhance his or her privacy settings, such as setting the profile page to "private," to prevent direct access to the information.

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[20] Mary Pat Gallagher, *Hostile Use of "Friend" Request Puts Lawyers in Ethics Trouble*, N.J. L.J. (Sept. 3, 2012), *available at* http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&expNewLead=id%3D%22expandedNewLead%22&brand=ldc&_m=5a0c1444bb0a9f9e0d9025835bb45323&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzt-zSkAW&_md5=d38690a94403288588821ec7a8224ff9&focBudTerms=&focBudSel=all.

[21] Steven C. Bennett, *Ethics of "Pretexting" in a Cyber Word,* 41 McGeorge L. Rev. 271, 273 (2010); *see, e.g.,* Ass'n of the Bar of the City of N.Y., Comm. on Prof'l and Judicial Ethics, Op. 2010-2, *available at* http://www2.nycbar.org/Ethics/eth2010.htm (last visited June 13, 2013); Phila. Bar Ass'n., Prof'l Guidance Comm., Op. 2009-02, at 4 n. 1 (March 2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf (last visited June 13, 2013) ("[T]he Committee does not believe that [Rule 4.3] is implicated by this proposed course of conduct [third-party 'friending' an unrepresented person].").

[22] Margaret M. DiBianca, *Ethical Issues Arising from Lawyers' Use of (and Refusal to Use) Social Media,* 12 Del. L. Rev. 179, 184 (2011).

C. *Ethical Implications of Using Social Media to Contact Judges and Attorneys*

Whether it is with a high school classmate or another member of the local bar, social media presents valuable networking opportunities. Social media contact with other attorneys and judges, however, still demands the same level of civility and candor as in-person contact or other written communications.

1. Civility

In the Preamble to the Model Rules, lawyers are instructed to maintain a "professional, courteous and civil attitude toward all persons involved in the legal system." Moreover, Rule 3.5(d) prohibits a lawyer from engaging in conduct "intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal." Unfortunately, when shielded by the screen of a computer, lawyers may lose sight of these provisions. For example, a Florida attorney called a judge an "evil, unfair witch" in a blog post. That attorney, not surprisingly, was reprimanded by the court.[23]

Not only should lawyers be careful about what they post, but they need to be aware of how their post may be used by others. For example, a few days prior to a Monday morning mediation, one South Carolina lawyer posted his plans to celebrate his fiftieth birthday over the weekend. At mediation, opposing counsel posted the lawyer's Facebook page as part of his opening statement and suggested that the lawyer failed to take the case seriously because he was celebrating instead of preparing for mediation. Opposing counsel neglected to mention that the lawyer's senior associate was actually handling the case, and had been for many months, under the lawyer's close supervision. Needless to say, the case did not settle at mediation.[24]

2. Ex-Parte Communication – Model Rule 3.5

Rule 3.5 prohibits lawyers from seeking to "influence a judge, juror, or prospective juror or other official." In the era of social networking, the likelihood that an attorney has an online relationship with a judge is high. The ABA's rule regarding a judge's participation in social networking is as follows:

> A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the

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[23] *Id.* at 197; John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. Times (Sept. 12, 2009), *available at* http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=0.

[24] Stuart Mauney, *Burned at Mediation by my own Facebook Post!,* Abnormal Use (Feb. 8, 2012), *available at* http://abnormaluse.com/2012/02/burned-at-mediation-by-my-own-facebook-post.html (last viewed June 13, 2013).

> Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.[25]

State opinions vary. Some jurisdictions have gone so far as to ban judges from becoming Facebook friends with lawyers who appear before them.[26] Other jurisdictions, however, permit judges to engage in social networking, including being Facebook friends with attorneys.[27] South Carolina favors judicial use of social networking as a way to promote the public's understanding of the judiciary.[28] The ABA's conclusion echoes the public outreach virtues recognized by South Carolina.

> Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.[29]

Even in jurisdictions where such connections are allowed, lawyers should avoid engaging in any conduct seeking to influence the judge.

D. *Professional Misconduct: Lawyers Behaving Badly*

As we continue down the social media path, the cases of lawyers misusing social media are on the rise. In many instances, lawyers have engaged in inadvertent misuse of social media. In other situations, the involved lawyers have acted intentionally. All of these instances provide teachable moments.

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[25] ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 462, at 1 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf [hereinafter Formal Op. 462].

[26] DiBianca, *supra* note 22, at 193; Brian Hull, *Why Can't We Be "Friends"? A Call for a Less Stringent Policy for Judges Using Online Social Networking,* 63 Hastings L.J. 595, 613, 614-15 (2012) (citing Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 11 (2010); Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2010-06 (2010); Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009); Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011)).

[27] Hull, *supra* note 26, at 614 (citing Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010); Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7 (2010); N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009)).

[28] DiBianca, *supra* note 22, at 193; Hull, *supra* note 26, at 608 (citing S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009)).

[29] Formal Op. 462, *supra* note 25, at 4.

1. The *Gilligan's Island* Trial from Hell

In Florida, Assistant State Prosecutor Brandon White recounted a "trial from hell" on his Facebook page to the theme song from *Gilligan's Island*. The jury, however, had not yet returned its verdict when the parody was posted. White potentially could have run afoul of Rule 3.6(a) which prohibits lawyers from making extrajudicial statements that could "materially prejudice" a legal proceeding. However, fortunately for White, the jury had finished deliberating so there was little risk that the parody would "materially prejudice" the outcome of the case. White was not sanctioned for his conduct, but his boss, Chief Assistant State Attorney Tom Bakkedahl, is using the post as a "training moment" for other lawyers in the state's attorney's office.[30]

2. Facebook in Texas: Use at Your Own Risk

Judge Susan Criss checks the Facebook pages of those who appear in her Texas court. In one instance, a lawyer requested a continuance due to the death of her father. Judge Criss subsequently checked the lawyer's Facebook page only to discover that she had engaged in a week of drinking and partying after making the request. When the lawyer appeared before Judge Criss, she told a completely different story. Unsurprisingly, her motion for a continuance was denied. Another lawyer was caught complaining on Facebook about having Judge Criss hear her motion. When Judge Criss discovered the account, she engaged in some "friendly" banter with the attorney over the social networking site.[31]

While neither attorney was subject to sanctions, these examples show how a lawyer's conduct can negatively affect the outcome of the case.

3. Appealing Through Social Media is Not Recommended

In *Office of Disciplinary Counsel v. Wrona*, a Pennsylvania attorney was disbarred for making false accusations against a judge and engaging in conduct prejudicial to the administration of justice.[32] The judge found the attorney's client in contempt for failure to pay child support. Following a number of unsuccessful appeals and motions alleging that statements had been omitted from the official transcript, the attorney engaged in a media campaign against the judge and the judicial system. In a letter to the editor published in the local paper, the attorney accused the court of "systematically depriv[ing] litigants of due process" and

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[30] Melissa E. Hoslman, *Facebook Poem Gets Prosecutor in Hot Water*, SunSentinel (Apr. 22, 2010), *available at* http://articles.sun-sentinel.com/2010-04-22/news/fl-facebook-poem-ada-20100422_1_jurors-trial-facebook (last visited June 14, 2013).

[31] Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, A.B.A. J., Jul. 31, 2009, http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/.

[32] 908 A.2d 1281 (Pa. 2006).

"harbor[ing] criminal misconduct in order to prevent successful appeals."[33] Thereafter, he posted a "press release" on an Internet website accusing the judge of "criminal alteration of recorded court proceedings" and of "subornation of perjury."[34] In addition, he wrote a letter to the Attorney General's office comparing the judge's behavior to priests who molested young boys and bishops who covered up the complaints.[35] The court determined that the attorney acted recklessly without any reasonable factual basis in making his statements.[36] In doing so, the court held that he had engaged in professional misconduct in violation of numerous ethical rules, including Pennsylvania Rules of Professional Conduct Rules 3.3(a)(1), 8.2(b), 8.4(a), 8.4(c), and 8.4(d).

4. Caution When Emailing Witnesses (Then Blogging About It)

In Minnesota, an attorney was suspended from the practice of law following a series of Internet-based ethical violations. First, the attorney sent an email to a witness in another lawyer's disciplinary matter instructing the witness not to cooperate. Thereafter, he made a number of misleading statements about the event on his firm's website, both before and after his suspension from the practice of law. As a result, he was suspended from practice for at least 30 months and ordered to pay $900 in costs.[37]

5. Cautionary Tale of Blogging About One's Clients

Kristine Peshek, a former Illinois public defender, was brought before the disciplinary commission due to postings on her personal blog.[38] Peshek penned a blog called "The Bardd [sic] Before the Bar – Irreverant [sic] Adventures in Life, Law, and Indigent Defense," which chronicled her work in the public defender's office. In her blog posts, she identified her clients and revealed confidential information about them.

One particular post was exceptionally harmful. Peshek recalled a conversation with a client following her sentencing. The client asked Peshek if she could go back to tell that judge she was on Methadone, contrary to her earlier testimony. Peshek's response was:

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[33] *Id*. at 1285.

[34] *Id*.

[35] *Id*. at 1286.

[36] *Id.* at 1289.

[37] Disciplinary Action Against Soronow, 694 N.W.2d 556 (Minn. 2005).

[38] Debra Cassens Weiss, *Blogging Assistant PD Accused of Revealing Secrets of Little-Disguised Clients*, A.B.A. J. (Sept. 10, 2009), http://www.abajournal.com/news/article/blogging_assistant_pd_accused_of_revealing_secrets_of_little-disguised_clie/.

> Huh? You want to go back and tell the judge that you lied to him. You lied to the pre-sentence investigator, you lied to me? And you expect what to happen if you do this? I'll tell you what would happen; the sentence just pronounced would be immediately vacated and you'd go to prison, that's what would happen.[39]

Aside from speaking directly about the case, Peshek also appears to have been complicit with her client's fraud. Peshek was suspended 60 days for violating Rules 1.2, 1.6, 3.2, and 8.4.[40]

II.
Spokeo, Facebook,Twitter and Juror "Deselection"
Social Media at Trial from Voir Dire Through Deliberations

With a billion Facebook users, hundreds of millions of Twitter postings daily, and a Google query of any adult likely to produce at least a few search engine "hits," it was only a matter of time before social media and the Internet made their presence felt in the jury selection process in American courtrooms. Indeed, the wealth of data available on line has allowed lawyers the opportunity to screen prospective jurors and also tailor the presentation of their cases to jurors' biases and preferences. As one trial lawyer stated in a 2011 interview: "Let's say you have a case involving an emergency room—you're suing a hospital for negligence. Wouldn't it be nice to know that there's some picture posted on a website of [a prospective juror] attending some hospital charity event?"[41]

The growth of social media technology has caused courtroom rules to evolve. While it has become commonplace for judges to instruct jurors against social media use and Internet research during trial (some courts even confiscate jurors' cell phones and tablets before each day of testimony), this ban thankfully has not been extended to trial attorneys.[42] Even if it is recognized as inappropriate (and unethical) for attorneys to contact jurors through social media (such as "friending" them on line either directly or through surrogates),[43] it

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[39] Complaint, In re Kristine Ann Peshek, No. 6201779 (Ill. Att'y Registration & Disciplinary Comm'n Aug. 25, 2009), https://www.iardc.org/09CH0089CM.html.

[40] *See In re* Disciplinary Proceedings Against Peshek, 798 N.W.2d 879 (Wis. 2011).

[41] Ryan Flinn, *Social Media: A New Jury Selection Tool,* Businessweek (April 21, 2011), http://www.businessweek.com/magazine/content/11_18/b4226028093461.htm (last visited June 14, 2013) (quoting David Wenner, Snyder & Wenner, Phoenix, Ariz.).

[42] Michael K. Kiernan & Samuel E. Cooley, *Juror Misconduct in the Age of Social Networking,*62 Fed'n Def. & Corp. Couns. Q. 179, 190-92 (2012).

[43] *See* Phila. Bar Ass'n., Prof'l Guidance Comm., Op. 2009-02 (March 2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf (last visited June 13, 2013).

is nonetheless considered acceptable for attorneys to view juror material available to the general public on the Internet.[44] Thus, it is becoming routine for attorneys to probe juror's social media profiles during jury selection and throughout trial — to uncover any biases or behavior that would justify striking a juror during voir dire or disqualify them in the course of trial. Some commentators have observed that Internet research is not only a tool to give the ambitious attorney the edge at trial; they also contend that best practices and professional standards may *require* at least some review of social media and juror backgrounds during voir dire and trial.[45] That said, consideration must be given to the nature, extent, and significance of social media information that can be developed and effectively utilized at all phases of trial.

A. *Voir Dire or "Voir Google"?*

Jury questionnaires, which most courts distribute to lawyers at the beginning of jury selection, often contain little information beyond name, age, and marital status. Also, many judges and venues restrict the questions attorneys can ask potential jurors during voir dire. For instance, it is typical to prohibit attorneys from asking prospective jurors about their political affiliations. Thus, online access, both through social media and Internet databases, can provide important end runs around court-imposed restrictions on voir dire. Jury consultants have been attempting for decades to create psychological profiles to assist trial counsel in the voir dire process – by retaining private investigators to review voting records and public mortgage documents, or driving to the jurors' neighborhoods to assess their affluence or lifestyles. The lure of social media sites is that they allow lawyers to gather the same information—in seconds. "There's a whole sort of generation of lawyers who used to pay investigators to drive by houses to see if there were kids [in the yard] or [political] bumper stickers on their cars," said Georgia State University law professor, Caren Morrison. "Now they can do it instantaneously."[46]

In a world where people reveal themselves, often unflatteringly, on Facebook and other social media sites, Internet vetting by trial counsel can provide an invaluable "correction" for jurors who are not forthcoming during jury selection. Indeed, use of search engines databases during voir dire has one commentator re-naming the process "voir Google."[47] In some

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[44] Carino v. Muenzen*,* No. L-0028-07, 2010 WL 3448071, at *9-10 (N.J. Super. Ct. App. Div. Aug. 30, 2010); Johnson v. McCullough*,* 306 S.W.3d 551, 554 (Mo. 2010)(en banc).

[45] J.C. Lundberg, *Googling Jurors to Conduct Voir Dire,* 8 Wash. J. L. Tech. & Arts 123, 132-33 (2012).

[46] Tricia Bishop, *Social Media of Increasing Concern for Courts: Lawyers Use Information to Check Possible Jurors,* Balt. Sun, Sept.18, 2011, at A1, *available at* http://articles.baltimoresun.com/2011-09-18/news/bs-md-facebooking-lawyers-20110918_1_potential-jurors-jury-selection-bribery-trial (last visited June 23, 2013).

[47] Brian Grow, *Internet v. Courts: Googling for the Perfect Juror,* Reuters, Feb. 17, 2011, *available at* http://www.reuters.com/article/2011/02/17/us-courts-voirdire-idUSTRE71G4VW20110217.

instances, such as in high profile and capital cases, jury pool sheets are provided in advance, allowing lawyers to conduct extensive online searches about prospective jurors and compile this information on spreadsheets. More commonplace, however, is the growing scenario in which attorneys or (if resources allow) a trial consultant is handed a jury questionnaire at the outset of voir dire; they frantically type prospective jurors' names into their laptops to gather whatever juror information they can in the minutes the court allocates during jury selection. Facebook, Spokeo, and Twitter are thus crucial resources as attorneys attempt to gather information beyond the often unhelpful details set forth in the jury questionnaires. Spokeo.com, a people search site, can provide an immediate link to a birds-eye image of a juror's home; it readily yields other free information in a matter of seconds, such as home values and the names of individuals who reside at the given address. For a small monthly fee, Spokeo provides extensive additional information. Of course, this type of vetting raises privacy concerns and some courts inevitably may wish to assert a role in supervising this information-gathering process.

In one case, a Google search revealed that a potential juror lied during voir dire when he claimed he had never been in a courtroom before. In fact, the Google material demonstrated that the juror had actually recently served as an expert witness at a jury trial.[48] Similarly, in a 2008 West Virginia criminal case, a conviction was reversed where a juror failed to disclose that she was a Myspace friend with the defendant. Even though she voted to convict, the state appeals court believed her lack of candor potentially affected the outcome of the case. The juror, for her part, explained afterwards that her contact with the defendant was limited and, other than several Myspace contacts, she had no interactions with the defendant. "Maybe I should have said he was on my Myspace page," the woman explained, "but then I thought to myself, I really don't know him, so I'm really not lying."[49]

The Internet vetting of jurors raises questions of how far can, or should, an attorney go when it comes to investigating a juror's background and potential biases? Are there any ethical limits and privacy considerations of which counsel should be aware? What limits have judges placed on Internet vetting? Furthermore, what amount of vetting is actually productive for counsel? Is there a point where too much Internet information confuses the process and distracts counsel from old-fashioned "gut" feelings about jurors that can be quite distinct from general impressions derived from by what is available about a juror online?

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[48] Flinn, *supra* note 41.

[49] *Id.*

B. *Rule 3.5 Impartiality and Decorum of the Tribunal*

American Bar Association Model Rule of Professional Conduct 3.5 states:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

While often cited in the context of juror vetting, Rule 3.5 is actually focused on "communication" with the juror – which technically is not what is going on during Google and Spokeo searches or while counsel peruses a juror's open-to-the-public Facebook and MySpace materials. Thus, while contacting a juror through social media, or enlisting someone else to do it for you, is understood to be unethical, few specific limits have been formally imposed on counsel, either by ethics considerations or courtroom rules enacted by individual judges, when it comes to investigating prospective and empanelled jurors.

Indeed, in one widely-reported New Jersey case plaintiff's "counsel began using a laptop computer to access the Internet, intending to obtain information on prospective jurors. Defense counsel objected."[50] The opinion includes the following transcript of the exchange between the judge and the plaintiff's counsel:

THE COURT: Are you Googling these [potential jurors]?

[PLAINTIFF'S COUNSEL]: Your Honor, there's no code law that says I'm not allowed to do that. I-any courtroom-

THE COURT: Is that what you're doing?

[PLAINTIFF'S COUNSEL]: I'm getting information on jurors-we've done it all the time, everyone does it. It's not unusual. It's not. There's no rule, no case or any suggestion in any case that says-

[50] Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at *4 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

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THE COURT: No, no, here is the rule. The rule is it's my courtroom and I control it.

[PLAINTIFF'S COUNSEL]: I understand.

THE COURT: I believe in a fair and even playing field. I believe that everyone should have an equal opportunity. Now, with that said there was no advance indication that you would be using it. The only reason you're doing that is because we happen to have a [Wi-Fi] connection in this courtroom at this point which allows you to have wireless internet access.

[PLAINTIFF'S COUNSEL]: Correct, Judge.

THE COURT: And that is fine provided there was a notice. There is no notice. Therefore, you have an inherent advantage regarding the jury selection process, which I don't particularly feel is appropriate. So, therefore, my ruling is close the laptop for the jury selection process. You want to-I can't control what goes on outside of this courtroom, but I can control what goes on inside the courtroom.[51]

After the jury returned a verdict for the defendant doctor, the plaintiff appealed unsuccessfully. Among the errors alleged, the plaintiff asserted that the trial judge erred by "precluding his attorney from accessing the internet during jury selection."[52] The appellate court ruled that the trial judge had improperly restricted plaintiff's counsel's online juror vetting, but the trial court's ruling did not prejudice the plaintiff.[53] The appellate court upbraided the trial judge for its ruling.

> Despite the deference we normally show a judge's discretion in controlling the courtroom, we are constrained in this case to conclude that the judge acted unreasonably in preventing use of the internet by [plaintiff]'s counsel. 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.[54]

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[51] *Id.*

[52] *Id.* at *7.

[53] *Id.* at *10.

[54] *Id.*

C. *Juror Vetting Should Not End With Voir Dire*

Juror vetting should not end with the voir dire process. Although the time crunch of jury selection may prevent comprehensive juror vetting at that time, once a jury is empanelled counsel may find it worthwhile to double-check on their jurors. In two well-publicized cases,[55] trial lawyers were surprised by what they failed to unearth during the voir dire process.

In the first case, a jury consultant for the defendant manufacturer discovered that an empanelled juror had posted on Facebook that her hero was Erin Brockovich, the crusading paralegal famous for her pro-plaintiff efforts in environmental cases. This research ultimately helped defense attorneys in the case have the juror removed from the panel and replaced by an alternate.[56]

An even more compelling situation arose in *Khoury v. ConAgra Foods, Inc.*, a case in which the plaintiff alleged she had contracted a rare lung disease from consuming microwave popcorn containing a chemical (diacetyl) produced by ConAgra.[57] According to the news article written about this case, during the trial, a ConAgra lawyer discovered that a juror's Facebook page provided links to numerous websites critical of big corporations and promoted a boycotting of BP oil.[58]

> According to the transcript, the juror, 24-year-old University of Missouri-Kansas City student Jonathan Piedimonte, also was found to have a personal blog -- called "The Insane Citizen: Ramblings of a Political Madman." The blog consists of poetry and short essays, and included statements such as "F--- McDonald's. I hate your commercials. I'm not 'lovin' it.'"[59]

ConAgra argued for the juror's removal because he had hidden his anti-business sentiments during jury selection and the judge agreed. According to the reporter who wrote about this case, the transcript quotes Judge Jack Grate saying "I'm going to err on the side of anybody that stinks at all of prejudice is not going to sit on the damn jury."[60] The jury ruled in ConAgra's favor, but only by a 9-3 vote. ConAgra's counsel believes the outcome might have been different if Piedimonte had been allowed to remain on the jury because he might have influenced the other jurors. When interviewed, Piedimont said "that while he understands why ConAgra's lawyers viewed his online activities as evidence of bias, he

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55 Grow, *supra* note 47.

56 *Id.*

57 368 S.W.3d 189 (Mo. App. W.D. 2012).

58 Grow, *supra* note 47.

59 *Id.*

60 *Id.*

doesn't believe they should have been taken so seriously. 'This is the Internet,' he said. 'It's a different realm. It's like a playground.'"[61]

On appeal, the Missouri appellate court affirmed the trial court's judgment for ConAgra.[62] The court quoted Judge Grate's reasons for removing the juror:

> What I'm shooting for here is a fair and impartial jury. And what we've got now is 15 people who have passed the muster by any way that you want to measure it. And nobody has lodged additional objections against those 15 people…. I think it's a very close call whether Mr. Piedimonte should have been removed at all. I'm actually following through on what is my heartfelt conviction that my primary duty in voir dire is to make sure that any opportunity for bias or prejudice to filter into the jury deliberations is extinguished….[63]

The appellate court reasoned that trial judges can observe jurors answer questions relating to possible bias, instead of relying on a "cold" transcript, and that is why the court "accord[s] so much discretion to … colleagues on the trial bench in 'close calls' relating to the 'possibility' of juror bias or other issues relating to the ability of a juror to effectively discharge his duties."[64] Thus, the trial court did not abuse its discretion in concluding, out of an abundance of caution, that because of possible corporate bias, the juror was not qualified to serve on the jury.[65]

The appellate court was careful to point out the boundaries of its holding regarding using the Internet to screen jurors during trials. It also stressed that a finding that a juror engaged in intentional nondisclosure during voir dire is not essential when a trial court exercises its discretion to remove a juror for possible bias towards one party. As stated by the court,

> our ruling today is not a suggestion that jurors are "fair game" for continuous Internet "screening" during the course of a trial. Instead, when … there is evidence fairly suggesting intentional nondisclosure to a voir dire question, litigants have a right to bring such alleged nondisclosure to the trial court's attention…. [I]t is also not a requirement for the trial court to conclude that a juror has, in fact, engaged in intentional nondisclosure during voir dire for the trial court to exercise its discretion to grant relief to strike a juror from the jury when … a juror possesses the possibility of bias towards one of the parties in the jury proceeding.[66]

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[61] *Id.*

[62] *Khoury*, 368 S.W.3d 189, 192 (Mo. App. W.D. 2012).

[63] *Id.* at 201.

[64] *Id.*

[65] *Id.*

[66] *Id.* at n. 11.

D. *Juror Vetting: A Tool or a Requirement?*

Vetting jurors throughout trial may be more than just good practice; in fact, some courts have indicated that investigating juror backgrounds has essentially become a requirement.

In *Tricam Industries, Inc. v. Coba,* the trial court refused to grant the plaintiff a new trial based on a juror's non-disclosure of previous litigation history. The appellate court affirmed because the failure to disclose the information was attributable to the plaintiff's lack of diligence.[67] In *Coba*, a juror did not disclose during voir dire his litigation history which included a divorce, three foreclosures, and two collection actions. Although the juror may not have understood the questions asked by the court regarding the jurors' prior litigation experience, the appellate court considered it very significant that "during the trial, the trial court suggested that the attorneys run the jurors' litigation histories electronically before the jury commenced deliberations and while an alternate was still available" and that plaintiff's counsel declined the offer to run the jurors.[68] According to the court, while the Florida Supreme Court had never required trial counsel to run jurors' litigation histories to demonstrate due diligence, attorneys are permitted to run searches and trial courts can suggest them. Moreover, the Florida Supreme Court never held that a trial court could not "in appropriate circumstances, consider a trial counsel's refusal to run a juror's litigation history as one of several factors under a due diligence inquiry."[69]

A similar decision was reached by the Supreme Court of Missouri in *Johnson v. McCullough*, where, during voir dire in a medical malpractice case, a juror incorrectly answered a question about whether he had been a litigant in any prior lawsuits. After a defense verdict, the plaintiff conducted an online search and discovered that the juror had been a defendant in a personal injury action. Although the court held that counsel should conduct their database searches during voir dire, instead of waiting until after trial,[70] it upheld the defense verdict because at the time of the trial, there was no evidence that it was practicable for counsel to have investigated the litigation history of all the selected jurors prior to the jury being empanelled.[71] In dictum, the Missouri Supreme Court admonished counsel that

> 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 for jurors' prior litigation history when, in many instances, the search also could have been done in the final stages of

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67 100 So.3d 105, 112 (Fla. Dist. Ct. App. 2012).

68 *Id.* at 114.

69 *Id.*

70 Johnson v. McCullough, 306 S.W.3d 551, 554 (Mo. 2010)(en banc).

71 *Id.* at 558.

> jury selection or after the jury was selected but prior to the jury being empanelled. Litigants should endeavor to prevent retrials by completing an early investigation. Until a Supreme Court rule can be promulgated to provide specific direction, to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial.[72]

More recently, in *Khoury v. ConAgra Foods, Inc.*, the plaintiff relied on *Johnson v. McCullough* and argued that a defense motion to strike a juror for possible corporate bias was untimely because it was made after the jury was empanelled.[73] Although the jury was empanelled before the motion to strike was made, the court considered it significant that the juror did not sit on the jury or participate in the verdict because he was replaced by one of the alternates before opening statements occurred.[74] Moreover, the court distinguished *Johnson* as follows:

> In short, *Johnson* reflects a concerted effort by the Missouri Supreme Court to address timely and reasonable investigation of the *litigation history* of potential jurors. It is no coincidence that when the Supreme Court later promulgated a rule—Rule 69.025—the rule was expressly related to juror nondisclosure on the topic of *litigation history* only. Neither *Johnson* nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that any and all research—Internet based or otherwise—into a juror's alleged material nondisclosure must be performed and brought to the attention of the trial court before the jury is empanelled or the complaining party waives the right to seek relief from the trial court. While 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—that day has not arrived as of yet.[75]

Thus, although possible bias and juror nondisclosure should be brought to the court's attention as soon as possible, if the information it relates to is something other than a juror's litigation history, a timely motion may be brought after the jury is empanelled. While the *Khoury* decision creates an incentive for counsel to use Internet resources to investigate jurors even after they jury has been empanelled, the decision may also provide counsel with a sound basis for requesting sufficient time to perform background checks, rather than being hurried by the court to complete the jury selection process.

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[72] *Id.* at 558-59.

[73] *Khoury*, 368 S.W.3d 189, 202 (Mo. App. W.D. 2012).

[74] *Id.* at 203.

[75] *Id.* at 202-03.

E. *Practice Pointers*

Questions remain about whether attorneys must disclose their Internet research on jurors to opposing counsel. The Federal Rules of Civil and Criminal Procedure protect materials produced in preparation for trial, including work product of jury consultants. The results of juror research conducted on the Internet or elsewhere should fall under the protections of these rules.

While social media can be a useful tool in jury selection, the ineffective use of social media will only add even more stress to the already difficult voir dire process. For this reason, it is important to know what juror information is actually helpful versus what is merely distracting. For instance, it can be tempting to focus on everything jurors may write, tweet or post online and assign each statement exorbitant significance when, in fact, some such postings are randomly or sloppily posted and, in truth, are of little consequence.

One key to gathering worthwhile social media is to determine which information reveals the deeply held personal values of the juror. One commentator has stated: "We have found that the number of Facebook 'friends' a person has or the types of games they play are not typically as relevant to how the person will react as a juror as the various causes and events they 'like' or the things they post about themselves online."[76]

Counsel should also be wary of over-using technology in the presence of prospective jurors. Certainly, conspicuously Googling the panel right in front of them during voir dire is likely to offend some jurors. "Jurors often feel scrutinized by the questions lawyers ask during voir dire, and they can feel they are under even harsher scrutiny when they perceive that they are being 'investigated' on the internet or potentially attacked through this effort."[77] Thus, if social media searches reveal significant information about a prospective juror, counsel is well-advised to tread lightly before revealing that they are aware what the juror has been up to in their "virtual" life. Obviously, the blowback could be severe if jurors perceive that counsel has an online "dossier" that could be used to isolate or embarrass them.

Some tried and true advice applies equally in the age of technology. Barriers to communication between the attorney and the jury must be minimized. One such barrier is having too much technology, such as a tablet or laptop, at the podium while counsel speaks to jurors. For this reason, voir dire should be conducted with little in hand except a legal pad for notes and perhaps a seating chart to keep track of juror's names.

Rather than typing out juror names on a laptop in plain view of the juror, counsel should consider carving out a period of time, perhaps through prior request of the court, for conducting online vetting out of the presence of potential jurors. By reminding the trial judge of the precedent where counsel was reprimanded for failing to conduct background

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[76] Samantha D. Holmes & Lori G. Cohen, *Seven Deadly Social Media Sins Lawyers Commit During Jury Selection,* Defense Research Institute "Sharing Success--A Seminar for Women Lawyers" Course Materials 45, 45 (October 1, 2012) (on file with the author).

[77] *Id.*

checks,[78] counsel is likely to secure at least a small amount of time to Google jurors without the discomfort of having to do so in the juror's presence.

Lawyers can become so focused on jurors' online activities that they fail to see what jurors are doing right in front of them in the courtroom. "While it can be interesting to know who people "friend" and "unfriend" on Facebook, it can be even more informative to know whom they "friend" and "unfriend" in the courtroom."[79]

Similarly, some lawyers think up-to-date technology and a familiarity with Facebook will be all they need to pick a good jury. In fact, social media savvy will not, by itself, overcome common errors of jury selection, the most common of which is the misperception that a jury is actually being "picked" at all. The process is not about "picking" good jurors; indeed, it is typically a foregone conclusion that the prospective jurors you like most will be the first ones stricken by your adversary. Thus, the real purpose of voir dire, rather than selecting a jury, is *deselecting* those jurors you can identify as unfavorable to your case.

F. *Cutting to the Chase: What to Look for on Social Media*

When looking at social media associated with a potential juror, consider the following short list of what to look for and consider and what it may signify:

1. Consider a potential juror's social media "likes," "tweets," and "wall posts." These should yield important insight into a juror's core values and beliefs.
2. Examine a juror's identification with perceived victims or their membership in charity, political, or activist organizations.
3. Take particular note of any "online rants" and angry posts. These may reveal an unhappy juror, possibly with scores to settle.
4. Look for life experiences or situations similar to any of the litigants in your case.
5. Consider any indications of leadership qualities such as online popularity or a closely-followed blog.
6. Photos posted say a great deal about the values of the juror. They may make a social or political statement or reveal attitudes and lifestyle philosophies.

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[78] *See, supra,* Part II.D discussing Tricam Industries, Inc. v. Coba, 100 So.3d 105, 112 (Fla. Dist. Ct. App. 2012).

[79] Holmes & Cohen, *supra* note 76, at 47.

III.
Juror Access to and Misuse of Social Media During Trial

Justice Oliver Wendell Holmes observed:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.
>
> …When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied.[80]

In November 2008, a trial court hearing a child abduction and sexual assault case against three defendants in Lancashire, England dismissed a juror who posted details of the trial on a social networking site. The juror had commented on her Facebook page, "I don't know which way to go, so I'm holding a poll." She invited those visiting her page to help her decide whether the three defendants were guilty or innocent. The court dismissed the juror and concluded the trial with the eleven jurors remaining, who ultimately acquitted the defendants.[81]

To trial lawyers and judges who learned their craft prior to the advent of social media, grasping the familiarity and extent of use of that media by those who grew up with it is difficult. A recent article noted:

> To understand the impact of social media, we must first consider a historical perspective. To reach 50 million users, the medium of radio required 38 years. Television required 13 years, while the Internet only four. In comparison, Facebook reached 100 million users in less than nine months. If it were a country, Facebook would be the fourth largest in the world.[82]

Indeed, as of March 2013, Facebook claimed one billion monthly active users.[83] Approximately 79% of daily users are outside of the United States and Canada.[84] To put this number

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[80] Patterson v. Colorado, 205 U.S. 454, 462-63 (1907) (citations omitted).

[81] Urmee Kahn, *Juror Dismissed From a Trial After Using Facebook to Help Make a Decision*, The Telegraph (Nov. 24, 2008, 10:01 A.M.), http://www.telegraph.co.uk/news/newstopics/lawreports/3510926/juror-dismissed-from-a-trial-after-using-facebook-to-help-make-a-decision.html.

[82] Matthew J. Smith, *Social Media: What You're Doing Wrong and How to Fix It*, Claims Management (October 2012), http://claims-management.theclm.org/home/article/Social-Media-Insurance-Claims-What-Youre-Doing-Wrong-and-How-to-Fix-It.

[83] Facebook Newsroom, Company Info/Key Facts, http://newsroom.fb.com/Key-Facts (last visited June 21, 2013).

[84] *Id.*

in perspective, it represents slightly less than one-seventh of the world's population of over 7 billion individuals.[85] Thus, a poll of the type conducted by the Lancashire juror, depending upon the user's privacy settings, can disseminate trial information and result in responses from a vast number of individuals, both within and outside of the United States, soliciting "votes" from those both familiar and unfamiliar with American law and the American jury system.

A. *Federal Judicial Center Study*

Although the use by jurors of social media during trial is documented, the scope of such use is largely unknown. In November 2011, the Federal Judicial Center released a report based upon a survey of federal judges designed "to assess the frequency with which jurors use social media to communicate during trials and deliberations."[86] The survey was conducted in October 2011 through an electronic questionnaire sent to all active and senior federal district judges. "Of the 952 judges who received the questionnaire, 508 responded."[87] The overall response rate was 53% with judges from all 94 federal districts represented.[88] The survey inquired of the federal judges' knowledge of jurors' use of social media during trial or deliberation and was not intended to be an empirical measure of how often such behavior actually occurred.[89]

Of the 508 judges who responded to the survey, only 30 judges, or 6%, reported knowledge of instances in which jurors used social media during trials or deliberations.[90] Twenty-three judges reported at least one instance when jurors used social media during trials. Twelve reported at least one occasion on which jurors used social media during deliberations. Twenty-two judges, the vast majority, reported that this occurred during a criminal trial, rather than a civil trial.[91] The media used included Facebook, instant messaging, Twitter and Internet chat rooms.[92] The reported instances included jurors using social media to post information about jury deliberations, attempts to "friend" participants in the lawsuit, disclosing identifying information about other jurors, conducting case related research, sharing general information about the trial, and, in one instance, allowing another person to

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[85] UN News Centre, *As World Passes Seven Billion Milestone, U.N. Urges Action to Meet Key Challenges* (October 31, 2011), http://www.un.org/apps/news/story.asp?NewsID=40257.

[86] Megan Dunn, Jurors Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management 1 (Fed. Judicial Ctr., ed., Nov. 22, 2011), http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 2.

[90] *Id.*

[91] *Id.*

[92] *Id.*

listen live to the testimony as the trial was proceeding.[93] Two judges "described situations in which a juror contacted a party with case-specific information" and another reported an alternate juror contacting an attorney during deliberations to provide information on the likely outcome of the trial.[94] Only two responding judges actually observed jurors using electronic devices in the courtroom, while others learned of the incidents through reports from attorneys or court personnel or, most often, another juror.[95] While the majority of these reported incidents resulted in the juror being removed from the panel or cautioned by the court, four judges declared a mistrial due to this conduct.[96]

B. *Reported Decisions*

Although the reported decisions regarding jurors using social media are sparse, three recent cases are instructive. In *United States v. Fumo*, the Third Circuit Court of Appeals considered the appeal by Pennsylvania State Senator Vincent Fumo of his conviction on 137 counts of fraud, tax evasion and obstruction of justice.[97] One basis upon which Fumo asserted the conviction should be reversed was that a juror posted comments on Facebook and Twitter during the trial which were noted, and reported, by a local television station.[98] The juror, who saw the news report and deleted the Facebook comments, had made a total of seven Facebook and Twitter entries during jury selection and trial which commented on the length of the trial and, ultimately, noted, "Stay tuned for the big announcement on Monday everyone!"[99] The comment on Twitter appeared after the completion of the first week of deliberations, and is reported to have stated "This is it … no looking back now!"[100]

Upon learning of the juror's comments, Fumo moved to disqualify the juror. The judge held an *in camera* hearing in which the juror stated that he had avoided watching news reports during the trial, but had inadvertently seen the report during which his social media comments were revealed.[101] As a result, although concluding that the juror had violated the court's instruction not to communicate concerning the case outside of the jury room, the trial judge nonetheless found that the comments were "'nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless.'"[102]

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[93] *Id.* at 3.

[94] *Id.* at 4.

[95] *Id.* at 4-5.

[96] *Id.* at 5.

[97] 655 F.3d 288, 294 (3rd Cir. 2011).

[98] *Id.* at 298.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 299.

In considering Fumo's appeal as to this issue, the Third Circuit noted that

> [n]ot unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence. If anything, the risk of such prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.[103]

However, the court concluded that every failure of a juror to abide by a trial court's admonition not to comment about the trial on social media sites will not result in a new trial, but rather the court must determine whether substantial prejudice exists.[104] In this regard, the Third Circuit found that Fumo's arguments that the comments reflected bias or partiality on the part of the juror were not plausible, and hence the trial court did not abuse its discretion in denying his motion for a new trial.[105] The Third Circuit agreed with the trial court's conclusions that the juror's comments were merely "harmless ramblings" with no prejudicial effect, and "so vague as to be virtually meaningless."[106] Even though the district court found that other jurors may have learned of these comments, the Third Circuit held that Fumo failed to demonstrate substantial prejudice and therefore, his motion for a new trial was properly denied.[107] The court ultimately affirmed Fumo's conviction, although it concluded for other reasons that his sentence should be vacated and the case remanded for resentencing.[108]

In a separate opinion concurring with the affirmance of the conviction, but dissenting as to the remand of the case for resentencing, one of the Third Circuit judges expressed concern regarding the misconduct of the juror in posting these comments, and urged:

> Technology, of course, will continue to evolve and courts must creatively develop ways to deal with these issues. In addition to the endorsement the majority opinion gives the recently proposed model jury instructions, I would encourage district courts to go further. We must first educate jurors that their extra-curial use

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[103] *Id.* at 305.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 306.

[107] *Id.*

[108] *Id.* at 324.

> of social media and, more generally, the Internet, damages the trial process and that their postings on social media sites could result in a mistrial, inflicting additional costs and burdens on the parties specifically, and the judicial system generally. I suggest that district courts specifically caution jurors against accessing the Internet to do research on any issues, concepts or evidence presented in the trial, or to post or seek comments on the case under review.
>
> …Finally, the Bar also bears some responsibility. During voir dire, attorneys should routinely question jurors on their Internet usage and social networking habits. A juror's Internet activities have the potential to result in prejudice against a defendant, and counsel must expand the voir dire questioning to include inquiries into online activity.[109]

A different rationale was used, and a different result reached, by the Supreme Court of Arkansas in a 2011 decision resulting from the appeal of a murder conviction, in part because a juror had posted comments about the trial to his Twitter account.[110] Erickson Dimas-Martinez was found guilty in the trial court on charges of capital murder and aggravated robbery, resulting in sentences of death and life imprisonment, respectively.[111] Appealing the conviction, the defendant alleged that a juror was "tweeting" during the trial and, even after the conduct was discovered and the juror was instructed by the trial judge not to do so, the juror's tweeting continued.[112] The postings included a "tweet" on the day that the submission of evidence was concluded during the sentencing phase, which stated, "Choices to be made. Hearts to be broken. We each define the great line."[113] Dimas-Martinez argued that the conduct of the juror represented "a flagrant violation of the circuit court's instruction against Twittering and demonstrated that [the juror] could not follow the court's instructions."[114]

The Arkansas Supreme Court agreed, but not because evidence had been presented which demonstrated some actual prejudice suffered by the accused. Noting that the juror's comments on Twitter about the trial were quite public, the court commented, "Even if such discussions were one-sided, it is in no way appropriate for a juror to state musings, thoughts, or other information about a case in such a public fashion."[115] The court then concluded that

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[109] *Id.* at 332-33.

[110] Dimas-Martinez v. State, 385 S.W.3d 238 (Ark. 2011).

[111] *Id.* at 240.

[112] *Id.* at 242.

[113] *Id.* at 246.

[114] *Id.*

[115] *Id.* at 248.

the prejudice warranting reversal demonstrated by the juror's conduct was not in the nature of the comments made, but in the demonstrated refusal of the juror to follow the trial court's instructions.

> First, the procedural posture of this case is not that appellant was prejudiced by the fact that the juror tweeted; rather, Appellant avers the prejudice results from the fact that the juror admitted to the misconduct, which proves that he failed to follow the court's instructions, and it is the failure to follow the law that prejudiced Appellant.[116]

In this respect, the Arkansas Supreme Court found that the trial court's failure to acknowledge the juror's inability to follow his instructions constituted an abuse of discretion which, along with evidence of a juror sleeping during the trial, warranted a reversal and remand of the case for a new trial.[117]

In doing so, the court noted that such juror misconduct was an issue which required further proactive consideration.

> Finally, we take this opportunity to recognize the wide array of possible juror misconduct that might result when jurors have unrestricted access to their mobile phones during a trial. Most mobile phones now allow instant access to a myriad of information. Not only can jurors access Facebook, Twitter, or other social media sites, but they can also access news sites that might have information about a case. There is also the possibility that a juror could conduct research about many aspects of a case. Thus, we refer to the Supreme Court Committee on Criminal Practice and the Supreme Court Committee on Civil Practice for consideration of the question of whether jurors' access to mobile phones should be limited during a trial.[118]

A third decision in 2011, this one from the United States District Court for the Eastern District of Pennsylvania, concerned a trial court finding a juror in contempt of court for violating the admonition against commenting on the trial through social media while it was ongoing. The court fined the juror $1000.[119] The juror, dismissed from the jury at her own request prior to the conclusion of the trial due to issues with her employment, sent an email to two other jurors on the night of her dismissal stating:

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[116] *Id.*

[117] *Id.*

[118] *Id.* at 249.

[119] United States v. Juror Number One, 866 F. Supp. 2d 442 (E.D. Pa. 2011).

> Dear [Juror Number Eight] and [Juror Number Nine]: It was great meeting you and working with you these past few days. If I was so fortunate as to have finished the jury assignment, I would have found [Defendant] guilty on all 4 counts based on the facts as I heard them. There was a lot of speculation and innuendo, but that is the case as I saw it. How wonderful it would have been to see how others saw it. Please fill me in as you can…. I feel like I was robbed. After four days, I should have been able to contribute in some way…. I want to wish you and the rest of the jurors very clear thinking and the will to do the right thing. Respectfully, [Juror Number One].[120]

Juror Number Eight responded with the following message: "Thank you for sharing your thoughts. I am of the same mind and have great doubt that the defense can produce anything new today that will change my thinking. It disturbs me greatly to know that people lie .... Anyway I will share your message with the gang."[121] Juror Number Eight was removed from the jury at the request of the defendant and without objection from the government, and replaced by an alternate. However, after voir dire of Juror Number Nine, during which she stated she had not seen the email from Juror Number One, she was allowed by agreement of the parties to remain on the jury.[122]

The trial judge referred the matter to the United States Attorney for prosecution of Juror Number One for contempt of court.[123] The district court concluded that the prosecution of the juror for failure to obey two separate court orders not to discuss the case with anyone until it was concluded, including specifically through the Internet or electronic messaging, constituted a criminal proceeding[124] for which the punishment was either a fine or imprisonment not to exceed six months.[125] Concluding that the evidence established beyond a reasonable doubt that the juror was guilty of criminal contempt of court and that her conduct warranted the imposition of a fine of $1,000, the court noted:

> Jurors are not supposed to discuss with anyone the cases they hear before deliberation or outside the jury deliberation room so as to avoid improper influences and to ensure that a jury's verdict will be just and fair.

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[120] *Id.* at 444.

[121] *Id.* at 445.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 446.

[125] *Id.* at 449.

> …Holding jurors in contempt due to Internet misconduct vindicates the court's authority by punishing past acts of disobedience and conveys "a public message that the judicial system cannot tolerate such behavior."[126]

C. *The Appearance of Impropriety*

Rule 1.2 of the American Bar Association's *Model Code of Judicial Conduct* codifies the significance of avoiding even the appearance of impropriety in requiring that judges "shall avoid impropriety and the appearance of impropriety."[127] As the author a *Georgetown Journal of Legal Ethics* Note observed:

> In order to protect public confidence in the judicial system, instances of juror misconduct via social networking sites and the use of sanctions to address such behavior must be evaluated under the appearance of impropriety standard. Currently, juror misconduct is viewed through the lens of prejudice. If the misconduct is not prejudicial against the defendant, a judge will generally not punish it. This standard is designed to protect the defendant's Sixth Amendment right to a fair trial. However, the prejudice standard does not account for potential damage to the judicial system's public image, something the *Model Code for Judicial Conduct* Rule 1.2 is designed to protect. News stories involving jurors Tweeting about evidence or posting Facebook messages describing deliberations reflect negatively on the judiciary as a whole, regardless of the prejudicial effect of that behavior.[128]

When jurors tweet during a trial despite being admonished not to communicate about the trial to anyone outside of jury deliberations, they demonstrate an inability or refusal to follow the trial judge's instructions. In the face of this type of conduct, courts cannot assume that jurors who disobey the court's admonition will nonetheless follow its instructions with regard to the law governing the case.[129] Thus, even in the absence of a showing of actual prejudice affecting the outcome of the trial, when jurors violate the court's instruction not to communicate their observations or thoughts outside of the jury deliberation room, their disobedience should be deemed, in order to avoid the appearance of impropriety in the judicial proceeding, to constitute prejudice warranting a mistrial or a new trial. Since actual

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[126] *Id.* at 451-52 (quoting United States v. Fumo, 655 F.3d 288, 332 (3rd Cir. 2011) (Nygaard, J., concurring in part, dissenting in part)).

[127] ABA Model Code of Judicial Conduct (2011), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html.

[128] David P. Goldstein, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 Geo. J. Legal Ethics 589, 603-04 (citations omitted).

[129] *See* Dimas-Martinez v. State, 385 S.W.3d 238 (Ark. 2011).

prejudice cannot be established absent an impermissible invasion of the sanctity of the jurors' deliberations, only a strict standard assuming such prejudice from a juror's violation of the court's prohibition against communicating about the proceedings outside of the deliberation room can ensure fairness of the judicial process for the litigants.

D. *Suggested Actions*

The Federal Judicial Center study found that 60% of federal judges responding to its survey had used a model jury instruction promulgated in January 2010 by the Committee on Court Administration and Case Management, which cautions jurors against the use of social media to communicate during trial about the proceeding.[130] The version promulgated in June 2012, for use before trial, includes the following admonition:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.[131]

The proposed model instruction for use at the close of the evidence and before deliberations includes a similar admonition, and states:

> In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.
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> You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through

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[130] Megan Dunn, Jurors Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management 6 (Fed. Judicial Ctr., ed., Nov. 22, 2011), http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf. Six percent of the judges responding were not aware that the model jury instructions existed. *Id.*

[131] Judicial Conference Comm. on Court Admin. & Case Mgmt., Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case (2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

> social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have.[132]

If a court gave these instructions at beginning of each day of trial and deliberations, respectively, with reminders when the court recesses for breaks, a sitting juror's violation of the admonition should be sufficient to demonstrate a failure or refusal of the juror to abide by the court's instructions and warrant a presumption that the juror will fail or refuse to abide by the court's instructions as to the law governing the decision in the case. Thus, trial court should be urged, before the start of trial, to give these admonitions to the jurors.

In order to emphasize to jurors that they must comply with the instruction that they not communicate regarding the case outside of the jury deliberation room, including through the use of social media, the trial court should require jurors to surrender their cell phones, Blackberries and other communication and Internet accessible devices at the beginning of each trial day, to be returned at the conclusion of that day. By surrendering their cell phones and other devices, jurors would realize just how important it is for them to comply with the instruction prohibiting outside communications. Upon returning the electronic devices to the jurors at the end of the trial day, and, perhaps, before the lunch recess, the court could again remind the jurors of the admonition not to discuss or investigate the case or any issues in it through any electronic means, or otherwise. This physical act of requiring the jurors to surrender their electronic devices while court is in session, coupled with the repeated admonition of the jurors upon returning their devices to them at the close of each court session, would likely create a strong impression in the minds of the jurors of the significance of their compliance with the court's admonition.

Finally, although some have cautioned that punishing jurors for their misuse of social media and disregard for the court's instructions might discourage participation in jury service,[133] the imposition of punishment and its publication in the media should impress in the minds of the public the significance of maintaining the integrity of the judicial process. If resistance to service on juries resulted, the court could continue to use its traditional authority to require compliance with that civic obligation. Certainly, the integrity of the judicial process, and the public's confidence in it, is a sufficient reason to require compliance with rules and admonitions against social media comments upon trial proceedings by sitting jurors, despite whatever objection may result from enforced compliance with those rules and processes which ensure that integrity.

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[132] *Id.*

[133] Goldstein, *supra* note 128, at 601.

IV.
Conclusion

Clients, the courts, and the profession are well-served by attorneys who recognize and utilize social media as a tool which can enhance and expand the scope of services delivered, collaboration, the sharing of information, and marketing efforts. The ethical rules governing attorney conduct are nonetheless applicable to the virtual world, and one can argue that the use of social media demands a heightened awareness of those standards. However, as demonstrated in this Article, social media's utility, scope, ease of use, and anonymity—real or perceived—has already resulted in a number of instances of attorney misconduct. Attorneys can and should (re)familiarize themselves with the Model Rules and applicable local standards when using social media and, when necessary, seek guidance before undertaking any questionable or novel uses of the medium.

Social media's impact on jury trials has been particularly profound. A trial attorney should take advantage of the jury research opportunities offered through social media – before, during, and after jury selection. Attorneys must nonetheless be careful to curb their enthusiasm as they mine social media for information regarding prospective and sitting jurors. Conduct that could be viewed as deceptive or invasive of privacy must be avoided, and social media should be used in conjunction with "old school" techniques of jury vetting.

A trial attorney must also be vigilant as to jurors' potential misuse of social media. Jurors have disclosed their thoughts and observations of proceedings and even jury deliberations to those having no involvement in the trial, or even knowledge of it. In fact, some jurors actively solicit comments and responses regarding these matters. The dangers associated with such communications warrant frequent, meaningful admonitions by the trial court reminding jurors not to comment upon, or review comments upon, the proceedings outside of the jury deliberation room. These admonitions should be reinforced by the physical act of requiring jurors to surrender their electronic communication devices at the beginning of each trial day, coupled with the imposition and public disclosure of sanctions for criminal contempt where violations of those admonitions are discovered. These precautions are necessary, insofar as is possible, to guard the integrity of the trial process.

Social media's role in litigation, trials and other aspects of the practice will continue to evolve, and is likely to give rise to additional dilemmas. Attorneys who keep abreast of future developments, who recognize that social media is a resource and a means to an end, and who adhere to the same ethical "rules of the road" applicable to other forms of communication will be well positioned to meet the challenges as they arise.

The Federation of Insurance Counsel was organized in 1936 for the purpose of bringing together insurance attorneys and company representatives in order to assist in establishing a standard efficiency and competency in rendering legal service to insurance companies, and to disseminate information on insurance legal topics to its membership. In 1985, the name was changed to Federation of Insurance and Corporate Counsel, thereby reflecting the changing character of the law practice of its members and the increased role of corporate counsel in the defense of claims. In 2001, the name was again changed to Federation of Defense & Corporate Counsel to further reflect changes in the character of the law practice of its members.

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