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Ethical Implications

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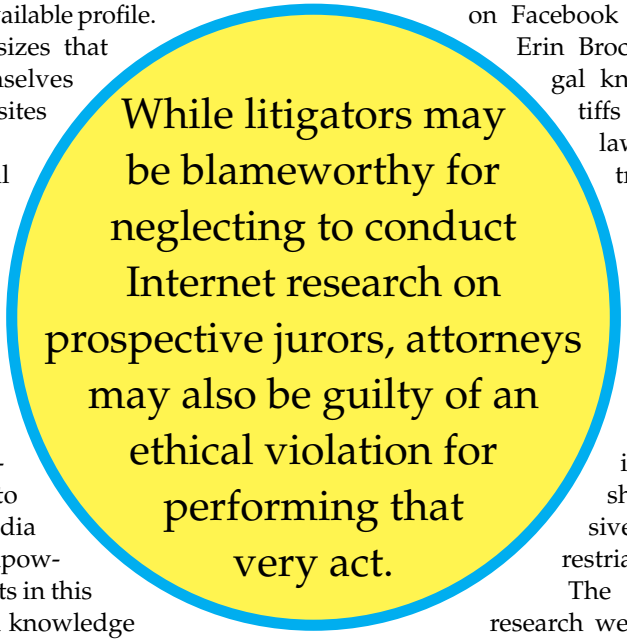
Introduction

As the membership rates of social networking[1] websites continue to soar, attorneys are increasingly relying on Internet research of prospective jurors to gain an advantage at trial. The ease with which litigators can obtain valuable information about members of the jury pool has made this a prevalent strategy. Anecdotes constantly surface about the trial consultant who miraculously discovers prospective jurors' hidden biases through their online activity. Pre-trial Internet research is becoming so much the standard that the New York City Bar Association (NYCBA) recently suggested that a trial attorney's failure to thoroughly investigate prospective jurors might be an abdication of the attorney's professional duty.[2]

But there is an apparent conundrum: while litigators may be blameworthy for neglecting to conduct Internet research on prospective jurors, attorneys may also be guilty of an ethical violation for performing that very act. In June, the NYCBA issued Formal Opinion 2012-2, a comprehensive report on the ethical implications for lawyers who research jurors on the Internet. Formal Opinion 2012-2 states that attorneys might be in violation of the New York Rules of Professional Conduct if

they contact a prospective juror through a social media site – even if the contact was unintentional. According to the NYCBA, if a social media site automatically notifies a juror when another person has viewed the juror's profile page, a lawyer "communicates" with a juror simply by looking at the juror's publicly available profile. Formal Opinion 2012-2 emphasizes that attorneys must educate themselves about how social media websites work before they use them.

At first glance, these ethical views may seem hard to reconcile. On one hand, an attorney could be liable for forgoing Internet background checks. On the other, an attorney may be culpable just by looking at a juror's publicly available social media profile page. But these guidelines are not in conflict. By compelling attorneys to learn how various social media sites operate, the NYCBA is empowering attorneys to become experts in this field. If lawyers are armed with knowledge about how these websites function, they can perform precise research that comports with their ethical obligations.



Internet Research of Jurors

The number of individuals with online profiles is growing exponentially. One recent survey estimates that 35% of adults and 60% of people under the age of 30 now belong to a social media networking site.[3] Given those figures, trial lawyers are using websites like Google, Facebook, and Twitter to learn as much as possible about the character traits of prospective jurors.[4] With the assistance of an associate or a paralegal, litigators can conduct real-time background searches on a multitude of potential jurors.

The primary purpose of performing Internet background research is to enable trial attorneys to weed out biased jurors during the *voir dire* process.[5] Litigators can use peremptory challenges – limited objections that a lawyer may use to strike a prospective juror – if attorneys discover evidence that a potential juror will be prejudiced against their clients.[6]

The benefits of Internet background research can be substantial.[7] Historically, trial lawyers have depended on confidential juror questionnaires to obtain background information about prospective jurors, but lawyers have criticized the paucity of information contained in juror questionnaires.[8] Now, through the Internet, trial attorneys can obtain information about prospective jurors that would otherwise not be disclosed during *voir dire*, such as the juror's political beliefs and economic philosophies.[9] Litigators can also use the Internet to identify jurors who may be receptive to their clients' claims or jurors who seem likely to disregard the rule of law.

For instance, a trial consultant in a products liability case learned that a potential juror had posted on Facebook "that one of her heroes was Erin Brockovich, the crusading paralegal known for her work for plaintiffs in environmental cases."[10] In a lawsuit involving patent rights, a trial consultant for the plaintiff discovered that a prospective juror had previously blogged about the unfairness of copyright infringement, and he sought to keep this juror on the panel.[11] And in a somewhat eccentric example, a potential juror in a personal injury case was rejected because she had blogged about her extensive attempts to contact extraterrestrials.[12]

The benefits of pre-trial Internet research were starkly realized in a recent products liability trial in Fort Lauderdale, Florida. The plaintiff claimed that he was injured after he was forced to clean a machine in a confined space. Before examining prospective jurors, the plaintiff's attorney began researching them on social networking sites. During the course of her research, the attorney learned that one of the potential jurors belonged to a support group for claustrophobics. She selected this juror for the panel, and the juror ultimately served as the foreman. The result: a verdict in favor of the plaintiff.[13]

Furthermore, Internet background searches are extremely efficient. Compared with traditional forms of investigative research, attorneys and their staff members can sift through vast amounts of information on the Internet in a relatively short amount of time.[14] Attorneys inside a courtroom can email the names of prospective jurors to associates or paralegals, who can then plug these names into various search engines or social media websites. Electronic data on social media websites can be retrieved within seconds, and the trial lawyer can receive the background information before making a decision about whether to strike the prospective juror.[15]

Social media websites may also be used by attorneys to verify the accuracy of statements made by prospective jurors during *voir dire*. Depending on the jurisdiction, *voir dire* can be a frenetic process, and it may not be possible to scrutinize the background information of each juror. In *Dellinger*,[16] a criminal fraud trial, a juror denied during *voir dire* that she had a social relationship with the defendant. After the jury rendered a guilty verdict against the defendant, the defendant disclosed that he

had received a message from the juror before the trial through a social networking site. In the message, the juror sympathized with the defendant's plight and said they would "Talk Soon!" The Supreme Court of Appeals of West Virginia ultimately held that the trial court abused its discretion in failing to order a new trial.

The efficacy of researching potential jurors on the Internet is leading some commentators to suggest that trial attorneys may be obligated to perform this service.[17] Indeed, the NYCBA observed that clients have begun to assume that their attorneys will conduct Internet background searches of jurors and that "standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[18] One recent scholarly essay proffers that it may even be malpractice for a trial attorney not to perform this research.[19]

To be sure, the New York Rules of Professional Conduct (NYRPC) do not provide any indication about whether pre-trial Internet research is required. Two rules in the NYRPC, however, bear on this issue. Rule 1.1 provides that "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." And Rule 1.3(a) states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[20] So, for the time being, it seems safe to assume that trial attorneys are not invariably required to perform this service. But it may not be long before that changes.

And while pre-trial Internet research may eventually be an obligatory ethical duty, the NYCBA's Formal Opinion 2012-2 indicates that when engaging in this conduct, attorneys must be mindful of their ethical responsibilities.

Ethical Rules About Researching Jurors Electronically

Until recently, the ethical rules for lawyers who conduct Internet research on potential jurors in New York State were not explicit. The NYRPC provides only that "a lawyer shall not communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case."[21] In 2011, the New York County Lawyers' Association Committee on Professional Ethics issued an interpretation of Rule 3.5(a)(4).[22] The Committee determined that it is ethical and proper under Rule 3.5(a)(4) for an attorney to "undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send Tweets to jurors or otherwise contact them."[23] Still, the precise meaning of "contact" and "communicate" in this context had not yet been defined.

In June, however, the NYCBA released its groundbreaking ethical opinion on using social media and related technology for pre-trial research. In it, the NYCBA attempted to clarify the meaning of "communication" within the context of Rule 3.5(a)(4). While the NYCBA does not have the authority for policing ethical violations in New York State, formal ethical opinions from the NYCBA definitely hold sway. In discerning the meaning "communication," the NYCBA referenced several sources: *Black's Law Dictionary* (9th Ed.), *The Oxford English Dictionary*, and Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York. Ultimately, it determined that it is irrelevant whether an individual intends to communicate with another person; communication is accomplished when knowledge or information is transmitted from one person to another. The focal point is on the recipient of the communication, not on the communicator.[24]

The NYCBA recognizes that some social media services automatically notify users when their profiles have been viewed. For example, members of LinkedIn, a highly popular professional networking site, receive a message when other LinkedIn members have viewed their profiles. Other social networking services that offer this feature include Bebo and Tagged.[25] The NYCBA concludes that

> [a] request or notification transmitted through a social media service may constitute a communication even

> if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.
>
> …
>
> The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent.[26]

Still, the NYCBA did not decide that an inadvertent or unintentional communication necessarily constitutes an ethical violation – only that it may. The NYRPC may ultimately need to weigh in on this subject.

The NYCBA repeatedly states that attorneys who engage in electronic background searches of jurors should study the functionality of the websites they use. If an attorney is unable to grasp how the social media service works, the NYCBA urges the attorney to proceed with caution and be aware that he or she may be at risk of violating the ethical rules.[27]

Before you conduct any research on a social media site you must confirm that the site does not notify other users when their profiles have been viewed.

Reconciling the Two Views

While one may initially believe that Formal Opinion 2012-2 creates an ethical dilemma, the fallacy of this assessment becomes evident upon closer inspection. Formal Opinion 2012-2 simply advises attorneys of the following: (1) you may – if not now, at some time in the future – be obligated to perform Internet research of prospective jurors; (2) you can view the publicly available electronic profiles of prospective jurors as long as you do not contact or communicate with the juror in any fashion; and (3) before you conduct any research on a social media site you must first examine how the site works, understand its privacy policies, and confirm that the site does not notify other users when their profiles have been viewed.[28]

If, for example, an attorney planned to use Facebook to research prospective jurors, the attorney would need to visit the Facebook's Help Center at http://www.facebook.com/help/?ref=ts. The Help Center is a user-friendly resource providing an abundance of basic information about Facebook. It contains a glossary of commonly used terms; debunks certain myths; and describes various features, services, and applications offered by the service. Most important, the Help Center provides a comprehensive explanation of Facebook's privacy policies, and it clearly delineates Facebook's policy about tracking who views your profile:

> Facebook does not provide a functionality that enables you to track who is viewing your profile (timeline), or parts of your profile (timeline), such as your photos. Third party applications also cannot provide this functionality. Applications that claim to give you this ability will be removed from Facebook for violating policy.[29]

Similarly, LinkedIn users can access the LinkedIn Learning Center, which contains detailed information about how the site works. LinkedIn further offers a function called "Answers" in which a user can ask questions about a variety of topics, including questions about various features offered through LinkedIn. The answers are provided by other users. A simple inquiry about whether users have the ability to track who views their profile yields an overwhelming number of responses that yes, indeed, you can (although users' ability to ascertain the identity of people who have viewed their profiles varies based on the type of LinkedIn account they have).

Twitter requires users to subscribe to another user's Twitter account, which has been found to be a blatant act of communication – and therefore it is a prohibited form of juror research. Still, if Twitter users have a public account, it is possible to access their Twitter accounts through a Google search without notifying the users that one has viewed their profile.

The more an attorney understands about a social media website, the more equipped the attorney will be to take advantage of all of the website's search capabilities. For example, the Facebook Help Center provides a cogent description of the Facebook Search function, explaining how users can filter their searches, search public information, or search for two things at the same time.

Conclusion

Pre-trial Internet research of prospective jurors is becoming an integral component of the trial preparation process. Trial attorneys would be well advised to apply this practice whenever possible because it may increase the likelihood of a favorable outcome. But before undertaking this research, attorneys must be familiar with the local ethical rules governing this practice. They must also determine whether jurors will receive a notification from the website if another user views their profiles. Fortunately, the leading social media websites provide user-friendly support software that allows trial attorneys to discern this information with relative ease. Given the role of social media in our society, investing the time to understand how these websites function is a worthwhile endeavor. ■

1. Social media is defined as "[w]eb sites and other online means of communication that are used by large groups of people to share information and to develop social and professional contacts: Many businesses are utilizing social media to generate sales." *See* Dictionary.com. http://dictionary.reference.com/browse/social+media?s=t (Mar. 5, 2012).

2. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2.

3. Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 Kan. L. Rev. 611, 612 n.5 (2012).

4. Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, Reuters Legal (Feb. 17, 2011).

5. Potential jurors are generally selected through a system of examination, known as *voir dire*, during which attorneys for each party can object to a juror.

6. Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. Rev. Disc. 28, 34–35 (2011).

7. *See* Beth Germano, *Social Media Changing the Way Juries Are Picked*, CBS Boston (Nov. 15, 2010), http://boston.cbslocal.com/2010/11/15/social-media-changing-the-way-juries-are-picked (medical malpractice attorney in Boston claims that social media research of prospective jurors has been revolutionary).

8. *Id.*

9. *See* Hoffmeister, *Applying Rules of Discovery supra* note 6, pp. 32–33.

10. Grow, *Internet v. Courts supra* note 4.

11. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times (Sept. 29, 2008), http://articles.latimes.com/2008/sep/29/nation/na-jury29.

12. *Id.*

13. Hoffmeister, *Investigating Jurors supra* note 3, pp. 612, 626.

14. *Id.* at 630.

15. *See* Hoffmeister, *Applying Rules of Discovery supra* note 6, pp. 33–34.

16. *See State v. Dellinger*, 696 S.E.2d 38, 40 (W. Va. 2010) (per curiam).

17. Hoffmeister, *Investigating Jurors*, *supra* note 3, p. 630.

18. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 I.

19. Hoffmeister, *Investigating Jurors*, *supra* note 3, p. 631.

20. *See* Rules 1.1, 1.3(a) of the NYPRC.

21. *See* Rule 3.5(a)(4) of the NYRPC.

22. NYCLA Comm. on Prof'l Ethics, Formal Opinion 743 (May 18, 2011).

23. *Id*. Indeed, although the New York Appellate Division has not directly addressed this question, a New Jersey Appellate Division decision is consistent with the New York County Lawyers' Association's position. In *Carino v. Muenzen*, 2010 N.J. Super. Unpub. LEXIS 2154, at *10 (Aug. 30, 2010), a medical malpractice case, the trial court ruled that a plaintiff's attorney could not use the Internet to obtain information about prospective jurors during jury selection because the plaintiff's attorney had failed to give advance notice to defense counsel that he would be conducting such research. The jury ultimately awarded the defendant a defense verdict, and the plaintiff appealed. On appeal, the Appellate Division determined that trial judge acted unreasonably. *Id.* at 26. The Appellate Division explained:

> In making his ruling, the trial judge cited no authority for his requirement that trial counsel must notify an adversary and the court in advance of using Internet access during jury selection or any other part of the trial. The issue is not addressed in the Rules of Court.

Id. The Appellate Division, however, determined that the plaintiff did not demonstrate that he suffered any prejudice as a result of the trial court's error, and the defense verdict was affirmed. *Id.* at 27.

24. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.2.

25. Bebo, launched in 2005, is a social media site where users can post blogs, pictures, music, videos, and questionnaires. www.bebo.com. Tagged is a "social discovery site" that enables members to browse the profiles of other members, play games, and share tags and virtual gifts. www.tagged.com.

26. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.2–3.

27. *See* NYCBA Comm. on Ethics Formal Opinion 2012-2 II.B.3.

28. NYCBA Comm. on Ethics Formal Opinion 2012-2 is extremely thorough. It also provides that an attorney may not engage in deception or misrepresentation in researching jurors on social media websites and discusses an attorney's obligation to reveal improper juror conduct to the court.

29. *See* http://www.facebook.com/help/?page=11603751514719 (Aug. 4, 2012).

"I don't have too many answers. I'm just up here avoiding jury duty."