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JUROR INVESTIGATION: IS IN-COURTROOM INTERNET
RESEARCH GOING TOO FAR?

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ABSTRACT

Lawyers traditionally have conducted research on potential jurors outside the courtroom as part of voir dire. But as wireless Internet access becomes ubiquitous, attorneys are increasingly likely to conduct juror research inside the courtroom, including during voir dire itself. In the August 2010 decision Carino v. Muenzen, a New Jersey appeals court held that a trial court judge erred when he told a lawyer to close his laptop during voir dire, reasoning that there was no disruption, no resulting prejudice, and no rule against researching jurors online during the proceeding. This Article examines the Carino decision and the issue of researching potential jurors during voir dire. Because there is very little guiding law, lawyers should expect to encounter attorneys who research potential jurors in the courtroom and realize that this practice may be allowed at the discretion of individual judges.

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INTRODUCTION

Advances in technology have changed the judicial process and forced new issues into the legal consciousness. Increased availability to jurors of research and communication tools via the Internet, for example, has generated new problems regarding the proper juror use of those resources during trials.¹ Courts now face a related but distinct issue: increased attorney use of the same tools. The availability of Internet access in courtrooms allows lawyers to research jurors in real time, inside the courtroom, and in the presence of the judge and the juror being researched.

In the unpublished decision *Carino v. Muenzen*, a suit alleging medical malpractice in the treatment of Joseph Carino's deceased wife, plaintiff's counsel used his laptop to access the courtroom's free wireless Internet connection and research potential jurors during *voir dire*.² Counsel for the defendant objected, and the trial judge ruled that such use of the Internet was an unfair practice, barring it.³ On appeal, the court held that it was improper for the judge to bar this activity.⁴

¹ See, e.g., Caren Myers Morrison, *Can the Jury Trial Survive Google?*, CRIM. JUST., Winter 2011 at 4, 5 (describing juror's factual and legal research, as well as Blogging during trial).

² *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071, at *4 (N.J. Super. Ct. App. Div. Aug. 30, 2010), *cert. denied*, 205 N.J. 100 (2011).

³ *Id.*

⁴ *Id.* at *10.

This Article discusses the constitutional underpinnings of the *voir dire* process, examines current *voir dire* research practices and their public policy implications, and offers practice pointers for judges and attorneys.

I. CONSTITUTIONAL AND GENERAL BACKGROUND

Rules governing jury selection have their roots in four separate constitutional provisions. Article III⁵ and the Sixth Amendment⁶ provide for the right to trial by “an impartial jury” in criminal cases, while the right to trial by jury in civil cases stems from the Seventh Amendment.⁷ The Supreme Court has interpreted an “impartial jury” to mean one that is selected from a “representative cross section of the community.”⁸ Selecting an impartial jury also requires “identifying and eliminating biased and prejudicial prospective jurors,”⁹ which is the basis for our current *voir dire* system. While the Sixth Amendment’s protections have been extended to apply to the states,¹⁰ the Seventh Amendment’s have not.¹¹ Yet many states “separately provide for jury trials in civil actions in their constitutions or by statute.”¹² The Equal Protection Clause of the Fourteenth Amendment further safeguards the process of jury selection, prohibiting certain discriminatory selection procedures.¹³

⁵ U.S. CONST. art. III, § 2, cl. 3.

⁶ U.S. CONST. amend. VI.

⁷ U.S. CONST. amend. VII. The Seventh Amendment right to a “trial by jury” implies an impartial jury as well. *See McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1983).

⁸ *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

⁹ Karen Monsen, *Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights from Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 REV. LITIG. 285, 298 (2002).

¹⁰ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

¹¹ *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 220 (1916).

¹² *See* NANCY GERTNER & JUDITH H. MIZNER, *THE LAW OF JURIES* § 1:11 (2d ed. 2009). For examples of provisions in state constitutions, *see* MASS. CONST. art. XV; NEV. CONST. art. I § 3; N.H. CONST. art. 20. For examples of provisions in state statutes, *see* KAN. STAT. ANN. § 60-239 (2010); N.C. GEN. STAT. § 1A-1, Rule 38 (2009).

¹³ U.S. CONST. amend. XIV. *See, e.g., Batson v. Kentucky*, 476 U.S. 79

Beyond this Constitutional framework, sparse law guides lawyers in whether it is appropriate to use the Internet to research potential jurors. Many attorneys have recognized the lack of rules on this issue and stated a desire for guidance,¹⁴ even describing this area as the “Wild West.”¹⁵

Further complicating the issue is the fact that each judge in state and federal court may set different rules, because judges are typically accorded broad discretion in setting proper courtroom behavior, including the examination of jurors.¹⁶ Nearly “every federal judge has his or her own procedure for the selection of jurors.”¹⁷ In addition, “[g]iven the broad discretion afforded the court on *voir dire*, the district court’s determination on issues concerning the scope of *voir dire* will be overturned only for an abuse of discretion.”¹⁸

Use of the Internet to research potential jurors implicates constitutional and other important issues, including whether it violates potential jurors’ right to privacy, whether it leads to the selection of more impartial juries, and to what extent it streamlines the judicial process. Some commentators have noted that such a development benefits the legal system because the information that can be gathered quickly from online tools decreases attorney’s reliance on broad stereotypes in exercising their peremptory challenges.¹⁹ Others point out, however, that information collected

(1986) (holding that a prosecutor may not use a peremptory challenge to exclude jurors based solely on their race).

¹⁴ See, e.g., Mike Rosen, *Voir Dire for the Vanguard*, CALIFORNIA LAWYER (Oct. 2010), available at <http://www.callawyer.com/story.cfm?eid=911878&evid=1>.

¹⁵ Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS (Feb. 17, 2011, 2:49 PM), <http://www.reuters.com/article/2011/02/17/us-courts-voirdire-idUSTRE71G4VW20110217>.

¹⁶ See, e.g., *Real v. Hogan*, 828 F.2d 58, 62 (1st Cir. 1987). See also KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 4:7 (6th ed. 2011).

¹⁷ See JAMES WILLIAM MOORE, 9 MOORE’S FEDERAL PRACTICE §47.10[3][a] (3d ed. 1997).

¹⁸ See *id.* at § 47.10[5] (internal citations omitted).

¹⁹ See, e.g., Jamila A. Johnson, *Voir Dire: To Google or Not to Google*, GPSOLO LAW TRENDS & NEWS (American Bar Association, Chicago, Ill.), Fall 2008, http://www.americanbar.org/content/newsletter/publications/law_trends_

online may not be accurate, and in some cases, may simply represent an effort of the clever potential juror to escape jury duty.²⁰

In the absence of consistent rules regulating use of the Internet to research potential jurors, the growing consensus among courts, practitioners and academics is that conducting such research is acceptable.²¹ It has been argued that Internet research is required to satisfy the lawyer's professional duty of competence and due diligence,²² and LexisNexis markets a tool for this specific purpose.²³ As an indication of the extent of juror research in practice, the Missouri Supreme Court has held that in order "to preserve the issue of a juror's nondisclosure [during voir dire], a party must use reasonable efforts" to examine the potential jurors' prior litigation history using online tools.²⁴ The court stated:

[I]n 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

news_practice_area_e_newsletter_home/litigation_johnson.html.

²⁰ See, e.g., Anita Ramasastry, *Googling Potential Jurors: The Legal and Ethical Issues Arising from the Use of the Internet in Voir Dire*, FINDLAW (May 30, 2010), <http://writ.news.findlaw.com/ramasastry/20100730.html>.

²¹ See, e.g., *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010), *cert. denied*, 205 N.J. 100 (2011); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3(b) (5th ed. 2010) ("When the identity of prospective jurors is known, the prosecution or the defense or both may undertake a pretrial investigation of them. . . . Information about potential jurors often is available on the [I]nternet for litigants to research.").

²² See, e.g., *Should Lawyers Monitor Jurors Online?* NEW ORLEANS CITYBUSINESS, Dec. 23, 2010, <http://neworleanscitybusiness.com/blog/2010/12/23/should-lawyers-monitor-jurors-online>; *But see De La Rosa v. Zequeira*, 659 So.2d 239, 242 (Fla. 1995) (citing *De La Rosa v. Zequeira*, 627 So.2d 531, 534 (Fla. Cir. Ct. 1993) (Baskin, J., dissenting)) (holding that an attorney may rely on the potential juror's duty of honesty, and refusing to impose a duty on attorneys to conduct independent fact-confirming research).

²³ See SmartLinx, LEXISNEXIS, <http://www.lexisnexis.com/government/solutions/research/smartlinx.aspx> (last visited Nov. 8, 2011).

²⁴ *Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010).

attention at an earlier stage.²⁵

Continued Internet research throughout trial has also been endorsed as a method of removing a juror from a case²⁶ and as a method of obtaining a new trial.²⁷

Publicly available Internet tools allow attorneys to collect a great deal of potentially relevant information regarding potential jurors. For example, an attorney could use a person's LinkedIn Profile to find out that they used to work for a competitor of a party to the suit, or Google to discover that a person belongs to certain political organizations. A lawyer could use Facebook to find out a person's religious views and Twitter to uncover racist comments. All of this information can be advantageous in exercising peremptory challenges, and help the parties obtain an impartial jury.

While Internet research has gained general acceptance, there is more debate surrounding its propriety when it is conducted in a courtroom. One Texas county provides every District Attorney with an iPad specifically for this purpose.²⁸ In other jurisdictions, attorneys may conduct this research from their table or bring paralegals to do it more discreetly.²⁹ Allowing this research is most advantageous when attorneys do not have juror pool information prior to *voir dire*. In-court online research allows increasingly flexible research strategies and facilitates real-time fact checking of juror responses.

²⁵ *Id.* at 558-59.

²⁶ *See, e.g.,* United States v. Warner, 498 F.3d 666, 688 (7th Cir. 2007) (jurors dismissed due to background information discovered during deliberations).

²⁷ *See, e.g.,* State v. Dellinger, 696 S.E.2d 38, 44-45 (W. Va. 2010).

²⁸ *See, e.g.,* Laura B. Martinez, *Cameron Co. DA will Check Facebook Profiles for Jury Picks*, HOUSTON CHRON., Jan. 17, 2011, <http://www.chron.com/disp/story.mpl/tech/news/7384860.html>.

²⁹ *See, e.g.,* Stephanie Francis Ward, *Tech Check: Lawyer Uses Web to Sort Through Jury Pool*, ABA J., July 2010, at 28, available at http://www.abajournal.com/magazine/article/tech_check.

II. NEW JERSEY COURT OF APPEALS FINDS DENYING INTERNET ACCESS IMPROPER

The August 2010 New Jersey appellate court decision in *Carino v. Muenzen* provides a new perspective on the issue of in-courtroom Internet research.³⁰ Joseph Carino sued Christopher Muenzen, alleging medical malpractice in Muenzen's treatment of Carino's deceased wife.³¹ During *voir dire*, plaintiff's counsel used his laptop to access the courtroom's free wireless Internet connection and research potential jurors.³² Defense counsel objected, and the trial judge barred the practice, stating: "there was no advance indication that you would be using [the Internet]. . . . Therefore, you have an inherent advantage regarding the jury selection process, which I don't particularly feel is appropriate."³³

Among the issues on appeal after a jury verdict was the question of whether the trial judge acted outside his authority when he barred the use of the laptop to access the Internet.³⁴ The appellate court found that he did but upheld the outcome because there was no resulting prejudice.³⁵ In so finding, the court acknowledged that the rules of the court did not address the issue and that lower court judges get wide discretion in running their courtrooms.³⁶ The court cited no authority to support its position. Instead, the court held that because there was no disruption, no resulting prejudice (because both sides had notice), and no rule against the use of the Internet, it was improper for the trial judge to bar use of the Internet, stating:

That [plaintiff's counsel] had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial

³⁰ *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010), *cert. denied*, 205 N.J. 100 (2011).

³¹ *Id.* at *1.

³² *Id.* at *4.

³³ *Id.*

³⁴ *Id.* at *7.

³⁵ *Id.* at *10.

³⁶ *Id.* at *9-10.

intervention in the name of “fairness” or maintaining “a level playing field.” The “playing field” was, in fact, already “level” because [I]nternet access was open to both counsel, even if only one of them chose to utilize it.³⁷

This case raises at least three important points relevant to the issue of courtroom research during *voir dire*. First, the court acknowledged that there are no established rules in this area. Second, the court acknowledged that trial court judges are typically accorded wide discretion in determining proper courtroom procedure. Finally, the court imposed a limit on judicial discretion whereby an action taken in the absence of disruption, prejudice or rule against it cannot be barred by the trial judge. *Carino v. Muenzen* was denied *certiorari* by the Supreme Court of New Jersey, indicating that this rule will stand, at least in that jurisdiction.

III. WHAT ARE THE POLICY CONSIDERATIONS?

Attorneys routinely conduct research on potential jurors, often using online tools. This practice is generally accepted because it facilitates the selection of an impartial jury. The issue in *Carino*, and on which the following discussion is based, is whether allowing such online research to take place in the presence of potential jurors during *voir dire* is good for the judicial system.

A. Potential Jurors: Privacy and Perceptions

Members of the jury pool have an interest in (though not a right to) privacy,³⁸ especially where threats of retaliation or coercion are present.³⁹ While allowing in-courtroom research likely increases the amount of research conducted on a potential juror, especially when attorneys do not have potential jurors’ names ahead of time,

³⁷ *Id.* at *10.

³⁸ *Free-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 511-12 (1984). *See also* Monsen, *supra* note 9, at 289.

³⁹ *See* Anne M. Payne & Christine Cohoe, *Jury Selection and Voir Dire in Criminal Cases*, 76 AMERICAN JURISPRUDENCE TRIALS 127 § 7 (2011).

this practice does not increase invasions of jurors' privacy interests. First, the information collected through online tools is usually not private at all, but publicly available on the Internet. Second, prohibiting in-courtroom research would not prevent the information from being collected, but merely relegate its collection to the attorney's office or the courtroom hallway. Third, the invasion into a potential juror's privacy represented by Internet research pales in comparison with other research practices and can be significantly less invasive than *voir dire* questioning itself.⁴⁰ Finally, it has been suggested that permitting in-courtroom Internet research could actually increase juror privacy, because it allows attorneys to gather sensitive information quietly, rather than eliciting its revelation on the public record through questioning.⁴¹

A related and perhaps more important question is whether this conduct might affect potential jurors' perceptions of their privacy and potential invasions of it. People who have served in jury pools have reported being offended by the extent of information they are required to expose publicly,⁴² which could lead to decreased willingness to participate⁴³ or otherwise interfere with their ability to perform their duties to the court.⁴⁴ If jurors were aware of the

⁴⁰ See, e.g., Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1690 (2008) ("Jury consultants increasingly run background checks on the various prospective jurors in the pool, pulling credit reports, employing search engines, looking for rap sheets, and examining property tax records. In high-stakes cases, jury consultants work with private investigators who photograph prospective jurors' homes and vehicles, searching for any pertinent information like a political yard sign or a religious bumper sticker.").

⁴¹ 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>.

⁴² See, e.g., *United States v. Padilla-Valenzuela*, 896 F.Supp. 968, 971 (D. Ariz. 1995) ("As the scope of inquiry during *voir dire* has relentlessly expanded, resistance has been expressed by or on behalf of prospective jurors."); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 126 (1996) ("Juror apprehension about safety and privacy may be at an all-time high.").

⁴³ See, e.g., Strahilevitz, *supra* note 40, at 1694 ("Jury duty is already viewed as an unappetizing prospect for many Americans, and the loss of privacy associated with comprehensive government background checks could prompt stiff resistance and exacerbate juror absenteeism.").

⁴⁴ See *United States v. Black*, 483 F.Supp.2d 618, 630-31 (N.D. Ill. 2007)

extent of information being collected in addition to the information they provide, this effect could be exacerbated. Jurors who notice attorneys conducting online research may also be more likely to conduct their own independent online research about the case, even despite a judge's instructions to the contrary.⁴⁵ In light of these concerns, even commentators who advocate conducting in-courtroom Internet research on potential jurors caution attorneys to be careful to "avoid overt references to a juror's personal information during jury selection and trial," and to be discreet about conducting the research while in the presence of the jury.⁴⁶

Whether or not courts come to allow this research, some have argued that potential jurors should at least be alerted that their online presence may be subjected to scrutiny by attorneys.⁴⁷ Rather than concealing this activity from those dutifully serving the system, it is argued, courts should educate potential jurors on the possible risks of service. It remains to be seen whether these suggestions will be adopted by the courts.

B. Other Policy Concerns

Courts and society have an interest in building an efficient legal system that keeps costs low,⁴⁸ and the Sixth Amendment provides criminal defendants the right to a speedy trial.⁴⁹ Allowing in-courtroom Internet research of potential jurors facilitates both of these goals. The ability to conduct research and verify juror responses in real time in a courtroom prevents attorneys from having to return to their offices or take breaks in order to conduct

("[T]o transform jurors' personal lives into public news . . . could unnecessarily interfere with the jurors' ability or willingness to perform their sworn duties.").

⁴⁵ See generally Morrison, *supra* note 1, at 5.

⁴⁶ Christopher B. Hopkins, *Internet Social Networking Sites for Lawyers*, TRIAL ADVOC. Q., Spring 2009, at 12, 14. See also Julie Kay, *Vetting Jurors via MySpace: Social Websites Contain a Trove of Data for Attorneys*, 809 PLI/LIT 87, 92 (2009).

⁴⁷ See, e.g., Morrison, *supra* note 1, at 15.

⁴⁸ See, e.g., David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 33-34 (1997).

⁴⁹ U.S. CONST. amend. VI.

research and respond to its results. This speeds up the process and facilitates more flexible approaches to *voir dire*.

While the relevant facts of *Carino* centered on the use of a laptop computer to access a court-provided wireless Internet connection, other tools could be used to accomplish the same objective. Internet research could be conducted with a smartphone, or a tablet or laptop computer tethered to a cell phone network. Thus any rule promulgated by a court or legislature should address the issue of in-courtroom research broadly, rather than access to a wireless Internet network specifically. As an example, a court could ban the use of all electronic devices, a rule already enforced in some courts.⁵⁰

Finally, in reaching its conclusion, the *Carino* court noted a press release announcing that the courtroom at issue had wireless Internet available.⁵¹ The court reasoned that this press release provided all attorneys with notice of the Internet's availability, indicating that there was no unfairness resulting from its use.⁵² This sort of evidence may lead a court to find that there was no prejudice in an attorney's use of the Internet in future cases. In general, however, attorneys should be on notice that Internet research is possible even in the absence of a public wireless Internet network through technologies such as smartphones.

CONCLUSION

Increased availability of the Internet in courtrooms has led some attorneys to conduct juror research as *voir dire* takes place. There are few guidelines as to whether this is an appropriate practice, and in the first case to address the issue, a New Jersey court held that a trial court judge's decision to prevent it was improper. Competing policy considerations make it unclear what the best rule would be: allowing this research potentially increases

⁵⁰ See, e.g., *New Jersey Appellate Court: Lawyers Can Google Jurors*, GOING PAPERLESS (Oct. 13, 2010, 5:42 PM), <http://goingpaperlessblog.com/2010/10/13/new-jersey-appellate-court-lawyers-can-google-jurors>.

⁵¹ *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071, at *10 (N.J. Super. Ct. App. Div. Aug. 30, 2010), *cert. denied*, 205 N.J. 100 (2011).

⁵² *Id.*

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judicial efficiency but also potentially decreases society's willingness to participate in the judicial system. Because individual judges generally have broad discretion in running the *voir dire* process, different rules may arise in different jurisdictions. Current law suggests that, outside New Jersey, the decision remains with individual judges.

PRACTICE POINTERS

For lawyers:

- The propriety of in-courtroom juror research is a live issue and a judge could rule either way if the question is presented.
- Potential jurors could react in unpredictable ways upon realizing they are being researched.
- Be prepared to object to opposing parties' use of the Internet, or to follow suit if opposing counsel engages in such research (bring a laptop).
- The *Carino* decision indicates that arguments to the court against use of in-court Internet research should focus on any evidence of courtroom disruption or resulting prejudice.

For judges:

- Be prepared for attorneys who conduct juror research in your courtroom, and be prepared to hear objections to it.
- Unless you are in New Jersey, whether you allow the research is for now within your discretion.
- The first court to hear the issue on appeal took the view that this research should be allowed absent a showing of courtroom disruption or resulting prejudice.