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ABSTRACT

During voir dire in Johnson v. McCullough*, a medical malpractice case in Missouri, at least one juror failed to answer honestly a question about whether he had been a defendant or plaintiff in a lawsuit. After the verdict was entered, the plaintiff conducted a search on Missouri's online case database and discovered that one of the jurors had been a defendant in a personal injury suit. In the resulting appeal, the Supreme Court of Missouri held that litigants should conduct a search in this database during voir dire, instead of waiting until after a verdict is entered.* Johnson *is one of several cases that explicitly state an expectation that attorneys conduct a form of Internet research. New and existing ethics guidelines, including ABA Model Rule of Professional Conduct 3.5, place boundaries around the depth of inquiry permitted. According to some commentators, because Internet research is ethically permitted, at a minimum attorneys should ask leave of the court and conduct a precursory Internet search of the venire. This Article addresses the extent to which courts have permitted lawyers to use the Internet to conduct jury research and what limits the Model Rules of Professional Conduct and courts place on the practice. It further addresses the degree to which this kind*

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of research has become compulsory as a shield against a possible malpractice claim.

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INTRODUCTION

Most potential jurors are like icebergs; you only see a small part of them during voir dire. An ever-increasing number of attorneys are turning to the Internet to uncover information about members of the venire that was previously beneath the waterline. In so doing, they are stepping into an unsettled field that lacks concrete guidance as to the level of scrutiny permitted or the level required to avoid exposure to a malpractice suit.[1]

[1] "Anyone who does not make use of [Internet searches] is bordering on malpractice." Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, LOS ANGELES TIMES, Sept. 29, 2008, http://articles.latimes.com/print/2008/sep/29/nation/na-jury29. Multiple decisions have imposed some sort of obligation on attorneys to conduct Internet research on jurors or members of the venire in order to preserve a possible claim of juror misconduct or non-disclosure on appeal. *See, e.g.*, Johnson v. McCullough, 306 S.W.3d 551, 559 (Mo. 2010) (en banc) (requiring attorneys to conduct a search on Case.net, "Missouri's automated case record service," before the trial begins in order to preserve the issue of a potential juror's non-disclosure for appeal); Burden v. CSX Transp., Inc., No. 08–cv–04–DRH, 2011 WL 3793664, at 9 (S.D. Ill. Aug. 24, 2011) (holding that Internet searches constitute "reasonable diligence"). Even if Internet research of potential jurors does not offer the sole and unambiguous standard at present, barring a truly radical change by state or local bar associations, the place of the Internet in conducting voir dire will only expand as time progresses.

According to the vast majority of sources that have addressed this issue to date, an attorney's use of the Internet to conduct research on a member of the venire is permissible unless an attorney attempts to reach out to a potential juror by, for example, following him or her on Twitter or sending a friend request on Facebook.[2] In essence, a meaningful and important distinction between observing potential jurors' Internet presences[3]—which is permitted—and using the Internet to interact with them—which is not—has begun to evolve. Because of its ease and immense usefulness in uncovering juror nondisclosure and bias, the failure to utilize Internet searches in voir dire research may fall below new expectations of attorney performance.[4] That said, some judges may feel protective of the juries in their courtrooms and may disapprove of attorneys using the Internet to conduct research on potential jurors. An attorney should therefore request leave of the court before researching potential jurors on the Internet.[5]

The growing efficacy of the Internet as a tool for conducting jury research has far outpaced the development of guidelines for its use, leaving Internet-based jury research in an ambiguous position. Interviews of practitioners have shown that "Internet vetting of jurors is catching on in courtrooms across the nation, [but] lawyers are skittish about discussing the activity, in part because court rules on the subject are murky or nonexistent in most jurisdictions."[6]

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[2] *See, e.g.*, New York County Lawyers' Ass'n Ethics Opinion No. 743 (May 18, 2011); Phila. Bar Ass'n Ethics Opinion No. 2009-02 (Mar. 2009).

[3] "Internet presence" would include—but is certainly not limited to—an individual's public profile on Facebook, Myspace, LinkedIn, Twitter or other social networking site; blogs the individual juror or actively participates in; comments on news articles and non-anonymous participation on Internet bulletin boards (e.g. Reddit, Digg, Fark or Slashdot).

[4] "With the relative present day ease of procuring the venire member's prior litigation experiences, via Case.net, '[w]e encourage counsel to make such challenges *before* submission of a case whenever practicable.'" *Johnson*, 306 S.W.3d at 558 (quoting McBurney v. Cameron, 248 S.W.3d 36, 41 (2008)) (emphasis in original).

[5] Despite the permissibility of Internet research, *see infra* pp. 130-134, a request of leave is recommended for practical reasons because some judges may disapprove. At a minimum this prevents reprimand and preserves the issue for appeal.

[6] Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS,

Courts and state bar associations are beginning to address this practice but they are doing so at a slower rate than attorneys are adopting it. Attorneys are taking up Internet research despite the fact that "'[l]awyers don't know the rules yet . . . . It's like the Wild West.'"[7] The few rules that have been issued permit the practice, though typically with limits. Because of the precedent set by these standards and the immense value of Internet research, the practice seems to be here to stay despite its uncertain position in most jurisdictions.

I. LIMITS ON UTILIZING THE INTERNET TO CONDUCT VOIR DIRE

Under well-established rules, a lawyer's actions relative to jurors fall along a spectrum spanning from the prohibited (*ex parte* communication with jurors) to the permitted and non-discoverable (independent jury research conducted by the attorney or jury consultants). Practitioners, courts, and state bar associations are struggling to fit Internet-based research and Internet-based interactions between lawyers, judges, and jurors into this spectrum.

On one end of the spectrum, *ex parte* communication between lawyers and jurors is strictly prohibited under the Model Rules of Professional Conduct (MRPC). For example, "[t]he Model Rules [of Professional Conduct] and the Model Code forbid improper *ex parte* communications with jurors or prospective jurors."[8] In brief, before or during trial an attorney may not communicate in any way with any member of the venire or any juror away from the court's watchful eye. The rule reads: "[a] lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or] (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law

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Feb. 17, 2011, http://www.reuters.com/article/2011/02/17/us-courts-voirdire-idUSTRE71G4VW20110217.

[7] *Id.* (quoting John Nadolenco, a partner at Mayer Brown in Los Angeles).

[8] RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2012–2013 ed. 2012) § 3.5–3. These Rules have not been adopted wholesale by any state but many states have adopted rules of professional conduct similar to the MRPC.

or court order . . . ."[9] The purpose of MRPC 3.5 is to prevent parties—or their attorneys—from passing information to jurors outside of court. "When all parties are not present to hear a communication with the court, the litigants cannot voice their positions or preserve their rights on appeal."[10]

Questions remain about whether attorneys have a duty to disclose the results of Internet research on jurors to opposing counsel. Generally, what must be disclosed is governed by procedural rules. The Federal Rules of Civil and Criminal Procedure offer safe harbor for materials produced in preparation for trial, such as work product produced by jury or trial consultants.[11] The results of research on jurors or members of the venire, conducted either with or without the aid of the Internet, could arguably fall under the protections of these rules. Hence, under this logic, Internet jury research is not discoverable and there exists no duty to disclose the results of the research.[12]

Formal ethics opinions issued by the bar associations of New York County and Philadelphia follow the reasoning that activity conveying any information—no matter how minimal—from a lawyer to a potential juror is not permissible. Information, for these purposes, includes the fact that a lawyer is following a juror on Twitter, wants to be friends on Facebook or joins the juror's network on LinkedIn. When asked whether an attorney could conduct ongoing research on members of an empanelled jury by monitoring their footprint on social networking sites, the New

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[9] MODEL RULES OF PROF'L CONDUCT R. 3.5.

[10] ROTUNDA & DZIENKOWSKI, *supra* note 8, § 3.5–3.

[11] FED. R. CIV. P. 26(b)(3) ("[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)") and FED. R. CRIM. P. 16(a)(2) ("this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case") and (b)(2)(A) ("[e]xcept for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of: reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense").

[12] Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. REV. DISC. 28 (2011).

York State Bar Association responded:

> It is proper and ethical under [Rule of Professional Conduct] 3.5 for a lawyer 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 jurors tweets or otherwise contact them.[13]

In 2009, the Philadelphia Bar Association's Professional Guidance Committee addressed a proposal that went beyond passively monitoring individuals. An attorney in Philadelphia wanted to have a third party "friend" an unrepresented witness on Facebook.[14] This would, on its face, seem to avoid the above problem of having direct contact with that person; however, such behavior seems to violate the intention of the MRPC. The Committee opined that this roundabout process would constitute making a false statement and therefore misconduct under MRPC 8.4(a).[15] Rule 8.4 reads "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . . [or] (c) engage in conduct involving dishonesty . . . or misrepresentation . . . ."[16] The Philadelphia Bar Association reasoned that MRPC 5.3(a) prohibits an attorney from using a third party as an intermediary because third parties are held to the same standard as attorneys. An attorney's obligations to an unrepresented third party under the MRPC are more relaxed than those owed to a juror under MRPC 3.5. The Philadelphia Bar Association's opinion ultimately boils down to the fact that reaching out to a juror—by "friending" the juror on Facebook or

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[13] New York County Lawyers' Ass'n Ethics Opinion No. 743 (May 18, 2011).

[14] Pennsylvania has adopted MRPC 3.5, 5.3 and 8.4.

[15] Phila. Bar Ass'n Ethics Opinion No. 2009-02 (Mar. 2009).

[16] MODEL RULES OF PROF'L CONDUCT R. 8.4. This principle, that an attorney cannot get an agent to do something the attorney cannot do him or herself, has been long settled in legal ethics.

following the juror on Twitter—violates the Rules of Professional Conduct.

The reasoning of the New York and Philadelphia decisions is consistent with the decisions of numerous courts that have defined "communicate" to include activities such as joining someone's network on LinkedIn or friending an individual on Facebook or Myspace.[17] This reading of "communicate" is likely broader than the drafters of the MRPC contemplated, as the relevant sections of the MRPC were last updated in 2002, before the proliferation of social networking websites. However, this interpretation of "communicate" reflects the concern that permitting juror contact in this way would open the door for illicit communication and highlights the party's interest to the individual contacted.

Some attorneys consider it ethically acceptable to have a potential juror friend the attorney's office. Armando Villalobos, the district attorney of Cameron County, Texas, "is considering a method to get behind the site's private wall to learn more. One option is to grant members of the jury pool free access to the court's wi-fi network in exchange for temporarily "friending his office."[18] He has purchased iPads to allow his prosecutors "to scan the Web during jury selection."[19] Villalobos's project demonstrates the shift towards greater use of the Internet to conduct research on potential jurors.

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[17] People v. Fernino, 19 Misc.3d 290, 293, 851 N.Y.S.2d 339 (N.Y. Crim. Ct. 2008) ("The MySpace Friend Requests fall within the court's mandate that, 'Respondent shall have NO CONTACT' (sic) with [a woman who had a restraining order against the respondent].'"). *But see* People v. Rios, 26 Misc.3d 1225(A), 907 N.Y.S.2d 440, 2010 WL 625221, 5 (N.Y. Sup. Ct. 2010) (finding no juror misconduct when a juror "friended" a witness because "[d]efendants failed to elicit any testimony to establish. . . [how the juror's] 'feelings' implicit in her friend request affected the jury's deliberations in any way.")

[18] Ana Campoy Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, THE WALL STREET JOURNAL, Feb. 22, 2011, http://online.wsj.com/article/SB10001424052748703561604576150841291918 86.html

[19] *Id.*

II. PERMISSIBILITY OF SEARCHING THE INTERNET FOR INFORMATION ABOUT JURORS

Attorneys understandably feel the need to conduct as much research about their panel as possible, because the Constitution guarantees the right to "an impartial jury" during criminal trials.[20] Similarly, the Seventh Amendment's right to a trial by jury in civil cases implies the right to an impartial jury.[21] The Supreme Court has read this provision to require "identifying and eliminating biased and prejudicial prospective jurors."[22] To that end, attorneys conduct voir dire to screen potential jurors for possible biases that would preclude their objectivity. The Supreme Court has "stressed the wide discretion granted to trial courts in conducting voir dire in the area of pretrial publicity and in other areas that might tend to show juror bias."[23]

Attorneys are permitted to make

> a suitable inquiry . . . in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases.[24]

The typical guidelines during voir dire are that attorneys are not permitted to begin arguing their case or pose hypotheticals too close to the facts of the controversy at issue.[25] Beyond that,

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[20] U.S. CONST. art. III, § 2, cl. 3 and amend. VI.

[21] *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 549–54 (1983) (Alleged failure of a juror to answer truthfully during voir dire does not entitle a party to a new trial "unless the juror's failure to disclose denied respondents their right to an impartial jury").

[22] 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 (2002).

[23] Mu'Min v. Virginia, 500 U.S. 415, 415 (1991).

[24] *Id.* at 422 (quoting Connors v. United States, 158 U.S. 408, 413 (1895)).

[25] Marc B. Stahl, *Objections During* Voir Dire *Examination of Prospective*

permissible questions are subject to the trial judge's discretion and can vary widely from courtroom to courtroom.

A. Permissibility of In-Court Use of the Internet

The Appellate Division of the New Jersey Superior Court was among the first appellate courts in the country to explicitly address whether attorneys could use the Internet to conduct research during voir dire.[26] The court made wireless Internet access available in the courthouse in April 2008.[27] The following May, plaintiff's counsel in a medical malpractice case used a laptop to obtain Internet-based information about potential jurors.[28] The judge ordered the attorney to close his laptop because he failed to inform defense counsel of his intention to use the court's Internet in the courtroom during voir dire.[29] The plaintiff appealed, alleging that the trial court erred in—amongst other things—"precluding his attorney from accessing the Internet during jury selection."[30]

The appellate court explained that unequal use of the Internet did not imply an unequal playing field: "[t]hat [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 intervention in the name of 'fairness' or maintaining 'a level playing field.'"[31] The court continued, "[t]he '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."[32] Despite that fact, the Appellate Division did not overturn the trial court because the plaintiff could not point to a single juror whom he would have dismissed based on the Internet research he subsequently performed outside the courthouse. Ultimately, *Carino* held that not

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Jurors, 97 ILL. B.J. 42 (2009).

[26] Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at 4 and 10 (N.J. Super. Ct. App. Div. Aug. 30, 2010); Duncan Stark, *Profiling Jurors: How Far is too Far?*, 7 WASH J.L. TECH. & ARTS 93, 103 (2011).

[27] *Carino*, 2010 WL 3448071 at 10.

[28] *Id.* at 4.

[29] *Id.* at 4 and 10.

[30] *Id.* at 7.

[31] *Id.* at 10.

[32] *Id.*

only could attorneys use the Internet, they could do so in the courtroom. The *Carino* court did not, however, delve into the possible types of Internet research, or attempt to make such research compulsory, but a Missouri case decided a few months earlier took that next step.

B. Limited Duty to Conduct Internet Searches

In *Johnson v. McCullough*, the Supreme Court of Missouri created a limited duty for lawyers to research members of the venire. During voir dire in a medical malpractice case, plaintiff's counsel asked the venire if any of them had any "prior involvement in litigation."[33] Many members of the venire answered affirmatively but one member did not respond and eventually became part of the seated jury.[34] The jury returned a verdict for the defendant; the juror in question voted in favor of that verdict.[35] After the jury returned the verdict, plaintiff's counsel searched Case.net[36] and found that this specific juror "had been a defendant in multiple debt collection cases and in a personal injury case."[37] Three of these cases had been filed in the previous two years.[38]

The plaintiff filed a motion for a new trial alleging jury non-disclosure based on this juror's failure to reveal her prior litigation history.[39] After a hearing, the trial court granted the motion.[40] The Supreme Court of Missouri found no error in the granted motion because the reviewing court "cannot convict the trial court of error

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[33] Johnson v. McCullough, 306 S.W.3d 551, 554 (Mo. 2010) (en banc). The exact question was, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?"

[34] *Id.* at 554–55.

[35] *Id.* at 555.

[36] "Case.net can be accessed using the following web address: https://www.courts.mo.gov/casenet." *Id.*, at 554 n. 2. "Case.net is your access to the Missouri state courts automated case management system. From here you are able to inquire about case records including docket entries, parties, judgments and charges in public court." *Case.net*, YOUR MISSOURI COURTS (Oct. 23, 2011, 10:35 AM) https://www.courts.mo.gov/casenet.

[37] *Johnson*, 306 S.W.3d at 554.

[38] *Id.* at 555.

[39] *Id.* at 554.

[40] *Id.*

in following the law in existence at the time of trial," namely, that there was no duty to search Case.net or any other database to verify jurors' answers before trial began.[41]

The court continued noted in dicta that "[w]ith the relative present day ease of procuring the venire member's prior litigation experiences, via Case.net, '[w]e encourage counsel to make such challenges *before* submission of a case whenever practicable.'"[42] The court further stated that, "to preserve the issue of a juror's non-disclosure, 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."[43] This approach discourages attorneys from waiting to perform a search until after an unfavorable verdict has been entered. In requiring a search to preserve the issue of non-disclosure, *Johnson* took a step towards establishing the need for Internet research during voir dire as a standard of professional care.

C. What Exactly Do Courts Permit?

Over the last few years, numerous bar journals have published articles describing the benefits of using the Internet during voir dire.[44] Support for this practice stems from the fact that potential jurors have an ever-expanding footprint on the Internet by way of public records, participation in social networking sites,

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[41] *Id.* at 558.

[42] *Id.* at 558–59 (quoting McBurney v. Cameron, 248 S.W.3d 36, 41 (Mo. Ct. App. 2008)) (emphasis in original).

[43] *Johnson*, 306 S.W.3d at 558–59.

[44] *See* Jamila A. Johnson, *Voir Dire: To Google or Not to Google*, 5 GP/SOLO LAW TRENDS AND NEWS (2008), https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/litigation_johnson.html; Michelle D. Craig, *Did you Twitter My Facebook Wall?*, 58 La. B.J. 26. (2010); Shannon Awsumb, *Social Networking Sites: The Next E-Discovery Frontier*, 66-NOV BENCH & B. MINN. 22 (2009); Suzanna Craig Robertson, *'Friend' or Foe: Social Media is Calling. How Should Lawyers Answer?*, 47-MAR TENN. B.J. 16 (2011); Greg Stoner, *The Jury Is Out: Considerations for Using an Online Jury Research Service*, 59-FEB VA. LAWYER 48 (2011).

membership in various organizations with an Internet presence, and postings on blogs and services such as Twitter.[45]

Much of this data is available via lower-tech jury research. One commentator has opined that permissible activities include general searches for the potential juror's name (i.e., googling the potential juror), searching government databases to determine if the juror contributed to political candidates or Political Action Committees, and searching on social networking sites (e.g., Facebook, Myspace, Twitter and LinkedIn).[46] Aside from *Johnson*, which limited its comments to searches on Case.net, no court has addressed what online information may or may not be permissible to consult in conducting jury research.

One way to narrow the scope of Internet research is by questioning members of the venire on their Internet use. One could ask, for example, what Web sites or social networking sites a potential juror frequents, or if the potential juror writes for a blog. Further, one could ask what usernames a potential juror uses on various Web sites, especially social networking sites.[47] On the other hand, there are some problems inherent in that line of questioning, including the potential for illicit contact and the possibility that jurors find this degree of questioning invasive. Therefore, before asking members of the venire for a list of the usernames they use on various social networking sites, attorneys should confirm with their judge that such questions would be permitted.

CONCLUSION

The Internet has given attorneys an additional resource to conduct research on potential jurors during voir dire. For now, the MRPC offer a guide, despite being written for a somewhat different time, and remain one of the only sources on point until courts or state bar associations develop a firm set of guidelines

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[45] JEFFREY T. FREDERICK, MASTERING *VOIR DIRE* AND JURY SELECTION 235 (3rd ed. 2011).

[46] *Id.* at 251–52.

[47] It is becoming increasingly common to ask for this sort of information from parties to a suit in interrogatories or requests for production.

governing when and how attorneys can vet members of the venire using the Internet. Even if following those rules in good faith, attorneys should seek leave of the court before beginning that research, because judges may oppose Internet research on members of the venire.

PRACTICE POINTERS

- Request leave and permission of the court before undertaking Internet research on potential jurors.
- Do not contact the venire in any way, including friending potential jurors on Facebook or MySpace, connecting on LinkedIn, or following potential jurors on Twitter.