# CONSIDERATIONS IN LAWYERS' USE OF THE INTERNET TO MONITOR JURORS' INTERNET ACTIVITY DURING TRIAL

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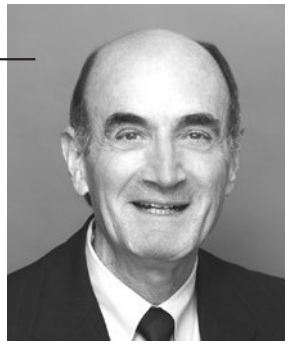

It is a quarter to ten in the morning. You have been sitting in the courtroom where your civil jury trial is scheduled to begin, waiting for the end of the law and motion calendar and for the courtroom clerk to receive, copy, and give you the list of prospective jurors for your trial. You have already announced *ready* and are anxious to start voir dire.

The 8:30 a.m. calendar is now completed. The judge takes a 15-minute break. The jurors begin to fill the hallway outside the courtroom. The clerk distributes the jury pool list. The judge resumes the bench and welcomes the jurors as they filter into the courtroom and take seats.

What do you know about the prospective jurors? The clerk has given you a list of 52 names and addresses; rarely is there more juror information from the court. What can you find out in the time you have for voir dire to help you make decisions about whom to keep and whom to challenge? Will questioning during voir dire be enough? What else might be allowed?

The good news is that the judge will begin the voir dire, likely taking all or most of the time until noon and then will recess proceedings for lunch, usually for an hour and a half. Whether you represent the plaintiff or the defendant, the noon break gives you time to hone your voir dire approach based on how jurors will have responded so far. And, in that time (if you do not have a colleague who can start the investigation once the juror list is distributed and update you as voir dire progresses during the morning session or at the noon break), you could scour the Internet for clues to the prospective jurors' abilities to be fair and impartial in adjudicating the facts of your case — and for clues to their proclivities and prejudices, potentially learning clues to whether they may favor or oppose your client's interests.

The questions are: Is mining the Internet for information on the jury venire permissible?, ethical?, imperative?

May you scour Internet sites to develop portraits of the prospective jurors? Do you do the search without mentioning it — until you find something that you want to use to excuse a juror for cause or to defend a peremptory challenge that on its surface may be subject to question? In those cases in which a questionnaire is used in advance of the jurors arriving in the courtroom, do you ask the trial

judge to include questions about the prospective jurors' Internet presence and practices, to list the sites that they visit, or to list their Internet "handles" so you can explore their Internet activity extensively? Do you ask the judge to tell the jurors at some point in his greeting to them that counsel will be doing Internet searches of the jurors?

Code of Civil Procedure sections that address jury selection (e.g., § 222.5 et seq.) are silent on *counsels'* use of Internet searches in the jury selection process. The only proscription on such searches is directed to *jurors*. The very first California civil jury instruction, read to the jurors when they are empaneled, admonishes jurors not to explore the Internet for anything related to the case, the lawyers or law firms trying the case, as well as for information on any witness who testifies, or about the subject matter of the action. (Judicial Council of California Civil Jury Instructions (CACI) No. 100 is based on Code of Civil Procedure section 611 which states that "the prohibition on research [by jurors extends] to all forms of electronic and wireless communication." CACI No. 116, also to be read to jurors at the outset of a civil trial, explains to jurors why, prior to verdict, they may not "electronically communicate or do any research on anything having to do with this trial or the parties." The Ninth Circuit's Jury Instruction No. 3.2, contains similar admonishments.) This caution *to jurors* is reinforced by courthouse signs posted to remind and reinforce for jurors that they are not to do Internet research that is in any way related to the case for which they have been called or on which they are empaneled. (There are no such signs directed to lawyers.)

It is ironic that in the state where the Internet — as well as multiple Internet search engines — were invented, there is no clear guidance on trial counsels' use of the Internet in connection with jury selection.

The only official pronouncement of the State Bar of California on this subject is in rule 3.5(h) of the Rules of Professional Conduct, which provides: "A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service." Rule 3.5(i) extends the same restrictions to members of the family of the prospective juror. (This rule is unchanged in any material respect from former rule 5.320.)

Is the search of a juror's Internet activity permitted — or prohibited — by this rule? Does an attempt to access the prospective juror's LinkedIn page, Facebook page, Twitter posting, or other Internet activity violate this ethics provision?

There is no guidance from the State Bar on the meaning of the phrase "in a manner likely to influence the state of mind of [a prospective juror]." Instead, the State Bar website refers the inquiring lawyer to ethics opinions or commentaries on any limits to investigating jurors' "social media" issued by one local and several out-of-state bar associations.

As rule 3.5(h) is identical to the American Bar Association rule of the same number, let's start with ABA Formal Opinion No. 466, which formulates guidance on compliance with that rule. Discussion in this ethics opinion begins: "There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents …. [¶] …. [W]e strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order … will in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel. [¶] Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM [electronic social media] and websites. If a judge believes it to be necessary … to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations." (Fns. omitted.)

This rule sanctions the "passive review" of jurors' websites or social media, provided (1) access is limited to that which is publicly available and (2) so long as access does not result in the juror learning that the viewing has occurred. The opinion reasons that viewing limited in this way is not an ethical breach because the "mere act of observing" does not constitute improper ex parte conduct, notwithstanding that the juror will be notified that the search has occurred.

The opinion also contains this caution regarding the scope of such inquiries: "Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen, or jurors should act with circumspection and restraint." (See also ABA Ethical Considerations (EC) Nos. 7-29 & 7-30; ABA Disciplinary Rules, rule 7-108. Note that EC No. 7-29 extends the same limitations on

lawyer — juror communications to members of the family of the juror and prospective jurors.)

As noted, the ABA opinion allows such limited lawyer-juror contact even when the juror's social media platform is programmed to identify for the juror the person who has accessed the juror's social media account. The ABA characterizes this *automatic* notification feature as a communication by the social media platform rather than by the inquiring lawyer notwithstanding that, when such notice is sent, the juror necessarily learns that it is the lawyer who has made the inquiry. Further, the juror is unlikely to appreciate the distinction the ABA draws. (The ABA opinion also indicates that it is improper for the lawyer to ask jurors for access to their social media accounts.)

Ethics opinions of other bar associations have reached the opposite conclusion: that such a network-generated notice to the juror that the lawyer has reviewed the juror's social media does constitute an impermissible lawyer-jurors communication. For example, Formal Opinion No. 743 of the New York County Lawyers Association Committee on Professional Ethics concludes, "[i]f a juror become aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial." The same view is expressed in Formal Opinion No. 2012-2 of the Bar of the City of New York Committee on Professional Ethics and in Opinion No. 743 of the New York State Bar Association Commercial & Federal Litigation Section. Formal Opinion No. 2013-189 of the Oregon State Bar reaches a conclusion in accord with that of the New York bar organizations, as do the opinions of several other state bars or bar associations. Other bar associations reach varied conclusions.

In its opinion, the ABA does "strongly encourage[] judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet." And the ABA recommends that those discussions detail how and the extent to which counsel may investigate (and monitor during trial) the Internet activity of jurors — and how the trial judge would explain to the jurors that this activity will be occurring.

Are such inquiries breaches of the jurors' privacy or are they "fail safes," appropriate to verify or refute the responses the prospective jurors give during voir dire? Is monitoring of jurors' Internet activity during trial important to ensure the integrity of their deliberations and of the verdict?

It is likely that jurors may have difficulty in appreciating their being restricted in their use of the Internet during the trial while the lawyers in the case they are charged with determining are allowed to search the jurors' Internet presence, beginning with voir dire, and monitor it throughout the trial.

How do trial judges view these issues? While instructing jurors not to do Internet searches once they are sworn and through verdict is relatively without controversy and is part of pattern jury instructions in state and federal courts, there is limited discussion in materials available to trial judges of issues arising from counsels' exploration of potential or seated jurors' Internet activity. (For example, the 2021 revised edition of the California Judicial Council's Jury Management Bench Handbook, section 1.45, available to all state court judges, discusses only the jury instruction admonition; it makes no reference to issues arising from counsels' exploration of jurors' online presence or activities.)

To remedy this gap and to learn what the trial judge will permit, or will not sanction, trial lawyers should inquire no later than the final pretrial jury instruction conference whether their trial judge will go beyond these admonitions and allow counsel to investigate the Internet activity of prospective jurors for voir dire, or of seated jurors during the course of the trial. It is far better to ask for permission to do this than to later plead for forgiveness. Because trial judges differ on their views of these matters, it is incumbent on counsel to raise the issue and the scope of the inquiry that counsel wish to make of jurors' ESM with the trial judge enough in advance of the trial that the issue can be resolved thoughtfully. (The ABA opinion discussed above cautions that judges may be reluctant to sanction lawyers' investigating jurors' Internet activity, cautioning that the judge may "believe[] it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites….")

Does case law provide any guidance? *Oracle America, Inc. v. Google, Inc.* (N.D.Cal. 2016) 172 F.Supp.3d 1100 (*Oracle America*), presents an interesting discussion of the issues, and a forthright statement of the perspective of that trial judge. The opinion begins: "Trial judges have such respect for juries — reverential respect would not be too strong to say — that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information." (*Id.* at p. 1101.)

Following what the opinion describes as the "cratering" of discussions in that case about having the prospective jurors complete a questionnaire once the judge realized that counsel wanted the names and addresses of the prospective jurors so counsel could "scrub [listed Internet sites] to extract personal data on the venire," the judge addressed whether counsel should be allowed to conduct any investigation of prospective jurors at all. (*Oracle America*, *supra*, 172 F.Supp.3d at p. 1101.) For reasons discussed in the opinion that are well worth taking the time to review, the judge determined that among the dangers of allowing the searches that counsel sought were the facilitation of "personal appeals to particular jurors via jury arguments and witness examinations patterned after preferences of jurors found through [the sought after] internet searches." (*Id.* at p. 1103.)

Rather than impose a ban on social media mining, the judge "call[ed] on [the excellent counsel in the case] to voluntarily consent to a ban against internet research … until the trial is over." (*Oracle America*, *supra*, 172 F.Supp.3d at p. 1103.) In exchange for counsel refraining, the judge offered them time to conduct "extra voir dire themselves" if counsel would agree to his request. (*Ibid.*) If they did not agree, he set out a procedure for counsel to inform the jury venire of the lawyers' intent to explore the jurors' social media/Internet presence. And, once the lawyers completed their explanations to the venire, "[t]he venire persons will then be given a few minutes to use their mobile devices to adjust their privacy settings, if they wish." (*Id.* at p. 1104.)

In addition to setting out other parameters, the trial judge advised counsel that "[t]he Court would much prefer to fully protect the privacy of all venire persons from Internet searches and only reluctantly allows the foregoing." (*Oracle America*, *supra*, 172 F.Supp.3d at p. 1105.)

Note how the judge advised counsel that the jurors would be given time to "adjust their privacy settings" before the lawyers could begin their Internet searches of the prospective jurors' Internet usage. Among the questions that arise from this procedure is whether, in that "adjustment period," jurors could "sanitize" their Internet presence, thereby limiting the value of later Internet searches by counsel.

Observe too that the judge did not mention whether he would instruct the jurors to not delete any postings they had made — only to change (assumedly, strengthen) their privacy settings if they so wished. It is potentially problematic, for example, that a juror's earlier posting of an opinion on a subject about which counsel would want to know, whether in conducting voir dire or in exercising a cause challenge (or in defending a peremptory challenge), would be removed from view and thereby from access by counsel. (In the end, counsel acceded to the judge's request not to search the jurors' Internet postings.)

An interesting twist on the scenario is jurors searching the Internet for information on counsel, notwithstanding the admonition they receive at the beginning and periodically during trial. For example, the appellate court in *Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1483 considered whether the trial court had properly granted a motion by the defendant-manufacturer ordering plaintiff's counsel to remove pages from its Internet website "touting [its] recent successes against manufacturers in similar actions." Notwithstanding the concern of defense counsel that jurors may visit counsels' Internet sites and be swayed in plaintiff's favor based on counsel's firm's Internet postings, the *Steiner* court concluded that the giving of the "standard admonition" to jurors (i.e., CACI Nos. 100 & 116) was sufficient to deal with "the threat of jury contamination." (*Id.* at p. 1490.)

It bears emphasis that questions of prospective jurors about their Internet activities can be a part of the "liberal and probing examination to discover bias and prejudice with regard to the circumstance of the particular case…." (Code Civ. Proc., § 222.5, subd. (b)(1).) Indeed, third party Internet sites, such as those listing political contributions, are ripe for "mining" jurors' interests and preferences and are most unlikely to provide notice to jurors that inquiring lawyers are accessing the fact of the jurors' political preferences.

What happens when a juror does not answer questions truthfully or does his or her own Internet research, or both? The result can be the granting of a new trial. For example, *Nissan Motor Acceptance Cases* (2021) 63 Cal. App.5th 793 (*Nissan*), presented both questions: whether a juror had given false responses to several questions on a pre-voir dire questionnaire and, after being seated, whether the juror had conducted her own Internet research on matters at issue in the case. In granting the defendant's new trial motion, the judge determined that the juror had failed to disclose material information when answering the juror questionnaire (finding that she had given "'patently false' or misleading answers") and had conducted independent research on a technical issue important to the outcome of the case, resulting in prejudicial misconduct.

In affirming the grant of a new trial, the appellate court wrote that, from the misconduct, "the trial court could reasonably infer that [the juror's] omissions concealed a state of mind that prevented her from being an impartial juror." (*Nissan*, *supra*, 63 Cal.App.5th at p. 819.) The appellate court explained that "juror misconduct violating the right to an impartial jury raises a rebuttable presumption of prejudice." (*Id*. at p. 821, citing *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58; see also Code Civ. Proc., § 657, subds. (1) & (2).) The Court of Appeal also cited ABA Formal Opinion No. 466, discussed above. (*Nissan*, at p. 822, fn. 10.) (And note that a juror may be adjudicated in contempt for willfully violating the admonition regarding any form of research about the case. (Code Civ. Proc., § 1209, subd. (a)(6).))

While the *Nissan* case presents a clear discussion of the consequences of juror misconduct, the misconduct there was discerned based on the questions which the juror posed during the trial (suggesting independent research into certain technical issues, among other things) and on the depth of the juror's participation during the jury's deliberations rather than from counsel monitoring the jurors' Internet activity. The case nevertheless indicates potential consequences when a juror gives false answers and breaches the admonition not to do independent research.

How can counsel seek out Internet postings of a juror if counsel suspects, or needs to confirm, that the juror has been "supplementing" courtroom testimony with independent research? In *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, after a criminal trial, one of the jurors filed a declaration that she had learned that another juror had posted comments about the evidence as it was being presented and had invited friends to "respond" to the juror's postings during deliberations. (The juror who reported the situation had been "friended" by the posting juror after the verdict, which is when she became aware of the earlier postings.) After being advised of the postings, counsel for the party that had not prevailed subpoenaed the Internet provider to produce the postings for in camera review, and the court ordered the juror who had made the postings to execute the release which the site required for it to comply. The trial court denied the motion to quash the subpoena filed by counsel for the posting juror, and the Court of Appeal denied the posting juror's petition for writ of prohibition. (*Ibid*.)

The power of a court to order such disclosures remains in flux, however. (See, e.g., *Facebook v. Superior Court* (2020) 10 Cal.5th 329 [remanding for further proceedings]; *In re Sittenfeld* (6th Cir. 2022) 49 F.4th 1061 [holding that, in investigating juror misconduct, a court may question a juror about the juror's conduct but does not have the power to order the juror to allow forensic inspection of the juror's cellphone or other electronic devices].)

Trial judges' attitudes toward lawyers accessing jurors' ESM are varied. In the seven years I taught judges at Judicial College (all new state court judges must attend following their appointment or election), their views on whether and how to allow or restrict access by trial lawyers to the ESM of jurors varied widely. The variations were founded in large part on the experiences of these former lawyers in their own practices. Those who had tried "high profile" or "high value" cases were more likely to have conducted Internet explorations of prospective jurors' ESM or monitored jurors' ESM during trial. Some of these lawyers conducted these Internet explorations without alerting the judge, only doing so if they came across a juror whose Internet activity revealed that the prospective juror's voir dire responses were inconsistent with that person's Internet activity, or, after being empaneled, if the juror was discovered to be conducting research on issues in the case or commenting on it prior to verdict.

Judges clearly understand, and are duty-bound to preserve and enforce the integrity of the judicial process, including that jurors give truthful answers during voir dire, that they follow the admonition they receive to not conduct research on matters arising during trial, and that they do not comment on the case outside the jury room prior to verdict. That understanding should not lead trial lawyers to conclude that they may engage in Internet research of jurors without first having had a timely discussion with their trial judge to determine the judge's views on the extent of the lawyers' exploration of the jurors' Internet activity or ESM footprint.

When alerted to a violation of the court's instructions to the jurors, the judge will address it — but the lawyer who did not earlier seek permission to conduct the monitoring that has resulted in discovery of the ESM violation by a juror may come to acknowledge that it would have been better to have first sought permission to conduct that investigation.

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