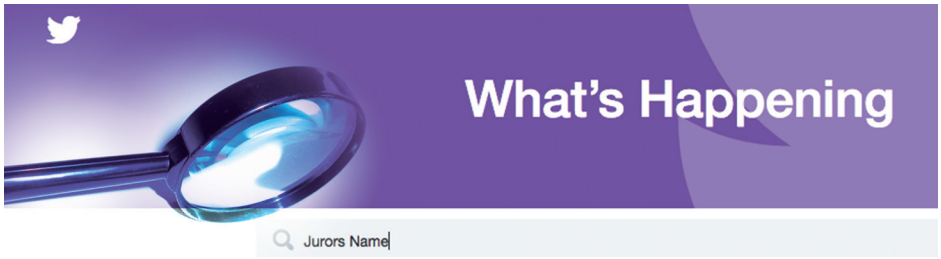
By DANIEL J. SIEGEL

How Much Curiosity Is Too Much?

Lawyers Searching Through Jurors' Social Profiles Raises Questions



As lawyers, we are trained to ask questions and seek as much information as possible. Lawyers who try cases have always tried to learn as much as possible about the jurors who will decide their cases so they can hopefully present their cases in a way that will be as persuasive as possible. So, how far can a lawyer go when researching jurors and where is the ethical line a lawyer can't cross?

There is, to date, no simple "hornbook" to answer the question. According to jury consultant Marshall Hennington, a clinical psychologist who describes his firm as "the leading trial and jury consulting firm in the nation," as long as the information about a juror is publicly available and of use to a client, "everything is fair game," noting that a jury trial is "war." [1]

Although there is some ethical guidance for lawyers about the boundaries for researching jurors, many questions remain unanswered. In Formal Opinion 2014-300, "Ethical Obligations For Attorneys Using Social Media," the Pennsylvania Bar Association Committee on Legal Ethics and Professional Reasonability opined that during "jury selection and trial, an attorney may access the public portion of a juror's social networking website but may not attempt or request to access the private portions of the website," concluding that "Requesting access to the private portions of a juror's social networking website would constitute a [prohibited] ex parte communication."

Similarly, the American Bar Association's Standing Committee on Ethics and Professional Responsibility concluded in Formal Opinion 466 that a lawyer may view the public portion of the social networking profile of a juror or potential juror, but is prohibited from communicating directly with the juror or jury panel member. The Committee determined that a lawyer or a lawyer's agent may not request access to the private portion of a juror's or potential juror's social networking.

So where does this leave lawyers? Consider Twitter where a user posts "tweets," short comments running no longer than 140 characters, on any subject the poster desires. Unless their Twitter account is private, anyone can view anyone else's tweets. Similarly, unless their Twitter account is private, the site also allows anyone to "follow" anyone, offering no way to prohibit someone from following someone else. Plus, when one person decides to follow someone else on Twitter, the service notifies the person being followed who is now following him or her. Does that notification constitute an impermissible *ex parte* communication? Ethics commentators are divided on this subject, although the ABA Formal Opinion concluded that it is not a prohibited *ex parte* communication if the social networking website independently notifies users when the page has been viewed.

The issue of lawyers investigating jurors gained national attention in *Oracle America, Inc. v. Google, Inc.*, when U.S. District Court Judge William Alsup issued an Opinion and Order on March 25, 2016 [2] where he sought to ban both of the tech titans from researching the jury panel. Although Google agreed to the proposed ban, Oracle did not, and as a result, the judge required each side to inform the "venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and monitor jurors, specifically including searches on Facebook, LinkedIn, Twitter and so on, including the extent to which they will log onto their own social media accounts to conduct searches and the extent to which they will perform ongoing searches while the trial is underway."

Judge Alsup prohibited counsel from "explain[ing] away their searches on the ground that the other side will do it, so they have to do it too." The judge also required counsel to "simply explain that they feel obliged to their clients to consider all information available to the public about candidates to serve as jurors." He believed that by imposing these restrictions "the venire will be informed that the trial teams will soon learn their names and places of residence and will soon discover and review their social media profiles and postings, depending on the social media privacy settings in place."

But the judge had an ulterior motive. Once the panel was informed the extent of the searches that would be performed on them, the court then gave the venire "a few minutes to use their mobile devices to adjust their privacy settings, if they wish." Review of the opinion confirmed that if the two sides did not agree to the ban, the process of researching the jury would be transparent and would give the jury notice of just how much counsel was trying to discover about them.

Interestingly, when Judge Alsup issued

his Opinion, he explained that Google was willing to accept an outright ban on Internet research about the venire and the jury, provided the ban applies equally to both sides. He noted that Oracle would not agree to the ban. He wrote that "Oracle initially took a broad position on the scope of Internet research it intended to conduct, but it has since purported to scale back its plan [by supplying] confusing answers to the Court's inquiries about its plan, and its responses make little sense in light of how the Court understands the most prominent social media sites to operate."

Just five days later, Oracle filed a two-page response to the Order, "consent[ing] to the Court's proposed ban on all juror research, including Internet and social media research and research using proprietary sources of information, on the venire or the empaneled jury until the trial is over." End of discussion.

But for most cases, where the parties are neither high-profile nor as tech-savvy as Oracle and Google, the question persists, "How far can the lawyers go?"

In one law review article, [3] Thaddeus Hoffmeister, associate professor of law at University of Dayton School of Law and editor of JURIES (http://www.juries.typepad.com.), suggests that courts should "subject any juror information discovered by an attorney to the rules of discovery if such information would result in a juror being either challenged for cause or disqualified from serving."

When the Pennsylvania Supreme Court modified the Comment to Pa.R.P.C. 1.1 to expand the definition of "competence" to include a requirement that lawyers know "the benefits and risks associated with relevant technology," jury research may not have been the Court's main focus. To trial courts, however, it raises one of the most crucial questions about the Rule. ■

[1] *http://articles.latimes.com/2008/sep/29/nation/na-jury29*

[2] *http://pdfserver.amlaw.com/ca/OracleGoogle.pdf*

[3] *59 UCLA L. Rev. Disc. 28 (2011)*

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