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Juror Misconduct: Strategies for Jury Research in the New Social Media Age

In 2011, the Federal Judicial Center issued a report to the Judicial Conference Committee on Court Administration and Case Management regarding the use of social media by jurors during trials and deliberations. *Juror's Use of Social Media During Trials and Deliberations,* M. Dunn (Nov. 22, 2011). At that time, "[t]he use of social media by jurors during trial and deliberations [was] not a common occurrence." *Id.* The most common use of social media by jurors reported at the time included jurors "friending" or attempting to "friend" a participant in the case; communicating directly with participants in the case; posting information about jury deliberations; case-related research; and, sharing general information as to the progress of the case through social media. *Id.*

The times were already changing. A month before the Report was issued, the Third Circuit noted:

> "The theory of our system," wrote Justice Holmes, "is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado,* 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907). Justice Homes, of course, never encountered a juror who "tweets" during the trial. Courts can no longer ignore the impact of social media on the judicial system, the cornerstone of which is trial by jury. We have always understood that, although we operate from the presumption that a jury's verdict will be just and fair, jurors themselves can be influenced by a host of external influences that can call their impartiality into question. The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program. The days of simply

> instructing a jury to avoid reading the newspaper or watching television are over. Courts must be more aggressive in enforcing their admonitions.
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> The Internet, especially social networking sites like Facebook and Twitter, have created a society that is "connected" at all times. Facebook, created in 2004, is arguably the most popular social networking platform. Facebook allows people to communicate with their family, friends and co-workers and to share information through the digital mapping of people's real-word social connections. *See* Facebook, Factsheet, available at http://www.facebook.com/press/info.php (last visited July 18, 2011). Currently, Facebook has over 500 million registered users, and these users spend over 700 billion minutes per month using the site. *Id.* The average user is connected to 80 community pages, groups or events. *Id.* Twitter was created in 2006 and is a real-time information network that lets people share and discuss what is happening at a particular moment in time. *See* Twitter, available at http://twitter.com/about (last visited July 18, 2011). Twitter has approximately 100 million users and differs from Facebook by allowing its users to send out a text message from their phones (up to 14 characters) to their followers in real time. *Id.* It is estimated that Twitter users send out over 50 million of these messages (or, Tweets) per day. *Id.* In other words, the effects and affects of electronic media are pervasive. *U.S. v. Fumo,* 655 F.3d 288 (3rd Cir. 2011) (citations in original).

Since 2011, cases discussing the influence of social media on juries and deliberations has increased—just as the "use" of social media has increased. In *Paige,* a juror—during deliberations—Googled "where do punitive damages go." *Paige v. St. Louis Metropolitan Police Dept.,* 2015 WL 3961099 (Mo. App. Jun. 30, 2015). The juror used his smart phone—from the jury room. *Id.* A Wikipedia article became the learned treatise on punitive damages and the juror read aloud from it to his fellow jurors. *Id.* Although the court recognized the impropriety of the juror's conduct, it found that the trial court did not abuse its discretion in denying the defendant's motion for a new trial on punitive damages—there were no extrinsic, evidentiary facts that created a presumption of prejudice to the defendant. *Id; see also Steiner v. Superior Court,* 220 Cal. App.4th 1479 (Ca. App. Nov. 26, 2013) (trial court did not have the authority to order pages removed from the plaintiff's counsel's web-site in order to prevent jury

contamination). *State v. Abdi,* 191 Vt. 162 (Vt. Jan. 26, 2012) (a juror's research of the Somali culture during deliberations warranted a new trial). "Devices" in the jury deliberation room increase the opportunity for jurors to conduct research. Those devices also connect jurors to millions of people through social networking.

In *Webster,* a juror acknowledged to be "Facebook friends" with the stepmother of the victim in a criminal case. *State v. Webster,* 865 N.W.2d 233 (Ia. Jun. 19, 2015). Defense counsel "elected not to thoroughly explore the nature of the [juror's] relationship" during voir dire. *Id.* Prior to the verdict, the juror clicked "like" on a Facebook comment made by the victim's stepmother that read, "Give me strength." *Id.* The misconduct was not severe enough to warrant a new trial. *Id.; see also W.G.M. v. State,* 140 So.3d 491 (Al. App. Aug. 30, 2013) (no prejudice when juror was "Facebook friends" with a witness and when several jurors were "Facebook friends" with the district attorneys); *see also Sluss v. Commonwealth,* 381 S.W. 3d 215 (Ky. Sep. 20, 2012) (status of two jurors as "Facebook friends" of minor victim's mother not basis for a new trial).

A juror tweeted throughout the trial in *DeLeon. State v. DeLeon,* 185 Wash. App. 171 (Wa. App. Dec. 23, 2014). The issue regarding the tweets was raised prior to the verdict and no party moved to excuse the juror. *Id.* The court found that the tweets—mostly regarding "the juror's negative attitude about the justice system, the length of jury service, and lawyers—did not prejudice the defendants enough to warrant a new trial. *Id.; see also U.S. v. Liu,* 69 F.Supp.3d 374 (S.D.N.Y. Nov. 11, 2014) ("[the tweeting juror] was an attentive juror who, while engaging in banter with fellow Twitter users about her experience, was nonetheless careful never to discuss the substance of the case * * *."); *see also Juror Number One v. Superior Court,* 206 Cal. App. 4th 854 (Ca. App. Aug. 22, 2012) (ordering juror to execute a consent form for *in camera* review of

Facebook posts made during trial); *Commonwealth v. Werner,* 81 Mass. App. 689 (Ma. App. May 2, 2012) (Facebook posts by juror did not warrant a new trial); *Dimas-Martinez v. State,* 2011 Ark. 515 (Ak. Dec. 8, 2011) (tweeting juror denied defendant a fair trial).

Sometimes, it is the lawyers who cannot leave their Twitter or other social media at home. *State v. Polk,* 415 S.W.2d 692 (Mo. App. Dec. 17, 2013). The district attorney in *Polk* publicly commented on a case that she tried before she tried it; while she was trying it; and, after she was done trying it. *Id.* While noting that the district attorney's tweets were improper, the verdict was affirmed by the trial and appellate courts. *Id.*

In *Smith,* a juror sent a Facebook message to an expert witness for the prosecution ("I though you did a great job * * * not sure if you recognized me * * * [y]ou really explained things so great * * * there are 3 of us on the jury from Vandy and one is a physician (cardiologist) so you may know him as well"). *State v. Smith,* 418 S.W.2d 38 (Tn. Sep. 10, 2013). The trial court found the exchange to not be a problem. *Id.* The Supreme Court of Tennessee remanded the matter to the trial court for a hearing. *Id.; see also State v. Smith,* 2015 WL 100452 (Tn. App. Jan. 7, 2015) (the trial court—on remand—found no prejudice and the appellate court affirmed); *U.S. v. Juror Number One,* 866 F.Supp.2d 442 (E.D. Pa. Dec. 21, 2011) (affirming criminal contempt—and $1,000 fine—against dismissed juror who e-mailed jurors that remained on the panel prior to their reaching a verdict).

The use of social media by jurors raises several considerations: prior to voir dire, during trial, during deliberations, and post-verdict. Publicly available "social media" can be a valuable tool for use in preparation for voir dire. Information may demonstrate bias in favor of (or against) a party or position or may reveal that a prospective juror is being "less-than-truthful" during the voir dire process. Grounds to dismiss a juror "for cause" may become available

through research of publically available "social media" that may have not otherwise been revealed during the voir dire process. Publically available "social media" information prior to trial, during trial, during deliberations, or post-verdict may demonstrate a basis for removing a juror prior to deliberations or may warrant a new trial.

The American Bar Association published a formal opinion regarding a lawyer's research of jurors' internet presence:

> "Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.
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> A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).
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> The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).
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> In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal. *Lawyer Reviewing Juror's Internet Presence,* Formal Op. No. 466, American Bar Association (Apr. 24, 2014) (Model Rule 3.5 addresses communications with jurors before, during, and after trial. Model Rule 3.3—amended in 2002—discusses a lawyer's duty to protect the tribunal from criminal or fraudulent conduct by the lawyer's client and such conduct by any other person, i.e., jurors.).

While not an exhaustive list, the "most-used" social media platforms include Facebook, Twitter, and LinkedIn. While the Model Rules prohibit from requesting access to a jurors' social media, publically available social media remains fair game. As soon as the jurors' questionnaires

are produced, the race is on. Google-ing opposing parties was the trend, Google-ing jurors should become the trend, to protect our clients and to protect the integrity of our justice system.

There is no such thing as a "perfect trial."

Sometimes, you should be careful what you wish for. Although the availability of "social media" information undoubtedly adds a few arrows to a lawyer's quiver, the information learned and the lawyer's ethical obligations with regard to that information poses a threat of danger. Regardless, a lawyer's obligation to zealously represent her client dictates that publicly available "social media" information be considered prior to trial, during trial, during deliberations, and post-verdict.

Jurors' use of social media must also be addressed through the court's instructions and admonitions to the jury. As pointed out by the Third Circuit, "[t]he days of simply instructing the jury to avoid reading the newspaper or watching television are over." *Fumo, supra.* A lawyer's obligation to zealously represent her client dictates that appropriate instructions and admonitions be provided to the jury. Federal courts have adopted model instructions with regard to the use of social media. Make sure that your state court does, too!