Ethical Issues Involving Social Media In Jury Cases

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Introduction

Social media has become prevalent in the past decade. A recent survey by the Pew Research Center found that 69 percent of Americans use one of the major social media platforms. In 2005 that number was 5 percent. *Social Media Fact Sheet*, PEW RESEARCH CENTER (Feb. 5, 2008), https://www.pewinternet.org/fact-sheet/socialmedia/.

Social media has also found itself into the practice of law and litigation. Law firms use it for marketing, as well as to obtain information that is useful in litigation. The background of prospective jurors has been a topic of interest to trial lawyers for many years. Prospective jurors' life experiences often provide important clues to how they will view and potentially vote on a particular case, and for that reason any information that can be obtained about them is of immense value to attorneys preparing for trial.

But one aspect of this explosion is that it is becoming increasing clear that not all that glitters is in fact gold. Social media is self-censoring, and may or not represent accurate snapshots of a person's beliefs.

This paper will address ethical issues involving social media that have arisen in recent years in the context of litigation, and address some of the ways in which information from social media is being put in practice in jury selection.

Ethical Issues Arising Out of Social Media Use

Social media has been around long enough to raise numerous serious concerns for participants in litigation. One of the most significant is the heightened risk of disclosure of confidential client information – whether inadvertently or intentionally. Another is the risk of making false statements of fact or law, misusing the "friending" process in connection with judges, parties or witnesses, or raising impeachment, if not spoliation issues in connection with "cleaning up" social media accounts.

Another issue is keeping current with social media. In 2012 the ABA modified Model R.P.C. 1.1 so that "competence" in representation includes being able to advise clients on the "benefits and risks of technology" in one's area of the law. Since then, over thirty states have amended their rules of professional conduct to include "technology competence" as a fundamental duty of lawyers. Does this mean that lawyers now need to be able to speak "emoji" or understand the correct use of hashtags or Twitter ratios? Will it mean that next year? Is the answer different if the case involves sexual or racial harassment in the workplace, as opposed to commercial litigation?

Social Media in Jury Selection

Traditional sources of information, such as public records databases, have long been available for review. In recent decades sources have expanded to include online databases which provide financial information as well as information regarding a prospective juror's prior experience with the legal system.

What is different in recent years however, is the explosion in social media which has provided enormous additional sources of information regarding jurors' experiences, beliefs, and likely proclivities. Approximately 79 percent of Americans have a social media profile. *Percentage of U.S. population with a social media profile from 2008 to 2019*, STATISTICA (March 20, 2019), https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/. These profiles can provide litigants with useful information when determining what jurors will be most – and least – receptive to their case.

What are the rules?

Numerous courts and professional associations have begun developing rules and guidelines delineating the permissible activity regarding researching prospective jurors' social media activity. In general, online research is allowed if searches are limited to information that is publicly available on social media. Of course trial teams and those working at their behest cannot attempt to contact a prospective juror online any more that they could in person. But they likewise cannot seek to obtain access to nonpublic portions of a prospective juror's social media account through false pretenses, as in creating a misleading online profile and connecting with jurors to see their information. There are indeed numerous ways to indirectly connect to a potential juror profile that skirt the ethics line in this new age of online existence. The rules continue to evolve and vary by jurisdiction.

Below is a list of noteworthy cases and new rules that are of interest.

- *Johnson v. McCullough,* 306 S.W.3d 551 (Mo. 2010). After trial, attorneys discovered that a juror intentionally did not disclose relevant litigation history during voir dire. In its decision, the Supreme Court of Missouri said it would adopt a rule "requiring litigants to promptly bring to the trial court's attention information about jurors' prior litigation history" and until the rule is in place, parties should make "reasonable efforts" to research the litigation history of "jurors selected but not empaneled" and bring that information to the trial court prior to trial.

- *Carino v. Muenzen*, 2010 WL 3448071 (N.J. App. Div. – August 30, 2010). The court concluded that the trial court acted unreasonably by not allowing counsel to use a laptop computer to research potential jurors by conducting internet searches from the courtroom.

- *New York County Lawyers' Association Committee on Professional Ethics Formal Opinion No. 7435* (2011) – Although the Committee believed it was ethical to conduct social media searches of prospective jurors, this opinion prohibited any contact, direct or indirect (such as through an agent like a jury consultant), with jurors during trial. It concluded that lawyers may look at publicly available information on jurors' social media pages, but cautioned attorneys from acting "in any way by which the juror becomes aware of the monitoring." This opinion would also require attorneys to report any juror misconduct discovered to the court promptly.

- *New York City Bar Association Formal Opinion* 2012-26 (2012) – While acknowledging that for attorneys "standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case," this opinion reinforced the New York County Lawyers' Association prohibition against making direct contact with potential jurors. It also prohibited any indirect communication that would include "any notification to the person being researched that they have been the subject of an attorney's research efforts."

  Practically speaking, although this is not currently a problem on sites such as Facebook and Twitter that do not show users who has viewed their profile, this can be a problem for LinkedIn, which does unless the searcher enables a function in LinkedIn that allows them to search anonymously. These rules put the burden on the attorney to understand how each social media site they are searching functions and to search appropriately, and to notify the court "promptly" in the event of any misconduct.

- *ABA Formal Opinion 466* (2014) – Contrary to the New York County Lawyers' Association and the New York City Bar Association opinions, the ABA was more lenient in that it did not prohibit the indirect communication that might leave a trace of the search. It only prohibited direct contact with potential jurors. Further, the ABA's opinion says attorneys must notify the court of juror misconduct if it is "criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently"

- *Oracle v. Google* (2016) – In this case the judge banned the trial teams from researching jurors for three reasons. First, there was the fear that if the jurors knew they were being researched they would violate the court's admonition to refrain from doing research of their own. Second, the judge feared lawyers would shape their presentation of evidence or arguments to make improper appeals based on jurors' preferences. Finally, the judge wanted to protect the privacy of the venire.

One emerging issue in the above cases, as well as others is not whether it is permissible to contact jurors or find a way into their personal information by hook or crook – clearly it is not. Rather, the question is usually whether searches are permissible even if a juror may not be able to ascertain that a trial team was looking at their publicly accessible information online.

Jurisdictions vary on this rule even within a jurisdiction. For example, in the Eastern District of Texas, what contact that is permissible varies from one judge to another and even within judges in the same courthouse. Judge Ron Clark in Beaumont, for example, does not permit attorneys to research jurors on social media platforms which leave information from which the account holder could tell their account had been viewed, in line with the New York

opinions; while Judge Rodney Gilstrap in Marshall, on the other hand, expressly does, citing the American Bar Association opinion.

Further, when allowed, some judges have been known to rely upon counsel to disclose social media research that reveals juror misconduct. In one particular case, such research revealed a seated juror's crude remarks about jury duty. Once the judge was alerted, the juror was scolded and then led out of the courtroom in handcuffs. *See* Litigation Insights, March 2016 article "Is it ethical to research jurors online during jury selection?" http://litigationinsights.com/jury-selection-process/ethical-research-jurors-online/

Another emerging issue is proper reliance upon, and analysis of a now voluminous collection of posts, mentions, "thumbs up," "thumbs down," shares with comments, shares without comments, etc. about any one juror. Such concerted effort to monitor, collect and interpret publicly available information can be time-consuming and costly.

Using social media information

Social media can generate a blizzard of information for trial counsel, especially in the tight timeframe between counsel's access to a jury list from the court – assuming that the court provides one – and the time that the decision to exercise peremptory strikes must be made. Facebook pages, for example, can provide dozens or even hundreds of "likes" which can give an indication of the types of activities or entertainment that a juror prefers. For this reason, it is helpful for members of the trial team to have a desired juror or profiles that indicate characteristics that are considered either favorable, or to be avoided. Trial attorneys are cautioned that information is not knowledge, that the interpretation of data collected is key especially when time is short as it is in many voir dire situations.

There is a growing body of research that explores methodologies that will identify accurate characteristics based on analysis of publicly available social media profiles and engagement, taking into consideration the self-censorship that happens in this environment. It purports to confidently interpret and generalize findings with "boosted regression modeling." The "trove of potential online social media data is vast, but the availability of researchers identifying ground truth models, and thus to verify its authenticity, is low." *See* Hall, M., Caton, S. (2017) "Am I who I say I am? Unobtrusive self-representation and personality recognition on Facebook." PLoS ONE 12(9): e0184417. https://doi.org/10.1371/journal.pone.0184417

Conclusion

Social media technology presents numerous ethical issues for litigants, both before and during trial. In addition, the ethical considerations of social media research into juror profiles remain dynamic and abundant as more and more legal teams resort to publicly available, online social media, in addition to traditional sources of information. Between the self-censoring nature of social networking posts and the aggressive mining of personal data that commonly used search engines produce (which we now know indicates with increasing accuracy a person's future behavior), trial advocates and their support teams will continue to be challenged by the meaningful usage and application of the material they amass on-the-fly, from a multitude of online sources and the companies that offer data-mining and analysis.

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