EMERGING ETHICS ISSUES & CASE UPDATES

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The purpose of this paper is to briefly examine how social media affects juror research and the increasing potential for juror misconduct in today's digital age. As a result of the explosive growth of social media, attorneys are increasingly turning to the internet to investigate jurors. Is this practice permissible and what are the risks? The growth and handheld mobility of social networking services like Facebook and Twitter further requires judges to be vigilant to ensure that trials remain fair. To account for this developing risk, most courts have revised pattern jury instructions. Finally, this paper examines how New York State courts have recently resolved discovery requests for social media content.

I. SOCIAL MEDIA & JURORS

Juror Investigation:

Attorneys, of all ages, are taking up internet research as a tool. Implied in the Seventh Amendment is the right to an impartial jury. Attorneys conduct voir dire to screen potential jurors for possible biases that would preclude their objectivity. The Supreme Court's cases have stressed the wide discretion granted to trial courts in conducting voir dire in areas that might tend to show juror bias. *Mu'Min v. Virginia*, 500 U.S. 415, 415 (1991).

Cases are now beginning to address whether an attorney may use the internet to investigate jurors. In *Carino v. Muenzen*, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154 (N.J. Sup. Ct. App. Div Aug. 30, 2010), the Superior Court of New Jersey held that a trial judge "acted unreasonably in preventing use of the internet by [Plaintiff's] counsel." The trial judge's decision was apparently motivated by the fact that defense counsel was not equipped with a laptop while plaintiff's counsel had the "foresight" to bring his computer to court. The trial judge mistakenly believed he needed to level the playing field.

There is limited authority that an attorney has a duty to perform internet research on the juror. See *Johnson v. McCullough*, 306 S.W. 3d 551 (Mo. 2010). In *Johnson* a juror failed to disclose her prior litigation history in response to a voir dire question. After a six day jury trial and defense verdict, plaintiff's counsel investigated the juror using an online automated case record service and discovered that the juror had been a defendant in a personal injury case. A new trial was ordered. Notably, the decision provides:

> "However, in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's

> attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled. Litigants should endeavor to prevent retrials by completing an early investigation."

While a trial lawyer may not have an express duty to scan social networking sites for juror postings, discoveries of dishonesty during voir dire must be promptly reported to the court. See, e.g., *United States v. Daugerdas*, 867 F. Supp. 2d 445 (S.D.N.Y. 2012) ("An attorney's duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client.") In *Daugerdas*, the court denied one defendant's motion for a new trial as a consequence of counsel not bringing suspected juror misconduct to the attention of the court, while three other defendants' received new trial.

Juror Misconduct:

No doubt about it, the internet has had a significant influence on juror behavior. The New York Pattern Jury Instructions ("PJI") include suggested jury charges that prohibit juror use of the internet to discuss or research the case. Jury charges have been recently revised to include admonitions against utilizing electronic means and devices to research or communicate with others about the case. A sample New York State Supreme Court jury instruction[1] provides:

> *"5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the internet, or any other news media.*
>
> *6. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the internet, or by any other means or source.*
>
> *In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, internet chat rooms, blogs, or social websites, such as Facebook, MySpace or Twitter.*

[1] Copy provided by MLA Judicial Member Hon. John G. Ingram.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posing of information about the case, or what you are doing in the case, on any device, or internet site, including blogs, chat rooms, social websites or any other means.

You must also not Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge."

A copy of the Instruction is attached hereto as Enclosure "A."

While beneficial to legal counsel, social networking websites have created mayhem in some jury boxes, resulting in several mistrials.

II. RECENT NEW YORK ETHICS OPINIONS

Question: *Can a lawyer use a social media websites for juror research?*

The New York County Lawyers' Association Committee on Professional Ethics issued an opinion, Formal Opinion 743, providing that "It is proper and ethical under RPC 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 tweets to jurors or otherwise contact them."

The New York City Bar Association issued it Formal Opinion 2012-02, Jury Research and Social Media, addressing this issue. Largely agreeing with the NYCLA, the Opinion concludes that an attorney can use social media websites provided that no communication occurs between the attorney and juror. However, the Opinion further cautions lawyers to be aware of how the relevant social media service works and understand the functionality and privacy setting of any service so to avoid an unintended communication with a juror in violation of RPC 3.5.

Copies of these Opinions are attached hereto as Enclosure "B" & "C."

III. SOCIAL MEDIA DISCOVERY REQUESTS-CASE UPDATES

Requests for social media materials/authorizations to users should specifically identify which materials are requested since not all communications are related to the cause of action. *See Patterson v. Turner Construction Co.*, 88 A.D. 3d 617; 931 N.Y.S.2d 311 (N.Y. 2011)

(allowing discovery of Facebook information regardless of plaintiff's privacy settings, provided defendant's request specifically identified information that conflicted with plaintiff's claims of PTSD and inability to work).

Nieves v. 30 Ellwood Realty LLC, 2013 N.Y. Misc. LEXIS 1525 (N.Y. 2013) (directing plaintiff to conduct an initial review of her own Facebook initially, followed by an in camera review of records as needed).

Bianco v. North Fork Bancorporation, Inc., 2012 Misc. LEXIS 4889 (N.Y. 2012) (ordering plaintiff to produce Facebook content for in camera review to be supervised by a Special Referee in light of broad claims as to the alleged impact of the accident to his lifestyle and loss of enjoyment of life claim).

In *Richards v. Hertz Corporation*, 100 A.D. 3d 728; 953 N.Y.S.2d 654 (N.Y. 2012), the plaintiff testified in July of 2009 that her injuries impaired her ability to play sports but defense counsel discovered photographs of the plaintiff skiing in 2010 on public portions of her Facebook page. The Appellate Court expanded the lower court discovery ruling ordering the lower court to conduct an in camera inspection of all status reports, emails, photographs and video posted on plaintiff's Facebook profile since the date of the accident.

However, "fishing expeditions" will not be tolerated:

Fawcett v. Altieri, 38 Misc. 3d 1022; 2013 N.Y. Misc. LEXIS 82 (N.Y. 2013) (highlighting that electronic discovery is no longer within the exclusive province of corporate commercial litigation). In a well reasoned opinion, Judge Maltese denied defendant's request for "full access" authorizations to several social media websites at the initial outset of discovery. The opinion explains:

> Information posted in open on social media accounts are freely discoverable and do not require court orders to disclose them. However, this court will not go so far as to hold that all social media records are material and necessary based solely on the fact that many people avail themselves to these social media sites. In order to obtain a closed or private social media account by a court order for the subscriber to execute an authorization for their release, the adversary must show with some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand. The courts should not accommodate blanket searches for any kind of information or

> photos to impeach a person's character, which may be embarrassing, but are irrelevant to the facts of the case at hand.

Kregg v. Maldonado, 98 A.D. 3d 1289; 951 N.Y.S.2d 301 (N.Y. 2012) (holding trial court went too far in ordering the family of motorcycle accident victim to disclose "entire accounts" of any social media or internet postings). Defendants' disclosure request was not narrowly tailored but Appellate Division encouraged defendants to serve more narrowly tailored disclosure request.

Tapp v. New York State Urban Development Corporation, 102 A.D. 3d 620; 958 N.Y.S. 2d 392 (N.Y. 2013) (mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account).

CONCLUSION

Social media depicts the daily lives of many people, including jurors, of all ages. As technology continues to evolve, the savvy litigator will look to web based social media sites to research and prepare their cases. However, the digital age presents significant risks, requiring a few course corrections from counsel and the courts.

ENCLOSURE "A"

Jury Admonitions In Preliminary Instructions (Revised May 5, 2009)[1]

(Note: Statutory law requires that certain admonitions be given to the jury as part of the court's preliminary instructions. See CPL 270.40. This charge sets forth those admonitions and provides appropriate explanations.)

Our law requires jurors to follow certain instructions in order to help assure a just and fair trial. I will now give you those instructions.

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.

3. You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use internet maps or Google Earth or any other program or device to search for and view any location discussed in the testimony.

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[1] This charge was revised to include admonitions against utilizing electronic means and devices to research or communicate with others about the case.

5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the internet, or any other news media.

6. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the internet, or by any other means or source.

In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, internet chat or chat rooms, blogs, or social websites, such as Facebook, MySpace or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case, on any device, or internet site, including blogs, chat rooms, social websites or any other means.

You must also not Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.

Our law also does not permit jurors to converse among themselves about the case until the Court tells them to begin deliberations because premature discussions can lead to a

premature final decision.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and, our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

ENCLOSURE "B"

NYCLA COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION

No.: 743

Date Issued: May 18, 2011

TOPIC: Lawyer investigation of juror internet and social networking postings during conduct of trial.

DIGEST:

It is proper and ethical under RPC 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 tweets to jurors or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but must not "friend," email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly comply with Rule 3.5(d) and bring such misconduct to the attention of the court before engaging in any further significant activity in the case.

RULES:

RPC 3.5, 4.1, 8.4

QUESTION:

After voir dire is completed and the trial commences, may a lawyer routinely conduct ongoing research on a juror on Twitter, Facebook and other social networking sites? If so, what are the lawyer's duties to the court under Rule of Professional Conduct 3.5?

OPINION:

This opinion considers lawyer investigations of jurors during an ongoing trial. With the advent of internet-based social networking services, additional complexities are introduced to the traditional rules barring contact between lawyers and jurors during trials.

New York RPC 3.5(a)(4) and (a)(5) provide that a lawyer shall not:

4. communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case, or, during the trial of a case with any member of the jury unless authorized to do so by law or court order;

5. communicate with a juror or prospective juror after discharge of the jury if (i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service . . . .

Thus, the rules proscribe any direct or indirect communication with a juror or potential juror during trial, and prohibit certain categories of communication after the jury service is complete. It should also be noted that the RPC prevent a lawyer from doing indirectly, such as through a proxy, that which is directly proscribed for the lawyer. (RPC 8.4(a); 3.5).

A. Impermissible Communication

The RPC explicitly draw a distinction between conduct during trial, which is governed by RPC 3.5(a)(4), and conduct after discharge of the jury, which is regulated less strictly under RPC 3.5(a)(5). In fact, a lawyer's contact with jurors is divided, at least in practice, into three distinct areas. These are voir dire or jury selection, actual conduct of the trial, and post-verdict contact with jurors. As mentioned, any contact, direct or indirect, is proscribed as a matter of attorney ethics during the conduct of the trial, but permitted with certain conditions after discharge pursuant to RPC 3.5(a)(5).

Some authorities have examined a lawyer's use of internet resources to investigate potential jurors in the voir dire stage. For example, one recent Missouri decision considered and set aside a jury verdict in which a juror had specifically denied (falsely) any prior jury service. See Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010). In holding that the juror had acted improperly, the Court observed that a more thorough investigation of the juror's background would have obviated the need to set aside the jury verdict and conduct a retrial. The trial court chided the attorney for failing to perform internet research on the juror, and granted a new trial, observing that a party should use reasonable efforts to examine the litigation history of potential jurors. 306 S.W. 3d at 559. A New Jersey appellate court similarly held that the plaintiff counsel's use of a laptop computer to google potential jurors was permissible and did not require judicial intervention for fairness concerns. See Carino v. Muenzen, No. A-5491-08T1, N.J. Super. Unpub. LEXIS 2154, at *26-27 (App. Div. Aug. 30, 2010); see also Jamila A. Johnson, "Voir Dire: to Google or Not to Google" (ABA Law Trends and News, GP/Solo & Small Firm Practice Area Newsletter, Fall 2008, Volume 5, No. 1).

In another context, the New York State Bar Association Committee on Professional Ethics, in Ethics Opinion 843, recently considered whether a lawyer could ethically access the publicly available social networking page of an unrepresented party or witness for use in litigation, including possible impeachment. The NYSBA concluded that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither

"friends" the other party nor directs someone else to do so."[1] Drawing an analogy to jurors, we conclude that passive monitoring of jurors, such as viewing a publicly available blog or Facebook page, may be permissible.

During a trial, however, lawyers may not communicate with jurors outside the courtroom. Not only is direct or indirect juror contact during trial proscribed as a matter of attorney ethics, as a matter of law (which is outside the scope of this committee's jurisdiction), the courts proscribe any unauthorized contact between lawyers and sitting jurors.

Significant ethical concerns would be raised by sending a "friend request," attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog or "following" a juror's Twitter account. We believe that such contact would be impermissible communication with a juror.

Moreover, under some circumstances a juror may become aware of a lawyer's visit to the juror's website.[2] If a juror becomes 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.

B. Reporting Juror Misconduct

Lawyers who learn of impeachment or other useful material about an adverse party, assuming that they otherwise conform with the rules of the court, have no obligation to come forward affirmatively to inform the court of their findings. Such lawyers, absent other obligations under court rules or the RPC, may sit back confidently, waiting to spring their trap at trial.[3] On the other hand, a lawyer who learns of juror impropriety is bound by RPC 3.5 to promptly report such impropriety to the court. That rule provides that: "A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge." RPC 3.5(d).

The standard jury charge in a civil or criminal case instructs jurors not to discuss the case with anyone outside the courtroom, not to conduct any independent investigation, not to view the scene of the incident through computer programs such as Google Earth, and not to perform any independent research on the internet. See PJI 1:10, 1:11. According to the New York pattern jury instruction:

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[1] See NYSBA Ethics Op. 843, http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208 at 2-3

[2] For example, as of this writing, Twitter apparently conveys a message to the account holder when a new person starts to "follow" the account, and the social networking site LinkedIn provides a function that allows a user to see who has recently viewed the user's profile. This opinion is intended to apply to whatever technologies now exist or may be developed that enable the account holder to learn the identity of a visitor.

[3] Lawyers should keep in mind that RPC 3.4 provides that a lawyer shall not "disregard or advise the client to disregard a standing rule of a tribunal. . .."

> It is important to remember that you may not use any internet services such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties or the lawyers or the court.

Jurors have sometimes ignored instructions. For example, a New York juror googled defense counsel during trial, and discussed it at a social dinner.[4] A prominent television newscaster was criticized for tweeting on his Twitter account about his own jury service.[5] In a recent South Dakota case, a jury verdict was set aside after a juror performed his own internet research, which he shared with the other jurors.[6]

Any lawyer who learns of juror misconduct, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court. This is so even should the client notify the lawyer that she does not wish the lawyer to comply with the requirements of RPC 3.5. Of course, the lawyer has no ethical duty to routinely monitor the web posting or Twitter musings of jurors, but merely to promptly notify the court of any impropriety of which the lawyer becomes aware.

Further, the lawyer who learns of improper juror deliberations may not use this information to benefit the lawyer's client in settlement negotiations, or even to inform the lawyer's settlement negotiations. The lawyer may not research a juror's social networking site, ascertain the status of improper juror deliberations and then accept a settlement offer based on that information, prior to notifying the court. Rather, the lawyer must "promptly" notify the court of the impropriety—*i.e.*, before taking any further significant action on the case.

CONCLUSION:

It is proper and ethical under RPC 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. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not "friend" the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly

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[4] People vs. Jamison, 24 Misc. 3d 1238A, 243 N.Y.L.J. 42 (2006).

[5] Michael Hoenig, Juror Misconduct on the Internet, N.Y.L.J. October 8, 2009.

[6] Russo vs. Takata Corp., 2009 S.D. 83, 2009 S.D. Lexis 155 (Sept. 16, 2009).

comply with RPC 3.5(d) and bring such misconduct to the attention of the court, before engaging in any further significant activity in the case.

ENCLOSURE "C"

Formal Opinion 2012-2: JURY RESEARCH AND SOCIAL MEDIA

TOPIC: Jury Research and Social Media

DIGEST: Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.

RULES: 3.5(a)(4); 3.5(a)(5); 3.5(d); 8.4

Question: What ethical restrictions, if any, apply to an attorney's use of social media websites to research potential or sitting jurors?

OPINION

I. Introduction

Ex parte attorney communication with prospective jurors and members of a sitting jury has long been prohibited by state rules of professional conduct (*see* American Bar Association Formal Opinion 319 ("ABA 319")), and attorneys have long sought ways to gather information about potential jurors during voir dire (and perhaps during trial) within these proscribed bounds. However, as the internet and social media have changed the ways in which we all communicate, conducting juror research while complying with the rule prohibiting juror communication has become more complicated.

In addition, the internet appears to have increased the opportunity for juror misconduct, and attorneys are responding by researching not only members of the venire but sitting jurors as well. Juror misconduct over the internet is problematic and has even led to mistrials. Jurors have begun to use social media services as a platform to communicate about a trial, during the trial (*see WSJ Law Blog* (March 12, 2012), http://blogs.wsj.com/law/2012/03/12/jury-files-the-temptation-of-twitter/), and jurors also turn to the internet to conduct their own out of court research. For example, the Vermont Supreme Court recently overturned a child sexual assault conviction because a juror conducted his own research on the cultural significance of the alleged crime in Somali Bantu culture. *State v. Abdi*, No. 2012-255, 2012 WL 231555 (Vt. Jan. 26, 2012). In a case in Arkansas, a murder conviction was overturned because a juror tweeted during the trial, and in a Maryland corruption trial in 2009, jurors used Facebook to discuss their views of the case before deliberations. (*Juror's Tweets Upend Trials,* Wall Street Journal, March 2, 2012.) Courts have responded in various ways to this problem. Some judges have held jurors in contempt or declared mistrials (see *id.*) and other courts now include jury instructions on juror use of the internet. (*See* New York Pattern Jury Instructions, Section III, *infra.*)However, 79% of judges who responded to a Federal Judicial Center survey admitted that "they had no way of knowing whether jurors had violated a social-media ban." (*Juror's Tweets, supra.*) In this context, attorneys have also taken it upon themselves to monitor jurors throughout a trial.

Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case. However, social media services and websites can blur the line between independent, private research and interactive, interpersonal "communication." Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations. This opinion applies the New York Rules of Professional Conduct (the "Rules"), specifically Rule 3.5, to juror research in the internet context, and particularly to research using social networking services and websites.[1]

The Committee believes that the principal interpretive issue is what constitutes a "communication" under Rule 3.5. We conclude that if a juror were to (i) receive a "friend" request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended. In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror's social media activities, the lawyer must promptly reveal the improper conduct to the court.

II. Analysis Of Ethical Issues Relevant To Juror Research

A. Prior Authority Regarding An Attorney's Ability To Conduct Juror Research Over Social Networking Websites

Prior ethics and judicial opinions provide some guidance as to what is permitted and prohibited in social media juror research. First, it should be noted that lawyers have long tried to learn as much as possible about potential jurors using various methods of information gathering permitted by courts, including checking and verifying voir dire answers. Lawyers have even been chastised for *not* conducting such research on potential jurors. For example, in a recent Missouri case, a juror failed to disclose her prior litigation history in response to a voir dire question. After a verdict was rendered, plaintiff's counsel investigated the juror's civil litigation history using Missouri's automated case record service and found that the juror had failed to disclosure that she was previously a defendant in several debt collection cases and a personal injury action.[2] Although the court upheld plaintiff's request for a new trial based on juror nondisclosure, the court noted that "in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage." *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010). The court also stated that "litigants should endeavor to prevent retrials by completing an early investigation." *Id.*at 559.

Similarly, the Superior Court of New Jersey recently held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using the internet to research potential jurors during voir dire. During jury selection in a medical malpractice case, plaintiff's counsel began using a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff's attorney could not use her laptop during jury selection because she gave no notice of her intent to conduct internet research during selection. Although the Superior Court found that the trial court's ruling was not prejudicial, the Superior Court stated that "there was no suggestion that counsel's use of the computer was in any way disruptive. That he 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.' The 'playing field' was, in fact, already 'level' because internet access was open to both counsel." *Carino v. Muenzen*, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010).[3]

Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 ("SDCBA 2011-2") examined whether an attorney can send a "friend request" to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to "friend" a party, even if the "friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication" and is therefore *prohibited* by the rule against *ex parte* communications with represented parties.[4] In addition, the New York State Bar Association ("NYSBA") found that obtaining information from an adverse party's social networking personal webpage, which is accessible to all website users, "is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Niexi or Factiva and that is plainly *permitted*." (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers' Association ("NYCLA") published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 ("NYCLA 743") examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is "proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided 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. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not 'friend' the juror, email, send tweets or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring." (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety "before taking any further significant action in the case." *Id.* NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

As set forth below, we largely agree with our colleagues at NYCLA. However, despite the guidance of the opinions discussed above, the question at the core of applying Rule 3.5 to social media—what constitutes a communication—has not been specifically addressed, and the Committee therefore analyzes this question below.

B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror

1. Discussion of Features of Various Potential Research Websites

Given the popularity and widespread usage of social media services, other websites and general search engines, it has become common for lawyers to use the internet as a tool to research members of the jury venire in preparation for jury selection as well as to monitor jurors throughout the trial. Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend in part on, among other things, the technology, privacy settings and mechanics of each service.

The use of search engines for research is already ubiquitous. As social media services have grown in popularity, they have become additional

sources to research potential jurors. As we discuss below, the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research. However, the functionality, policies and features of social media services change often, and any description of a particular website may well become obsolete quickly. Rather than attempt to catalog all existing social media services and their ever-changing offerings, policies and limitations, the Committee adopts a functional definition.[5]

We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives. Professional networking sites have also become popular. The amount of information that users can view about each other depends on the particular service and also each user's chosen privacy settings. The information the service communicates or makes available to visitors as well as members also varies. Indeed, some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction. Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney's duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.

2. What Constitutes a "Communication"?

Any research conducted by an attorney into a juror or member of the venire's background or behavior is governed in part by Rule 3.5(a)(4), which states: "a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order." The Rule does not contain a *mens rea* requirement; by its literal terms, it prohibits *all* communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney's purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for the very purpose of communication, and automatic features or user settings may cause a "communication" to occur even if the attorney does intend not for one to happen or know that one may happen. This raises several ethical questions: is every visit to a juror's social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of "communicate" and "communication," which are not defined either in the Rule or the American Bar Association Model Rules.[6]

Black's Law Dictionary (9th Ed.) defines "communication" as: "1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. 2. The information so expressed or exchanged." The Oxford English Dictionary defines "communicate" as: "To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across." Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines "communication" (for the purposes of discovery requests) as: "the transmittal of information (in the form of facts, ideas, inquiries or otherwise)."

Under the above definitions, whether the communicator intends to "impart" a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the "transmission of," "exchange of" or "process of bringing" information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

3. An Attorney May Research A Juror Through Social Media Websites As Long As No Communication Occurs

The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror's social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably "communicated" with the juror. The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), *infra*.

Although the text of Rule 3.5(a)(4) would appear to make any "communication"—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site,

and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee's current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney's research or actions. However, other services may be more difficult to navigate depending on their functionality and each user's particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites' social functionality. An attorney may not, for example, send a chat, message or "friend request" to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a "communication" would be generated by the website.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

C. An Attorney May Not Engage in Deception or Misrepresentation In Researching Jurors On Social Media Websites

Rule 8.4(c), which governs all attorney conduct, prohibits deception and misrepresentation.[7] In the jury research context, this rule prohibits attorneys from, for instance, misrepresenting their identity during online communications in order to access otherwise unavailable information, including misrepresenting the attorney's associations or membership in a network or group in order to access a juror's information. Thus, for example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror's personal webpage that is accessible only to members of a certain alumni network.

Furthermore, an attorney may not use a third party to do what she could not otherwise do. Rule 8.4(a) prohibits an attorney from violating *any* Rule "through the acts of another." Using a third party to communicate with a juror is deception and violates Rule 8.4(c), as well as Rule 8.4(a), even if the third party provides the potential juror only with truthful information. The attorney violates both rules whether she instructs the third party to communicate via a social network or whether the third party takes it upon herself to communicate with a member of the jury or venire for the attorney's benefit. On this issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 ("PBA 2009-02") concluded that if an attorney uses a third party to "friend" a witness in order to access information, she is guilty of deception because "[this action] omits a highly material fact, namely, that the third party who asks to be allowed access to the witness' pages is doing so only because she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit." (PBA 2009-02 at 3.) New York City Bar Association Formal Opinion 2010-2 similarly held that a lawyer may not gain access to a social networking website under false pretenses, either directly or through an agent, and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to "friend" an adverse party. (NYCLA 743 at 2.) We agree with these conclusions; attorneys *may not* shift their conduct or assignments to non-attorneys in order to evade the Rules.

D. The Impact On Jury Service Of Attorney Use Of Social Media Websites For Research

Although the Committee concludes that attorneys may conduct jury research using social media websites as long as no "communication" occurs, the Committee notes the potential impact of jury research on potential jurors' perception of jury service. It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives. The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.

In general, attorneys should only view information that potential jurors intend to be—and make—public. Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption. The potential juror is aware that her information and images are available for public consumption. The Committee notes that some potential jurors may be unsophisticated in terms of setting their privacy modes or other website functionality, or may otherwise misunderstand when information they post is publicly available. However, in the Committee's view, neither Rule 3.5 nor Rule 8.4(c) prohibit attorneys from viewing public information that a juror might be unaware is publicly available, except in the rare instance where it is clear that the juror intended the information to be private. Just as the attorney must monitor technological updates and understand websites that she uses for research, the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries. Research permitted as to potential jurors is permitted as to sitting jurors. Although there is, in light of the discussion in Section III, *infra*, great benefit that can be derived from detecting instances when jurors are

not following a court's instructions for behavior while empanelled, researching jurors mid-trial is not without risk. For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.

III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge." Although the Committee concludes that an attorney may conduct jury research on social media websites as long as "communication" is avoided, if an attorney learns of juror misconduct through such research, she *must* promptly[8] notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney.[9]

On this issue, the Committee notes that New York Pattern Jury Instructions ("PJI") now include suggested jury charges that expressly prohibit *juror* use of the internet to discuss or research the case. PJI 1:11 Discussion with Others - Independent Research states: "please do not discuss this case either among yourselves or with anyone else during the course of the trial. . . . It is important to remember that you may not use any internet service, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial . . . For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as juror but you are not in the courtroom." Moreover, PJI 1:10 states, in part, "in addition, please do not attempt to view the scene by using computer programs such as Goggle Earth. Viewing the scene either in person or through a computer program would be unfair to the parties . . . ." New York criminal courts also instruct jurors that they may not converse among themselves or with anyone else upon any subject connected with the trial. NY Crim. Pro. §270.40 (McKinney's 2002).

The law requires jurors to comply with the judge's charge[10] and courts are increasingly called upon to determine whether jurors' social media postings require a new trial. *See, e.g., Smead v. CL Financial Corp.*, No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror's posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror's conduct is *mis*conduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a "conversation," it may not always be obvious whether a particular post is "connected with" the trial. Moreover, a juror may be permitted to post a comment "about the fact [of] service on jury duty."[11]

IV. Post-Trial

In contrast to Rule 3.4(a)(4), Rule 3.5(a)(5) allows attorneys to communicate with a juror after discharge of the jury. After the jury is discharged, attorneys may contact jurors and communicate, including through social media, unless "(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service." Rule 3.5(a)(5). For instance, NYSBA Opinion 246 found that "lawyers may communicate with jurors concerning the verdict and case." (NYSBA 246 (interpreting former EC 7-28; DR 7-108(D).) The Committee concludes that this rule should also permit communication via social media services after the jury is discharged, but the attorney must, of course, comply with all ethical obligations in any communication with a juror after the discharge of the jury. However, the Committee notes that "it [is] unethical for a lawyer to harass, entice, or induce or exert influence on a juror" to obtain information or her testimony to support a motion for a new trial. (ABA 319.)

V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. "Communication," in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney's research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is *the process of bringing an idea, information or knowledge to another's perception*—including the fact that they have been researched.In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.

1. Rule 3.5(a)(4) states: "a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order."

2. Missouri Rule of Professional Conduct 3.5 states: "A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order."

3. The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that "if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the in court voir dire, the Court's supervisory control over the jury selection process would, as a practical matter, be obliterated." (Aug. 30, 2011 letter from R. Rosenstein to Hon. Richard Bennet.) The Committee is unable to determine the court's ruling from the public file.

4. California Rule of Profession Conduct 2-100 states, in part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

5. As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.

6. Although the New York City Bar Association Formal Opinion 2010-2 ("NYCBA 2010-2") and SDCBA 2011-2 (both addressing social media "communication" in the context of the "No Contact" rule) were helpful precedent for the Committee's analysis, the Committee is unaware of any opinion setting forth a definition of "communicate" as that term is used in Rule 4.2 or any other ethics rule.

7. Rule 8.4 prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," and also states "a lawyer or law firm shall not: (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 or another." (Rule 8.4(c),(a).)

8. New York City Bar Association Formal Opinion 2012-1 defined "promptly" to mean "as soon as reasonably possible."

9. Although the Committee is not opining on the obligations of jurors (which is beyond the Committee's purview), the Committee does note that if a juror contacts an attorney, the attorney must promptly notify the court under Rule 3.5(d).

10. *People v. Clarke*, 168 A.D.2d 686 (2d Dep't 1990) (holding that jurors must comply with the jury charge).

11. *US v. Fumo*, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) *aff'd*, 655 F.3d 288 (3d Cir. 2011) ("[The juror's] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.") (internal citations omitted).