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6 Stetson J. Advoc. & L. 70 (2019)

Friend Request: Ethically And Legally Investigating Jurors' Social Media

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“A fox should not be on the jury at a goose’s trial.” Dr. Thomas Fuller, 1732.²

I. Introduction

70. The impartial and lacking in personal knowledge juror is essential to the modern trial process,³ but in the days of Dr. Fuller, English law still required that jurors be neighbors of the litigants, essentially serving as “accusatory witnesses.”⁴ These early jurors were selected in hopes that they either knew the facts already, or were in the best

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2 THOMAS FULLER, M.D. GNOMOLOGIA: ADAGIES AND PROVERBS; WISE SENTENCES AND WITTY SAYINGS, ANCIENT AND MODERN, FOREIGN AND BRITISH, 5 (1732).

3 *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“In the language of Lord Coke, a juror must be as ‘indifferent as he stands unsworne.’ His verdict must be based upon the evidence developed at the trial.”) (quoting Co.Litt. 155b).

4 Roger D. Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 GEO. L.J. 438, 438–39 (1928).

position to investigate the matter further themselves.⁵ Today, newly empaneled jurors are admonished to avoid obtaining information from outside sources,⁶ and numerous instances of jurors conducting online research have led many jurisdictions to revise their jury instructions with language specific to the internet and social media.⁷ As the internet continues to revolutionize how society views and shares information, the need for legal understanding and adaptation will also grow accordingly.

71. Social media as referred to herein can best be defined as “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).”⁸ Social media investigation, while primarily focused on social media as defined above, also refers to the use of search engines, court databases, proprietary databases, and the search for other sources of perceivable content accessible via the internet. Unless a distinction is necessary, any reference to jurors refers to both prospective and empaneled jurors.

72. This article seeks to provide a chronological approach to the questions lawyers will face when investigating jurors during voir dire and trial, while addressing legal, ethical, and strategic considerations relevant to each phase. Practical matters like basic social media investigation methodology will be also be discussed, along with some specific social media platforms commonly used at the time of this writing. Lastly, we’ll discuss common uses of the collected information, juror misconduct, and when attorneys are ethically bound to report or share their findings.

II. The Decision to Investigate Jurors Social Media

Legal Competency in the Digital Age

73. Familiarity with technology is quickly becoming a matter of legal competency.⁹ The comments to ABA Model Rule of Professional Conduct 1.1 were amended in 2012 to state that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with

5 John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 *COLUM. L. REV.* 1168, 1170 (1996).

6 *United States v. Williams*, 635 F.2d 744, 745-46 (8th Cir. 1980).

7 See, e.g., JOHN G. BROWNING, *THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LEGAL SYSTEM*, 181–87 (2010).

8 *Social media*, MERRIAM-WEBSTER.COM.

9 Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring A New Mandate for Competence in the Practice of Law*, 68 *U. MIAMI L. REV.* 445, 465–67 (2014).

relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”¹⁰ As of 2017, more than half of states have either adopted this rule or acknowledged it approvingly in advisory or formal ethics opinions.¹¹ Although there are no known instances of legal malpractice liability resulting from deficiencies in social media competence, it is not inconceivable in light of this rising standard of legal competency.¹²

The Right to Investigate Jurors

74. Generally speaking, attorneys are permitted to investigate jurors’ social media, as long as the methods utilized by the attorney or designee are ethically sound.¹³ In April 2014, the ABA’s Standing Committee on Ethics and Professional Responsibility promulgated formal opinion 466, titled “Lawyer Reviewing Jurors’ Internet Presence,” and opened with:

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.¹⁴

75. While deciding a criminal conviction appeal, the Supreme Court of Kentucky explicitly established the right to ethically investigate jurors’ social media accounts.¹⁵ One of the most noteworthy case examples comes from a New Jersey trial for medical malpractice claims, in which defense counsel noticed plaintiff attorney utilizing the internet on a laptop during voir dire and objected. This is the exchange that followed:

The Court: Are you Googling these [potential jurors]?

[Plaintiff’s Counsel]: Your Honor, there’s no code law that says I’m not allowed to do that. I — any courtroom —

The Court: Is that what you’re doing?

¹⁰ MODEL RULES OF PROF’L CONDUCT 1.1 cmt. 8 (AM. BAR ASS’N 2016).

¹¹ RYAN GARCIA & THADDEUS HOFFMEISTER, SOCIAL MEDIA LAW IN A NUTSHELL 357–358 (2017).

¹² RYAN GARCIA & THADDEUS HOFFMEISTER, SOCIAL MEDIA LAW IN A NUTSHELL, 336 (2017); But see William Peacock, *Will It Soon be Malpractice Not to be Social Media Savvy?*, [FINDLAW](#) (May 17, 2013).

¹³ E.g., N.Y. City Bar Ass’n Comm. Prof’l Ethics, [Formal Op. 2](#) (2012); Or. State Bar, [Formal Op. 189](#) (2013); Pa. Bar Ass’n, [Formal Op. 300](#) (2014); W. Va. Law. Disciplinary Bd., [L.E.O. No 02](#) (2015); Colo. Bar Ass’n, [Formal Op. 127](#) (2015); D.C. Bar, [Ethics Opinion 371](#) (2016); [Dist. Idaho Loc. Civ. R. 47.2](#) (2017).

¹⁴ ABA Standing Comm. on Ethics & Prof’l Responsibility, [Formal Op. 466, at 1](#) (2014).

¹⁵ *Sluss v. Com.*, [381 S.W.3d 215, 228](#) (Ky. 2012)(adopting the New York County method as described in N.Y. Cnty. Lawyers Ass’n Comm. on Prof’l Ethics, [Formal Op. 743](#) (2011)).

[Plaintiff's Counsel]: I'm getting information on jurors—we've done it all the time, everyone does it. It's not unusual. It's not. There's no rule, no case or any suggestion in any case that says —

* * *

The Court: No, no, here is the rule. The rule is it's my courtroom and I control it.

[Plaintiff's Counsel]: I understand.

The Court: I believe in a fair and even playing field. I believe that everyone should have an equal opportunity. Now, with that said there was no advance indication that you would be using it. The only reason you're doing that is because we happen to have a [Wi-Fi] connection in this courtroom at this point which allows you to have wireless internet access.

[Plaintiff's Counsel]: Correct, Judge.

The Court: And that is fine provided there was a notice. There is no notice. Therefore, you have an inherent advantage regarding the jury selection process, which I don't particularly feel is appropriate. So, therefore, my ruling is close the laptop for the jury selection process. You want to — I can't control what goes on outside of this courtroom, but I can control what goes on inside the courtroom.¹⁶

76. On appeal of a defense verdict, the appellate court affirmed on other grounds, but held that “the judge acted unreasonably in preventing use of the internet by [plaintiff's] counsel.” The use of the laptop was not disruptive, and no issues of fairness existed as notice was not required and the courthouse internet access was available to both attorneys, even if only plaintiff's attorney had the foresight to bring and utilize a laptop.¹⁷

The Obligation to Investigate Jurors Social Media

77. Besides the previously discussed reason of legal competency, attorneys may also be obligated to investigate by court rule or to avoid waiver. In a 2010 Missouri Supreme Court decision, the court adopted a rule requiring the parties to use reasonable efforts to search all jurors for prior litigation history on a case search website, Case.net, after the jurors are selected but before they are empaneled. Any relevant discoveries must be presented to the trial court before trial begins, otherwise the parties have failed to

¹⁶ *Carino v. Muenzen*, No. A-5491-08T1, 2010 WL 3448071, at 4, 10 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

¹⁷ *Carino v. Muenzen*, No. A-5491-08T1, 2010 WL 3448071, at 4, 10 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

preserve the issue.¹⁸ This court imposed duty was later adopted by a formal rule.¹⁹ The rule was limited to jurors' litigation history, and the Missouri Court of Appeals declined to expand it to require attorneys to also search social media like Facebook, Myspace, or LinkedIn.²⁰

78. As few courts have adopted rules mandating such online investigations, the issue of waiver seems to be the prevailing reason that social media investigation should be conducted at the earliest possible stage, and any relevant discoveries brought to the court's attention as soon as reasonably possible. A losing party conducting a post-verdict, sour grapes social media investigation can expect an unsympathetic ear when presenting evidence of juror bias or dishonesty that could have been discovered earlier through reasonable diligence and addressed before empanelment or during trial.

79. Florida Chief Judge Tom McGrady publicly voiced his concern, stating that "[i]n the old days, the losing side would have to send out a private investigator and snoop around, [now, technology offers lawyers] a gotcha card. They can wait and see how the verdict stands and then pull it out."²¹ Attorneys can avoid frustrating or surprising the court by collecting and presenting important social media discoveries as soon as reasonably practicable.

Risks and Rewards of Investigating Jurors Social Media

80. Risks of investigating jurors' social media are more strategic than legal or ethical, but include the possibility of alienating the jurors.²² Of course, this can only occur if a juror learns of the investigation, as one did in a U.S. District Court trial. A junior lawyer for the defense utilized LinkedIn to view a juror's profile, and the juror was notified by LinkedIn of the viewing and alerted the court.²³ In the absence of the judge or attorneys informing the jury of the likelihood of such investigations, it is conceivable that some jurors may not welcome such attempts to access their social media content. As we will discuss later, social media platforms like LinkedIn offer ways to browse anonymously, avoiding unnecessary surprises like the one experienced by the judge and jurors in the aforementioned case. This emphasizes the importance of the attorney or designee being competent in performing social media investigations in a discreet manner.

¹⁸ *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010).

¹⁹ Mo. Sup. Ct. R. 69.025.

²⁰ *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 202-03 (Mo. Ct. App. 2012).

²¹ *Burden v. CSX Transp., Inc.*, No. 08-CV-04-DRH, 2011 WL 3793664, at 9 (S.D. Ill. Aug. 24, 2011); Stephen Nohlgren, *Pinellas Judge: New Process May Be Needed to Screen Jurors*, TAMPA BAY TIMES (July 9, 2014).

²² JAN L. JACOBOWITZ & JOHN G. BROWNING, LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK, 98-99 (2017).

²³ WSJ Staff, *LinkedIn Search in Spotlight at Bank of America Trial*, WALL ST. J..

81. Rewards of investigating juror's social media far outweigh the risks, as the vast amount of information available online will often exceed that which can be obtained during the process of voir dire. This includes political affiliations, opinions on social issues, charitable affiliations, lifestyle, and shopping habits, to name a few.²⁴ In cases involving high profile incidents, jurors may have previously published opinions specific to the instant case. Social media investigations during voir dire have resulted in the dismissal of jurors who lied during examination to conceal their bias in hopes of being selected.²⁵ Such discoveries during trial and after verdict can result in mistrial.²⁶

Informing the Court and Prospective Jurors in-advance

82. To avoid the uncertainty of the judge's reaction to learning about the social media investigation at a later stage, attorneys should strongly consider informing the court before trial of their intent to conduct a social media investigation. This affords the court an opportunity to exercise its discretion by prescribing limitations on the scope and method of such inquiry. In the absence of state bar ethical guidance or controlling law, the court's limitations may be the only authoritative rule by which the parties can conduct themselves during the social media investigation.²⁷ As one of the primary purposes of such investigation is to gather evidence to support challenges for cause, early disclosure of the attorney's intent to investigate jurors social media can avoid unnecessarily surprising the judge at the time a challenge for cause is made.

83. Attorneys should also consider asking the judge to inform the prospective jurors of the possibility that their publicly available social media content may be viewed by the attorneys.²⁸ This can lessen the impact on a juror who receives an automatic notification (ie: LinkedIn)²⁹ that a member of the trial team viewed their profile. A recent survey by a trial consulting firm found that, after respondents received a brief explanation of the

24 See JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW*, 173–180 (2010).

25 E.g., Nolan Case, *Oklahoma County judge finds woman in contempt who was a potential juror at pharmacist's murder trial*, [THE OKLAHOMAN](#) (June 4, 20011); Kevin Armstrong, *Juror in Aaron Hernandez case dismissed over concerns about bias towards Patriots*, [NY DAILY NEWS](#), (Feb 3, 2015); *Dismissed juror in Zimmerman trial returns to court, gets escorted out*, [WFTV](#) (June 14, 2013).

26 JAN L. JACOBOWITZ & JOHN G. BROWNING, *LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK*, 181–87 (2017).

27 See JAN L. JACOBOWITZ & JOHN G. BROWNING, *LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK*, 110, 113–14 (2017).

28 ABA Standing Comm. on Ethics & Prof'l Responsibility, [Formal Op. 466](#) (2014) ("Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.").

29 LinkedIn, *Who's Viewed Your Profile — Basic and Premium Features*, [LINKEDIN.COM](#)

of the practice of such online searches, 82% of respondents would expect lawyers to conduct them.³⁰ The downside to informing jurors is that some may respond by quickly changing their privacy settings or temporarily disabling their social media accounts.

III. The Social Media Investigation

Ethical Constraints on how Social Media Content is Obtained

84. As this writing's title implies, sending a "friend request" to a juror has significant legal and ethical implications. MRPC Rule 3.5 states in-part that "[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"³¹ Most state bar associations have adopted this model rule or promulgated substantially similar limitations on ex parte communications with jurors.³² The ABA's formal opinion 466 stands to prohibit the practice of "friend requesting" jurors to access their non-public social media content:

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).³³

85. The few state and local bar associations that have issued ethical opinions on the topic of jury social media investigations have also concluded that sending an access request to a juror's social media account constitutes an impermissible ex parte communication.³⁴

86. The issue of impermissible ex parte communications also arises from the automatic notifications jurors may receive from the social media platform, specifically when their profile is viewed by one of the parties.³⁵ The New York County Lawyers Association

30 Stephen Paterson, *Using Social Media and Other Background Research in Voir Dire: Why Jurors Don't Care, But You Should*, VINSON & COMPANY (2016).

31 MODEL RULE PROF'L CONDUCT 3.5 (AM. BAR ASS'N 2013).

32 Am. Bar Ass'n CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct: Rule 3.5: Impartiality and Decorum of the Tribunal*, AM. BAR ASS'N (Sept. 29, 2017).

33 ABA Standing Comm. on Ethics & Prof'l Responsibility, *Formal Op. 466*, at 1 (2014).

34 E.g., N.Y. City Bar Ass'n Comm. Prof'l Ethics, *Formal Op. 2* (2012); Or. State Bar, *Formal Op. 189* (2013); Pa. Bar Ass'n, *Formal Op. 300* (2014); Colo. Bar Ass'n, *Formal Op. 127* (2015); D.C. Bar, *Ethics Opinion 371* (2016). See also W. Va. Law. Disciplinary Board, *L.E.O. No. 02* (2015).

35 See JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LEGAL SYSTEM*, 616-17 (2010).

Committee on Professional Ethics addressed this in 2011, taking a broad view on what constituted an impermissible communication with the juror in the context of notifications from the social media platform:

Moreover, under some circumstances a juror may become aware of a lawyer's visit to the juror's website. 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.³⁶

87. The ABA's formal opinion 466 departed from the New York County Lawyers Association's position regarding automatic notifications, stating that "[t]he 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)."³⁷ The ABA analogized viewing jurors publicly available social media content to driving down the street where they live:

In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions.³⁸

88. The ABA supported its position that these automatic notifications by the social media platform do not constitute impermissible contact by continuing their driving analogy, stating that such notifications are "akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."³⁹

89. Since the ABA's opinion was published, most state and local bar associations that have addressed this issue have adopted the ABA's position that automatic notifications by the social media platform do not constitute impermissible contact with the juror.⁴⁰ Although such notifications may not constitute impermissible contact generally, the triggering of these automatic notifications must not be used for any illegitimate purpose.⁴¹

36 NYCLA Comm. on Prof'l Ethics, [Formal Op. 743](#), at 3 n. 2 (2011).

37 ABA Comm. on Ethics & Prof'l Responsibility, [Formal Op. 466](#), at 1 (2014).

38 ABA Comm. on Ethics & Prof'l Responsibility, [Formal Op. 466](#), at 4 (2014).

39 ABA Comm. on Ethics & Prof'l Responsibility, [Formal Op. 466](#), at 5 (2014).

40 Pa. Bar Ass'n, [Formal Op. 300](#), at 16-17 (2014); Colo. Bar Ass'n, [Formal Op. 127](#), at 3 (2015); D.C. Bar, [Ethics Opinion 371](#), at 5 (2016).

41 MODEL RULES OF PROF'L CONDUCT 4.4(A).

Who Should Conduct the Social Media Investigation?

90. While this will often be dictated by the trial team composition or allocated resources, ideally the social media investigation should be conducted by a trained specialist. Such specialists may be available through a jury consultant, private investigation agency, or other third-party provider. Realistically, many lawyers will find themselves, their co-counsel, or support staff conducting the social media investigation, often without the benefit of specialized knowledge or training.⁴² The lead attorney should not conduct social media investigations personally during the voir dire process, but should instead focus on the questions posed and responses received from the jurors while someone else conducts the social media investigation. Regardless of who is designated to conduct the social media investigation, the attorney remains responsible for their work,⁴³ and should communicate effectively in-advance to ensure that the methods used are legal and ethical.

What are We Looking For?

91. The social media data of a single juror can sometimes exceed hundreds, even thousands of pages of content. However, the objective isn't much different than that of the questions verbally posed to jurors during voir dire; identify friends, eliminate foes, and understand your audience.⁴⁴ Bias is an important issue that serves all three objectives, and can be discovered by reviewing voter registrations, friend lists, comments made, photos, group memberships, listed interests, blog entries, employment, events attended, location check-ins, tv/movie interests, games, etc.

92. A key to identifying bias is ensuring that whoever conducts the social media investigation has a thorough understanding of the cause of action, the parties involved, and the strategy for voir dire.⁴⁵ In the face of thousands of individual items of social media content, relevant materials can only be identified by someone in-tune with the specifics of the case and intended direction at trial. This may include a list of keywords prepared in-advance to utilize in searching large collections of social media data with the use of software.

42 Adam J. Hoskins, *Armchair Jury Consultants: The Legal Implications and Benefits of Online Research of Prospective Jurors in the Facebook Era*, 96 MINN. L. REV. 1100, 1101 (2012).

43 Michael Begovich, *Voir Dire in A Digital World: A Model for Ethical Internet Investigation of the Venire*, 36 T. JEFFERSON L. REV. 227, 241 (2014).

44 See Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at A Time*, 60 U. KAN. L. REV. 611, 613–14 (2012); see also RYAN GARCIA & THADDEUS HOFFMEISTER, *SOCIAL MEDIA LAW IN A NUTSHELL*, 335–36 (2017).

45 Michael Begovich, *Voir Dire in A Digital World: A Model for Ethical Internet Investigation of the Venire*, 36 T. JEFFERSON L. REV. 227, 241 (2014).

When Should the Social Media Investigation be Conducted?

93. Voir dire social media investigations should be conducted as soon as the names of prospective jurors are released,⁴⁶ with the caveat that some prospective jurors may not be easily identified online without more information. Common names may result in multiple matches when searching online, and often positive identification cannot be made without comparing online photos against the prospective juror as they appear in the courtroom.⁴⁷ Nonetheless, any opportunity to conduct social media searches prior to voir dire beginning should be taken advantage of,⁴⁸ to get ahead of the fast-paced flow of information that occurs during questioning.

94. During voir dire, the social media investigation enables comparison of jurors' important disclosures against their social media content. This allows for more focused searches to be conducted, especially on strategically undesirable jurors that may have shown a possibility of bias during questioning. As the selection process often begins shortly after questioning has stopped, the searches should be focused on providing lead counsel with information critical to the impending decision to utilize peremptory challenges, cause challenges, or acceptance of the prospective juror.

95. After voir dire but before opening statements, any outstanding social media investigative tasks should be completed. This may be impractical in shorter "pick-and-go" trials, and could involve the assigned team member working through the night for trials scheduled to begin the day immediately following voir dire.

96. However, belated challenges for cause or discoveries of juror dishonesty presented at this stage will have a greater chance of success than after trial has begun, and will be less likely subject to waiver. One Florida judge has proposed "recess[ing] tough cases right after jury selection and requir[ing] lawyers to run background checks and raise objections before the trial."⁴⁹ This is also a good time to begin regular monitoring to see if jurors are discussing the case or their role as a juror.

97. During trial, jurors' social media should be checked daily to see if they are impermissibly discussing the case online. This also affords counsel the strategic advantage of

46 Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 606 (2013).

47 Michael Begovich, *Voir Dire in A Digital World: A Model for Ethical Internet Investigation of the Venire*, 36 T. JEFFERSON L. REV. 227, 247–48 (2014).

48 See Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at A Time*, 60 U. KAN. L. REV. 611, 613–14 (2012).

49 Stephen Nohlgren, *Pinellas Judge: New Process May Be Needed to Screen Jurors*, TAMPA BAY TIMES (July 9, 2014) (quoting Circuit Court Judge Anthony Rondolino during a January 2014 hearing on motion for new trial).

possibly learning what out-of-court experiences the juror is having while the trial is under way (ie: life events, career, social, etc.). In section IV, we will discuss when attorneys are required to disclose to the court their social media discoveries during trial.

98. Post-verdict, the non-prevailing party should consider continuing daily checks of jurors' social media to watch for any posts or comments that indicate the possibility of jury misconduct or improper influence on the venire. Keep in mind that old postings that could have been discovered prior to the start of trial will likely be insufficient grounds for requesting retrial.⁵⁰

Where Should the Social Media Investigation be Conducted From?

99. Ideally, the person conducting the social media investigation should be physically located in close proximity to the rest of the trial team, to facilitate the rapid exchange of information as critical discoveries arise. This is especially true during voir dire, when the designated investigator should be able to both see the jurors faces while identifying their online profiles.⁵¹ Fast, reliable internet must be available, along with a power source for laptops and mobile devices. A chat program or other form of silent electronic communication should be utilized to allow the designated investigator to share critical discoveries quickly with counsel's table. If laptops are not permitted in the courtroom, or reliable internet isn't available, a team method can be utilized to relay information and social media photos for comparison back-and-forth to the courtroom.

How Should the Jurors Social Media be Identified and Collected?

100. As mentioned earlier, the use of a trained specialist will produce the best results when investigating jurors' social media. Proprietary databases and powerful software platforms allow specialists to quickly identify jurors and capture large amounts of social media data under tight deadlines. However, just because the resources of a specialist may not be available to the trial team, does not mean social media should be completely overlooked. Most attorneys and their support staff are familiar with utilizing search engines or their own personal social media, and can use this experience to conduct a rudimentary social media investigation on the jurors.

50 E.g., *Burden v. CSX Transp., Inc.*, No. 08-CV-04-DRH, 2011 WL 3793664, at 9 (S.D. Ill. Aug. 24, 2011).

51 Michael Begovich, *Voir Dire in A Digital World: A Model for Ethical Internet Investigation of the Venire*, 36 T. JEFFERSON L. REV. 227, 247-48 (2014).

101. What follows are some basic searches that attorneys or their support staff can conduct, based on some of the most common social media platforms and internet sources in-use at the time of this writing. While most social media investigations should begin with the use of whatever proprietary databases the attorney may have access to, for this purpose we'll assume that no such databases are available. Keep in mind that search engines and social media websites frequently change their interface, privacy protocols, and search capabilities. This information is provided based on the platforms as they existed at the time of this writing.

102. Before conducting any searches, organize the information that you already have on each juror. Jurisdictions vary in how much information is provided for the prospective jurors, but the basics should include name and date of birth. If a questionnaire was provided to the jurors, additional information such as residence, marital status, or employment may be available. If a proprietary database was available and utilized, make note of e-mail addresses and phone numbers, as these can help locate social media profiles. A standardized method of organizing the information should be utilized for ease-of-use, preferably in an electronic format that can be quickly shared.

103. Google: In section I(b) we discussed the New Jersey judge who admonished plaintiff's counsel for "Googling" the jury. The name of this tech giant has become synonymous with the word "search", and for good reason; Google is a great place to start when searching for someone or something online. You can frequently find some of a person's social media profiles, photos, blogs, news articles, reviews, voter registrations, among other sources. These initial discoveries can give you a good starting point for further inquiries and searches. When typing your search criteria in, be sure you use search operators to narrow the search results to just the person you're seeking.⁵² It is important to note that unless manually disabled in the search settings, Google will personalize the search results based on your location, safety settings, and search history.⁵³

104. Court databases: Many jurisdictions now offer electronic databases to search court dockets and filings, making it easy to locate the litigation history of jurors.⁵⁴ U.S. Federal Courts have a low-cost case locator called PACER.⁵⁵ If a state-wide case locator search isn't available, try to search each county or circuit in which the juror was known to have resided. Even if juror denies being involved in previous litigation, the search should be conducted, as the juror could have lied or failed to understand that divorce, collections, evictions, and small claims are still forms of litigation.⁵⁶

⁵² Use Search Operators, [GOOGLE.COM](https://www.google.com).

⁵³ How Search Algorithms Work, [GOOGLE.COM](https://www.google.com).

⁵⁴ National Center for State Courts, *Privacy/Public Access to Court Records*, [NCSC.ORG](https://www.ncsc.org).

⁵⁵ Public Access to Court Electronic Records (PACER), *Search for Case Information*, [NCSC.ORG](https://www.pacer.uscourts.gov).

⁵⁶ See Stephen Nohlgren, *Pinellas Judge: New Process May Be Needed to Screen Jurors*, [TAMPA BAY TIMES](https://www.tampabay.com) (July 9, 2014).

105. Criminal databases: For a fee, some states offer state-wide criminal history searches.⁵⁷ This can be useful in states where the courts don't offer state-wide case locators, or when researching a juror without knowing exactly which cities or counties they resided in previously. Occasionally Google searches will yield links to official jail databases or privately-owned websites that collect arrest history and republish it, but that should not be relied on without additional verification.

106. Facebook: Facebook has undeniably left its mark on society and how we communicate.⁵⁸ As of March 2019, Facebook reports 1.56 billion daily active users,⁵⁹ and Pew Research Center reported last year that 68% of all Americans use Facebook.⁶⁰ Any user with a free Facebook account can search for other users,⁶¹ and view all their content marked "public" under the privacy option.⁶² A simple name search will produce numerous results, which can be narrowed further by city, school, employer, etc. Some users can also be located using their e-mail address, phone number, or screen name. Thanks to many of the default privacy settings, even a privacy minded individual may have unwittingly exposed some amount of public information just by having a Facebook account. Start with the assumption that each juror has a Facebook account and try to locate it.

107. LinkedIn: Think Facebook but for the workplace. With over 610 million users worldwide,⁶³ don't overlook this opportunity to get valuable information like education, current/past employment, volunteer experience, names of professional associates, and more. Most profile content is publicly visible by default.⁶⁴ Name searches allow advanced filtering by keywords, associates, location, past/present employer, etc.⁶⁵ To avoid the possibility of the user being notified that you viewed their profile, use the private browsing mode available in the settings.⁶⁶

108. Instagram: Instagram has managed to outpace Twitter in daily active users, twofold,⁶⁷ and allows users to quickly and easily share their photos publicly or among a private list

57 E.g., Florida Dept. of Law Enforcement, *Search Florida's Criminal Histories*, [FDLE](#).

58 Jessica Elgot, *From Relationships to Revolutions: Seven Ways Facebook has Changed the World*, [THE-GUARDIAN.COM](#) (Aug. 28, 2015).

59 *Stats*, Facebook Newsroom, [NEWSROOM.FB.COM](#).

60 Pew Research Center, *Social Media Update 2016*, [PEWRESEARCH.ORG](#) (Nov. 10, 2016).

61 *Finding Friends and People You May Know*, [FACEBOOK HELP CENTER](#).

62 *What is public information?*, [FACEBOOK HELP CENTER](#).

63 *About LinkedIn*, [LINKEDIN.COM](#).

64 *What People Can See on Your Profile*, [LINKEDIN HELP](#).

65 *Using Search Filters on LinkedIn*, [LINKEDIN HELP](#).

66 *Browsing Profiles in Private and Semi-Private Mode*, [LINKEDIN HELP](#).

67 Josh Constine, *Instagram's growth speeds up as it hits 700 million users*, [TECHCRUNCH.COM](#) (Apr. 26, 2017).

of followers. The photos can be tagged, commented on, and shared with other social media platforms. The default privacy setting for new accounts is public,⁶⁸ and users often leave this setting untouched.⁶⁹ Instagram allows you to search by name, tags (#hash-tags), or places. There is also an in-app option to search for friends from your contacts,⁷⁰ which will only work if you've entered the juror's phone number into your phone's contacts. Attorney's should never allow a phone containing client names or other potential confidential contact information to synchronize with these applications.⁷¹

109. Twitter: Over a decade since inception, Twitter is alive and well. This platform allows users to post short messages publicly or privately, to the recently increased limit of 280 characters (up from 140).⁷² The default privacy setting for new accounts is public,⁷³ and most users leave it public. Users can also share links, photos, videos, and send private messages to one another. One of the best Twitter features available during a social media investigation is the advanced search option, which allows various options to search for tweets by words, people, places, or dates.⁷⁴ This advanced search tool can be useful to determine if anyone is publicly tweeting about the subject matter of the trial.

110. YouTube: This popular video sharing website was acquired by Google in 2006 for \$1.65 billion,⁷⁵ and it currently controls over 76% of the market for online video platforms.⁷⁶ Users can share and watch videos, leave comments, create playlists, and more. Videos uploaded are set to public by default, but can be changed to private or unlisted prior to or after uploading.⁷⁷ Search results can be filtered to allow advanced searching,⁷⁸ and like the Google search engine, advanced operators can be used when typing a search string.⁷⁹

68 *How do I set my photos and videos to private so that only approved followers can see them?*, [INSTAGRAM HELP CENTER](#).

69 Mike Byrne, *Optical Cortex*, [INSTAGRAM STATISTICS](#) (Mar 12, 2014).

70 *How do I find people I know to follow on Instagram?*, [INSTAGRAM HELP CENTER](#).

71 Andy Radhakant & Matthew Diskin, *How Social Media Are Transforming Litigation*, [AM. BAR ASS'N](#).

72 Amanda MacArthur, *The Real History of Twitter, In Brief*, [LIFEWIRE.COM](#) (Nov 7, 2017).

73 *About public and protected Tweets*, [TWITTER HELP CENTER](#).

74 *Advanced search*, [TWITTER.COM](#); *How to use advanced search*, [TWITTER.COM](#).

75 *Google buys YouTube for \$1.65 billion*, [NBCNEWS.COM](#) (Oct 10, 2006).

76 *Market Share: Online Video Platforms*, [DATANYZE.COM](#).

77 *Change video privacy settings*, [YOUTUBE HELP](#).

78 *Advanced search (Filters)*, [YOUTUBE HELP](#).

79 *Use Advanced Search in Video Manager*, [YOUTUBE HELP](#).

111. Google+: This was Google's direct shot at Facebook, albeit, unsuccessful.⁸⁰ Its main function and features were similar to Facebook, and it was previously integrated with other Google sites and functions. At the time of this writing, Google had recently shut down the platform and began the process of deleting all associated data.⁸¹ While this site is no longer a resource for social media investigations, it serves as an example of how cross-platform integrations can result in users unwillingly or unwittingly sharing information publicly on social media platforms.⁸²

112. Other platforms: Some noteworthy mentions include Vine, Pinterest, Reddit, Blogspot, Tumblr, Meetup, and ClassMates.⁸³ There are also some social media platforms that are exclusively app-based, requiring a compatible phone to access content (ie: Snapchat).⁸⁴ While its unnecessary and nearly impossible to check every social media platform, keep an eye out for cross-linked social media accounts or content shared from another platform, as this could lead to the discovery of additional sources.

IV. Using the Social Media Collected

Voir Dire: Peremptory Strikes, Challenges, and Acceptance

113. When the fruits of your social media investigation are ripe will depend greatly on how far in-advance you received the juror list and began the social media investigation. Obtaining preliminary social media investigation results prior to voir dire can allow counsel to tailor their introduction, shape current questions or craft additional ones, and start voir dire with some familiarity of the prospective jurors. However, due to the difficulty of positively identifying jurors without the ability to compare their in-court appearance to their online photos,⁸⁵ the full social media investigation results will likely come closer to the end of voir dire, and will be more actionable when it comes time to make peremptory strikes and challenges for cause.

114. When the questioning ends and the opportunity to present peremptory strikes and cause challenges begins, attorneys must be prepared to use what ammunition they've

80 Arjun Kharpal, *Look Who's Admitting that Google+ is 'Confusing'*, CNBC.COM (Jul. 28, 2015); but see Rob Price, *Google is Still Refusing to let Google+ Die*, BUSINESSINSIDER.COM (Jan 18, 2017).

81 Chris Welch, *Google Begins Shutting Down its Failed Google+ Social Network*, THEVERGE.COM.

82 E.g., Dani Deahl, *The Many Annoying Ways Google Forced Users Onto Google+*, THEVERGE.COM.

83 Priit Kallas, DreamGrow Digital, *Top 15 Most Popular Social Networking Sites and Apps [November 2017]*, DREAMGROW.COM (Dec 5, 2017).

84 *Set Up Your Account*, SNAPCHAT.

85 See Michael Begovich, *Voir Dire in A Digital World: A Model for Ethical Internet Investigation of the Venire*, 36 T. JEFFERSON L. REV. 227, 248 (2014).

acquired from social media against undesirable jurors that are vulnerable to challenges for cause. As discussed earlier, withholding this information until after receiving an unfavorable verdict may constitute waiver, and will be viewed by the court unfavorably. It is critical that whomever conducted the social media investigation notate the degree of confidence held in the identification of the social media account, so that attorneys can properly argue specific cause challenges with a proposal to voir dire the prospective juror separately to authenticate the social media account and explore the topic of the challenge.

115. Even when a social media investigation fails to produce evidence sufficient to support a challenge for cause, the discoveries made could guide the strategic decision of whether to use a peremptory challenge against the juror.⁸⁶ The vast amount of information collected about the juror may give the attorney an idea of the juror's potential bias for or against their client or their client's cause. However, the decision to utilize a peremptory challenge must not be based on race, ethnicity, or sex.⁸⁷ As one fired Texas prosecutor learned, information obtained during a social media investigation may be insufficient to defend the peremptory strike against a Batson challenge, and may instead support the basis of the challenge.⁸⁸

116. After the dust settles from peremptory strikes and challenges for cause, hopefully we see some friends still sitting in the venire. The strategic decision to accept specific jurors will be made from all information obtained, both inside and outside of the courtroom. Viewing jurors' social media may have uncovered life experiences and stated opinions that strongly suggest they will be empathetic to your client.⁸⁹ Your social media discoveries may confirm your belief that you've found a friend in the box.

Trial: Knowing Your Jury

117. The intensive searches done at the beginning of trial can continue to serve you during trial. The information obtained from the social media investigation can allow

86 See Duncan Stark, *Juror Investigation: Is In-Courtroom Internet Research Going Too Far?*, 7 *WASH. J.L. TECH. & ARTS* 93, 98 (2011).

87 See *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting prosecutors from exercising peremptory challenges against potential jurors solely on account of their race); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying the principles established in *Batson* to civil trials); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (extending *Batson* principles to peremptory strikes based on sex).

88 Tony Plohetski, Austin American-Statesman, *DA Lehmborg: Prosecutor Fired Over Racially Insensitive Statements*, *STATESMAN* (Jun 11, 2014); Sean Collins Walsh, Austin American-Statesman, *Travis County to Settle with Fired Prosecutor Steve Brand for \$270,000*, *STATESMAN* (Dec 23, 2014) (the fired prosecutor claimed that he was actually fired for not cooperating with a cover-up of an investigation into a police detective).

89 JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LEGAL SYSTEM*, 173–74 (2010).

attorneys to tailor their opening statements, rethink their selection of witnesses and evidence, add or remove certain questions from examination, and drive home a closing argument that resonates with the jurors.⁹⁰ Continued monitoring of jurors' social media during trial may reveal insight into the jurors' life experiences occurring outside of court hours. This continued monitoring may also uncover evidence of juror misconduct or undue influences, which we'll discuss more in the last section.⁹¹

Appeal: Juror Misconduct

118. After trial, the non-prevailing party may appeal for a new trial if juror misconduct was discovered during or after the trial, as long as the issue was presented in a timely manner after discovery and the issue preserved. Jurors may have posted new content directly contradicting their voir dire responses, befriended parties or witnesses, or begun publicly discussing the trial or deliberations before a verdict is reached.⁹² In a West Virginia criminal appeal, a defendant successfully obtained a new trial by showing that a juror had communicated with the defendant on MySpace approximately one week before trial, and that the juror had ties to a witness which she failed to disclose during voir dire.⁹³

Candor to the Tribunal

119. While the discoveries of social media investigations generally fall within work-product doctrine, attorneys may uncover juror misconduct so egregious that an ethical duty exists to remedy it. The ABA's formal opinion 466 states that "[i]n 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."⁹⁴ The comments of this opinion reveals that a lower threshold of juror misconduct was intended, but not affected due to a dependent rule. Attorneys who observe online misconduct by jurors should review their jurisdiction's rules, statutes, ethical code, and the instructions given at the beginning of the trial.⁹⁵

90 JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LEGAL SYSTEM*, 176 (2010).

91 JOSHUA BRIONES & ANA TAGVORYAN, *SOCIAL MEDIA AS EVIDENCE: CASES, PRACTICE POINTERS, AND TECHNIQUES* 76–82 (2013).

92 E.g., JOSHUA BRIONES & ANA TAGVORYAN, *SOCIAL MEDIA AS EVIDENCE: CASES, PRACTICE POINTERS, AND TECHNIQUES*, 76–82 (2013).

93 *State v. Dellinger*, 696 S.E.2d 38, 40 (2010).

94 ABA Standing Comm. on Ethics & Prof'l Responsibility, *Formal Op. 466, at 1* (2014) (emphasis added).

95 See ABA Standing Comm. on Ethics & Prof'l Responsibility, *Formal Op. 466, at 1, 6–9* (2014).

V. Conclusion

120. As technology continues to change the way society shares information, attorneys must learn and adapt for the benefit of their clients. The social media sphere is flush with publicly viewable information that trial attorneys would be remiss to ignore during critical phases of trial. While there are important legal, ethical, and strategic considerations to be made while collecting juror social media, it is a worthwhile endeavor that can help identify friends and expose the foxes.