

*Something else to keep
us awake at night ...*

ETHICS IN JURY SELECTION

Christian & Small

ATTORNEYS AND COUNSELORS

Ethics in Jury Selection

- What information is available?
- How can we find it?
- How far can we go to find it?
- Is jurors' social media a public record?
- When does investigation constitute improper contact with a prospective juror?
- What if inadvertent contact is made?
- What is our duty to investigate jurors?
- What are the ramifications if we don't?

Ethics in Jury Selection

- Voir Google: Use of Social Media in Jury Selection
- Ethical Obligations in Juror Background Research
- Ethical Obligations to Disclose Juror Relationships
- Ethical Obligations of Competence
- Jurors and HIPAA
- Ethical Obligations in Post-trial Juror Interviews

VOIR GOOGLE

Use of Social Media in Jury Selection

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How Widespread is Social Media?

- Facebook = 500 million users
- Twitter = 600 million users
- Instagram = 150 million users
- YouTube = 1 billion users each month

67% of Americans with Internet Access use Social Media.

Social Media Use is Consistent Across:

- Racial & Ethnic Boundaries
- Educational & Socio-Economic Boundaries
- Urbanity

What does this mean for attorneys?

2 out of every 3 prospective jurors use social media.

Benefits of Using Social Media in Jury Selection

- Outlet in Which Jurors Voluntarily Engage
- Candid Information
 - *Employment History*
 - *Religious and Political Affiliations*
 - *Sexual Orientation*
 - *Age*
 - *Educational Background*
 - *Circle of Friends and Acquaintances*

Model Rule of Professional Conduct 3.5

Impartiality & Decorum of the Tribunal

“A lawyer shall not ... (b) communicate ex parte with [a juror] during the proceeding unless authorized to do so by law or court order.”

Responsible Social Media Analysis

1. Run names through public records database.
2. Use common search engines and social media sites.
3. Include common name variants.
4. Remember the importance of oral questioning and/or jury questionnaires.
5. Don't believe everything you read.

Crossing the Line

1. Don't violate privacy settings.
2. Don't "friend" potential jurors.
3. Don't make an enemy of the judge.
4. Avoid the "LinkedIn Problem."

Methods: Using Social Media in Jury Selection Process

- Research in Advance
- Turn to Jury Selection Consultants
- Perform Real-time Research

*Is there an ethical duty
for an attorney to
investigate jurors'
responses on voir dire?*

Duty to Investigate?

- **In Missouri, at least, the answer is yes.**
 - Missouri Supreme Court Rule 69.025 requires the attorney to research a jurors' litigation history.
 - Missouri has a free and easily accessible system for searching for past litigation.
 - Arose out of a case where juror's nondisclosure would have been easily found on case record system before verdict.
- **No other state has a similar rule, but ...**

Duty to Investigate?

[T]he evidence which was presented to the Court during the hearing on Defendants' post-judgment motions was all a matter of public record. Were Defendants genuinely concerned before the trial or before the verdict was returned about the prospective jurors' participation in prior bankruptcies and the like, they could have and should have looked at the available public records prior to or during the trial and afforded the Court an opportunity to take measures to address any concerns rather than waiting for a verdict to be returned, the jury discharged, and a judgment entered on the verdict.

Boudreaux v. Pettaway, 108 So. 3d 486, 491 (Ala. 2012) (quoting trial court's order and affirming holding)

Duty to Investigate?

At least one Kentucky case has at least implied that a party did not have a duty to search Facebook after a juror responded “no” to the Judge’s direct question as whether anyone was “on Facebook.” The juror lied, and was “friends” with the victim’s mother on Facebook.

Sluss v. Kentucky, 381 S.W.3d. 215 (Ky. 2012).

Is There a Duty to Disclose Known, or Suspected, Information?

- What if an attorney becomes aware of certain facts during trial that indicate a juror has failed to disclose material information during voir dire?

Why is this Important?

- In Criminal Trials – The Sixth Amendment guarantees the right to an impartial jury.
- In Civil and Criminal Trials – Great expense can be lost if the defendant waits until after the verdict to raise the issue.

Why is this Important?

- MRPC 3.3 and Ala. R. Prof. Cond. 3.3 – Candor Toward the Tribunal
 - Both state that “[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal.”
 - The comment also states: “There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”

Case Example:

- During the course of a criminal trial, defense counsel finds information that, upon reasonable investigation, would reveal that a juror has misrepresented in voir dire the following:
 - Her status as a suspended lawyer;
 - Her address;
 - Her and her husband's criminal history;
 - Her past litigation history.

Case Example:

- Does defense counsel have to:
 - (1) Investigate the possibility of nondisclosure?
 - (2) Disclose to the court and the prosecution the juror's suspected misrepresentation?

Case Example:

- Held:
 - Absolutely. There was sufficient information to determine the existence of falsehoods.
 - A report was generated during the trial that should have spurred at least further investigation and certainly disclosure of suspicion.

Case Example:

- Result:
 - Defendant's request for new trial denied.
 - The constitutional right to an impartial jury was waived by the counsel's conduct.
 - The other three defendants who did no research did get new trials.
 - *United States v. Daugerdas*, 867 F. Supp. 2d 445 (S.D.N.Y. 2012)

Case Example:

- The *Daugerdas* case was particularly egregious because of the expense:
 - 3 months of trial
 - 9,200 pages of testimony
 - 41 government witnesses
 - 22 million documents during discovery
 - 1,300 exhibits
 - 9 days of jury deliberations
 - \$110,569.85 in jury attendance and travel fees

The Basis for Permitting Waiver:

- “Any other rule would allow defendants to sandbag the court by remaining silent and gambling on a favorable verdict, knowing that if the jury went against them, they could always obtain a new trial by later raising the issue of juror misconduct.”
 - *United States v. Costa*, 890 F.2d 480 (1st Cir. 1989)

*There is one problem
that cannot be solved by
any amount of questioning,
research, consultants
or disclosure.*



*Is there an affirmative
obligation to report
known or suspected
juror misconduct?*

Alabama Rules of Professional Conduct

Alabama Rule of Professional Conduct 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

- a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- a) communicate ex parte with such a person except as permitted by law; or
- b) engage in conduct intended to disrupt a tribunal.

Alabama Rule of Professional Conduct 8.3 Reporting Professional Misconduct

- a) A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 [Misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- b) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request.

Ethical Obligation

- Currently, there is no Alabama Rule of Professional Conduct that directly addresses a lawyer’s affirmative duty to report jury misconduct.
- The Alabama Rules of Professional Conduct state that “Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living . . . Within the framework of these Rules many difficult issues of professional discretion can arise.”

Ethical Obligation – New York Bar Association

- New York Rule of Professional Conduct 3.5(d) states 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 her family of which the lawyer has knowledge.”
- Formal Opinion No. 2012-2 entitled “Jury Research and Social Media” states, in relevant part, “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.” The opinion goes on to say that the “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.”

Legal Obligation

Should you report juror misconduct to the Court?

- ***U.S. v. Breit*, 712 F.2d 81 (4th Cir. 1983) – “A defendant who remains silent about known juror misconduct – who in effect, takes out an insurance policy against an unfavorable verdict – is toying with the court.”**
- ***U.S. v. Desir*, 273 F.3d 39 (1st Cir. 2001) – “[A] defendant who has knowledge of juror misconduct or bias at the time of trial waives such a claim by failing to raise it until after trial.”**
- ***U.S. v. Costa*, 890 F.2d 480 (1st Cir. 1989) – “[T]he defendants and their attorneys had known of the juror’s misconduct before the verdict but had not come forward with this information until after the verdict. The judge concluded that this failure to come forward constituted a waiver of any right the defendants may have had to raise the issue of juror misconduct.”**

Interesting Note re: Jurors' Obligations

Juror can remain silent until asked an applicable question.

- *Thomas v. State*, 338 So.2d 1045 (Ala. Crim. App. 1976) - **“All parties are entitled to truthful answers from prospective jurors on examination of the venire and concealment of facts by silence by such a prospective juror denies the parties their right to advisedly exercise peremptory strikes, but it is permissible for a juror to remain silent until a question applies to him in a manner demanding a response.”**

*Is there an affirmative
obligation to report
a relationship between
a juror and a party
or lawyer?*

Ethical Obligation

- Alabama Rule of Professional Conduct 3.5 clearly prohibits ex parte communication with a juror.
- Run same risk of waiving objections and arguments on appeal.

Relationship Does Not Necessarily Mean Juror Will Be Dismissed

- *Whitehead v. State*, 777 So.2d 781 (Ala. Crim. App. 1999) - Court did not err in failing to remove juror who stated during voir dire that the victim and her husband were distant cousins but that this relationship would have no effect on her ability to make a decision based strictly on the evidence because she had no personal relationship with the victim or his family.

Alabama Rule of Professional Conduct 1.1 – Competence

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer and client may agree, pursuant to Rule 1.2(c), to limit the scope of the representation with respect to a matter. In such circumstances, competence means the knowledge, skill, thoroughness, and preparation reasonably necessary for such limited representation.”

Comment 8 to ABA Model Rule 1.1 Maintaining Competence

“To 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 relevant technology***, engage in continuing study and education, and comply with all continuing legal education requirements to which the law is subject.”

Best Practices

- Investigate
 - PROPERLY
- Before Trial
- During Voir Dire
- During Trial
- After Trial
- Ask Court for Social Media Jury Instructions
- Disclose Connections / Improper Contacts

Medical Privacy and *Voir Dire*

Jurors' Right to Privacy **vs.**

Litigants' Right to an Impartial Jury

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Balancing Act

- The “gist of the history of selecting fair and impartial jurors allows that if the issue is relevant to determining the bias or prejudice of a prospective juror then the question is proper.”

Brandborg v. Lucas, 891 F. Supp. 352, 361
(E.D. Tex. 1995).

Balancing Act

**Not relevant =
expectation of
privacy**

Privacy right
outweighs potential
information litigant
might gain from
questioning



**Relevant =
less
expectation of
privacy**

Right to discover
information
affecting bias
outweighs right of
privacy

Jurors' Medical Privacy Not a Settled Issue

- *U.S. v. McDade*

“Just because one gets called into jury service does not give eager and assiduous counsel the right to ... rummage through one's medicine cabinet, ... perusing the array of Rx labels.”

But, the court still allowed some inquiry into medical history because it was relevant to the trial.

929 F. Supp. 815, 817 (1996).

Jurors' Medical Privacy Not a Settled Issue

- Trial court could not “compel all potential jurors to waive HIPAA protections when they are questioned about their personal medical information.”

State v. Wise, 200 P.3d 266, 269 (Wash. App. 2009)

Safeguards for Jurors' Medical Privacy

- Jury questionnaires
- Anonymous jurors
- Judicial control of *voir dire*
- *In camera* questioning
 - *With counsel present and on the record*

Post-Trial Contact with Jurors

- 15th Judicial Circuit:

“After the trial’s completion, you are not obligated to answer questions presented by attorneys or the press. If unwanted questions persist, contact the court immediately.”

15jc.alacourt.gov/Jury/JURBOOK.pdf

Post-Trial Contact with Jurors

U.S. District Court, Northern District of Alabama LR47.1 Juror Interrogation.

“Communications with a juror concerning a case on which such person has served as a juror or alternate juror shall not, without prior express approval of a judge of this court, be initiated by any attorney, party, or representative of either, prior to the day following such person's release from jury service for such term of court.”

Post-Trial Contact with Jurors

BOTTOM LINE:

- Get permission
- Know the court's specific rules
- Respect juror's wishes



NONSTOP ADVOCATES

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