Finding the Bad Juror

Don't Let Juror Misconduct Lead to Mistrial or Lawyer Misconduct

By Justin Rice and Kyle Lansberry

Prudent lawyers will want to understand how to handle juror research, posttrial juror investigations, and juror misconduct under the ethics rules.

Selecting a jury may be more of an art than science, but how should lawyers navigate the legal and ethical issues presented by juries? This article explores several challenging issues confronting lawyers and jurors, spanning from voir dire to after a verdict, including (1) proper ways to conduct juror research, (2) handling juror misconduct under the ethical rules with a view toward avoiding or preserving a motion for a mistrial, and (3) conducting posttrial investigations of jurors.

Jury Selection and the Role of Social Media

Without question, social media plays an ever-increasing role in the lives of many, if not most, potential jurors. Facebook now has more than 1.1 billion users; Twitter's expanding user base "tweets" 350,000 comments every minute compared to 100,000 a year ago; and 120 new LinkedIn accounts are created every minute. *See* Hon. Amy J. St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, *More From the #Jury Box: The Latest On Juries and Social Media*, 12 Duke Law & Tech. Rev. 64, 67 (2014). Given the wealth of information available and ascertainable through social media, to what extent can trial lawyers investigate potential jurors through their online presence?

Although the ABA Model Rules of Professional Conduct (Model Rules) do not explicitly address the use of social media for this purpose, the rules nonetheless regulate lawyer contact with jurors and potential jurors. Specifically, a lawyer may not communicate *ex parte* with a juror or a prospective juror unless authorized to do so by law or court order. Model Rule 3.5(b).

Fortunately, the ABA recently published a formal opinion providing addi-

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tional guidance for properly investigating a potential juror's online presence. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466, Lawyer Reviewing Jurors' Internet Presence (Apr. 24, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf (last accessed Feb. 18, 2015). In sum, unless limited by law or court order, a lawyer may (1) review a juror's or potential juror's Internet presence before or during a trial but may not communicate with that juror, and (2) a lawyer may not send an access request for the juror's online information. *Id.* at 1. Further, when a network setting informs a juror of the lawyer's review of the juror's information, this does not constitute a "communication" with the juror. *Id.*

An attorney should also keep in mind that comment 8 to Model Rule 1.1 provides that a lawyer should "keep abreast of changes in the law and its practices, *including the benefits and risks associated with relevant technology*" as part of the requirement that lawyers provide competent knowledge and skill in their representation. Thus, technological missteps—such as the accidental invasion of a juror's privacy—are not excusable due to ignorance of Internet and social media tools. Similarly, Formal Opinion 466 states that a lawyer is expected to be aware of the terms and conditions, including privacy settings, associated with social network sites. *Id.* at 5–6. In other words, there is no such thing as "inadvertent" juror contact through these sites.

Online research of prospective jurors, also known as "voir Google," can improve counsel's ability to check the accuracy of potential jurors' answers to voir dire questions. It can also elicit information that would not generally be discovered through that process. Such investigation may demonstrate that a prospective juror has been untruthful, or only partially truthful, in his or her voir dire responses.

Some courts have gone as far as to *require* lawyers to conduct online research of potential jurors. *See, e.g.*, *id.* at 2 n.3 (citing cases where courts determined that lawyers should conduct online research of potential jurors as a matter of lawyer competence and diligence). The key, however, is that counsel's investigative methods should neither harass nor unduly embarrass potential jurors or invade their privacy.

For example, in 2010 the Missouri Supreme Court created a new standard for providing competent representation in the digital age—the duty to conduct online research during the voir dire process. *See Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010). In *McCullough*, during the voir dire phase of a medical malpractice trial, the plaintiff's attorney inquired whether anyone on the jury panel had ever been a party to a lawsuit. While several members of the panel were forthcoming, one prospective juror, Mims, was not. After a defense verdict, the plaintiff's counsel researched Mims online and learned of multiple previous lawsuits involving the juror. The trial court granted the plaintiff's motion for a new trial based on Mims' intentional concealment of her past litigation, but the Missouri Supreme Court reversed, reasoning:

> [I]n 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 [online] search… when, in many instances, the search could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled. *Id.*

The court imposed a new affirmative duty on lawyers, holding that "a party must use reasonable efforts to examine the litigation history [online] of those jurors selected but not empanelled and must present to the trial court any relevant information prior to trial." *Id.* This heightened juror research standard was later codified in the Missouri Supreme Court Rules.

Juror Misconduct: Use of Social Media During Trial

Of course, the advantage gained by proper use of social media to seat an impartial jury can be undermined by bias introduced by jurors who inappropriately use this technology to glean information about the parties, lawyers, judge, or witnesses in addition to the facts presented to them in a courtroom. Indeed, examples abound in courts throughout the country in which jurors have improperly used social media during a trial. *See* St. Eve, *supra*, at 69–78. The most effective deterrent to such abuses appears to be using a direct and meaningful social media instruction early and often throughout a trial. *Id.* at 86–90. Increasingly, courts are instructing jurors, in very explicit terms, about the prohibition against using social media to communicate about their jury service or a pending case, as well as the prohibition against conducting personal research about the matter, including research on the Internet. *See* Formal Opinion 466, *supra*, at 6.

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In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name. The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case… You may not communicate with anyone about the case on your cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube… I expect that you will inform me as soon as you become aware of another juror's violation of these instructions.

Unfortunately, jurors' use of social media is so prevalent today, we wonder whether

any instruction can sufficiently deter jurors' social media habits. For example, we searched the terms "#juryduty" and "#juryservice" on Twitter and viewed over 100 Tweets by individuals who appeared to have been summoned for jury duty or who actually served as jurors during a trial, and some of those Tweets included information about the individual's experience as a juror.

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Juror Misconduct: Juror Dishonesty

Social media and digital investigation of prospective jurors may, in some instances, lead to the discovery of juror dishonesty. Historically, attorneys had few methods by which to prove or to disprove statements made by jurors in their questionnaires or during voir dire. For example, if a prospective juror falsely claimed that he or she did not know any of the parties involved in a trial, an attorney would either need to take the juror at his or her word or find witnesses or an investigator to prove otherwise. With the myriad online resources available today, however, such information could be accessible to disprove the statement.

Upon uncovering juror dishonesty, the critical issue for a defense lawyer becomes what should the lawyer do with this information? A couple hypothetical scenarios graciously provided to the authors by the American Academy of Trial Lawyers help us discuss this issue.

Suppose, for example, that defense counsel—through online research—knows that a juror is lying about his previous involvement in a lawsuit very similar to the one at hand, yet also believes that the juror is likely to be pro-defense. Can the defense save its peremptory strikes for other jurors while waiting until after the verdict to decide whether to disclose the juror's dishonesty?

The Model Rules of Professional Conduct strongly indicate that withholding the information under such circumstances would be improper. Model Rule 3.3(a)(1) and its associated comments condemn making false statements to a tribunal, or allowing the tribunal to be misled. Waiting until after a verdict for the plaintiff to file a motion for a new trial based on the juror's dishonesty would be an implicit and false statement to the tribunal that the lawyer relied on the juror's dishonest statements in failing to seek the juror's exclusion from the jury panel. Notwithstanding these ethical pitfalls, as the cases discussed below make clear, counsel further risks waiving his or her client's right to a new trial by failing to disclose juror dishonesty or fraud in a timely way.

What if juror dishonesty is uncovered *after* a jury reaches a verdict? Especially in the case of a defense verdict, must defense counsel disclose the juror's dishonesty? Model Rule 3.3(b) requires lawyers to take remedial measures, including informing a tribunal, if necessary, when someone engages in criminal or fraudulent conduct related to a proceeding. This duty continues until the close of the proceeding. Model Rule 3.3(c). As demonstrated in the cases discussed below, the longer counsel wait, the more they can be criticized for failing to reveal dishonesty or fraud.

Real-World Examples of Juror Misconduct and Unanticipated Defense Consequences

While an attorney's ethical obligations certainly matter when conducting jury research and dealing with the information learned, an attorney must also consider that mishandling issues can negatively affect the result of a case for a client. Indeed, examples—such as the ones discussed below—abound demonstrating that defense counsel's mishandling of jury research or juror misconduct prevented their clients from the opportunity of a new trial.

In perhaps one of the more dramatic examples, *U.S. v. Daugerdas*, 867 F. Supp. 2d 445, 449 (S.D.N.Y. 2012), several defendants found guilty of tax fraud were granted a new trial when evidence of juror fraud was uncovered after the trial. One of the losing defendants, however, was not as fortunate. He was deemed to have waived the right to a new trial because his counsel had sufficient information to suspect the fraud at various stages of the trial and did not sufficiently investigate or timely report the fraud to the court and other parties' counsel. *Id.* at 484.

Daugerdas involved a three-month trial, 9,200 pages of testimony, 41 witnesses, 22 million documents produced by the government in discovery, and 1,300 exhibits—in other words, "no expense was spared." *Id.* at 448. During voir dire, "Juror No. 1" reported several things about herself, including that she was a stay-at-home wife, with a retired husband who previously owned bus companies, who lived in New York her whole life, and whose highest level of education was a B.A. in English Literature. *Id* at 450–51. One day after participating in the guilty verdict for four of the five defendants, Juror No. 1 wrote a letter to the IRS's trial counsel with her congratulations and opinions on the strengths and weaknesses of the case. *Id.* at 452. The IRS's counsel forwarded the suspicious letter to the court and defendants' counsel, which led to the parties' and the court uncovering numerous lies and omissions from Juror No. 1 during voir dire. *Id.* The defendants then moved the court for a new trial, alleging that the juror misconduct was evidence that they did not receive an impartial jury. *Id.*

As it turned out, Juror No. 1 had earned a juris doctorate from Brooklyn Law School and had had her law license suspended for failure to appear, violating court orders, being uncooperative in the investigation, and being deemed to be unfit to practice law after undergoing a psychiatric evaluation. *Id.* at 452–53. She lied about the status of a personal injury lawsuit in which she was the plaintiff. *Id.* at 452. She had alcohol dependency, including pleading guilty to driving while intoxicated. *Id.* at 453. Her husband had several arrests and convictions, and she herself had pleaded guilty to criminal contempt and aggravated harassment. *Id.* at 454. She had an outstanding arrest warrant in Arizona for disorderly conduct. *Id.* At the time of the voir dire and the trial,

she was on probation for shop lifting. *Id.* at 455. Yet, Juror No. 1 disclosed none of this information and completely misrepresented herself during voir dire.

While the court found that Juror No. 1's extensive lies warranted a new trial for three of the four guilty defendants, it determined that the fourth guilty defendant had waived his right to a new trial because his counsel had sufficient information during voir dire and afterward to know that Juror No. 1 was an imposter. *Id.* at 464. "That knowledge demanded swift action to bring the matter to the Court's attention. Further investigation would have been easy and prudent," the court wrote. *Id.* As the court explained, "[p]rior to the verdict, [the defendant's] attorneys knew—or with a modicum of diligence would have known—that [the] voir dire testimony was false and misleading." *Id.* at 476. To summarize, "defense counsel may not remain silent at trial about known *or suspected* juror misconduct." *Id.* at 478 (citing multiple cases) (emphasis added).

In *Apple, Inc. v. Samsung Electronics Co., LTD*, 2012 WL 6574785 (N.D. Calif. 2012), Samsung sought a new trial after a jury returned a verdict in favor of Apple for infringement and dilution of a range of patents and trade dresses on the basis that the jury foreperson, Hogan, gave dishonest answers during voir dire and that statements that he made in an interview that he gave after the verdict showed that he was biased. Both issues involved allegations that Hogan lied about his involvement in litigation with a company called Seagate, which was partially owned by Samsung. As to the dishonest answers during voir dire, the court ruled that Samsung had waived its claim for an evidentiary hearing and new trial based on Hogan's alleged dishonesty during voir dire because, before the verdict, Samsung could have discovered Hogan's litigation with Seagate had Samsung acted with reasonable diligence based on the information that Samsung acquired through voir dire. *Id.* at *5. As to Samsung's arguments that postverdict interviews by Hogan demonstrated that he introduced incorrect and extraneous legal standards to the jury deliberations, the court ruled that such statements are barred by Federal Rule of Evidence 606(b). *Id.* at *11.

As *Apple v. Samsung* and *Daugerdas* make clear, courts require immediate disclosure of known or suspected juror misconduct. A defendant "cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a postverdict motion that the verdict was prejudicially influenced by that misconduct." *Daugerdas*, 867 F. Supp. 2d at 478.

Posttrial Investigations of Jurors

Courts often differ whether, following the conclusion of a trial, a party or an attorney may interview or contact a juror. Jurors, of course, have the right to refuse to discuss a case or how they arrived at their verdict, yet they may possess a wealth of information, such as which key elements of a case they found persuasive or unpersuasive, which tactics or evidence they found weighed in favor or against a client, and what took place "behind the scenes" while the jurors were dismissed from the courtroom and during deliberations.

Communications with jurors posttrial may also lead to the discovery of juror misconduct. In determining whether an investigation of alleged misconduct is warranted, a minimal standard of a good-cause showing of specific instances of misconduct has been held to be acceptable. *See Gladney v. Clarksdale Beverage Co., Inc.*, 625 So.2d 407 (Miss. 2003). However, the preferable showing should clearly substantiate that a specific, demonstrable impropriety has occurred. *Id.* An inquiry regarding misconduct will generally not be permitted as a mere fishing expedition. *Id.* Nevertheless, all parties should be made aware of an allegation of juror misconduct as expeditiously as possible. *Id.*

A court has the power and duty to supervise posttrial investigations of juror misconduct to ensure that jurors are protected from harassment and to guard against inquiry into improper subjects. An inquiry may, with court permission, be conducted outside the presence of the court. However, when an inquiry seems likely to lead to harassment, or when an inquiry into an improper range of information may occur, a court should supervise the inquiry. *Id.* Also, at least one court has held that when a court has decided that an interview concerning the validity of the verdict should be conducted, the court should conduct the interview, limiting it as narrowly as possible. *Sconyers v. State*, 513 So.2d 1113 (Fla. Dist. Ct. App. 1987).

As discussed above, the ABA, in Formal Opinion 466, states that when a lawyer becomes aware of juror misconduct, Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures, including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to a proceeding. The history is muddled, however, concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of criminal or fraudulent conduct. Nonetheless, the serious consequences of failing to report suspected juror misconduct, such as occurred in *Daugerdas*, suggests that it is more prudent for lawyers simply to inform a tribunal of improper conduct as soon as possible.