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Can You Google Or Facebook Potential Jury Members?

Law360, New York (August 30, 2010) -- A lawyer facing a long, expensive trial receives a list of prospective jurors and a stack of responses to juror questionnaires. The first thing the lawyer wants to do is Google each of the potential jurors to learn as much as possible about them. The lawyer knows that with a few clicks, he may discover a wealth of information about the jurors' backgrounds including criminal history, education, socioeconomic status, and personal likes and dislikes. The lawyer also considers whether to mine social media and networking sites to gain additional information or whether to use the services of a jury consultant to research the venire.

But something makes the lawyer pause for thought and wonder whether doing so raises any ethical issues. Although the rules of professional conduct provide some guidance, the lawyer soon realizes there are many unanswered questions and gray areas to consider in striking the appropriate balance between the lawyer's desire to gain information about potential jurors and ethical conduct.

Can the lawyer investigate prospective jurors by Googling them on the Internet?

According to the American College of Trial Lawyers' Annotated Code of Trial Conduct, a lawyer may investigate prospective jurors, provided that:

- (1) there is no communication with them, direct or indirect, or with any member of their families; and
- (2) the lawyer does not conduct a vexatious or harassing investigation. American College of Trial Lawyers, Annotated Code of Trial Conduct, Rule 19(b) (2005).

When the lawyer begins Googling, he learns that several of the jurors have Facebook pages

and MySpace accounts and belong to other social networking sites (currently, there are more than 150 major social networking sites). There is very little information on the site available to the public in general, but the lawyer believes that these potential jurors have valuable information on their pages that is visible to hundreds of "friends." The lawyer considers whether to try to gain access to the potential jurors' sites.

Can the lawyer "friend" a potential juror to gain access to a Facebook page?

ABA Model Rule of Professional Conduct 3.5 mandates that a lawyer shall not communicate ex parte with a juror or prospective juror unless authorized by law or court order. Any attempt to view the prospective juror's private page would send a message to the juror requesting access and would likely be considered an improper ex parte communication.

Although slightly off-topic, the public reprimand of a North Carolina family court judge provides an example of improper ex parte communication involving Facebook activity. North Carolina Judicial Standards Commission, Inquiry No. 08-234 (Apr. 1, 2009). During a case, the judge and defense counsel designated each other as "friends" and discussed the case on Facebook. This activity constituted improper ex parte communications. The judge also conducted ex parte online research by Googling the plaintiff and visiting her business website during the trial and admitted that his Internet surfing influenced his opinion of the plaintiff.

Can the lawyer avoid violating Rule 3.5 by disguising his or her identity to gain access or by asking someone else to gain access and share what they find?

Although there is no case or opinion that directly relates to social media sites and investigating potential jurors, a March 2009 advisory opinion issued by the Philadelphia Bar Association provides guidance. The Philadelphia Bar addressed a lawyer's proposed use of Facebook and MySpace accounts to gain information about a nonparty witness. The lawyer proposed to have a third person go to the Facebook and MySpace websites, contact the witness and seek to "friend" her to gain access to the information on her pages. The third person would only provide truthful information but would not reveal his or her affiliation with the lawyer or the true purpose for seeking access to the witnesses' pages.

The Philadelphia Bar Association cited several ethical rules that were implicated by the proposed scenario: Rule 5.3, Responsibilities Regarding Nonlawyer Assistants; Rule 8.4,

Misconduct; and Rule 4.1, Truthfulness in Statements to Others. The Philadelphia Bar noted that the fact the actual interaction with the nonparty witness would be undertaken by a third party did not insulate the lawyer from ethical responsibility. Thus, the lawyer was responsible for the conduct even if he or she is not himself engaging in the actual conduct that may violate a rule.

The Philadelphia Bar further noted that the proposed communication was deceptive because it purposely concealed the reason why the third party sought access to the social media sites. In contrast, continued the opinion, if the lawyer simply asked the witness for access, such conduct would not be deceptive and would be permissible.

Translating the Philadelphia Bar advisory opinion to jury research, the lawyer would do well to instruct jury consultants and other agents not to "friend" prospective jurors. However, unlike the Philadelphia Bar opinion, neither the lawyer nor the lawyer's agent should "ask for access" (even with disclosure of identity) because doing so would require a communication with the potential juror. Rather, the lawyer and his agent should avoid any form of online interaction with the venire.

Can the lawyer visit prospective jurors' websites and read their blogs?

What if potential jurors have their own websites featuring personal information, details about their business or even a blog discussing political views? In an analogous situation, the Oregon State Bar addressed whether a lawyer could access an opposing party's website and communicate with representatives of the adverse party. Oregon State Bar Legal Ethics Comm'n, Op. 2005-164 (August 2005) (formerly 2001-164).

The Oregon Bar determined that lawyers could visit the opposing party's website because a lawyer who reads information posted for general public consumption is not communicating with the owner of the website, but warned lawyers to avoid any further contacts or communications. Once again, interaction is the litmus test.

The Oregon opinion seems to provide rational guidance with respect to investigating potential jurors: viewing publicly available content should be permitted, but the lawyer should also take care not to interact with the prospective juror in any way while conducting an online investigation (e.g., don't create a user account; don't post questions or inquiries; don't attempt to access restricted portions of the website).

Should the lawyer just not conduct any research on prospective jurors?

A recent opinion from the Missouri Supreme Court indicates that lawyers may have a duty to investigate prospective jurors. In *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010), plaintiff's counsel asked the venire members during voir dire about prior involvement in litigation. Although numerous members of the panel responded affirmatively, one venire member, Mims, did not respond and eventually was chosen to sit on the jury. After the trial — which resulted in a defense verdict — plaintiff's counsel researched Mims' civil litigation history using Missouri's automated case record service, Case.net, and discovered multiple lawsuits involving Mims.

The plaintiff filed a motion for new trial alleging Mims' intentional failure to disclose her prior litigation experience. The trial court granted the plaintiff's motion and the defendants appealed. Although the Missouri Supreme Court affirmed the trial court's judgment, the court opined on counsel's duty to research prospective jurors before a verdict is rendered:

"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. Until a Supreme Court rule can be promulgated to provide specific direction, to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial." *Johnson*, 306 S.W.3d 551 at 558-59.

Arguably, the cited language from *Johnson* could be limited to its facts. Just as arguably, it could be considered dicta. Even so, it is good dicta and reminds us that lawyers must make use of all the tools ethically at our disposal to protect our clients' interests.

So what should the lawyer do?

The best advice is often the simplest. First, the lawyer should review the applicable ethical

rules for his jurisdiction. He should consider the information provided by prospective jurors in the court-approved juror questionnaires. He could conduct a further investigation of the potential jurors through public records and reliable, publicly available Internet resources. He should avoid online interactions with members of the venire, even interactions that are ostensibly anonymous (because it is the interaction that creates the ethical problem, not whether he might get caught), and instruct his colleagues, consultants, staff and other affiliates to do the same.

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