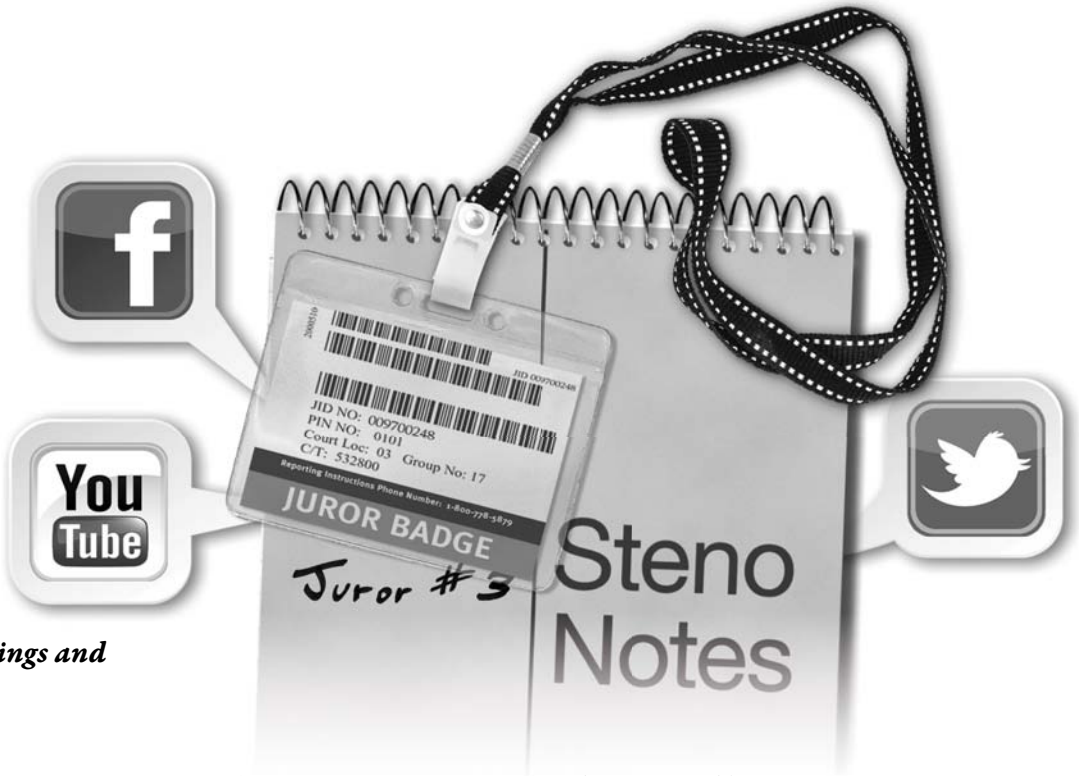
Social Media and Juries:

What Can Go Wrong and What to Do About It



By Justice (Ret.) J. Gary Hastings and John G. McCabe, Ph.D

You have just won a major victory by obtaining a defense verdict by a vote of 9-3 for your corporate client, avoiding a claim in excess of $50 million. Within a couple weeks you are served with the other side's motion for new trial based on juror misconduct. The supporting declarations establish that one of the jurors failed to disclose during voir dire that recently she and her company, of which she was a part owner, had successfully been sued on a claim similar to the one on which you just prevailed. Shortly afterward she established a blog on which she criticized the justice system and attorneys who bring frivolous claims. Another juror, during deliberations, used his iPhone to look up the definition of "prudent," a term that was central to the liability issue in your case. Another juror, who was excused during the trial due to a hardship, texted one of the remaining jurors during trial that she had formed a belief early on during the plaintiff's case-in-chief that the plaintiff's main witness was a liar and that defendant should prevail. The other juror texted back; "I think you are right. I'll bring this up with the other jurors." She then did so before the case concluded. Assuming these facts are true, what are the chances you will be able to hold on to the defense verdict?

These are not fanciful scenarios. Go online and search Google for "jurors & Internet & mistrials," and you will discover a number of articles written about juror misconduct involving use of the Internet that resulted in either mistrials or reversals on appeal after the trial court denied a motion for mistrial. This article does not rehash the various cases addressed in other articles. Rather, our aim is to address how you can use social media and the Internet to gain a strategic advantage without running afoul of your professional duties, and help you detect juror misconduct.

The Duty of Competence

First, you must recognize that to be a competent attorney you must understand and use technology, when appropriate. Comment No. 8 of Rule 1.1 of The American Bar Association Model Rules of Professional Conduct states: "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." California has not yet adopted similar language in its own Rules. But in an article in the Los Angeles County Bar Association County Bar *Update*, October 2013, Andrew M. Vogel opines that California will recognize such a duty. (See *www.lacba.org/showpage.cfm?pageid=15158.)* And Proposed Ethics Opinion No. 11-0004 recognizes that "[a]n attorney's obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law." (*www.calbar.ca.gov/Portals/0/documents/publicComment/2014/2014_11-0004ESI03-21-14.pdf.)* This Proposed Opinion addresses an attorney's competence in connection with e-discovery. It's only a short step to conclude an attorney's duty of competence will require use of the Internet and social media in connection with litigation, when appropriate.

Jury Misconduct

Jury misconduct is any conduct by a juror that interferes with a party's Constitutional right to unbiased and unprejudiced jurors. (*Weathers v. Kaiser Foundation Hosps.* (1971) 5 C3d 98, 103.)

If you learn of misconduct during the trial you must immediately bring it to the attention of the court. You cannot wait and see whether the outcome will be favorable to your side. (*Lindemann v. San Joaquin Cotton Oil Co.* (1936) 5 Cal.2d 480, 496.) A motion to dismiss the violating juror and install an alternate or for a mistrial are appropriate under the circumstances. (See *Weathers v. Kaiser Foundation Hosps*., *supra*, 5 Cal.3d at 103; *People v. Goff* (1981) 127 Cal.App.3d 1039, 1046.)

Jury Selection

Missouri recognizes an affirmative duty for a lawyer to research potential jurors.

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In *Johnson v. McCullough* (Mo. 2010) 306 S.W.3d 551, following a defense verdict, plaintiff's counsel discovered from an online database maintained by the courts ("Case.net": *https://www.courts.mo.gov/casenet/base/welcome.do),* that a juror had lied during voir dire about not being previously involved in litigation. A motion for new trial was granted by the trial court but reversed on appeal. The Court concluded that litigants cannot wait until after a verdict to do basic research on potential jurors when it could have been done during jury selection. Shortly after that the Missouri Supreme Court adopted Rule 69.025 which mandates background Internet searches on potential jurors, specifically their litigation history using Case.net.

Researching potential jurors is fraught with potential ethical and legal violations. California Rules of Professional Conduct, Rule 5-320, subsection (E) provides: "A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of the venire or a juror *in a manner likely to influence the state of mind of such person in connection with the present or future jury service*." (Emphasis added.) ABA Model Rules of Professional Conduct, Model Rule 3.5, also prohibits contact with jurors or potential jurors except as authorized by law or court order. (See *In re Holman* (S.C. 1982) 286 S.E.2d 148.) These rules do not prohibit an investigation of jurors or potential jurors, only the "manner" in which it is done. What does this mean?

New York Bar Association Formal Opinion 2012-2 directly addresses this issue. The Digest provides:

> 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 may 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 the 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.* (Emphasis added.)

This Formal Opinion was cited with approval by the San Diego County Bar Association in its Ethics Opinion 2011-2, which did not address juror contact, but addressed contact with an employee of an opposing party. *(See www.sdcba.org/index.cfm?pg=LEC2011-2.)* But the gist of the opinions are similar: it is deceptive and a violation of the Rules of Professional Conduct if an attorney, or someone at the behest of the attorney, seeks to "friend" or otherwise get behind the public portions of a website to gain information about

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a person. The San Diego Opinion goes further and states, "A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A)." It's not much of leap to conclude that such an attempt to obtain information about a juror is also a deceptive practice which may violate California's Rule 5-320, subsection (E). The New York Bar Association Opinion states: "The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that *a communication* with a 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 any attorney's research efforts*." (Emphasis added.) But the American Bar Association, in its Formal Opinion 466, issued on April 24, 2014, does not agree with the New York Bar Association that notice by the network to the potential juror is a violation of ethics. The summary of the opinion states, "The 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)."

So, how does an attorney research jurors or potential jurors without a "communication" that is "likely to influence the state of mind of such person in connection with the present or future jury service?" The attorney may try to hide his identity by using someone not connected with him or his firm, but that raises the issue of deception addressed in the New York and San Diego Bar Opinions. Still, conducting online research can potentially create problems because of the "footprints" which may be left behind.

"Footprints" are any indication to the potential juror that they have been the target of online research by a party in the suit. While online research can offer substantial benefits in terms of providing additional information to that garnered through voir dire, all forms of online juror research have inherent risks of leaving "footprints." The key is to minimize these risks through an understanding of how Internet and social media sites work.

Social media sites often allow users to access information on other users who have viewed their page. In addition, social media sites collect information on the pages that their users visit within the site. These records are used in creating the "people you may know" portion of the user's homepage. Thus, if you visit someone's page within Facebook, LinkedIn, etc., it is likely that you will show up on their "people you may know" list. This falls well within the San Diego and New York Bar Association's definition of "communication." Even if the researching attorneys adjust their own privacy settings in an attempt to view others' pages anonymously, the potential juror may receive notice that "a legal professional from XYZ law firm" viewed their page – again, a "communication." Thus, attorneys and their agents should never access a potential juror's pages from within the social media site.

However, many social media users will allow some or all of their information to be accessed by the public, depending on the user's privacy settings. This is the case with Twitter, where tweets can be public, but in order for users to see who specifically is reading their tweets the reader must be a follower. This public information is accessible through search engines like Google, and the records of these searches, though accessible to the social media site, are typically not available to potential jurors. As a result, online research of jurors' social media should be conducted through search engines like Google, and limited to publicly available information, with one very important condition.

Attorneys and their researchers should never use their own personalized computer to conduct the searches. Here's why.

Many web browsers save information about the user's social media accounts, e.g., user

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name and password. This information makes accessing social media accounts easier. However, when a user accesses a potential juror's public information on a social media site through a search engine, the user's browser may automatically log into the site. Thus, the search will create a record of the attorney's search that is available to the juror. As a result, attorneys and their agents should use only "sanitized" computers, free of add-ons, plug-ins, and personalized information.

Occasionally, a potential juror will have a website or personal blog. Depending on the juror's level of sophistication, the juror might be able to trace any search of the website or blog back to the attorney through a log of the site visitors' IP addresses. This is particularly true if the personal website or blog gets very little traffic. It is possible to avoid this problem by using proxy servers which route the search through other servers, masking the original server's IP address. The use of proxy servers takes some expertise on the part of the attorneys or their agent and also has the effect of slowing the search, sometimes considerably – a problem during jury selection when time is of the essence. Although this will prohibit the juror from identifying the attorney's search, the costs can outweigh the benefits during jury selection.

In sum, best practices call for the use of a "sanitized" computer and a search only of publicly available information on potential jurors through search engines like Google.

Issues Arising During Trial

In *U.S. v. Juror No. 1* (E. Dist. Pa, 2011) 866 F.Supp 842, a juror was dismissed from jury duty due to work conflicts. After being dismissed, she sent an email to jurors 8 and 9: "It was great meeting you and working with you these past three days. If I was so fortunate as to have finished the jury assignment, I would have found [Defendant] guilty on all four counts based on the facts as I hear them...." Juror 8 responded, "Thank you for sharing your thoughts. I am of the same mind and have great doubt that the defense can produce anything new today that will change my thinking. It disturbs me greatly that people lie.... Anyway, I will share your message with the gang." Juror 1 was hit with a $1,000 fine for contempt of court – violating an order of court not to discuss the case with anyone until the case had been completed.

We all know this occurs, and that jurors will also seek to obtain outside information in aid of deciding the case if they believe they haven't heard all of the evidence. In many cases a juror who has heard and understood the admonition of the judge will report the misconduct and it can be remedied during the trial. In other cases, counsel may learn of the misconduct in interviews with jurors after the trial is over, which will trigger a motion for new trial. (In *U.S. v. Juror No. 1, supra*, the misconduct was discovered during voir dire of juror No. 8 in a totally unrelated matter.) But in some cases, jurors may not come forward with any helpful information. What do you do?

First, you must anticipate that juror misconduct will occur. Address the possibility with the court at the outset and include questions on voir dire regarding juror use of social media to determine which jurors use the technology. Make sure the court instructs the jurors regarding discussion of the case with others or among themselves prior to deliberations and that they are not to obtain information from any outside sources. And these instructions should include communications through social media and information sought through use of the Internet. (See CACI No. 100) You may also request that the judge issue the admonitions as an order that can be enforced by contempt.

We all know that despite these admonitions, jurors are tempted to and do violate the instructions, especially given the ubiquitous nature of social media and the Internet. So what more can you do? If the case is worth it you may want to monitor the Internet to see if there is any activity involving your trial. How you do so may be problematic.

If during voir dire, a juror identifies herself as an active user of social media, the attorney should consider monitoring the juror's online activities during the trial. The same precautions described above should be taken. But during trial, when there may be more time to collect juror information, the use of proxy servers, despite their drawbacks, may be appropriate. Of course, any relevant information gleaned from this monitoring should be immediately brought to the court's attention.

Issues Arising After Trial

After the trial has been concluded, if an issue of jury misconduct arises a motion for new trial pursuant to California Code of Civil Procedure section 657(2) is the appropriate remedy. But evidence is limited in this regard.

California Evidence Code section 1150(a) provides, "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such character as is likely to have influenced the verdict improperly. *No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to*

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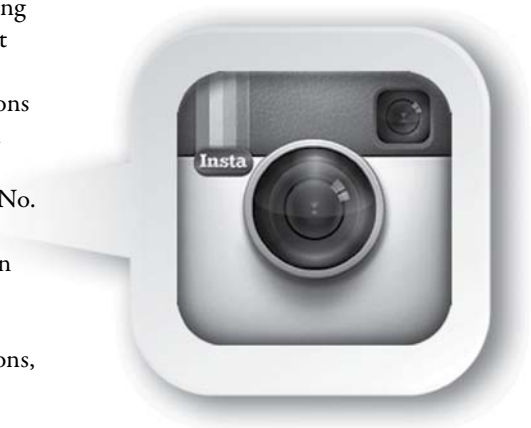


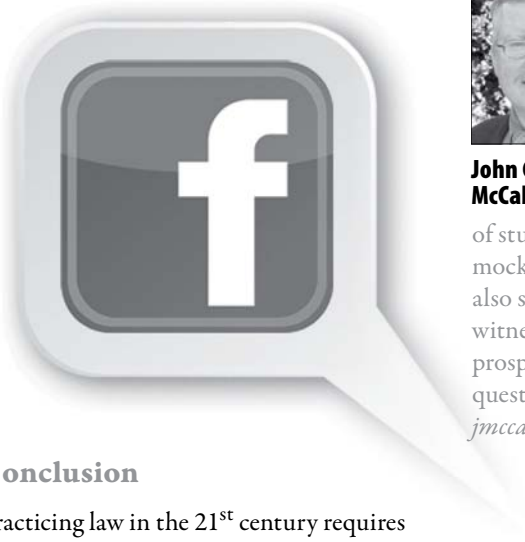
or dissent from the verdict or concerning the mental processes by which it was determined." (Emphasis added.)

In other words, evidence relating to the subjective reasoning processes of the jury or the jurors is inadmissible. "This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration. [Citation.] '[T]hese facts can be easily proved or disproved. There is invariably little disagreement as to their occurrence.' [Citation.]" (*People v. Hutchinson* (1969) 71 C2d 342, 350.)

One example of appropriately obtaining evidence from social media is *Juror Number One v. Superior Court of Sacramento County* (2012) 206 CA4th 854. After trial, the trial court was presented with information that one of the jurors had posted information on his Facebook page during trial about the trial. The court ordered the juror to provide consent to Facebook to turn over posts made during the applicable time period so the judge could determine if the juror had been guilty of misconduct and, if so, whether the misconduct was prejudicial. The Court of Appeal denied a petition for writ of prohibition sought by a juror who claimed the order violated his privacy.

But obtaining the necessary evidence may not be easy. California Rules of Professional Conduct, Rule 5-320, subdivision (D) provides, "After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury *that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.*" (Emphasis added.) As with subsection (E), there is no prohibition from contacting the jurors; it is the manner in which the jurors are contacted which may be the problem. (For an example of an improper communication see *Lind v. Medevac* (1990) 219 Cal.App.3d 516.) But, if a juror states he or she does not want to speak with counsel or an investigator it may be a violation of this Rule if counsel or the investigator continues to pressure the juror. That is so under ABA Model Rules, Rule 3.5(c)(2). In criminal cases, a refusal of a juror to discuss the case precludes any further contact. (Code Civ. Proc., § 206(b).) And if information about the jurors has been sealed, counsel must follow the proper procedure under Code of Civil Procedure section 237 to obtain the necessary information to contact the jurors.

Attorneys should supervise any third parties (e.g., trial consultants or investigators) conducting posttrial interviews with jurors, both in terms of the procedures for contacting jurors, as well as the questions to be asked. Generally, these interviews are conducted by telephone. Best practice is to develop a protocol. The protocol should include how the interview is introduced to the juror, how to handle common questions (e.g., which side is paying the interviewer?), and what to do when the juror refuses (i.e., thank them for their time and hang up). Surprisingly, many jurors are happy to be interviewed about their experiences and will talk, sometimes for several hours. This is particularly true if the interviewer is familiar with the case. Having been forbidden to talk about the case, the interview is often a cathartic experience for the juror. The attorney should also review with any third party interviewer what to do if the juror refers in the interview to events that may constitute juror misconduct.



Conclusion

Practicing law in the 21st century requires attorneys to be computer savvy and to use technology, when appropriate. The Internet offers a chance to learn more than ever before about potential jurors and their biases and to monitor their online behavior during the trial. This technology presents opportunities, but also imposes responsibilities. Attorneys must not deceive jurors, and also must inadvertently communicate with potential jurors by leaving "footprints" when they are investigating jurors online. In addition, attorneys should not leave jurors with the feeling that their privacy is threatened by their service, potentially souring their opinion of jury service and the justice system. If the proper precautions are taken, however, attorneys can make more informed decisions and eliminate jurors whose bias is not revealed during voir dire. In addition, jurors who flout judicial admonitions can be called to account for their transgressions. In all, modern technology can provide greater justice, if attorneys know how to use it.

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Justice J. Gary Hastings (Ret). served as a Judge at the Los Angeles Superior Court from 1985 to 1993, focusing on civil and criminal trials, family law matters, probate calendar, law and motion calendars, and civil master calendar. He was the Supervising Judge of the Southwest branch 1989-1990.

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