Voir Dire in the Age of Google

2/15/2011

With the click of a mouse, trial attorneys may gain much more information about a potential juror than a typical juror questionnaire provides. As social networking sites, blogs and Internet forums become a pervasive part of everyday life, adults are increasingly sharing their personal information online. Such individual-generated content provides a vast array of information regarding its author's social background, education, political views, religious affiliation and life experiences that can lead to valuable insights into how that person might process information and resolve issues. With more than 500 million people on Facebook, 175 million on Twitter, and over 70 million actively using LinkedIn, the Internet has become a powerful tool for jury consultants and trial lawyers to use when selecting a jury and structuring the presentation of evidence.

Courts are now addressing whether Internet research on potential jurors should be allowed. A recent New Jersey appellate court held that counsel can conduct Internet research on potential jurors during voir dire. In *Carino v. Muenzen*, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010), the trial judge barred the plaintiff's counsel from "googling" potential jurors during jury selection. The jury subsequently found for the defendant and the plaintiff appealed, arguing that the court acted unreasonably when it barred plaintiff counsel's Internet use during jury selection. Although the appellate court let the verdict stand due to lack of prejudice, the court did hold that the prohibition on Internet use was unreasonable:

Despite the deference we normally show a judge's discretion in controlling the courtroom, we are constrained in this case to conclude that the judge acted unreasonably in preventing use of the internet by [plaintiff's] counsel. There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining "a level playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it.

Id. at *10.

In another case, the Missouri Supreme Court not only suggested that Internet searches of jurors should be allowed, but held it was imperative for a party to conduct such searches or be deemed to have waived challenges to the verdict based on a juror's intentional non-disclosure. In *Johnson v. McCullough, M.D.*, 306 S.W.3d 551 (Mo. Sup. Ct. 2010), the plaintiff sought a new trial because one of the jurors failed to disclose he had been a party in prior lawsuits when asked by the plaintiff's counsel about any prior involvement in litigation. The trial court granted a new trial, and the Missouri Supreme Court affirmed, but cautioned that "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 parties to bring such matters to the court's attention at an earlier stage." Id. at 558. The court admonished litigants to "use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present . . . any relevant information prior to trial," and instructed trial courts "to ensure parties have an opportunity to make a timely search prior to the jury being empanelled[.]" *Id.*

As use of the Internet for researching, examining and selecting prospective jurors becomes widespread—owing to the increasing numbers of courtrooms that are equipped with wireless Internet access and the ubiquity of handheld Internet-capable devices—trial attorneys must understand both the ethical implications of accessing individual-generated Internet content and the most effective ways to utilize that content.

Top Social Networking Sites

Facebook

Facebook claims to have more than 500 million active users who share over 5 billion pieces of content, such as links, photos and videos. Facebook states that 50 percent of its users log onto it every day. *http//facebook.com/press/info.php?statistics*. The average user has 130 friends and people spend over 700 billion minutes per month on Facebook. *Id.* More than 200 million users routinely access Facebook on mobile devices to stay connected at all times. *Id.* Each Facebook user has an online profile that includes personal information, photos and links. Users can also become "fans" of businesses, products or people. The average user is connected to 80 community pages, groups and events and creates 90 pieces of content each month. *Id.*

Twitter
Twitter is a "micro-blogging" site that allows users to send "tweets"—short posts (140 characters or less) that are delivered to the user's "followers." Twitter describes itself as "a real-time information network that connects you to the latest information about what you find interesting. Simply find the public streams you find most compelling and follow the conversations." *www.twitter.com/about*.

LinkedIn
Specifically designed to help business people communicate and network, LinkedIn boasts over 85 million members in over 200 countries. *www.linkedin.com/about*. LinkedIn users create profiles that summarize professional expertise and accomplishments, as well as educational background. Users can form networks by inviting others to join and connect to the user.

Effective Use of Juror-Created Internet Content
Social networking sites, of course, are not the only source of personal information available on the Internet. Letters to the editor, campaign contributions, club memberships, and educational and professional profiles can be found in just minutes. In addition to the obvious sources, such as Facebook, Twitter and LinkedIn, attorneys should search the potential juror's employer's website; wink.com, which searches blogs and photo sharing sites; and zoominfo.com, a business information search engine for announcements and business information, among others. In one Milwaukee County court, the judge included a question in a pretrial questionnaire asking whether the potential jurors maintained a blog. Not only did this reveal one potential juror's blog, but it also enabled the attorneys to identify the juror's account on Twitter. This juror had already posted a message to his Twitter account, stating "Still sitting for jury duty crap. Hating it immensely. Plz don't pick me." A Trial Lawyer's Guide to Social Networking Sites, Part I, *available at http://jurylaw.typepad.com/deliberations/2007/10/a-trial-lawyers.html*. In another case, a paralegal noticed that one potential juror had posted on his Facebook account that he was "sitting in hell 'aka jury duty.'" Kimeball Perry, *Juror Booted for Facebook Comment*, Dayton Daily News, Feb. 1, 2009, at A6.

Information acquired from online content can also provide insight into juror biases and other relevant information that potential jurors might fail to reveal during voir dire. Not only have studies shown that jurors frequently harbor unspoken biases, but jurors occasionally conceal highly relevant information that could impact their decision-making. For example, in a recent case involving suspected "dirty bomber" Jose Padilla, defense attorneys relied on Internet searches during jury selection to discover that one juror had lied on her jury questionnaire by concealing her personal experience with the criminal justice system. This discovery resulted in her dismissal. Julie Kay, *Social Networking Sites Help Vet Jurors*, Law Technology News, Aug. 13, 2008 *available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202423725315*.

The potential benefits of Internet research do not end with jury selection. For example, one attorney discovered from a juror's social networking site that the juror's favorite book was *The Seven Habits of Highly Effective People*, and intentionally included references to the book during closing arguments. *Id.* An attorney can rely on this type of additional data—such as affiliations with specific types of charities or sports clubs—to build in metaphors to help the jurors identify with and better understand the attorney's arguments. While information gleaned from social networking sites can be illuminating, using that information in voir dire is not advisable; jurors likely will not like the investigation and intrusion into their personal lives.

It is also important to continue monitoring a seated juror's online postings during trial. Seated jurors sometimes post comments concerning trial proceedings on their blogs or on Facebook. Data from Reuters Legal shows that since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct. Since January 21, 2009, judges have granted new trials or overturned verdicts in 28 criminal and civil cases on that basis. Over a three-week period in November and December 2010, Reuters Legal monitored Twitter posts by users purporting to be prospective or sitting jurors; such tweets popped up at an astonishing rate of one nearly every three minutes. Brian Grow, *The Internet v. the Courts: First in a Series*, Westlaw News & Insight, *available at http://westlawnews.thomson.com/National_Litigation/News/2010/12_-_December/As_jurors_go_online,_trials_go_off_track*.

Ethical Concerns
State bar ethics committees have only just started addressing the ethical issues that arise when lawyers or their agents use social media to gather information. It should go without saying that even though social networking makes it possible to contact jurors with unprecedented ease and "discretion," the traditional rules prohibiting such contact remain applicable. The Pennsylvania Bar Association recently issued an ethics opinion concluding that it would be unethical for an attorney to ask a third party to contact an adverse witness via a social networking site in an attempt to "friend" the witness—and thus gain

access to information on that witness' social network restricted Bar Ass'n, Ethics Opinion 2009-02 (Mar. 2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2. The Pennsylvania Bar Association opined that doing so would be a deceptive use of social media if the third party requested access solely to obtain and share information with the lawyer while concealing his or her intent. However, the opinion stated it would be ethical for the attorney to request access directly because such action would be open and transparent, thus permitting the witness to choose not to "friend" the lawyer. *Id.*

Similarly, the New York Bar Association concluded that a lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) to obtain possible impeachment material. N.Y. State Bar Ass'n, Ethics Opinion 843 (Sept. 10, 2010), *available at* http://nysba.org/AM/Template.cfm?Section=Ethics_Opinion&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208. However, the New York Bar specifically noted that a lawyer must not attempt to "friend" or otherwise contact an adverse party to gain access to restricted information because such contact would violate New York's "no contact" rule that prohibits a lawyer from communicating with a party represented by counsel concerning the subject of the representation absent prior consent from the other party's lawyer.

New York's extension of the traditional "no contact" rule to the realm of social networks does not expressly apply to potential jurors, but it does demonstrate a logical extension of traditional ethics rules to regulate contact with potential jurors. For example, California Rule of Professional Conduct 5-320 prohibits any direct or indirect contact with anyone an attorney "knows to be a member of the venire from which the jury will be selected for trial of that case." Cal. Rules of Prof. Conduct 5-320, *available at* http://calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule5320.aspx. Thus, Rule 5-320 makes it unethical for an attorney to directly "friend" a potential juror.

However, the application of rules such as Rule 5-320 can become murky in practice, where the issue is not direct contact with a potential juror per se. For example, Facebook permits users to customize their privacy settings. These privacy settings provide three options: allow access to everyone; allow access only to the user's "friends;" or allow access to both "friends" and "friends of friends." The "friend of friends" setting permits a user to grant access to "people who are friends with [the user's] Facebook friends . . . [and] extends the range of sharing and makes it easier for [the user's] friends to share relevant content with their friends, even if [the user] posted the content . . . without having to set the content to 'Everyone' on the internet." Facebook Privacy: Privacy Settings and Fundamentals, "What does 'Friends of Friends' mean?" at http://www.facebook.com/help/?page=839#!/help/?faq=12241. Given this exponential expansion of the universe of contacts available in the "friends of friends" context, the question then arises—is it a violation of California Rules of Professional Conduct 5-320 for an attorney to "friend" a juror's "friend" to attempt to gain access to restricted information? ABA Model Rules of Professional Conduct 8.4 instructs that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *See also* Cal. Bus. & Prof. Code § 6106. "Friending" a "friend" of a potential juror likely could be construed as an improper, prohibited contact because the attorney would be seeking information through a deceitful means.

Conclusion

An increasing number of potential jurors are routinely broadcasting their political views, opinions and habits online, thus providing enterprising and Internet-savvy trial lawyers with an increasing universe of valuable data to use when evaluating jurors. Such resources should not be ignored. Equally important, however, is that trial lawyers must be mindful of the implications of their ethical duties and professional responsibilities in this Age of Google.