

## ETHICAL CONSIDERATIONS FOR ATTORNEYS RESEARCHING JURORS ON THE INTERNET

*Anthony M. LaPinta, Esq.\**

### I. INTRODUCTION

There are approximately 312 million internet users in the United States.<sup>1</sup> These users have access to a plethora of information in mere seconds. The rise of social media has given internet users broad access to qualitative information about social media users. For example, accessing one’s social networking site instantaneously provides: a “profile” of that person, outlining their interests, employment, education, and contacts.<sup>2</sup> Furthermore, “geotags”<sup>3</sup> on posts, pictures, conversations with others, and “status updates” can reveal that person’s locations, thoughts, opinions, likes, and dislikes in real-time. The number of adults using social media is ever-growing.<sup>4</sup> Ten years ago, 36% of adults were on social media. In 2019, that figure increased to nearly 72% of adults.<sup>5</sup>

In a research-driven profession, where a simple discovery of one fact can alter a case, attorneys have enthusiastically embraced this

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\* Anthony M. La Pinta, Esq. Defense Attorney and Managing Partner at Reynolds, Caronia, Gianelli & LaPinta, P.C., 200 Vanderbilt Motor Parkway, Suite C-17, Hauppauge, New York 11788.

<sup>1</sup>J. Clement, *United States: Number of Internet Users 2000-2019*, STATISTA (Nov. 2019), <https://www.statista.com/statistics/276445/number-of-internet-users-in-the-united-states/>; Hon. Amy J. St. Eve and Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH REV. 1, 3 (2012) (In 2012, there were approximately 240 million internet users in the United States).

<sup>2</sup> See, e.g., *What is Public Information?*, FACEBOOK HELP CENTER, [https://www.facebook.com/help/203805466323736/?helpref=search&query=what%20is%20public%20information&search\\_session\\_id=8b12d9079b07d00416f57c4c248a41e3&sr=0](https://www.facebook.com/help/203805466323736/?helpref=search&query=what%20is%20public%20information&search_session_id=8b12d9079b07d00416f57c4c248a41e3&sr=0), (last visited Feb. 22, 2021); *1.2 Public Information*, TWITTER PRIVACY POLICY, <https://twitter.com/en/privacy>, (last visited Feb. 22, 2021); *LinkedIn Public Profile Visibility*, LINKEDIN HELP, <https://www.linkedin.com/help/linkedin/answer/83/linkedin-public-profile-visibility?lang=en>, (last visited Feb. 22, 2021); *Who Can See My Profile and Photos on the Web?*, INSTAGRAM, <https://help.instagram.com/365041933611384?helpref=ufpermalink>, (last visited Feb. 22, 2021).

<sup>3</sup> A geotag is “a piece of electronic data that shows where someone or something is and can, for example, be attached to a photograph or comment on social media.”; *Geotag*, CAMBRIDGE DICTIONARY (18th ed. 2011)

<sup>4</sup> *Social Media Fact Sheet*, PEW RESEARCH CENTER (June 12, 2019), <https://www.pewinternet.org/fact-sheet/social-media>.

<sup>5</sup> *Id.*

new social media era.<sup>6</sup> Attorneys have found that social media research is most helpful in jury selection, as it can quickly reveal personal information that may not be otherwise discoverable through *voir dire*.<sup>7</sup> However, the use of such techniques has not been fully accepted in the legal system.<sup>8</sup> Attorneys find themselves in internet limbo due to fear that accessing new sites could result in ethical grievances.<sup>9</sup> While courts linger in the shadows of outdated internet-based research decisions and delay making rules on social media internet research, attorneys are struggling between fulfilling their duty to their clients and staying within the boundaries of their ethical responsibilities. As a result, there need to be clear rules on using social media for *voir dire* to improve the administration of justice and to ensure attorneys live up to their ethical duties to their clients by adapting to new technology.

## II. LAWS GOVERNING JURY SELECTION

### a. Constitutional Provisions

Several United States constitutional provisions govern the practice of jury selection in criminal cases, including Article III of the United States Constitution,<sup>10</sup> the Sixth Amendment,<sup>11</sup> and the Equal Protection Clause of the Fourteenth Amendment.<sup>12</sup> Both Article III and the Sixth Amendment provide the right to “an impartial jury” in a criminal trial.<sup>13</sup> An “impartial jury” is defined as “a jury that hears a case with no prejudice and will give a fair verdict.”<sup>14</sup> Additionally, the Supreme Court has determined that a jury is to be selected from “a representative cross-section of the community.”<sup>15</sup> The practice of *voir dire* is used to identify and eliminate prospective biased or prejudiced jurors.<sup>16</sup> In furtherance of ensuring a cross-section of the community,

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<sup>6</sup> Kathleen Pulver, *Jury Selection: How Social Media Is Changing the Game*, RICH. J. L. & TECH.: BLOG (Nov. 16, 2016), <https://jolt.richmond.edu/2016/11/16/jury-selection-how-social-media-is-changing-the-game>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>11</sup> U.S. CONST. Amend. VI.

<sup>12</sup> U.S. CONST. Amend. XIV, § 1.

<sup>13</sup> U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. Amend. VI.

<sup>14</sup> *Impartial Jury*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>15</sup> *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

<sup>16</sup> *Voir Dire*, BLACK’S LAW DICTIONARY (11th ed. 2019).

the Equal Protection Clause of the Fourteenth Amendment prohibits discriminatory jury selection procedures.<sup>17</sup>

### **b. Federal Rules of Criminal Procedure**

In addition to constitutional provisions, Federal Rules of Criminal Procedure Rule 24 is geared to evaluating potential jurors' properness.<sup>18</sup> Rule 24 permits a trial judge to allow the attorneys for the parties to examine prospective jurors, or it may do so itself.<sup>19</sup> Even if the court solely retains all examination, Rule 24 requires the court to allow the attorneys to either "ask further questions that the court considers proper," or "submit further questions that the court may ask if it considers them proper."<sup>20</sup> This ensures that, even if the court does not permit the attorneys to examine the prospective jurors directly, the attorneys still have means to evaluate prospective jurors. If a prospective juror is deemed unqualified, for example, due to perceived bias or prejudice, Rule 24 allows the parties to strike the prospective juror.<sup>21</sup>

The Constitution and Federal Rules provide a vehicle for attorneys to examine prospective jurors and evaluate their biases. The use of internet searches and social media arm them with the knowledge to make insightful inquiries. But the question remains: when does the use of internet-based and social media research of prospective jurors lead attorneys away from the competent and diligent representation of their clients and pull them into improper and unethical waters?

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<sup>17</sup> U.S. CONST. Amend XIV, § 1; *see* *Batson v. Kentucky*, 476 U.S. 79 (1986); *see also* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

<sup>18</sup> *See* FED. R. CRIM. P. 24.

<sup>19</sup> FED. R. CRIM. P. 24(a)(1).

<sup>20</sup> FED. R. CRIM. P. 24(a)(2).

<sup>21</sup> *See* FED. R. CRIM. P. 24(b).

### III. THE ETHICAL STRUGGLE

#### a. Duty of Competence and Due Diligence in Representing Clients

Model Rule of Professional Conduct 1.3 states, “a lawyer shall act with reasonable diligence and promptness in representing a client.”<sup>22</sup> This rule, in essence, requires lawyers to pursue all reasonably available legal means to advance a client’s interest.<sup>23</sup> The internet allows lawyers to search topics more thoroughly and find answers to specific questions based on the vast amount of accessible information. Internet searches yield significantly more detailed results by delivering answers and information instantly. Long hours of research are increasingly making way to expeditious Google searches.<sup>24</sup> Needless to say, the internet and social media networks prove to be powerful tools for lawyers in diligently and promptly representing their clients.<sup>25</sup>

The use of social media networks for researching individuals has found its way into jury selection.<sup>26</sup> Attorneys have realized the significant advantages of accessing prospective juror’s social media sites when selecting a jury.<sup>27</sup> For example, an attorney can quickly establish a juror’s candor by cross-referencing their answers to *voir dire* questions with the insight gathered from researching the juror’s social media activity.<sup>28</sup> Internet research can provide for a sense of a juror’s character without needing to ask embarrassing or personal questions during the jury selection process.<sup>29</sup> This strategy can also be valuable while conducting trials. Trial attorneys have used social media sites to gain a better understanding of jurors and have used this information in their trial strategy.<sup>30</sup> For example, if jurors’ posts reflect interests in baseball, trial attorneys can benefit from using a baseball metaphor to describe their case, thus appealing to the jurors on a more personal level.

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<sup>22</sup> MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N, Discussion Draft 1983).

<sup>23</sup> See *Id.* at cmt. 1.

<sup>24</sup> Pulver, *supra* note 6.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

One could expect this easily accessible and inexpensive resource to become standard procedure, as there is hardly any reason not to conduct such a search within the limitations of the court. However, even at this early stage of emerging court decisions about researching jurors on the internet, there is at least the potential for malpractice suits arising from an attorney's failure to conduct some form of internet research of jurors.<sup>31</sup>

It is a long-standing, recognized legal practice for attorneys to conduct investigations of prospective jurors.<sup>32</sup> These initial investigations are a critical tool that enable attorneys to challenge jurors more effectively.<sup>33</sup> The ability to ascertain more personal information about a juror leads to the enhanced ability to evaluate that juror's impartiality, suitability, and objectiveness.<sup>34</sup> The rise of social media has given attorneys an unlimited pool of information that can be utilized to paint more accurate portraits of jurors' personalities.

By using social media as an investigative resource, attorneys are now able to make better determinations as to a juror's qualifications by comparing the juror's answers during *voir dire* with information on their social media accounts. For example, a juror's Twitter account could reveal racist comments despite the juror claiming they could be fair and impartial to a minority Defendant. Because providing a client with a better chance of selecting an impartial jury offers significant advantages, an ethical question follows: to what extent is an attorney required to perform social media-based research in order to comply with due diligence requirement of the ethical rules?

The answer to the question is that it is within each specific court's discretion. State and federal courts are permitted broad discretion in determining their own rules for conducting examinations of jurors, absent the necessary requirements of Federal Rules of Criminal Procedure Rule 24.<sup>35</sup> Therefore, individual court rules often determine ethical guidelines concerning how much research is required to satisfy due diligence to the client, as shown in the following cases.

An example of a court's broad discretion can be seen in *United States v. Daugerdas*.<sup>36</sup> Judge Pauley of the Southern District of New

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<sup>31</sup> Pulver, *supra* note 6.

<sup>32</sup> State of Iowa v. Kerr, 426 N.W.2d 654, 656 (Iowa Ct. App. 1988).

<sup>33</sup> *Id.*

<sup>34</sup> Pulver, *supra* note 6.

<sup>35</sup> United States v. Daugerdas, 867 F. Supp. 2d 445 (S.D.N.Y. 2013).

<sup>36</sup> *Id.*

York denied the Defendant's motion for a new trial, despite outrageous false claims made by a juror during *voir dire*.<sup>37</sup> In this case, Juror Number One engaged in egregious conduct during *voir dire* by lying extensively and withholding crucial information about her background in a successful attempt to be selected as a juror.<sup>38</sup> The Court held that the Defendant waived his right to move for a new trial pursuant to Federal Rule of Criminal Procedure 33(a) based on jury misconduct because the Defendant had sufficient internet research to establish that the juror was lying and failed to bring the juror's misconduct to the Court's attention.<sup>39</sup>

The Defendant's attorney had conducted various internet-based searches, including public record searches, Google searches, and obtained a Westlaw Report with respect to Juror Number One.<sup>40</sup> These searches and reports indicated alarming information about her, including her suspended law licenses and pending disciplinary proceedings against her.<sup>41</sup> The Defendant's attorney argued that they were not certain that the juror and the individual found during their research were the same person and thought it was "inconceivable" that she had lied. Thus the attorney decided not to bring these issues to the Court's attention.<sup>42</sup>

This important decision determined that internet-based research of jurors was not required by attorneys to satisfy due diligence.<sup>43</sup> However, if an attorney so chooses to engage in this activity, they will be held accountable for performing such research with due diligence.<sup>44</sup> The Court made clear that if an attorney chooses to conduct such research, they thereafter cannot shield themselves from liability by arguing that the information was not revealed during *voir dire*.<sup>45</sup> Moreover, this case established that "an attorney's duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client."<sup>46</sup>

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<sup>37</sup> *Id.* at 468–76.

<sup>38</sup> *Id.* at 468–69.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 459–60. (The paralegal searched Westlaw for information on "Catherine M. Conrad," and generated a report (the "Westlaw Report")).

<sup>41</sup> *Id.* at 458.

<sup>42</sup> *Id.* at 461.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 484.

After the Court's decision in *Daugerdas*, the defense appealed the Court's order denying the Defendant's Federal Rules of Criminal Procedure Rule 33 U.S.C. motion to grant a new trial, in *United States v. Parse*.<sup>47</sup> The Second Circuit concluded that the Defendant had not in fact waived his right to move for a new trial.<sup>48</sup> The Circuit Court rejected the trial court's due diligence approach to waiver and held that a Defendant waives his right to a Rule 33 motion only if a fact is *conclusively discovered* before the trial ends, and fails to notify the court.<sup>49</sup> The Second Circuit determined that Juror Number One's deceit was confirmed post-verdict, permitting the Defendant to submit the motion.<sup>50</sup> Interestingly, this leaves much of Judge Pauley's analysis intact.<sup>51</sup> Although mere suspicions will not effectuate a waiver, an attorney can still be held accountable for failing to alert the court to conclusive information unearthed during internet research of jurors.

The holdings in *Daugerdas* and *Parse* reflect the Court's fears with respect to attorney's using internet-based research. Although many courts do not restrict internet research of jurors, they impose higher burdens on the attorney's performing such research to ensure that ethical standards are not abused.

Contrary to the *Daugerdas* decision, some state courts have encouraged the use of internet research of jurors, such as *Carino v. Muenzen*.<sup>52</sup> In this matter, the New Jersey Court of Appeals held that the trial court abused its discretion in prohibiting the Plaintiff's counsel from using his laptop to research potential jurors during *voir dire*.<sup>53</sup> In support of its holding, the Appellate Court emphasized that although trial courts have substantial discretion in running their courtrooms the trial court acted unreasonably in preventing the use of the internet during *voir dire*. The Court did not cite any authority in reach this conclusion but merely reasoned that absent disruption, prejudice, or a judge's specific court rules against conducting internet research of jurors, this practice cannot be barred.<sup>53</sup>

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<sup>47</sup> *United States v. Parse*, 789 F.3d 83, 85 (2d Cir. 2015).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 109.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Carino v. Muenzen*, No. A-5491-08T1, 2010 WL 3448071, 4 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

<sup>53</sup> *Id.*

<sup>53</sup> *Id.* (finding a lack of prejudice as a result of the trial court's ruling.)

### **b. Violating the Communication Restriction**

In the practice of law, attorneys are constantly reminded of their duties to represent their clients diligently. In an effort to do their due diligence, many attorneys look to the convenience of quick internet searches, as these searches offer significant information. However, many attorneys conduct these internet searches without fully understanding the mechanics of these websites and social networks.

Notably, social networking sites were designed with the goal of connecting people, as opposed to being used for investigation.<sup>54</sup> Therefore, many of these sites prevent anonymous viewings and have installed automatic features to allow people to connect with others quickly.<sup>55</sup> A “social networker” has the ability to respond to those who view their profile or information, in an attempt to promote their site.<sup>56</sup> Therefore, a simple click on a profile may result in an automatic email alert being sent to the person being searched, opening the streams of communication with that person.<sup>57</sup>

Courts are aware of the many risks involved when jurors feel that their jury service requires a loss of privacy.<sup>58</sup> Courts are also adamant in ensuring that attorneys do not engage in any behavior that would dissuade juror service.<sup>59</sup> Therefore, court decisions, ethical opinions, and laws with respect to researching jurors on the internet have primarily focused on the importance of preventing any actions that would cause a juror to believe that they are being investigated.<sup>60</sup> However, what constitutes “communication” between an attorney and a juror can vary between the states. For example, what the American Bar Association (ABA) considers to be “communication” between attorney and juror is different from how the New York City Bar Association defines it.<sup>61</sup>

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<sup>54</sup> *What is Public Information?* FACEBOOK HELP CENTER, *supra* note 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Pulver, *supra* note 6.

<sup>59</sup> *Id.* In addition to the ethical consideration attorneys face in the context of using the internet to research jurors, there are also significant constitutional rights, such as the right to privacy, that must be accounted for.

<sup>60</sup> *Id.*

<sup>61</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

#### IV. AMERICAN BAR ASSOCIATION APPROACH

In 2014, the ABA issued a formal opinion outlining instances when attorneys are permitted to research potential jurors.<sup>62</sup> An attorney may not send a request to a juror or potential juror's social media account.<sup>63</sup> An access request is considered a form of communication in which the juror has not made information public, therefore going against and violating Model Rule 3.5(b).<sup>64</sup>

However, an attorney may look at the jurors' or potential jurors' information if the information is made public.<sup>65</sup> In addition, when the attorney looks at the juror's or potential juror's information, and a notification is sent to the individual, according to the ABA, this does not violate Model Rule 3.5(b) and is allowed.<sup>66</sup> Lastly, when looking at the potential juror's information, if the attorney finds misconduct of any kind, which includes, but is not limited to, criminal or fraudulent activity, the attorney must take corrective measures, and if necessary, disclosure to the tribunal.<sup>67</sup>

#### V. N.Y.C. BAR ASSOCIATION APPROACH

In 2012, the New York City Bar Association issued a formal opinion, in which the Committee structured rules on internet research of jurors through an analysis of "communication" in the context of Rule 3.5 of the New York Rules of Professional Conduct.<sup>68</sup> The Committee defined the term communication to mean "a process of bringing an idea, information or knowledge to another's perception."<sup>69</sup> Thus, during the course of conducting internet research, if an attorney caused the juror to know or have reason to suspect that they are being researched, the attorney has in fact engaged in communication with that juror.<sup>70</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> New York City Bar Ass'n, Formal Opinion No. 2012-02: Jury Research and Social Media (2012), <https://www2.nycbar.org/pdf/report/uploads/20072303-FormalOpinion2012-02JuryResearchandSocialMedia.pdf>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

This opinion suggests that it is irrelevant whether the attorney intends for the communication to take place.<sup>71</sup> For example, if the attorney “friend requests” a juror on Facebook and that juror thereafter receives notification of this request, the notification itself caused the communication, regardless of whether the juror accepts the invitation or not.<sup>72</sup> While placing restrictions on attorney’s internet research of jurors, this opinion suggests that lawyers are expected to do all they can to research and learn about jurors who will sit on trial.<sup>73</sup> The New York City Bar Association’s opinion grants attorneys the freedom to conduct internet research of jurors, however, it places a responsibility on attorneys to inform themselves of the features of the social networking site or other internet-based searches.<sup>74</sup>

Few courts have banned the practice of internet research of jurors.<sup>75</sup> Fewer courts have made decisive rulings with respect to whether this is a permitted practice and to what extent. In *United States v. Watts*,<sup>76</sup> Judge Matsumoto of the Eastern District of New York provided some guidance that many attorneys have needed in order to engage in internet searches of jurors ethically. The Court granted the Defendant’s request to conduct internet searches of prospective jurors and specified three limitations of permissible searches.<sup>77</sup> First, the Court stated direct contact with prospective or current jurors was wholly impermissible. The Court provided the example of “LinkedIn” to demonstrate that such social networks would result in impermissible communication, because it would inform the account holder that they were searched.<sup>78</sup> Thus, concluding that an internet search may not be conducted through any site would inform the account holder that they were searched by a party.<sup>79</sup> Second the Court held that both parties were barred from telling the jurors that internet research was permitted in the case.<sup>80</sup> Third, the Court reaffirmed the *Daugerdas* decision, which requires counsel to disclose

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Stephanie M. Coughlan, *The (Im)Partial Jury: A Trial Consultant’s Role in the Venire Process*, 84 BROOK. L. REV. 671, 697 (2019).

<sup>74</sup> *United States v. Daugerdas*, 867 F. Supp. 2d 445 (S.D.N.Y. 2013).

<sup>75</sup> *United States v. Parse*, 789 F.3d 83, 85 (2d Cir. 2015).

<sup>76</sup> *United States v. Watts*, 934 F. Supp. 2d 451 (E.D.N.Y. 2013).

<sup>77</sup> *Id.* at 494–95.

<sup>78</sup> *Id.* at 495.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

any information discovered about a juror that would have a bearing on that juror's fitness to serve on the case.<sup>81</sup>

## VI. CONCLUSION

As ever-changing technological advances give rise to increasing amounts of information at the touch of our fingertips, the legal system is racing to catch up. However, the legal community has not embraced the inevitable changes that the internet has had on the litigation process. Many attorneys complain of the lack of case law and court guidance when researching jurors on the internet. The broad discretion placed in the hands of attorneys is a dangerous scenario that may violate ethical rules and codes of conduct.

The struggle between ethics and zealous representation is not a novel issue to the legal profession. Attorneys are given broad discretion to act on behalf of their clients. Ethical rules have been established to assist, guide, and instruct attorneys on violations and responsibilities. However, the rules are not an exhaustive list of all scenarios. Attorneys are expected to use their superior knowledge and skill to diligently and zealously represent their clients while still maintaining the ethical responsibilities associated with the profession. Using the internet to research jurors should be used with caution, like any other discovery device in litigation. Internet research of jurors, if conducted fairly and cautiously, can be a powerful trial advocacy tool.

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<sup>81</sup> *Id.*