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Researching the Jury's Internet and Social Media Presence: The Ethical and Privacy Implications

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Researching the Jury's Internet and Social Media Presence: The Ethical and Privacy Implications

WHITNI HART*

“Jurors are like icebergs – only 10 percent of them is what you see in court . . . But you go online and sometimes you can see the rest of the juror iceberg that’s below the water line.”¹

This Comment discusses the lack of guidelines regulating attorneys’ online research of potential and sitting jurors. Instantaneous online access to the personal lives of jurors provides attorneys with the opportunity to exploit private information throughout the entire trial process, ranging from voir dire to closing arguments. Because this research most often occurs outside of the courtroom doors, courts have had little opportunity to address the issue. Very few courts and ethics committees have implemented policies related to the use of social media to investigate jurors, which leaves it up to the attorneys in most jurisdictions to decide what is or is not acceptable conduct. Because attorneys have a duty to act in the best interests of their clients, it is unlikely that they will find on their own that simple online research would violate a juror’s privacy or threaten the integrity of a trial. After providing a summary of the limited authority from various jurisdictions regulating the use of online research of jurors, this Comment analyzes the differences and reconciles them by proposing uniform model guidelines for attorneys to follow.

* Third-year law student at Northern Illinois University College of Law. I would like to thank Professor Jeanna Hunter and Professor Jay Streitz for their encouragement and guidance as I navigated the research and writing process of this Comment.

1. Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS LEGAL (Feb. 17, 2011, 10:50 PM), <https://www.reuters.com/article/us-courts-voirdire/internet-v-courts-googling-for-the-perfect-juror-idUSTRE71G4VW20110217> [<https://perma.cc/T2E9-WPW8>].

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I. INTRODUCTION

A 2019 study revealed that 79% of Americans have at least one social media account, which amounts to approximately 247 million users.² Users have indicated that the primary reasons that they create social media accounts are to maintain relationships and to connect with others.³ It is highly unlikely that the driving force behind the creation of social media accounts is to make it more convenient for attorneys to locate background information about citizens in the event that they are called for jury duty. However, while “[v]etting of potential jurors through social media is becoming more common, ‘lawyers

2. J. Clement, *Share of U.S. Population with a Social Media Profile 2008-2019* (Aug. 9, 2019), <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/> [https://perma.cc/R8L8-28ND].

3. Aaron Smith, *Why Americans Use Social Media*, PEW RSCH. CTR. (Nov. 15, 2011), <https://www.pewresearch.org/internet/2011/11/15/why-americans-use-social-media/> [https://perma.cc/VSV6-6KCD].

are skittish about discussing the practice, in part because the court rules on the subject are murky or nonexistent in most jurisdictions.”⁴

Social media is defined as “all the technological means . . . that enable people to participate in Internet content creation and online social networking.”⁵ Internet investigations of potential jurors, as referred to herein, primarily applies to social media as defined, but it also applies “to the use of search engines, court databases . . . and the search for other sources of perceivable content accessible via the internet.”⁶ Conducting internet research of potential jurors may be critical to an attorney’s case because social media can reveal personal information and opinions of potential jurors that would not otherwise be discoverable throughout the jury selection process.⁷ While this practice is becoming more common with the advances in technology, attorneys in most jurisdictions have to guess as to how they are expected to conduct such investigations because the searches take place outside of court and rarely cause disputes; therefore, courts thus far have had little reason to rule on the issue.⁸ John Nadolenco, a Los Angeles-based attorney, acknowledged the ambiguous guidelines, stating that “[l]awyers don’t know the rules yet. It’s like the Wild West.”⁹ Furthermore, during a 2011 study of the jury selection process, ten law firms denied the researchers access to their methods of building juror profiles, with many admitting that it was due to the fact that they were unsure if judges would approve of their techniques.¹⁰ The inconsistent, or complete lack of, rules surrounding internet searches of potential jurors leave too many issues open to interpretation by attorneys whose duty it is to act in the best interests of their clients.

According to a 2014 survey of United States district judges, 73.3% of federal judges did not know how many attorneys used the internet or social media to conduct background investigations of potential jurors during voir dire.¹¹ Of all of the judges who responded to the survey, 90.6% indicated that

4. *Sluss v. Commonwealth*, 381 S.W.3d 215, 227 (Ky. 2012) (quoting *Grow*, *supra* note 2).

5. *Social Media*, BLACK’S LAW DICTIONARY (11th ed. 2019).

6. Brandon A. Fortuno, *Friend Request: Ethically and Legally Investigating Jurors’ Social Media*, 6 STETSON J. ADVOC. & L. 70, 71 (2019), https://www2.stetson.edu/advocacy-journal/wp-content/uploads/2019/06/Fortuno_2019.pdf. [<https://perma.cc/T255-BNBQ>].

7. *Id.*

8. JOSEPH C. CRAWFORD, INTERNET AND SOCIAL MEDIA SEARCHES ABOUT POTENTIAL AND ACTUAL JURORS DURING VOIR DIRE AND TRIAL – ETHICAL AND TRIAL ADVOCACY ISSUES 13 (Mar. 1, 2018), https://www.actl.com/docs/default-source/default-document-library/events/mar_1_2018_cle_materials_mock_pre_trial_hearing_request_to_use_social_media_searches [<https://perma.cc/SXR5-T3AK>].

9. *Grow*, *supra* note 2.

10. *Id.*

11. MEGHAN DUNN, FED. JUDICIAL CTR., JURORS’ AND ATTORNEYS’ USE OF SOCIAL MEDIA DURING VOIR DIRE: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT

they did not know what forms of internet or social media searches the attorneys used in order to learn more information about prospective jurors.¹² Furthermore, 69.3% of the responding judges indicated that they did not even address the issue of internet and social media searches with attorneys before they conducted voir dire.¹³ This consensus is consistent with the trend throughout the United States: Jurors, attorneys, and judges are largely unaware of the guidelines to which attorneys must adhere when conducting internet and social media research.¹⁴

The lack of regulation of a practice as common as researching potential jurors' online presence is dangerous for attorneys, clients, and jurors alike. Part II of this Comment will discuss the limited authority that exists for guiding social media searches of jurors and will illustrate that the court decisions, ethics opinions, and procedural rules that are currently in place leave significant gaps in guidelines. Part III will offer a recommendation as to how to best reconcile the discrepancies between the various authorities and will suggest a model rule that would protect the interests of litigants, attorneys, and jurors. Part IV will conclude the Comment.

II. HISTORY

A. AN EXAMINATION OF THE RIGHT TO AN IMPARTIAL JURY

Litigants in both criminal and civil court proceedings are constitutionally entitled to trial by an impartial jury.¹⁵ The Sixth Amendment of the Constitution grants jury trial rights to criminal defendants and ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."¹⁶ Similarly, the Seventh Amendment grants

ADMINISTRATION AND CASE MANAGEMENT 12 (2014), <https://www.fjc.gov/sites/default/files/2014/Jurors-Attorneys-Social-Media-Trial-Dunn-FJC-2014.pdf> [<https://perma.cc/G4QV-VJK6>]. Of the 1,021 judges who were sent the survey, 494 provided responses. *Id.* at 3.

12. *Id.* at 13. 4.6% of judges indicated that attorneys were searching Facebook, 4.6% indicated that attorneys were searching Google, 2.4% indicated that attorneys were searching LinkedIn, 2.4% indicated that attorneys were looking at personal blogs or websites, and 1.8% indicated that attorneys were searching Twitter. *Id.*

13. *Id.* 4.9% of judges indicated that they permit attorneys to use social media during voir dire, and 25.8% of judges indicated that they do not permit attorneys to use social media during voir dire. DUNN, *supra* note 12, at 13.

14. See CRAWFORD, *supra* note 9; DUNN, *supra* note 12; STEPHEN PATTERSON, VINSON & CO., USING SOCIAL MEDIA AND OTHER BACKGROUND RESEARCH IN VOIR DIRE: WHY JURORS DON'T CARE BUT YOU SHOULD 1 (2016), <https://vinsoncompany.com/wp-content/uploads/2015/09/Using-Social-Media-Other-Background-Research-in-Voir-Dire.pdf> [<https://perma.cc/R2QJ-3LKQ>].

15. Skaggs v. Otis Elevator Co., 164 F.3d 511, 514 (10th Cir. 1998).

16. U.S. CONST. amend. VI.

civil litigants jury trial rights by stating, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”¹⁷ While the Seventh Amendment does not contain explicit language requiring that a jury in a civil trial be impartial, that right has been implied because, otherwise, the right to a jury trial would be a façade.¹⁸ An impartial jury is vital to any fair trial because the purpose of a jury is to inject the common sense of the community into the trial process to protect litigants from the intentional or unintentional biases of experienced attorneys or judges.¹⁹

Ideally, an impartial jury means that all members are willing and able to disregard any extraneous information or opinions they may possess and to consider only the evidence presented during trial while deliberating the verdict.²⁰ In order to evaluate whether jurors possess biases that would render them impartial, attorneys or judges ask potential jurors a series of questions while the jurors are sworn under oath, a process known as “voir dire.”²¹ Trial judges in both criminal and civil cases are granted broad discretion to control the line of questioning during voir dire, and they usually permit any questions that are relevant to uncover biases that would influence the jurors’ determination of the case.²²

If an attorney uncovers information about a juror during voir dire that is unfavorable to her client’s case, she may excuse that juror through either a challenge for cause or a peremptory challenge.²³ Challenges for cause are unlimited in number and are permissible when the juror possesses either inferred or actual bias.²⁴ On the other hand, peremptory challenges are limited in number and may be exercised, without explanation, as the attorneys desire.²⁵ However, peremptory challenges may not be exercised in a discriminatory manner based upon protected classes, and the definition of “protected

17. U.S. CONST. amend. VII.

18. *Skaggs*, 164 F.3d at 514.

19. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

20. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).

21. *See Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991). “Voir dire” means “to speak the truth.” *Voir Dire*, BLACK’S LAW DICTIONARY (11th ed. 2019).

22. *Mu’Min*, 500 U.S. at 422. One factor that judges should consider when evaluating the appropriateness of a question during voir dire is the claim or punishment at stake. *Brandborg v. Lucas*, 891 F. Supp. 352, 356 (E.D. Tex. 1995). For example, if the jury is determining whether to impose the death penalty on a criminal defendant, very few questions would be irrelevant because both parties have great interests in the outcome. *Id.*

23. JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION 2* (4th ed. 2018).

24. *Id.* Inferred bias of juror is assumed by the court as a result of a juror’s personal interest in or relationship to the case. *Id.* Actual bias is assigned to jurors based upon prejudicial statements made during voir dire. *Id.*

25. *Id.*

classes” has gotten more broad in recent years.²⁶ Because of the increasingly restrictive rules surrounding peremptory challenges, voir dire now requires more extensive information to ensure that challenges are not exercised for improper reasons.²⁷

In order to obtain the information necessary to exercise appropriate challenges during voir dire, attorneys often engage in pretrial investigations of jurors.²⁸ However, the rules of professional conduct prohibit attorneys from engaging in ex parte communication with potential jurors before, during, and generally after the court proceedings, so any inquiry into a juror must be carried out with caution.²⁹ In the past, attorneys traditionally gathered information through indirect means such as “researching newspapers and public archives, consulting other attorneys, conducting ‘drive-bys’ of jurors’ residences, speaking with neighbors of jurors, and following jurors throughout the day.”³⁰ While these methods have provided attorneys with more information than they would be privy to without a pretrial investigation, the recent rise of social media has opened even more investigatory doors that were previously unimaginable.³¹ However, courts, ethics committees, and scholars share vastly different opinions as to how attorneys should be expected to conduct such searches.³² Various courts have ruled on the issues of internet searches, public records searches, and social media searches.

B. CASES PERMITTING INTERNET SEARCHES OF POTENTIAL JURORS, WITH POSSIBLE RESTRICTIONS

i. *United States v. Parse*

In *United States v. Parse*, the court was alerted to an attorney’s internet searches of potential jurors and did not prohibit it, but the court left open the

26. *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting the exercise of peremptory challenges based upon race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (prohibiting the exercise of peremptory challenges based upon gender). The Supreme Court has acknowledged that States are permitted to experiment with different “protected classes” of jurors, despite the traditional notion that peremptory challenges were not to be subjected to judicial review. *See McCray v. New York*, 461 U.S. 961, 963 (1983).

27. *Brandborg*, 891 F. Supp. at 357.

28. Thaddeus Hoffmeister, *Applying Rules of Discovery to Info. Uncovered About Jurors*, 59 UCLA L. REV. DISCOURSE 28, 34 (2011).

29. MODEL RULES OF PRO. CONDUCT r. 3.5(b) (AM. BAR ASS’N 1983). “A lawyer shall not . . . communicate ex parte with [a prospective juror] during the proceeding unless authorized to do so by law or court order.” *Id.* “Ex parte” means “for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest.” *Ex Parte*, BLACK’S LAW DICTIONARY (11th ed. 2019).

30. Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 618 (2012).

31. *See id.* at 625.

32. *See CRAWFORD*, *supra* note 9.

question of what the consequences would be for conducting internet searches and failing to disclose what an attorney reasonably believes to be misconduct by the potential juror.³³ Parse and multiple others were convicted of various fraud and tax-related offenses.³⁴ Following the convictions, the defendant and three co-defendants appealed, contending that they were entitled to a new trial because Juror Conrad gave false statements and withheld information that would have revealed her bias during voir dire.³⁵ The motion for a new trial stated that the defense's investigation into Juror Conrad was prompted by the government's disclosure of a post-trial letter it received from Juror Conrad, in which she praised the government's performance during trial.³⁶ At an evidentiary hearing to evaluate Juror Conrad's nondisclosures, the court found that she lied about only possessing a bachelor's degree and that she actually obtained a law degree and practiced law in New York, until her license was suspended for failure to cooperate with an investigation into her alleged misconduct.³⁷ She also lied about prior arrests and criminal charges of both her husband and herself.³⁸ At the hearing, Juror Conrad admitted that she lied in order to make herself more "marketable" as a juror.³⁹

Parse's counsel later admitted that they discovered the suspension order for Juror Conrad's law license before voir dire, but they claimed that they took her statements to mean that she was a different person than the individual named on the order.⁴⁰ Parse's counsel conducted another search after closing arguments and found evidence of Juror Conrad's true identity, but counsel claimed that they did not definitively conclude who Juror Conrad was until after the government disclosed the letter and they matched Juror Conrad's phone number with a phone number listed on the New York attorney registration website.⁴¹

The trial court denied Parse's motion for a new trial because his attorneys were either aware of the potential misconduct during trial, or failed to act with reasonable diligence by not investigating further once they had reason to be suspicious.⁴² Parse appealed, and the appellate court believed that a new trial was appropriate because Parse was denied his right to an impartial jury since his attorneys could have reasonably believed that Juror Conrad's statements under oath were truthful.⁴³ Nevertheless, the court did not reach the question of whether Parse would have otherwise waived his right to an

33. See *United States v. Parse*, 789 F.3d 83, 112 (2d Cir. 2015).

34. *Id.* at 85.

35. *Id.* at 86.

36. *Id.* at 90.

37. *Id.* at 88.

38. *Parse*, 789 F.3d at 89.

39. *Id.* at 91.

40. *Id.* at 94.

41. *Id.* at 95.

42. *Parse*, 789 F.3d at 95. Parse's co-defendants were granted a new trial. *Id.*

43. *Id.* at 116, 118.

impartial jury because the court found that Parse's attorneys did not possess knowledge of Juror Conrad's misconduct.⁴⁴ *Parse* illustrates the risks that stem from engaging in pretrial research and neglecting to report suspected juror misconduct to judges because it is unclear if Parse's counsel's failure to disclose would have resulted in a waiver of Parse's constitutional right to an impartial jury.

ii. *Roberts ex rel. Estate of Roberts v. Tejada*

In *Tejada*, a widow brought a medical malpractice suit against Dr. Tejada, claiming he was negligent in the treatment of her husband's cancer.⁴⁵ During voir dire, the court and attorneys asked if any potential juror had ever been involved in a lawsuit, and, after a defense verdict, the plaintiff's attorney conducted a public records search and discovered that three jurors failed to disclose their prior litigation history during voir dire.⁴⁶ The Florida Supreme Court held that public records searches of potential jurors should be permitted upon request if they can be conducted without unnecessary delay; however, the court rejected the adoption of a bright-line rule requiring a public records search because there would be no way to implement a uniform application of the rule.⁴⁷ The court discussed the vast array of resources that contained public records and the court's inability to provide litigants and their attorneys with proper means to review all possible records; therefore, the court found it inappropriate to impose rules that would require a team of lawyers to remain in compliance.⁴⁸

iii. *Sluss v. Commonwealth*

In *Sluss v. Commonwealth*, the defendant was on trial for multiple offenses stemming from his driving under the influence and striking another vehicle, which resulted in the death of an eleven-year-old child.⁴⁹ The defendant moved for a new trial due to alleged juror misconduct that resulted from two jurors being Facebook "friends" with the victim's mother, but the motion was denied by the trial court.⁵⁰ The defendant appealed the denial, and the appellate court remanded the case back to the trial court to make factual determinations as to the extent of the relationship between the jurors and the victim's mother.⁵¹ Although the appellate court did not decide the

44. *Id.* at 112.

45. *Roberts ex rel. Estate of Roberts v. Tejada*, 814 So. 2d 334, 336 (2002).

46. *Id.* at 337.

47. *Id.* at 344.

48. *Id.*

49. *Sluss v. Commonwealth*, 381 S.W.3d 215, 218 (Ky. 2012).

50. *Id.* at 221.

51. *Id.* at 229.

ultimate issue as to whether the social media relationships at issue constituted juror misconduct, the court did comment on the permissibility of social media searches of prospective jurors.⁵² The court acknowledged that internet searches of potential jurors are common but that “[l]awyers are skittish about discussing the practice, in part because the court rules on the subject are murky or nonexistent in most jurisdictions.”⁵³ The court held that social media searches of potential jurors were permissible so long as attorneys followed the guidelines set forth by the New York County Lawyers Association’s Committee,⁵⁴ which will be discussed in detail later in this Comment. The court also stated that defense counsel was not at fault for failing to search social media because he could have reasonably believed the jurors’ statements during voir dire, but that if a lawyer does conduct a search and finds evidence of misconduct, he must report the misconduct to the court before moving forward with the case.⁵⁵

iv. *Carino v. Muenzen*

In *Carino v. Muenzen*, the plaintiff filed a medical malpractice suit against Dr. Muenzen.⁵⁶ During voir dire, plaintiff’s counsel began using a laptop to conduct internet searches of prospective jurors, and the defense objected.⁵⁷ The trial court sustained the objection, stating that the lack of advance notice of the intent to conduct internet searches placed the defense at an unfair disadvantage.⁵⁸ The jury returned a defense verdict and the judge dismissed the matter, but the plaintiff appealed, claiming, in part, that the trial judge erred in precluding counsel from conducting internet research during voir dire.⁵⁹ Despite the traditional deference given to trial judges to make their own courtroom rules, the appellate court found that the judge in this case acted unreasonably because plaintiff’s counsel’s laptop use was not disruptive and because the parties already had a “level playing field” since both parties had internet access in the courtroom.⁶⁰ Even so, the appellate court denied reversal on these grounds because the plaintiff did not prove that the trial court’s ruling caused him prejudice.⁶¹

52. *Id.* at 227.

53. *Id.* (quoting Grow, *supra* note 2).

54. *Sluss*, 381 S.W.3d at 227.

55. *Id.* at 228.

56. *Carino v. Muenzen*, No. A-5491-08T1, 2010 WL 3448071, at *3 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

57. *Id.* at *4.

58. *Id.*

59. *Id.* at *7.

60. *Id.* at *10.

61. *Carino*, 2010 WL 3448071, at *10.

v. Oracle America, Inc. v. Google Inc.

In 2016, Judge William Alsup for the Northern District of California took a unique approach to the issue of social media searches of potential jurors in the case of *Oracle America, Inc. v. Google Inc.*⁶² In *Oracle*, both attorneys to a copyright suit requested extra time between the return of the initial juror questionnaires and beginning voir dire.⁶³ Judge Alsup discovered that the additional time was to permit internet searches, and he determined that if the parties would not agree to an outright ban on those searches, they would have to follow a set of strict guidelines.⁶⁴

To begin with, Judge Alsup expressed the “reverential respect” that judges have for juries and was troubled by the notion that juries, in addition to the sacrifices of their service, must also tolerate the attorneys invading their privacy on social media.⁶⁵ On the other hand, Judge Alsup also recognized the fact that social media searches of potential jurors could reveal information that would allow for more effective peremptory challenges or discovery of information that was concealed by a juror during voir dire questioning.⁶⁶ Nevertheless, he considered restricting social media searches altogether for three reasons.⁶⁷ First, Judge Alsup believed that if jurors learned that the attorneys were researching them online, jurors would be more inclined to conduct their own research about the attorneys and about the case.⁶⁸ He thought it unfair to permit the attorneys to do to the jurors what the jurors could not do to the attorneys, and doing so had the potential to make jurors feel justified in conducting their own research.⁶⁹ Second, the attorneys would be more likely to make improper emotional appeals to the jury if they uncovered information about the jury’s personal preferences and opinions.⁷⁰ The court permitted “analogies and quotations” during jury arguments but drew the line when those methods turned into a calculated personal appeal.⁷¹ Third, Judge Alsup was concerned about the privacy rights of the potential jurors.⁷²

62. See Sudhin Thanawala, *Judge Reignites Debate Over Researching Jurors Online*, ASSOC. PRESS (July 16, 2016), <https://ap-news.com/7be31b151b88499e948c8231cf09f151/judge-reignites-debate-over-researching-jurors-online> [<https://perma.cc/U6A8-AGXL>].

63. *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1101 (N.D. Cal. 2016).

64. *Id.* at 1102. The attorneys admitted to Judge Alsup that they wanted to use the names and addresses from the juror questionnaires to investigate the background of the potential jurors on Facebook, Twitter, LinkedIn, and other internet sites. *Id.* at 1101.

65. *Id.*

66. *Id.* at 1102.

67. *Oracle Am., Inc.*, 172 F. Supp. 3d at 1102.

68. *Id.*

69. *Id.*

70. *Id.* at 1103.

71. *Id.*

72. *Oracle Am., Inc.*, 172 F. Supp. 3d at 1103.

In the court's opinion, juror privacy should only yield when necessary to uncover bias or a failure to follow court rules, and jury selection is not meant to be a process of constructing a "fantasy team."⁷³ Furthermore, the court rejected the argument that the privacy settings on social media were a sign of consent by the jurors to investigate because the complex nature of the privacy settings render them "more a matter of blind faith than conscious choice."⁷⁴

While evaluating the concerns that arise when attorneys are granted access to social media profiles, Judge Alsup considered properly exercising his discretion and imposing an absolute ban on searches; however, in order to prevent viewers in the gallery from possessing more information than the attorneys themselves, he instead elected to establish a procedure for the attorneys to follow if they chose to search the jurors' social media accounts.⁷⁵ To begin with, each attorney had a duty from the beginning to inform the potential jurors of the methods they would use to investigate and monitor online presences.⁷⁶ The attorneys were prohibited from excusing their own research by stating it was only because the other party was engaging in such behavior, and they could not imply that the judge approved of the intrusion.⁷⁷ The disclosure would place the jurors on notice that the parties would acquire their names and addresses, as well as review their social media accounts.⁷⁸ At this point, the jurors would be granted time to adjust the privacy settings on their social media accounts.⁷⁹ Because Google itself was a party to the case, the court took extra precautions and informed the jurors that their search histories would not be mined by either party.⁸⁰

Additionally, the attorneys were required to disclose any "apparent misconduct" to the court and the opposing party, no matter who the information benefitted.⁸¹ Both parties were required to record each search that was conducted, including the date, in order to prevent one side from falsely claiming that they were unaware of information that later resulted in an allegation of juror misconduct.⁸²

According to Judge Alsup's procedure, attorneys would be prohibited from making personal appeals to any juror if the appeal exploited information

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Oracle Am., Inc.*, 172 F. Supp. 3d at 1104. While explaining the reasons for the internet and social media searches to the potential jurors, the attorneys were limited to stating that "they [felt] obliged . . . to consider all information available to the public about candidates to serve as jurors." *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Oracle Am., Inc.*, 172 F. Supp. 3d at 1104.

82. *Id.*

that was obtained during internet and social media searches.⁸³ Judge Alsup repeatedly emphasized that he would rather protect juror privacy by prohibiting all internet and social media searches, but that he reluctantly permitted the searches so long as they were in compliance with his guidelines.⁸⁴

C. CASES EFFECTIVELY REQUIRING INTERNET SEARCHES

i. *Johnson v. McCullough* (and corresponding Missouri Civil Procedure Rule 69.025)

In *Johnson v. McCullough*, during voir dire in a medical malpractice lawsuit, plaintiff's counsel asked whether any of the potential jurors had ever been involved in a lawsuit, and Juror Mims remained silent.⁸⁵ However, after a defense verdict, plaintiff's counsel researched Juror Mims on Case.net and discovered that Juror Mims was previously a defendant in multiple debt collection cases and in a personal injury case.⁸⁶ The plaintiff was granted a new trial on the grounds of juror misconduct, and the defendant appealed.⁸⁷ The court affirmed the trial court's holding because there was no evidence that the attorneys could have investigated the litigation history of every potential juror.⁸⁸ However, the court acknowledged modern technological advances and established a rule for future cases that required "a party [to] use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empaneled and [to] present to the trial court any relevant information prior to trial."⁸⁹ The court intended for these guidelines to be effective until the Missouri Supreme Court enacted an applicable rule.⁹⁰

In the aftermath of *Johnson*, the Missouri Supreme Court promulgated the following rule, which made Missouri one of the first jurisdictions to impose a duty on attorneys to conduct internet searches of potential jurors:

69.025 Juror Nondisclosure

- (a) Proposed Questions. A party seeking to inquire as to the litigation history of potential jurors shall make record of the proposed initial questions before voir dire. Failure to follow this procedure shall result in waiver of the right to inquire as to litigation history.

83. *Id.*

84. *Id.*

85. *Johnson v. McCullough*, 306 S.W.3d 551, 554 (Mo. 2010).

86. *Id.* at 555. Case.net is "Missouri's automated case record service." *Id.*

87. *Id.*

88. *Id.* at 558.

89. *Johnson*, 306 S.W.3d at 559.

90. *Id.*

- (b) Reasonable Investigation. For purposes of this Rule 69.025, a “reasonable investigation” means review of Case.net before the jury is sworn.
- (c) Opportunity to Investigate. The court shall give all parties an opportunity to conduct a reasonable investigation as to whether a prospective juror has been a party to litigation.
- (d) Procedure When Nondisclosure is Suspected. A party who has reasonable grounds to believe that a prospective juror has failed to disclose that he or she has been a party to litigation must so inform the court before the jury is sworn. The court shall then question the prospective juror or jurors outside the presence of the other prospective jurors.
- (e) Waiver. A party waives the right to seek relief based on juror nondisclosure if the party fails to do either of the following before the jury is sworn:
 - (1) Conduct a reasonable investigation; or
 - (2) If the party has reasonable grounds to believe a prospective juror has failed to disclose that he or she has been a party to litigation, inform the court of the basis for the reasonable grounds.
- (f) Post-Trial Proceedings. A party seeking post-trial relief based on juror nondisclosure has the burden of demonstrating compliance with Rule 69.025(d) and Rule 69.025(e) may satisfy that burden by affidavit. The court shall then conduct an evidentiary hearing to determine if relief should be granted.⁹¹

In 2017, the Missouri Court of Appeals in *King v. Sorenson* clarified Rule 69.025 and held that the duty to conduct a “reasonable investigation” was satisfied so long as the litigant conducted a Case.net search of potential jurors using the names provided by the court, even if a name turned out to be incorrect.⁹² The court also limited the scope of the duty to conduct a “reasonable investigation” of jurors’ backgrounds solely to a search of Case.net, but acknowledged that technological advances may require the court to expand the scope of required internet searches at some point.⁹³ While the court attempted to clarify Rule 69.025, the petitioner in the case submitted a brief

91. Mo. R. Civ. P. 69.025.

92. *King v. Sorenson*, 532 S.W.3d 209 (Mo. Ct. App. 2017).

93. *Id.* at 215.

that highlighted the various issues that have resulted from putting the Rule into practice.⁹⁴ More specifically, petitioner acknowledged the danger of the waiver provision under Rule 69.025 that imposes severe consequences on those who have a duty to conduct searches of a system for purposes that the system was not designed for.⁹⁵ The waiver provision under Rule 69.025 deprives litigants of their constitutional right to an impartial jury, even if the errors in the system are through no fault of the litigants themselves.⁹⁶

ii. *Burden v. CSX Transportation, Inc.*

In 2011, in the case of *Burden v. CSX Transportation, Inc.*, the United States District Court for the Southern District of Illinois held that the defendant waived his objections to nondisclosures by jurors during voir dire because the nondisclosures could have been discovered by the attorney's exercise of reasonable diligence prior to the verdict.⁹⁷ After a verdict for the plaintiff, the defense attorney instructed a paralegal to conduct internet searches on two jurors that sat on the case.⁹⁸ The paralegal's investigation uncovered numerous pieces of information that the jurors failed to disclose during voir dire.⁹⁹ The defense moved for a new trial on the grounds that the Seventh Amendment's right to trial by an impartial jury was violated when the jurors failed to disclose information that had the potential of creating bias against the defendant.¹⁰⁰ While considering the defense's motion for a new trial, the court stated:

A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination.¹⁰¹

The court also said that "a party cannot gamble with the possibility of a verdict and thereafter, when the verdict proves unfavorable, raise a question he might have raised before verdict."¹⁰² The court dismissed the motion for a new trial because the jurors' nondisclosures could have been revealed if the

94. See Brief for Petitioner, *King v. Sorenson*, 532 S.W.3d 209 (Mo. Ct. App. 2017) (No. 80196), 2017 WL 1374153.

95. *Id.* at *52.

96. *Id.*

97. *Burden v. CSX Transp., Inc.*, No. 08-cv-04-DRH, 2011 WL 3793664, at *9 (S.D. Ill. Aug. 24, 2011).

98. *Id.* at *7.

99. *Id.*

100. *Id.* at *5.

101. *Id.* at *8 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 550 n.2 (1984)).

102. *Burden*, 2011 WL 3793664, at *8 (quoting *Stanczak v. Penn. R.R.*, 174 F.2d 43, 48-49 (7th Cir. 1949)).

defense would have exercised reasonable diligence prior to the verdict.¹⁰³ The disputed information about the jurors was all found in public documents, with the majority of the information resulting from simple internet searches; therefore, the information could have been discovered at an earlier time, and the defendant gambled with the verdict and raised issues that should have been raised earlier.¹⁰⁴ The practical impact of this case is that trial attorneys in the Southern District of Illinois have a duty to conduct internet searches of potential jurors prior to the verdict in order to preserve the issue of juror non-disclosure.¹⁰⁵

D. CASES PROHIBITING SEARCHES

i. *United States v. Kilpatrick*

In *United States v. Kilpatrick*, the United States District Court for the Eastern District of Michigan prohibited attorneys from using juror information that was provided by the court to conduct internet investigations of jurors.¹⁰⁶ In *Kilpatrick*, Detroit's former mayor and other public officials were accused of engaging in illegal behaviors, which resulted in the case attracting massive public attention.¹⁰⁷ Therefore, the prosecution moved to empanel an anonymous jury to protect the potential jurors from unwanted publicity, to which the defense objected.¹⁰⁸ The court elected to empanel a semi-anonymous jury, from which the parties would obtain the names and zip codes of prospective jurors.¹⁰⁹ The attorneys were prohibited from sharing the jurors' information, and were not allowed to engage in "any type of surveillance, investigation, or monitoring (via the internet or any other means) using that juror information."¹¹⁰ The court reasoned that voir dire provided the parties with sufficient opportunities to investigate the jurors.¹¹¹ The court prioritized the safety and privacy of the jurors over the investigation of attorneys because jurors serve a critical function in the "democratic system of justice" and that investigating them would "unnecessarily chill the willingness of jurors . . . to serve."¹¹²

103. *Id.* at *10.

104. *Id.* at *9.

105. See CRAWFORD, *supra* note 9, at 24.

106. *United States v. Kilpatrick*, No. 10-20403, 2012 WL 3237147, at *3 (E.D. Mich. Aug. 7, 2012).

107. *Id.* at *1.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Kilpatrick*, 2012 WL 3237147, at *3.

112. *Id.*

E. ETHICS OPINIONS PERMITTING SEARCHES

Very little case law exists regarding the permissibility of attorneys conducting internet and social media investigations of prospective jurors.¹¹³ As previously stated, attorneys generally conduct searches outside of court and the information obtained rarely causes meaningful controversy; therefore, courts have had little reason to rule on the issue thus far.¹¹⁴ However, an increasing number of ethics committees are submitting suggested guidelines for attorneys to follow if they wish to engage in online research.¹¹⁵ The majority of ethics opinions are concerned with Model Rule of Professional Conduct 3.5(b), which prohibits attorneys from “communicat[ing] ex parte with [a prospective juror] during the proceeding unless authorized to do so by law or court order.”¹¹⁶ While ethics opinions are not binding, they are instructive as to how attorneys may engage in certain activities and still remain compliant with ethical standards of conduct.¹¹⁷

i. American Bar Association (ABA) Formal Opinion 466

In 2014, the ABA Committee on Ethics and Professional Responsibility released a formal opinion on the subject of lawyers' research of jurors' internet presence.¹¹⁸ At the time of the opinion, the Committee considered social media platforms such as Facebook, MySpace, LinkedIn, and Twitter.¹¹⁹ “The line is increasingly blurred” between an attorney's proper investigation of a juror and his improper communication with the juror.¹²⁰ For this reason, the Committee suggests judges and attorneys discuss the rules of internet searches with one another, as well as advise jurors that their backgrounds may be investigated throughout the trial process.¹²¹

More specifically, the Committee deems it permissible to engage in a “passive review” of a juror's online presence, so long as the attorney does not send any form of an access request to the juror's social media account.¹²² On certain websites, the juror may receive an automated notification from

113. Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1106 (N.D. Cal. 2016).

114. CRAWFORD, *supra* note 9, at 13.

115. See Oracle Am., Inc., 172 F. Supp. 3d at 1107.

116. MODEL RULES OF PRO. CONDUCT r. 3.5(b) (AM. BAR ASS'N 1983).

117. Ethics Opinions, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/ [https://perma.cc/9BBH-PZSQ].

118. ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014).

119. *Id.*

120. *Id.*

121. *Id.*

122. ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014). The Committee compared a “passive review” to an attorney driving past the juror's home and using his observations to benefit his jury selection decisions. *Id.*

the website itself when a person views his profile.¹²³ However, the Committee views this notification as “beyond the control of the reviewer” because the website sends the information independently; therefore, an attorney is allowed to view a juror’s webpage that sends automated notifications of the review, even if the juror will know that the attorney was the one behind it.¹²⁴ While the Committee approves of this behavior, it does recommend that the attorneys be aware of the subscriber-notification and that the attorney be familiar with the technology.¹²⁵ Additionally, the attorneys are not allowed to engage in activity that is solely designed to “embarrass, delay, or burden a third person,” so internet research that results in automated notifications must serve some legitimate purpose.¹²⁶

If an internet search reveals possible juror misconduct that is criminal or fraudulent, Model Rule 3.3(b) requires that the lawyer take remedial measures, which in some cases may require disclosing the information to the court.¹²⁷ However, the Rules have yet to address the duties of attorneys who discover juror misconduct that falls short of criminal or fraudulent conduct.¹²⁸ The Committee avoided filling in that gap because its role is not to determine questions of law, but it did suggest that the law may impose a duty on attorneys to reveal to the court juror misconduct that falls short of being criminal or fraudulent if it violates court instructions.¹²⁹

Following the publication of ABA Formal Opinion 466, bar associations in Washington D.C., Pennsylvania, and Colorado adopted the same guidelines for attorneys who wish to conduct investigations of a potential juror’s online presence.¹³⁰

ii. New York County Lawyer’s Association Formal Opinion 743

In 2011, the New York County Lawyer’s Association Committee released a formal opinion addressing the permissibility of attorneys conducting internet and social media research during trial.¹³¹ The Committee deemed it

123. *Id.* One example of such a website is LinkedIn. *Who’s Viewed Your Profile – Privacy Settings*, LINKEDIN, <https://www.linkedin.com/help/linkedin/answer/47992/who-s-viewed-your-profile-privacy-settings?lang=en> [<https://perma.cc/HJS6-R9XG>].

124. ABA Comm. on Ethics & Prof. Resp., Formal Op. 466 (2014). The Committee compared the automated notifications to “a neighbor’s recognizing a lawyer’s car driving down the juror’s street and telling the juror that the lawyer had been seen driving down the street.” *Id.*

125. *Id.* The Rules deem it important for attorneys to stay current with technology. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2012).

126. MODEL RULES OF PRO. CONDUCT r. 4.4 (AM. BAR ASS’N 1983).

127. MODEL RULES OF PRO. CONDUCT r. 3.3(b) (AM. BAR ASS’N 1983).

128. ABA Comm. on Ethics & Prof. Resp., Formal Op. 466 (2014).

129. *Id.*

130. Colorado Bar Ass’n, Formal Op. 127 (2015); D.C. Bar Ass’n, Formal Op. 371 (2016); Pennsylvania Bar Ass’n, Formal Op. 2014-300 (2014).

131. New York County Lawyer’s Ass’n, Formal Op. 743 (2011).

ethical under its version of Model Rule 3.5 for attorneys to conduct investigations of jurors' online presence, so long as the attorney does not communicate with them in any way.¹³² The Committee stated, "[i]f a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."¹³³ The Committee took a different approach to the automated notification feature of social media websites than the ABA, which concluded that an automated notification to the juror of an attorney's review of the social media profile did not constitute an impermissible communication under Rule 3.5.¹³⁴ Furthermore, the attorney must "promptly notify the court" of any juror misconduct that is discovered during the investigation.¹³⁵

iii. New York City Bar Association Formal Opinion 2012-2

In 2012, the New York City Bar Association released an opinion discussing the ethical implications of attorneys conducting internet research of potential jurors and concluded that such research is permissible.¹³⁶ The Committee determined that if an attorney engages in online investigations that she knew would result in a juror receiving a message or notification, the communication certainly violates Rule 3.5.¹³⁷ However, the Committee decided that if an attorney is unaware that her investigations will result in a message or notification to the juror, the conduct could possibly, but not automatically, violate Rule 3.5.¹³⁸ The Committee analyzed the definition of "communication" to arrive at the conclusion that an inadvertent message or notification might be a violation.¹³⁹ Rule 3.5 does not include a mens rea requirement; therefore, the literal interpretation of the language of the Rule would lead to the conclusion that any communication with a juror, intentional or not, is a violation.¹⁴⁰ The Committee defined communication as the "transmission of, 'exchange of' or 'process of bringing' information or ideas from one person to another."¹⁴¹ According to this definition, an unintentional notification or message that is sent to a juror may still constitute a communication because the attorney "imparted to the person being researched the knowledge that he or she is being investigated."¹⁴² Moreover, the Committee advised

132. *Id.*

133. *Id.*

134. *See id.*

135. *Id.*

136. New York City Bar Ass'n, Formal Op. 2012-2 (2012).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. New York City Bar Ass'n, Formal Op. 2012-2 (2012).

142. *Id.*

attorneys to only view information that potential jurors intended to make public because reading public postings on social media is similar to reading newspaper articles that were authored by potential jurors.¹⁴³ According to the Committee, any misconduct that an attorney discovers must be disclosed to the court, regardless of the nature of the information.¹⁴⁴

III. RECOMMENDATION

As technology in the United States advances, internet and social media searches of potential jurors are becoming common practice, but they are inconsistently regulated. The inconsistent, or complete lack of, rules and procedures governing the research of potential jurors leave the issues largely open to the interpretation of attorneys who have ethical duties to act only in their clients' best interests. A practice so widely utilized is most often regulated by the zealous lawyers who are themselves engaging in the research, which may lead to the clouding of their ethical judgments. While the practice of conducting internet and social media searches should remain permissible, it is critical to the integrity of the judicial system that the conduct be standardized and carried out in a manner that does not interfere with the jurors' impartial decision-making. While individual judges enjoy the right to structure voir dire as they see fit,¹⁴⁵ this Comment will suggest a model rule for courts to consider when determining the permissibility and procedures for attorneys conducting online research.

The benefits of conducting internet and social media searches of potential jurors are undeniable. Critical information that would not otherwise be uncovered during voir dire may be discovered during online research and help attorneys better exercise peremptory challenges.¹⁴⁶ Possessing additional information about a juror's online presence allows an attorney to engage in jury selection with more confidence, which eliminates the need to make such important decisions with merely a "gut feeling."¹⁴⁷ The additional information helps attorneys avoid engaging in *Batson* violations because they have the knowledge necessary to exercise peremptory challenges constitutionally.¹⁴⁸ Moreover, jurors may be more inclined to be truthful during voir dire questioning if they know that attorneys may research their online presence and verify certain responses.¹⁴⁹

143. *Id.*

144. *Id.* For example, an attorney may not withhold juror misconduct because the information benefits his client. *Id.*

145. *See Skilling v. United States*, 561 U.S. 358, 386 (2010).

146. CRAWFORD, *supra* note 9.

147. Mark O'Mara & Shawn Vincent, *Social Media Jury Investigations Weed Out Stealth Jurors*, NAT'L TRIAL LAWS. (June 26, 2014), <https://www.thenationaltrial-lawyers.org/2014/06/social-media-investigation/> [<https://perma.cc/L6WJ-ALK5>].

148. Hoffmeister, *supra* note 29.

149. *Id.* at 35.

On the other hand, internet and social media searches of potential jurors also raise significant privacy concerns. Some authorities have acknowledged that the critical role that jurors play in the democratic process may be chilled if the jurors feel as if they are under investigation.¹⁵⁰ Additionally, being confronted with potentially intimate information during voir dire may make a juror feel violated and defensive, which may result in a bias against the questioning attorney.¹⁵¹

A. PERMISSIBILITY OF SEARCHES

While both pros and cons stem from conducting online research of potential jurors, the benefits substantially outweigh the disadvantages. It is proper for courts to permit internet and social media searches, but there is an obvious need for regulation. The lack of case law on the subject demonstrates that in most jurisdictions across the United States, online research of potential jurors is a task that attorneys undertake with little to no supervision.

As a general rule, attorneys should be permitted to conduct online research of potential jurors. As the *Oracle* court acknowledged, it would be counterintuitive to force attorneys to shield themselves from jurors' online presence and know less information about the jurors than the press or gallery members.¹⁵² In fact, attorneys may find themselves in situations where conducting online research is a task that the duty of competence under Model Rule 1.1 requires.¹⁵³ In 2012, the ABA added a comment to the rule of competence that stated, "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."¹⁵⁴ Therefore, it is clear that a total ban on online research of potential jurors may interfere with an attorney's duty to provide competent representation to her client. In some circumstances, an attorney may observe suspicious juror behavior and determine that her client's case would best benefit from further internet research. Due to the prevalence of technology in society, it is important that an attorney at least have the option to conduct internet research to avoid engaging in ethical misconduct by not even considering it.¹⁵⁵

150. See *United States v. Kilpatrick*, No. 10-20403, 2012 WL 3237147, at *3 (E.D. Mich. Aug. 7, 2012); New York City Bar Ass'n, Formal Op. 2012-2 (2012).

151. Jonathan Redgrave & Jason Stover, *The Info. Age, Part II: Juror Investigation on the Internet – Implications for the Trial Lawyer*, 2 SEDONA CONF. J. 211, 214 (2001).

152. *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1103 (N.D. Cal. 2016).

153. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983). "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Id.*

154. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2012).

155. D.C. Bar Ass'n, Formal Op. 371 (2016).

Nonetheless, internet and social media searches of potential jurors should not be required due to the unpredictable nature of the online platforms. Accordingly, it would be improper for a court to impose on the parties a waiver of the right to obtain relief for juror misconduct, as seen in *Johnson* and *Burden CSX Transportation, Inc.*, in the absence of a pretrial internet investigation of the potential jurors.¹⁵⁶ The internet and social media were not designed to be reliable, stable databases for litigation purposes, much like Case.net in Missouri.¹⁵⁷ In *King v. Sorenson*, the Missouri Court of Appeals was forced to decide a case in which the waiver provision was implicated, which consequently removed the litigant's right to an impartial jury, because the court gave the attorneys the wrong name for a potential juror.¹⁵⁸ As a result, the attorney's mandatory search of Case.net failed to reveal information relating to the juror's nondisclosure of his litigation history.¹⁵⁹ As evidenced by *King*, even a database that was specifically designed to record the court-related matter of litigation history was not functional or reliable enough to carry the burden of storing information that could alter a litigant's right to an impartial jury. Thus, a database as unpredictable and ever-changing as social media surely cannot withstand the burden of holding the key to an individual's constitutional rights.

Furthermore, people often go by completely unrecognizable aliases on social media to prevent employers and other passersby from locating their profiles.¹⁶⁰ If internet and social media investigations were required to preserve the right to relief based upon juror misconduct, the complex and unsteady nature of social media would likely increase litigation by presenting courts with novel reasons as to why a particular piece of public information about a juror could not have been revealed through a simple internet search of the name given to the attorneys by the court. A litigant's constitutional right to an impartial jury is far too precious to entrust to social media platforms, and a waiver of the opportunity to obtain relief based upon juror misconduct that results from the attorney's failure to look on such platforms is too harsh a result. Therefore, attorneys should enjoy the option of researching potential jurors on social media, but litigants should not lose their right to an impartial jury if attorneys fail to do so. As will be discussed later, courts should impose on litigants a waiver of the right to obtain relief based upon

156. *Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010); *Burden v. CSX Transp., Inc.*, No. 08-cv-04-DRH, 2011 WL 3793664, at *9 (S.D. Ill. Aug. 24, 2011).

157. Brief for Petitioner, *King v. Sorenson*, 532 S.W.3d 209 (Mo. Ct. App. 2017) (No. 80196), 2017 WL 1374153, at *52.

158. *King v. Sorenson*, 532 S.W.3d 209, 212 (Mo. Ct. App. 2017).

159. *Id.*

160. See *Facebook Changes Real-Name Policy, Allows Aliases*, REUTERS LEGAL (OCT. 2, 2014, 07:20 AM), <https://www.reuters.com/article/us-usa-drag-california/facebook-changes-real-name-policy-allows-aliases-idUSKCN0HR19220141002> [<https://perma.cc/K82B-CB9U>].

juror misconduct only if the attorneys learned of juror nondisclosure through their research but failed to disclose it to the court before the jury rendered a verdict.

B. PROCEDURES THAT ATTORNEYS SHOULD FOLLOW WHEN CONDUCTING RESEARCH

In the past, the United States Supreme Court honored and prioritized juror privacy in a way that seems abandoned in the digital age.¹⁶¹ Nowadays, attorneys can learn the most intimate information about jurors with just a click of a button, and the impatient “need” for personal information has led the system down a path that overlooks jurors’ rights when evaluating a litigant’s right to an impartial jury.¹⁶² Because of the critical role that juries play in the outcome of court proceedings, it is of the utmost importance that the pendulum swing back and start offering jurors more protections. When constructing guidelines for attorneys to follow when conducting internet and social media research of potential jurors, there are two important considerations: juror privacy and Model Rule of Professional Conduct 3.5(b). While numerous bar associations have addressed how an attorney can remain in compliance with Rule 3.5(b) while conducting internet and social media research,¹⁶³ Judge William Alsup, in *Oracle America, Inc. v. Google Inc.*, was the first to consider the issue of juror privacy in this context.¹⁶⁴ Thus, it is appropriate to turn to both authorities for guidance as to how attorneys can properly conduct internet and social media research of potential jurors.

To begin with, if attorneys intend to conduct searches of potential jurors, the attorneys must reveal that intention to the jurors at the outset of the proceedings.¹⁶⁵ The attorneys must tell the jurors what platforms may be searched and cannot research any source beyond that of which the jurors have been warned.¹⁶⁶ After the attorneys have fully disclosed their intent and the scope of their research, the jurors should be given sufficient time with their electronics to alter the privacy settings on their social media accounts if they wish to do so.¹⁶⁷ By including jurors in the decision to research their online presence and allowing them more control over their personal information, courts put the jurors back in control and make them feel less like they are the ones on trial. The court’s noticeable interest in the protection of juror privacy

161. See *Sinclair v. United States*, 279 U.S. 749 (1929).

162. See *Brandborg v. Lucas*, 891 F. Supp. 352, 357 (E.D. Tex. 1995).

163. ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014); Colorado Bar Ass’n, Formal Op. 127 (2015); D.C. Bar Ass’n, Formal Op. 371 (2016); New York City Bar Ass’n, Formal Op. 2012-2 (2012); New York County Lawyer’s Ass’n, Formal Op. 743 (2011); Pennsylvania Bar Ass’n, Formal Op. 2014-300 (2014).

164. See *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1106 (N.D. Cal. 2016).

165. *Id.* at 1103.

166. *Id.* at 1104.

167. *Id.* at 1103.

may provide the jurors with a sense of security and safety that encourages and increases candor during voir dire.¹⁶⁸ Because of the benefits to both the court proceedings and to the morale of each individual juror, courts everywhere should share the “reverential respect” for juries that Judge Alsup expresses and demonstrates.¹⁶⁹

In order to remain compliant with Model Rule of Professional Conduct 3.5(b), which prohibits attorneys from engaging in ex parte communications with jurors, bar associations all agree that an attorney cannot send a juror a “friend request” in order to view information that he intends to keep private on his profile.¹⁷⁰ However, a dispute arises when a social media platform automatically sends an account holder a notification when another user views his profile, a practice which has been referred to as an “active search.” The American Bar Association determined that an automated notification from a website is not a communication because it is not sent by the attorney herself,¹⁷¹ but the New York City Bar Association concluded that the notification is a search because the account holder still receives a communication and the knowledge that the attorney viewed his profile.¹⁷² The explicit language of Model Rule 3.5(b) does not require a certain mental state that attorneys must possess in order to engage in prohibited communications with jurors.¹⁷³ The Rule’s language seems to prohibit all communications, and not only those that the attorney intentionally creates.¹⁷⁴ Communication is defined as “the process of bringing an idea to another’s perception.”¹⁷⁵ Even if an attorney does not intend to send a message to a juror by viewing the juror’s profile, the attorney is still causing an idea – that the juror is being researched – to be brought to the juror’s attention.¹⁷⁶ The sender of the notification is irrelevant when the attorney is the one triggering the creation of the message in the first place.¹⁷⁷ Regardless, the juror is made aware that his online presence is being monitored.

Additionally, the United States Supreme Court addressed a comparable issue in *Sinclair v. United States*. In *Sinclair*, the defendants asserted the right to have detectives conduct surveillance on jurors by shadowing them outside

168. See *United States v. Bruno*, 700 F. Supp. 2d 175, 182 (N.D.N.Y. 2010).

169. *Oracle America, Inc.*, 172 F. Supp. 3d at 1101.

170. ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014); Colorado Bar Ass’n, Formal Op. 127 (2015); D.C. Bar Ass’n, Formal Op. 371 (2016); New York City Bar Ass’n, Formal Op. 2012-2 (2012); New York County Lawyer’s Ass’n, Formal Op. 743 (2011); Pennsylvania Bar Ass’n, Formal Op. 2014-300 (2014).

171. ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014).

172. New York City Bar Ass’n, Formal Op. 2012-2 (2012).

173. MODEL RULES OF PRO. CONDUCT r. 3.5(b) (AM. BAR ASS’N 1983).

174. MODEL RULES OF PRO. CONDUCT r. 3.5(b) (AM. BAR ASS’N 1983); New York City Bar Ass’n, Formal Op. 2012-2 (2012).

175. *Communication*, BLACK’S LAW DICTIONARY (11th ed. 2019).

176. New York City Bar Ass’n, Formal Op. 2012-2 (2012).

177. *Id.*

of the courthouse and reporting on their daily activities.¹⁷⁸ The Court held that the surveillance was impermissible because it was “enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration . . . they will either shun the burdens of the service or perform it with disquiet and disgust.”¹⁷⁹ An “active search” of a juror’s social media that results in the notification that the search has taken place is analogous to the real-time surveillance over which the Court previously expressed concern.¹⁸⁰ In *Sinclair*, the jurors could potentially see in real-time when they were being followed and watched because of the detective’s physical presence in the area, which the Court was afraid would cause intimidation that would interfere with the jurors’ decision-making.¹⁸¹ Similarly, when a juror receives a notification at the exact moment the attorney views his profile, he is aware in real-time that he is being watched and may feel the same intimidation that interferes with “the exercise of calm judgment upon patient consideration.”¹⁸² A juror’s hyperawareness of not only the fact that he is being watched, but the exact moment that it is occurring, can significantly harm the juror’s willingness to perform his duties while serving on the jury. Therefore, attorneys should avoid conducting any research that cannot be done without alerting the juror.

Furthermore, at the time the various bar associations debated the issue of automated notifications, they only considered the notifications that resulted from viewing an individual’s LinkedIn account.¹⁸³ However, the rapid advances in technology have expanded this issue in more ways than previously imaginable. Today, individuals can participate in “live” social media, which includes live streaming videos and posting “stories” for twenty-four hours at a time.¹⁸⁴ When social media users post “live” materials, the users can view who has clicked on and watched the post.¹⁸⁵ In order to see an individual’s social media “stories” on both Facebook and Instagram, all the person who wishes to watch must do is tap the user’s profile picture at the top

178. *Sinclair v. United States*, 279 U.S. 749, 754 (1929).

179. *Id.* at 765.

180. *See id.*

181. *Id.*

182. *Id.*

183. *Who’s Viewed Your Profile – Privacy Settings*, LINKEDIN, <https://www.linkedin.com/help/linkedin/answer/47992/who-s-viewed-your-profile-privacy-settings?lang=en> [<https://perma.cc/HJS6-R9XG>].

184. Amber van Moessner, *Getting Starting with Social Media Streaming: What You Need to Know*, VIMEO, <https://livestream.com/blog/social-media-streaming-livestream> [<https://perma.cc/TV7L-3XQZ>]; *Stories*, INSTAGRAM, <https://help.instagram.com/1660923094227526> [<https://perma.cc/FL74-DY5T>]; *Create and Share Your Story*, FACEBOOK, <https://www.facebook.com/help/126560554619115> [<https://perma.cc/6S2V-4XCF>].

185. *Stories*, *supra* note 185; *Create and Share Your Story*, *supra* note 185.

of the screen.¹⁸⁶ The social media platforms keep track of who clicks on the profile picture and reports the names back to the user, similar to the LinkedIn automated notifications. As a result of the complexity of “live” social media, attorneys who decide to engage in social media research of jurors have a heightened duty of competence. Model Rule of Professional Conduct 1.1 requires that a lawyer “provide competent representation to a client,” which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁸⁷ A comment to the Rule states that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”¹⁸⁸ In order to comply with this ethical rule, attorneys who conduct social media research need to maintain intimate familiarity with the platforms and their notification settings in order to avoid engaging in improper communications by causing jurors to receive notifications that the attorneys are monitoring their online presence.

Once attorneys begin their research, they must document every search they make and copy all information they view.¹⁸⁹ By keeping exact records of the research, attorneys will already possess the materials needed in the case of a subsequent motion for relief based upon juror misconduct or non-disclosure.¹⁹⁰ The court and the attorneys may both review the records to ensure that neither party withheld troublesome information prior to the verdict in order to obtain a benefit for their clients.

While the waiver of a litigant’s right to an impartial jury would be an improper consequence for an attorney who bypassed internet or social media research of a potential juror, a waiver of that right based on juror misconduct or nondisclosure is proper if an attorney’s research revealed suspicious information and the information was withheld from the court and opposing party. If, in the course of research, potential misconduct is discovered, the attorney must immediately reveal the information to the court and opposing party, even if the information is beneficial to her case.¹⁹¹ Imposing an absolute duty to reveal any potential misconduct eliminates the interpretive issue that the American Bar Association (ABA) encountered with Model Rule of Professional Conduct 3.3.¹⁹² Rule 3.3 requires that a lawyer “who knows that a per-

186. *How Do I See Someone's Instagram Story?*, INSTAGRAM, https://www.facebook.com/help/instagram/899271546851408?helpref=uf_permalink [<https://perma.cc/R2VF-9ZEU>]; *How Can I Tell Who's Seen My Story on Facebook?*, FACEBOOK, <https://www.facebook.com/help/1322453704471759> [<https://perma.cc/LN9P-JLC4>].

187. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

188. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2012).

189. *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1104 (N.D. Cal. 2016).

190. *Id.*

191. New York City Bar Ass'n, Formal Op. 2012-2 (2012).

192. ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014).

son . . . has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”¹⁹³ The ABA contemplated what an attorney should do if her affirmative duty to report is not triggered by the information she discovers because it falls short of criminal or fraudulent behavior but is nonetheless problematic because it violates court procedures or instructions.¹⁹⁴ This scenario invites the temptation for attorneys to withhold information as a matter of strategy if the information benefits their client or their case. An Illinois court in *Burden v. CSX Transportation, Inc.* addressed the issue of attorneys “gamb[ing] with the possibility of a verdict and thereafter, when the verdict proves unfavorable, raise a question he might have raised before verdict.”¹⁹⁵ The court in *Burden* treated the withholding of information until after an unfavorable verdict as a waiver of the right to later challenge the jury if the information was known by the party or the attorney before the verdict.¹⁹⁶

The United States Supreme Court took a similar position in *McDonough Power Equipment, Inc. v. Greenwood*.¹⁹⁷ In *McDonough Power Equipment*, the Court struggled with the question of whether the attorneys knew during voir dire that the juror was withholding information.¹⁹⁸ The Court held that if the attorneys knew during voir dire that a juror was withholding information, the party who possessed the information and failed to reveal it or inquire further “would be barred from later challenging the composition of the jury.”¹⁹⁹ Requiring immediate disclosure of the information that attorneys discover during internet and social media research of potential jurors, and waiver of the right to challenge the jury in the absence of disclosure, is consistent with the Supreme Court’s attempt to prevent attorneys from suppressing information that suggests juror misconduct in order to obtain an advantage in their cases. It would be improper and inefficient to allow attorneys to frustrate and surprise courts by pulling out “gotcha cards” in the event of an unfavorable verdict.²⁰⁰ Therefore, it is appropriate for courts to impose a waiver of the right to an impartial jury on parties who possess information suggesting juror misconduct or nondisclosure, but fail to disclose that information to the court and opposing party before the jury renders a verdict.

193. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS’N 1983).

194. ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014).

195. *Burden v. CSX Transp., Inc.*, No. 08-CV-04-DRH, 2011 WL 3793664, at *8 (S.D. Ill. Aug. 24, 2011).

196. *Id.*

197. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984).

198. *Id.* at 559 n.2.

199. *Id.*

200. Fortuno, *supra* note 7, at 79.

C. WHAT CAN ATTORNEYS DO WITH THE INFORMATION?

While attorneys should be permitted to conduct internet and social media research of potential jurors while following the above procedures, courts should place restrictions on how attorneys may use that information during voir dire and trial. According to a 2016 survey of 100 jury-eligible adults, potential jurors usually expect that attorneys will conduct some sort of background investigation on them and are not overly concerned by that fact.²⁰¹ The primary concern that potential jurors have with attorneys conducting online research is, instead, what the attorneys choose to do with that information inside the courtroom.²⁰² The survey found that only 20% of participants thought that it was appropriate for attorneys to ask specific follow-up questions in front of the other members of the jury, while 62% felt that specific follow-up questions were appropriate if asked outside the presence of the other members of the jury.²⁰³ If attorneys expose personal information about potential jurors to everyone sitting in the courtroom, they run the risk of biasing the targeted juror against their client's case. If a juror feels wronged from the very beginning and is chosen to sit on the jury, that juror may carry his bias against the attorney into deliberations and taint the entire jury. Jurors should remain focused on the facts and law of each case, and public disclosure of their most intimate opinions and experiences may shift their focus into a personal vendetta against an attorney. Therefore, an attorney should only inquire into specific details found on a juror's social media in private to avoid damaging her client's case.

In addition to avoiding specific follow-up questions about a juror's online presence during voir dire, attorneys should also avoid exploiting the information they learn online to make improper personal or emotional appeals to an individual juror during arguments and witness questioning throughout trial. As Judge Alsup stated in *Oracle*, a "calculated personal appeal" by an attorney "in an effort to ingratiate himself or herself into the heartstrings of that juror" is "out of bounds."²⁰⁴ A jury's role is to decide a case based solely on the evidence before it, and an argument or line of questioning that is designed to invite a juror to render a verdict based on an emotional appeal is improper.²⁰⁵ In fact, the Federal Rules of Evidence even permit a court to "exclude relevant evidence if its probative value is substantially outweighed"²⁰⁶ by the danger of unfair prejudice, which has been com-

201. PATTERSON, *supra* note 15, at 14.

202. *Id.* at 1.

203. *Id.* at 10.

204. *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1103 (N.D. Cal. 2016).

205. Rosemary Nidiry, *Restraining Adversarial Excess In Closing Argument*, 96 COLUM. L. REV. 1299, 1318 (1996).

206. FED. R. EVID. 403.

monly interpreted to mean “inducing a decision on a purely emotional basis.”²⁰⁷ Courts and rulemakers alike have taken affirmative steps to prevent attorneys from presenting information that would cause the jury to violate its duty to consider only the facts and the law of the case, and instead consider emotional and personal opinions. Exploiting specific personal information about jurors during trial proceedings for the benefit of one’s case is nothing more than another version of introducing evidence that induces a decision based upon impermissible considerations. An example that Judge Alsup offered in *Oracle* was if an attorney in a copyright proceeding learned from social media that a juror’s favorite book was *How to Kill a Mockingbird*, the attorney could form connections between the copyright case at bar and the recent death of the author of the book, Harper Lee, to invite the juror to feel emotionally invested in the outcome of the case.²⁰⁸ The emotional connection that the juror would feel may interfere with his ability to see the case he is sitting for through an objective lens, and instead consider how he would feel if there were a copyright infringement against his favorite late author. Therefore, attorneys should only be able to use the information they gather during internet and social media research to excuse jurors, and not to construct arguments that individual jurors will appreciate based upon their personal preferences.

IV. CONCLUSION

Modern technology has proven to be incredibly helpful for attorneys in litigation preparation, but courts have demonstrated difficulty in keeping up with its rapid advances. Attorneys have unprecedented access to the personal lives, opinions, and experiences of potential jurors with just one click on social media, which is easily conducted outside the presence and supervision of the court. Courts and ethics opinions that have made attempts to address the issue have left important gaps in analyses and rules. This Comment offers a model rule for courts to consider and attorneys to follow, while taking the limited existing authority into consideration. This Comment suggests that internet and social media research should be permitted by courts but should not be required or result in a waiver of the right to obtain relief based upon juror misconduct if the attorney fails to conduct research. Attorneys should be required to follow specific guidelines before, during, and after the research in an effort to honor juror privacy and ethical rules. Once attorneys gather information from the internet and social media, they should only be allowed to use that information to excuse jurors and avoid using it to make personal appeals to individual jurors.

207. FED. R. EVID. 403 advisory committee’s note to 1972 proposed rules.

208. *Oracle Am., Inc.*, 172 F. Supp. 3d at 1103.