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Social Media, Jurors and Jury Instructions

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The recent New York State Court of Appeals decision in *People v. Neulander*, 2019 NY Slip Op 07521 (Oct. 22, 2019), underscores the significance of a juror's improper use of social media, which can rock the foundation of a party's right to a fair trial. The decision should give counsel pause as to whether he or she should be retaining a jury consultant or license software that could monitor jurors' public social media posts during venire selection, trial, deliberations and thereafter. Such monitoring, as discussed below, however, must be consistent with counsel's ethical obligations not to communicate with a juror by inadvertently causing an electronic communication to be sent to the juror that would alert him or her to the name of counsel who had viewed their social media.

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What if your social media monitoring reveals that a juror publicly tweeted, for example, that he or she is on jury duty and the name of the case. Is that sufficiently violative of a jury instruction not to use social media to discuss the case to have to be reportable to the court or does the putatively improper social media communication have to be more substantial? Also when does the disclosure of alleged juror misconduct have to be made? What if the client objects to disclosure of certain juror misconduct, and can counsel hold back reporting juror misconduct and only disclose it after a verdict is rendered that is prejudicial to the client?

Finally, what, if anything, should a judge advise a jury

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concerning trial counsel potentially monitoring jurors' social media? (On Oct. 23, 2019, the Second Circuit Judicial Council and the New York State-Federal Judicial Council jointly presented a CLE entitled "*Admissibility of Electronic Evidence and Social Media Profiling of Jurors*" where the author presented on the issues addressed in this article.) Whether a court should advise jurors, as part of a court's admonitions, that their public social media communications may be viewed by trial counsel is controversial, and ethics opinions from the New York City Bar Association and the American Bar Association are not consistent on this issue. In deciding whether to give such a jury instruction, on the one hand, courts seek to make the jury selection process transparent and want to take advantage of the in terrorem effect such a charge might have on presumably causing jurors not to use social media during trial. On the other hand, courts are concerned with jurors' perceived right to privacy of their social media, that such a charge would facilitate improper personal appeals to jurors through jury arguments and witness examinations patterned after preferences of jurors found via their social media posts, and causing "rogue" jurors not to reveal wrongful misconduct publicly, but instead to privately post communications behind security settings that would likely not be uncovered by counsel.

Undisclosed Juror Use of Social Media During Trial. In *Neulander*, the court affirmed setting aside a jury verdict where one of witnesses, throughout the trial

> Sent and received hundreds of text messages about the case. Certain text messages sent and received by Juror 12 were troublesome and inconsistent with the trial court's repeated instructions not to discuss the case with any person and to report any attempts by anyone to discuss the case with a juror. Juror 12 also accessed local media websites that were covering the trial extensively. In order to hide her misconduct, Juror 12 lied under oath to the court, deceived the People and the court by providing a false affidavit and tendering doctored text message exchanges in support of that affidavit, selectively deleted other text messages she deemed "problematic," and deleted her now-irretrievable internet browsing history.

What, if anything, should a judge advise a jury concerning trial counsel potentially monitoring jurors' social media?

The court stated that the "record plainly supports the findings of both lower courts that Juror 12's conduct disregarded the court's plentiful instructions as to outside communications and when such conduct was brought to light, the juror was deliberately and repetitively untruthful." The court noted that "'[j]urors, of course, do not live in capsules' and cannot be isolated during their service from the outside world, including their friends and families. However, they must be expected, at the very minimum, to obey the admonishments of the trial court, report attempts by others trying to influence their oath to be objective, and to be forthcoming during court inquiries into their conduct as a juror."

What Constitutes Improper Communication by an Attorney With A Juror? New York City Bar Association Formal Opinion 2012-2 (City Bar Opinion) provides: "Attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no *communication* with the juror occurs" (emphasis added).

The City Bar Opinion notes that NYRPC Rule 3.5(a)(4) "does not impose a requirement that a communication [with a juror] be willful or made with knowledge to be prohibited."

> For example, if an attorney views a juror's social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—*the attorney has arguably*

"communicated" with the juror. The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. (emphasis added)

"[R]esearch using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a 'communication' would be generated by the website." The City Bar Opinion states that "an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated."

American Bar Association Formal Opinion 466 (ABA 466), however, provides that:

> a lawyer who uses a shared [electronic social media] platform to passively view juror [electronic social media] under these circumstances does *not* communicate with the juror. The lawyer is *not* communicating with the juror; the [electronic social media] service is communicating with the juror based on a technical feature of the [electronic social media]. This is akin 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. (emphasis added)

Should the Court Advise Jurors That Lawyers May View Their Public Social Media? Different views exist as to whether a court should advise jurors that their public social media may be viewed by trial counsel. The City Bar Opinion states:

> Social media profiling of potential jurors needs to be considered by trial counsel, but it must respect the rights of jurors.

It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives. The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.

ABA 466, however, provides: "Judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their [electronic social media and websites."

ABA 466 further notes: "Discussion by the trial judge of the likely practice of trial lawyers reviewing juror [electronic social media] during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."

The Commercial and Federal Litigation Section of the New York State Bar Association issued a report on Dec. 8, 2015 titled *Social Media Jury Instruction Report*, which addressed the issue of judges advising jurors that their public social media posts may be view by trial counsel.

What Jury Misconduct Needs To Be Disclosed by Counsel to the Court, and When? New York and the American Bar Association differ as to what types and the degree of juror misconduct must be reported to the court. NYPRC Rule 3.5(d) provides: "A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge."

The City Bar Opinion provides that "if an attorney learns of juror misconduct through such research, she *must* promptly notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider

whether the juror's improper conduct benefits the attorney."

NYCLA Committee on Professional Ethics Formal Opinion No. 743 (NYCLA 743) states that:

> [a]ny lawyer who learns of *juror misconduct*, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court. (emphasis added)

NYCLA 743 notes that the above applies "even should the client notify the lawyer that she does not wish the lawyer to comply with the requirements of RPC 3.5."

ABA 466, on the other hand, provides that:

> [a] lawyer's affirmative duty to act is triggered only when the juror's known conduct is *criminal or fraudulent*, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted *criminally or fraudulently*. The remedial duty flowing from known *criminal or fraudulent* juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a *crime or fraud*. (emphasis added)

Failure to apprise the court of jury misconduct can have disastrous effects on a defendant's right to a fair trial. In *United States v. Parse*, 789 F.3d 83 (2d Cir. 2015), the Second Circuit, in a criminal case, reversed a denial of a motion for a new trial based on a juror who admitted to lying during voir dire. The trial court found that the defendant's attorneys "either knew of the juror's misconduct prior to the verdict or failed to act with reasonable diligence based on the information they had, and that Parse had thus waived his right to an impartial jury." The Second Circuit reversed on the issue of counsel's knowledge of the juror's false and misleading testimony and, in a concurrence, one judge acknowledged the trial court's concern about lawyers "sandbagging" verdicts with previously undisclosed evidence about juror misconduct, but stated that not ordering a new trial would "make a farce of our system of justice."

A Court's Consternation About Monitoring Jurors' Social Media. Social media profiling of potential jurors needs to be considered by trial counsel, but it must respect the rights of jurors, while at the same time providing counsel with the opportunity to pick a panel after fair and appropriate "due diligence" of jurors' backgrounds. In *Oracle v. Google*, 172 F. Supp. 3d 1100, 1101 (N.D. Cal. 2015), the court noted that:

> [i]n this high-profile copyright action, both sides requested that the Court require the venire to complete a two-page jury questionnaire. One side then wanted a full extra day to digest the answers, and the other side wanted two full extra days, all before beginning voir dire. *Wondering about the delay allocated to reviewing two pages, the judge eventually realized that counsel wanted the names and residences from the questionnaire so that, during the delay, their teams could scrub Facebook, Twitter, LinkedIn, and other Internet sites to extract personal data on the venire. Upon inquiry, counsel admitted this.* The questionnaire idea cratered, and the discussion moved to whether Internet investigation by counsel about the venire should be allowed at all. (emphasis added)