# PRACTICE TIP SHEET

## Jury Selection in the Digital Age

The process of jury selection is an important one in preparing for trial. Each party has an interest in seating a jury equipped to make an impartial ruling on the case they're about to present.

The process is known as *voir dire*, literally meaning "to see, to speak," and it allows questioning of potential jurors by the judge and counsel in an effort to select the best jury possible for the case.

### Juror Challenges

Counsel are allowed to disqualify or "challenge" prospective jurors based on certain criteria. Generally, counsel are allowed an unlimited number of challenges for cause. A common reason for a challenge for cause is if the prospective juror personally knows someone involved in the trial. In other cases, a prospective juror may respond to a question in such a way that will suggest bias in favor of one party or the other, or will suggest an inability to be objective.

In addition, counsel are allowed a certain number of peremptory challenges of potential jurors, for which no reason need be given. This allows counsel to strike a juror for more subjective reasons, although care should be taken because peremptory strikes can be challenged if it is suspected they are discriminatory.

In the age before laptops, smartphones or tablets, trial teams had fewer tools at their disposal for researching potential jurors. Back then, they had their powers of observation of each juror during *voir dire*, plus information gleaned from any questionnaire allowed by the judge, and that was all.

Now with laptops and tablets in the courtroom equipped with search engines, and the prevalence of social media use by almost everyone who might be called to jury duty, trial teams have additional research mechanisms at their disposal apart from gut feelings.

But are these ethical to use? This has been a hotly debated topic in recent years, as trial teams wish to arm themselves with as much information as possible when seeking to seat a jury equipped to make an impartial ruling on the case they're about to present.

The American Bar Association weighed in on the subject with an ethics opinion in 2014.

### ABA Formal Opinion 466

ABA Formal Opinion 466 discusses under what circumstances a lawyer may ethically research prospective jurors' social media sites. Its conclusion?

Yes, a lawyer may ethically review any information publicly available about a juror online.

However, a lawyer may not send any sort of access request to a juror (such as a Friend request on Facebook), *nor may he or she have someone else - say, a paralegal - do so*. This would constitute an unethical *ex parte* contact with the juror in violation of Model Rule 3.5(b).

Several state bar associations have issued similar ethics opinions that are more specific than the ABA's about the distinction between passively viewing publicly available information on a juror vs. requesting access to nonpublic information, and there are some differences among the state bar opinions.

For example, all agree that a Facebook "friend request" or LinkedIn "connection request" would be improper. However, the New Hampshire Bar Association in its Advisory Opinion #2012-13/05 sees no ethical violation in a lawyer "following" someone on Twitter. In contrast, the New York County Lawyers Association (Formal Opinion No. 743), The New York City Bar (Formal Opinion 2012-2), and the New York State Bar Association (Social Media Ethics Guidelines, Guideline No. 6) all state that a lawyer may not use social media sites to research jurors if it would result in a communication with the juror from the social media source, as would be the case in, for example, following a juror on Twitter, or signing up for an RSS blog feed.

This ABA Ethics Opinion has received mixed reviews. Some attorneys are glad to see reasoned confirmation that a practice lawyers have been engaging in for some time anyway is being sanctioned as ethical by the ABA. However, others are critical of the opinion and feel the ABA is giving lawyers license to improperly invade jurors' privacy.

The bench appears to be divided on the issue too. Some federal judges go so far as to ban attorneys from using social media research of prospective jurors, citing concerns about juror privacy. On the other hand, Missouri Supreme Court Rule 69.025 includes research of a juror's litigation history via Case.net in it definition of the "reasonable investigation" which attorneys are required to pursue of prospective jurors.

Therefore, it is incumbent on us to understand any local ethics opinions, and any rules of court, local rules, or case law on the subject to assure we are using best practices in juror research for our jurisdiction. It's the best way to obtain a just trial for our clients while ensuring the highest ethical standards for ourselves.