

VI. Social Media Use and Other Complex Jury Issues

Social media is here to stay – and has become the communication venue of choice for a wide variety of people. Whether it be through LinkedIn, Facebook, Twitter, Flickr, Pinterest or Instagram, today’s citizen (who might be a potential jury member, lawyer, judge, witness or party in litigation) is generating an incredible amount of evidence in digital form that they may not even realize lacks any protection or privacy under court rules or recent case law. Moreover, this electronically stored information (ESI) is nearly always searchable, discoverable and admissible, creating a rich repository that can be mined by those involved in a case and even by those who seek to unduly influence the process or outcome of a case. Interestingly, the public is just beginning to realize the extent to which their information can be shared and used, typically without their knowledge or consent, and that this information should be considered nearly permanent. Thus, we now see statistics indicating what might be called “social media remorse” from those who have shared too much and are now trying to be more cautious. Consider the following statistics from the *ABA Journal* (October 2013, p. 12)

- “29% of social media users between the ages of 18 and 34 say they have posted photos, comments or other information that could come back to haunt them during a job search.
- 21% of those users say they have taken down a photo, post or comment over fears of the repercussions it could have with an employer.
- 82% of those users pay attention to privacy settings.
- 6% of those users do not pay attention to privacy settings.”

The government is also quite interested in what is posted on social media sites. For example, the Twitter Transparency Report, dated July 31, 2013, reported that “U.S. and foreign governments have made 1,157 requests for information about Twitter users in the first six

months of this year, up from the 1,009 requests made in the preceding six months” - which represents a 14.7% increase. (*ABA Journal*, October 2013, p. 12)

A. Change of Venue Requests: When and How They Are Used (Social Media)

Changes in venue are being sought because of issues with social media, particularly publicity that is generated about these cases and the concern over whether this publicity will prejudice the pool of potential jurors, as well as threats against or intimidation of witnesses. These cases range from local (Evansville) and typical (personal injury) to the most high-profile, sensational cases (Jodi Arias). Depending on the type of case and jurisdiction, the appropriate rules should be consulted before requesting a change of venue.

- Indiana Rules of Court: Rules of Trial Procedure (Including Amendments made through January 1, 2013),
http://www.in.gov/judiciary/rules/trial_proc/index.html#_Toc341261853, accessed 10/8/13.

Rule 76. Change of venue

- (A) In civil actions where the venue may be changed from the county, such change of venue from the county may be had only upon the filing of a verified motion specifically stating the grounds therefor by the party requesting the change. The motion shall be granted only upon a showing that the county where suit is pending is a party or that the party seeking the change will be unlikely to receive a fair trial on account of local prejudice or bias regarding a party or the claim or defense presented by a party. A party shall be entitled to only one change of venue from the county. Denial of a motion for change of venue from the county shall be reviewable only for an abuse of discretion. The Rules of Criminal Procedure shall govern proceedings to enforce a statute defining an infraction.
- (B) In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one [1] change from the judge. After a final decree is entered in a dissolution of marriage case or paternity case, a party may take only one change of judge in connection with petitions to modify that decree, regardless of the number of times new petitions are filed. The Rules of Criminal Procedure shall govern proceedings to enforce a statute defining an infraction.
- (C) In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for change of judge (or change of venue) shall be filed not later than ten [10] days after the issues are first closed on the merits. Except:
 - (1) in those cases where no pleading or answer may be required to be filed by the defending party to close issues (or no responsive pleading is required under a statute), each party

shall have thirty [30] days from the date the case is placed and entered on the chronological case summary of the court as having been filed;

- (2) in those cases of claims in probate and receivership proceedings and remonstrances and similar matters, the parties thereto shall have thirty [30] days from the date the case is placed and entered on the chronological case summary of the court as having been filed;
 - (3) if the trial court or a court on appeal orders a new trial, or if a court on appeal otherwise remands a case such that a further hearing and receipt of evidence are required to reconsider all or some of the issues heard during the earlier trial, the parties thereto shall have ten [10] days from the date the order of the trial court is entered or the order of the court on appeal is certified;
 - (4) in the event a change is granted from the judge or county within the prescribed period, as stated above, a request for a change of judge or county may be made by a party still entitled thereto within ten [10] days after the special judge has qualified or the moving party has knowledge the cause has reached the receiving county or there has been a failure to perfect the change. Provided, however, this subdivision (4) shall operate only to enlarge the time allowed for such request under such circumstances, and it shall not operate to reduce the period prescribed in subdivisions (C), (C)(1), (C)(2), (C)(3);
 - (5) where a party has appeared at or received advance notice of a hearing prior to the expiration of the date within which a party may ask for a change of judge or county, and also where at said hearing a trial date is set which setting is promptly entered on the Chronological Case Summary, a party shall be deemed to have waived a request for change of judge or county unless within three days of the oral setting the party files a written objection to the trial setting and a written motion for change of judge or county;
 - (6) if the moving party first obtains knowledge of the grounds for change of venue from the county or judge after the time above limited, he may file said application, which must be verified personally by the party himself, specifically alleging when the cause was first discovered, how discovered, the facts showing the grounds for a change, and why such cause could not have been discovered before by the exercise of due diligence. Any opposing party shall have the right to file counter-affidavits on such issue within ten [10] days, and the ruling of the court may be reviewed only for abuse of discretion.
- (D) Whenever a change of venue from the county is granted, the parties may, within three (3) days from the granting of the motion or affidavit for the change of venue, agree in open court upon the county to which venue shall be changed, and the court shall transfer such action to such county. In the absence of such agreement, the court shall, within two (2) days thereafter , submit to the parties a written list of all counties adjoining the county from which the venue is changed, and the parties within seven (7) days from the date the clerk mails the list to the parties or within such time, not to exceed fourteen (14) days from that date, as the court shall fix, shall each alternately strike off the names of such counties. The party first filing such motion shall strike first, and the action shall be sent to the county remaining not stricken under such procedure. If a party is brought into the action as provided in Trial Rule 14, and that party thereafter files a motion for change of venue which is granted, that party and the plaintiff shall be the parties entitled to strike. A moving party that fails to strike within said time shall not be entitled to a change of venue, and the court shall resume jurisdiction of the cause. If a nonmoving party fails to strike within the time limit, the clerk shall strike for such party.

- Indiana Rules of Court: Rules of Criminal Procedure (Including Amendments Received Through May 29, 2013), http://www.in.gov/judiciary/rules/criminal/#_Toc341194241, accessed 10/8/13.

Rule 12. Change of venue in criminal cases

(A) Change of Venue from the County. In criminal actions and proceedings to enforce a statute defining an infraction, a motion for change of venue from the county shall be verified or accompanied by

an affidavit signed by the criminal defendant or the prosecuting attorney setting forth facts in support of the constitutional or statutory basis or bases for the change. Any opposing party shall have the right to file counter-affidavits within ten (10) days, and after a hearing on the motion, the ruling of the court may be reviewed only for abuse of discretion.

(B) Change of Judge--Felony and Misdemeanor Cases. In felony and misdemeanor cases, the state or defendant may request a change of judge for bias or prejudice. The party shall timely file an affidavit that the judge has a personal bias or prejudice against the state or defendant. The affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. The request shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice.

(C) Change of Judge--Infractions and Ordinance Violations. In proceedings to enforce a statute defining an infraction and in cases involving the prosecution of ordinance violations, a motion for change of judge shall be verified or accompanied by an affidavit signed by the criminal defendant or prosecuting attorney setting forth facts in support of cause for such change of judge. Any opposing party shall have the right to file counter-affidavits within ten (10) days. The decision of the court in such matters shall be reviewed only for abuse of discretion. In the event a motion for change of judge is granted under this provision, the procedure for reassignment of the case as set forth in Criminal Rule 13 shall apply.

(D) Time Period for Filing Request for Change of Judge or Change of Venue. In any criminal action, no change of judge or change of venue from the county shall be granted except within the time herein provided.

- (1) *Thirty Day Rule.* An application for a change of judge or change of venue from the county shall be filed within thirty (30) days of the initial hearing. Provided, that where a cause is remanded for a new trial by the court on appeal, such application must be filed not later than thirty (30) days after the defendant first appears in person before the trial court following remand.
- (2) *Subsequently Discovered Grounds.* If the applicant first obtains knowledge of the cause for change of venue from the judge or from the county after the time above limited, the applicant may file the application, which shall be verified by the party specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause for a change, and why such cause could not have been discovered before by the exercise of due diligence. Any opposing party shall have the right to file counter-affidavits on such issue within ten (10) days, and after a hearing on the motion, the ruling of the court may be reviewed only for abuse of discretion.

(E) Pleadings and Papers. All pleadings, papers and affidavits filed at any hearing held pursuant to this rule shall become a part of the record without further action upon the part of either party.

(F) Reassignment of Case or Selection of Special Judge. Whenever in a criminal action an application for a change of judge has been timely filed and granted, the case shall be reassigned or a special judge shall be selected in accordance with Ind.Crim.Rule 13.

(G) Procedure for Change of Venue from County.

- (1) Whenever a change of venue from the county is granted, if the parties to such action shall agree in open court, within three (3) days from the granting of the motion or affidavit for the change of venue, upon the county to which the change of venue shall be changed, it shall be the duty of the court to transfer such action to such county. In the absence of such agreement, it shall be the duty of the court within two (2) days thereafter to submit to the parties a written list of all of the counties adjoining the county from which the venue is changed; provided, however, if it appears to the regular judge or the presiding judge before whom an application for a change of venue from the county is pending that the grounds for such change also exist in one or more of the adjoining counties to which the case may be venued, such judge shall have the right to eliminate such county or counties from the list of counties to be submitted for striking and to substitute another county or counties where such grounds, in his opinion, do not exist in order that the defendant shall have a fair and impartial trial.

- (2) The parties within seven (7) days thereafter, or within such time, not to exceed fourteen (14) days, as the court shall fix, shall each alternately strike off the names of such counties. The party first filing such motion shall strike first, and the action shall be sent to the county remaining not stricken under such procedure. If a moving party fails to so strike within said time, such party shall not be entitled to a change of venue, and the court shall resume general jurisdiction of the cause. If a non-moving party fails to strike off the names of such counties within the time limited, then the clerk shall strike off such names for such party.
- (3) Whenever a court has granted an order for a change of venue to another county and the costs thereof have been paid where an obligation exists to pay such costs for such change, either party to the cause may file a certified copy of the order making such change in the court to which such change has been made, and thereupon such court shall have full jurisdiction of said cause, regardless of the fact that the transcript and papers have not yet been filed with such court to which such change is taken. Nothing in this rule shall be construed as divesting the original court of its jurisdiction to hear and determine emergency matters between the time that a motion for change of venue to another county is filed and the time that the court grants an order for the change of venue.
- (4) Notwithstanding any provision of these rules or the Indiana Rules of Trial Procedure to the contrary, whenever a court has granted an order for a change of venue to another county, the judge granting the change of venue may be appointed as special judge for that cause in the receiving county if the judge granting the change, the receiving judge, and all of the parties to the cause agree to such appointment.

➤ 28 USC § 1404 - CHANGE OF VENUE, > Title 28 > Part IV > Chapter 87 > § 1404, <http://www.law.cornell.edu/uscode/text/28/1404>, accessed 10/8/13. (District Courts)

- (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.
- (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.
- (c) A district court may order any civil action to be tried at any place within the division in which it is pending.
- (d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term “district court” includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.

B. Mining Social Media for Information about Parties, Jurors and Witnesses

In his article posted on About.com Law Practice Management, Pfeifer discusses why lawyers should request the Twitter handles from potential jurors as part of the *voir dire* process.

(W. Pfeifer. *Social Media Use by Jurors in the Courtroom*. About.com Law Practice Management, <http://law.about.com/od/trialtechniques/a/Social-Media-Use-By-Jurors-In-The-Courtroom.htm>, accessed 10/8/13) He and several colleagues make a number of observations about why this is helpful and even necessary in today's social media world:

How often do trial lawyers ask the jury venire during voir dire for their Twitter handles? Considering how slow many lawyers have been to adapt to evolving technology, my guess is that there aren't many. However, this is precisely what was recommended by attorney Tomasz Stasiuk in an article called *Twitter in Court: Find Out Who Is Tweeting*. Stasiuk points out that Twitter is "a huge back channel" showing what people are thinking and discussing with their friends. As Stasiuk states, "The more people feel they are trapped somewhere they do not want to be . . . the more likely they are to be tweeting about it to their friends."

Leslie Ellis makes a similar point in *Friend or Foe? Social Media, the Jury and You*. Ellis says that lawyers should attempt to identify the social media accounts of jurors, study their public posts, make sure the person they found online is the same person who is in the courtroom, and incorporate the knowledge gleaned from their social media posts into *voir dire*. Ellis also cautions attorneys to remember not to commit any ethical violations in this process, such as using a fake identity or getting a third party to access the person's restricted pages.

Attorneys representing Conrad Murray did precisely this during jury selection, screening jurors based on their Twitter and Facebook posts. The jury questionnaire asked the jurors to disclose information about their social media posts such as whether they had publicly commented on Conrad Murray and his involvement with Michael Jackson's death, and the lawyers also studied information that was publicly available online about the jurors. (Id.)

Pfeifer makes the following observations about the power of social media when selecting jurors:

Social media offers the opportunity to learn far more about jurors than was possible in the past. While some may find it disturbing to realize how much information can be gleaned about people, it would be far more disturbing to let someone on a jury who is tweeting negative comments about your client to his friends. Try eavesdropping on what your jurors are tweeting, and you may learn something that could change the outcome of your case. (Id.)

In terms of mining social media for information on parties, jurors and witnesses, it is important to be mindful of the ethical rules that may impact what can be obtained and how, including candor to the tribunal, impartiality and decorum of the tribunal, truthfulness in statements to others, dealing with unrepresented persons and respect for rights of third persons. The following selected Indiana Rules of Professional Conduct and Comments may be helpful.

- Indiana Rules of Court: Rules of Professional Conduct (Including Amendments made through January 1, 2013), http://www.in.gov/judiciary/rules/prof_conduct/#_Toc341255473, accessed 10/8/13.

Rule 3.3. Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment.
- (d) engage in conduct intended to disrupt a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Rule 4.3. Dealing with Unrepresented Persons

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 4.4. Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

- For a case on Facebook friendship between a judge and the victim's father, see *Youkers v. State*, 2013 WL 2077196 (Tex. App.—Dallas May 15, 2013).

C. Researching Private vs. Public Social Media Accounts – What’s Ethical?

Many court decisions and commentators have observed that there can be little to no expectation of privacy for information, images, video, audio and other materials posted on social media sites. Although a user may intend that the content be only accessible for a limited audience and may select appropriate settings to try to ensure limited distribution, this does not necessarily mean that the content will not be accessible to others or that it cannot be searched or requested as part of a discovery process. It is important to monitor court cases as well as rules related to professional ethics to determine where to draw the line when using social media to research parties, opposing parties, jurors, judges, witnesses and third parties who might be involved in the litigation. A substantial article by Lackey and Minta covers a number of important issues with lawyers and social media, including the duty of confidentiality, attorney comments about tribunals and the judiciary, judges and attorneys “friending” each other, using social media to address discovery disputes and using social media in court. (M.E. Lackey, Jr. and J.P. Minta. *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*. 28 *Touro L. Rev.* 149 (2012)) A shorter article appearing in *Res Gestae* considers a number of ethical issues that might present themselves when lawyers use social media, such as client confidentiality, conduct concerning opponents, witnesses and investigations, discovery and communications and other conduct between attorneys and judges. (Legal Ethics Involved in Online Social Media and Networking: An Overview. *Res Gestae*, March 2011, pp. 29-33)

Several ethics opinions have attempted to provide clarity on lawyer and attorney use of social media. For example, the Association of the Bar of the City of New York’s Committee on Professional Ethics has promulgated Formal Opinion 2012-2 on jury research and social media. (Formal Opinion 2012-2: Jury Research and Social Media, <http://www.nycbar.org/ethics/ethics->

[opinions-local/2012opinions/1479-formal-opinion-2012-02](#), accessed 10/9/13). The Digest for the opinion states that:

Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court. (Id.)

This opinion relates to Rules 3.5(a)(4), 3.5(a)(5) and 3.5(d), which cover maintaining and preserving the impartiality of tribunals and jurors, as well as 8.4 on misconduct. The American Bar Association recently issued a formal opinion about judges using social media. (ABA Formal Opinion 462, Judge's Use of Electronic Social Networking Media, February 21, 2013). For a case disallowing an insurance company to investigate non-public section of social networking accounts, see *Keller v. National Farmers Union Property & Cas. Co.*, 2013 WL 27731 (D. Mont. Jan. 2, 2013). A recent article in *Indiana Lawyer* also notes the importance of being able to authenticate information located on social media before it will be admissible in court. (D. Stafford. Digital Detectives: Social Media Sleuths Find Evidence, But Admissibility Requires Authentication. *Indiana Lawyer*, May 8-21, 2013, pp. 7-8).

D. Uncovering Juror Misconduct and What to Do About It

According to an article by Pfeifer on About.com Law Practice Management, "[j]uror misconduct online has results in numerous new trials and overturned verdicts." (W. Pfeifer. *Social Media Use by Jurors in the Courtroom*. About.com Law Practice Management, <http://law.about.com/od/trialtechniques/a/Social-Media-Use-By-Jurors-In-The-Courtroom.htm>,

accessed 10/8/13) The article provides some suggestions for what to do if the attorney suspects juror misconduct through social media and provides examples of what the consequences of this misconduct might be:

What if you believe a juror is engaging in misconduct in their social media posts? If you've heard that a juror has been posting comments but you don't have access to what was said because you haven't "friended" the juror or because of their privacy settings, then one approach would be to ask the judge to order the juror to release his or her social media records. This was attempted in a case in California and became an issue that is pending in the appellate courts when the juror refused to comply with the order. In that case, the juror had posted messages on Facebook during the trial, including one about how boring it was going over some of the evidence. However, at a hearing over the issue the juror insisted that he did not comment on the evidence and did not express an opinion about the defendant's guilt. Nonetheless, the judge ordered the juror to turn over his Facebook records. Rather than comply with the judge's order, the juror filed an appeal arguing that federal law protected the material from disclosure unless police have a warrant.

In a more unusual case, a male juror in Florida has been accused of "friending" a female defendant while serving on her jury. Rather than accept the friend request, the juror told her lawyer about it and the man was dismissed. However, the man then went home and posted comments on Facebook making jokes about getting out of jury duty. The judge scheduled a hearing on whether the juror should be held in contempt of court, which could result in a fine or even jail time. A ruling has not been made as of the time of writing this article.

Juror misconduct in social media can have dramatic consequences on the outcome of a trial. In Arkansas, the Arkansas Supreme Court reversed a capital murder conviction and death sentence and ordered a new trial due to a juror repeatedly tweeting comments during trial and even during jury deliberations. Although the trial court made a finding that the defendant did not suffer any prejudice, the Arkansas Supreme Court disagreed and said that the juror's tweet's constituted public discussion of the case. They went on to recommend that the court system should consider limiting juror access to mobile devices during the course of trials because of the risk of this conduct and because mobile devices give jurors access to a wide range of information they should not be considering in their deliberations. (Id.)

Raysman reports that while some activities did not rise to the level of juror misconduct,

United States v. Ganius, 2011 WL 4738684, at *3 (D. Conn. Oct. 5, 2011) (postings such as "Guinness for lunch break. Jury duty ok today;" "Your honor, i[sic] object! This is way too boring.... Somebody get me outta here;" and on the day of the verdict, "Guilty :)") did not constitute bias or misconduct)

“other social media activities could potentially disrupt the integrity of the proceedings or end in a mistrial, and examples abound of instances where jurors have been removed from trials after attempting to friend the defendant on Facebook.” (R. Raysman. *Courts Attempt to Reign in Social Media Use by Jurors*. Holland & Knight, February 4, 2013, <http://www.mondaq.com/unitedstates/x/220250/Social+Media/Courts+Attempt+To+Reign+In+Social+Media+Use+By+Jurors>, accessed 10/8/13)

Sluss v. Commonwealth, 2012 WL 4243650 (Ky. Sept. 25, 2012) (court orders hearing on whether certain jurors in a criminal trial answered voir dire questions truthfully, and whether the jurors' Facebook "friendship" with the victim's mother constituted impermissible juror bias). (Id.)

In response to these concerns, a Judicial Conference Committee updated the set of model jury instructions that federal judges can use to deter jurors from using social media to research or communicate about cases on which they serve. (Revised Jury Instructions Hope to Deter Juror Use of Social Media During Trial. *The Third Branch News*, August 21, 2012, <http://news.uscourts.gov/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial>, accessed 10/8/13.) Among the other suggestions are repeated reminders by the judge, detailed explanations of the consequences of social media use during a trial and a poster to be displayed wherever jurors congregate. (Id.). Interestingly, the article notes that when juror use of social media was detected, it was most often because of a report by another juror. (Id.) The updated jury instructions cover this situation and the need to report violations to the judge. (Id.)

- Indiana Rules of Court: Rules of Trial Procedure (Including Amendments made through January 1, 2013), http://www.in.gov/judiciary/rules/trial_proc/index.html#_Toc341261853, accessed 10/8/13.

Rule 59. Motion to correct error

(A) Motion to correct error--When mandatory. A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address:

- (1) Newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial; or
- (2) A claim that a jury verdict is excessive or inadequate.

All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief.

(B) Filing of motion. The motion to correct error, if any, may be made by the trial court, or by any party.

(C) Time for filing: Service on judge. The motion to correct error, if any, shall be filed not later than thirty (30) days after the entry of a final judgment is noted in the Chronological Case Summary. A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5. The time at which the court is deemed to have ruled on the motion is set forth in T.R. 53.3.

(D) Errors raised by motion to correct error, and content of motion.

Where used, a motion to correct error need only address those errors found in Trial Rule 59(A)(1) and (2).

Any error raised however shall be stated in specific rather than general terms and shall be accompanied by a statement of facts and grounds upon which the error is based. The error claimed is not required to be stated under, or in the language of the bases for the motion allowed by this rule, by statute, or by other law.

(E) Statement in opposition to motion to correct error. Following the filing of a motion to correct error, a party who opposes the motion may file a statement in opposition to the motion to correct error not later than fifteen [15] days after service of the motion. The statement in opposition may assert grounds which show that the final judgment or appealable final order should remain unchanged, or the statement in opposition may present other grounds which show that the party filing the statement in opposition is entitled to other relief.

(F) Motion to correct error granted. Any modification or setting aside of a final judgment or an appealable final order following the filing of a Motion to Correct Error shall be an appealable final judgment or order.

(G) Cross errors. If a motion to correct error is denied, the party who prevailed on that motion may, in the appellate brief and without having filed a statement in opposition to the motion to correct error in the trial court, defend against the motion to correct error on any ground and may first assert grounds for relief therein, including grounds falling within sections (A)(1) and (2) of this rule. In addition, if a Notice of Appeal rather than a motion to correct error is filed by a party, the opposing party may raise any grounds as cross-errors and also may raise any reasons to affirm the judgment directly in the appellate brief, including those grounds for which a motion to correct error is required when directly appealing a judgment under Sections (A)(1) and (2) of this rule.

(H) Motion to correct error based on evidence outside the record.

- (1) When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion.
- (2) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file opposing affidavits.
- (3) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file its own motion to correct errors under this subdivision, and in which to assert relevant

matters which relate to the kind of relief sought by the party first moving to correct error under this subdivision.

(4) No reply affidavits, motions, or other papers from the party first moving to correct errors are contemplated under this subdivision.

(I) Costs in the event a new trial is ordered. The trial court, in granting a new trial, may place costs upon the party who applied for the new trial, or a portion of the costs, or it may place costs abiding the event of the suit, or it may place all costs or a portion of the costs on either or all parties as justice and equity in the case may require after the trial court has taken into consideration the causes which made the new trial necessary.

(J) Relief granted on motion to correct error. The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

(1) Grant a new trial;

(2) Enter final judgment;

(3) Alter, amend, modify or correct judgment;

(4) Amend or correct the findings or judgment as provided in Rule 52(B);

(5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

(6) Grant any other appropriate relief, or make relief subject to condition; or

(7) In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

In its order correcting error the court shall direct final judgment to be entered or shall correct the error without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. If corrective relief is granted, the court shall specify the general reasons therefor. When a new trial is granted because the verdict, findings or judgment do not accord with the evidence, the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted. Such finding shall indicate whether the decision is against the weight of the evidence or whether it is clearly erroneous as contrary to or not supported by the evidence; if the decision is found to be against the weight of the evidence, the findings shall relate the supporting and opposing evidence to each issue upon which a new trial is granted; if the decision is found to be clearly erroneous as contrary to or not supported by the evidence, the findings shall show why judgment was not entered upon the evidence.

(K) Orders regarding services, programs, or placement of children alleged to be delinquents or alleged to be in need of services. No motion to correct error is allowed concerning orders or decrees issued pursuant to Indiana Code sections 31-34-4-7(e), 31-34-19-6.1(e), 31-37-5-8(f), or 31-37-18-9(b). Appeals of such orders and decrees shall proceed as prescribed by Indiana Appellate Rule 14.1.

- Indiana Rules of Court: Rules of Criminal Procedure (Including Amendments Received Through May 29, 2013), http://www.in.gov/judiciary/rules/criminal/#_Toc341194241, accessed 10/8/13.

Rule 16. Motion to Correct Error

(A) When Mandatory. A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days after the date of sentencing which, with reasonable diligence, could not have been discovered and produced at trial.

All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief.

(B) Time for Filing; Service on. A Motion to Correct Error, if any, shall be filed within thirty (30) days after the date of sentencing, or the date of notation in the Chronological Case Summary of an order of dismissal or an order of acquittal, and shall be served upon the judge having jurisdiction of the cause. Trial Rule 59 (Motion to Correct Error) and Trial Rule 53.3 (Motion to Correct Error: Time Limitation for Ruling) will apply to criminal proceedings insofar as applicable and when not in conflict with any specific rule adopted by the Indiana Supreme Court for the conduct of criminal procedure.

E. State Statutory Efforts to Control Jury Social Media Use – Prevention and Penalties

Many jury members are using social media at trial, including in high-profile cases. For example, potential jurors were questioned about social media use as part of the George Zimmerman trial. (See Potential Jurors Questioned Heavily About Social Media Use in Zimmerman Trial, WFTV News, June 11, 2013, <http://www.wftv.com/news/news/local/potential-jurors-questioned-heavily-about-social-m/nYH9m/> accessed 10/8/13).

Associate Professor Jane Johnston from Bond University (Australia) served as the leader of a project that resulted in *Juries and Social Media Report*, released in April 2013. (L. Mezrani. Jurors Need Social Media Education. *Lawyers Weekly*, April 24, 2013, <http://www.lawyersweekly.com.au/wig-chamber/news/jurors-need-social-media-education>, accessed 10/8/13.) According to Professor Johnston, “the legal system is incapable of silencing internet chatter before potential damage to a fair trial has been done. The most realistic approach to preserving the integrity of the court process is social media-specific jury directions, juror education and pre-trial training.” (Id.) As indicated in the article, “[t]he report includes a string

of recommendations on how to drive the message home to jurors that certain social media use during a trial is prohibited. These include ensuring jury directions, both written and oral, use plain language; specifically referring to social media in jury directions, and reminding jurors of the possible consequences of a failure to comply, such as criminal sanctions. A pre-trial jury-training module is also advised by the report.” (Id.) The article goes on to define juror misconduct as including “using social media to communicate with parties to the case, divulging details of an ongoing trial, seeking responses or advice about the case, or ‘friending’ fellow jurors on Facebook during the trial.” (Id.) The problem of juror misconduct is serious and poses a threat to the smooth functioning of the judicial process, with Mezani’s article noting that this type of juror behavior led to 90 verdicts being challenged in the U.S. between 1999 and 2010, which was reported in Reuters Legal. (See B. Grow. As Jurors Go Online, U.S. Trials Go Off Track. *Reuters Legal*, December 8, 2010, <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>, accessed 10/8/13)

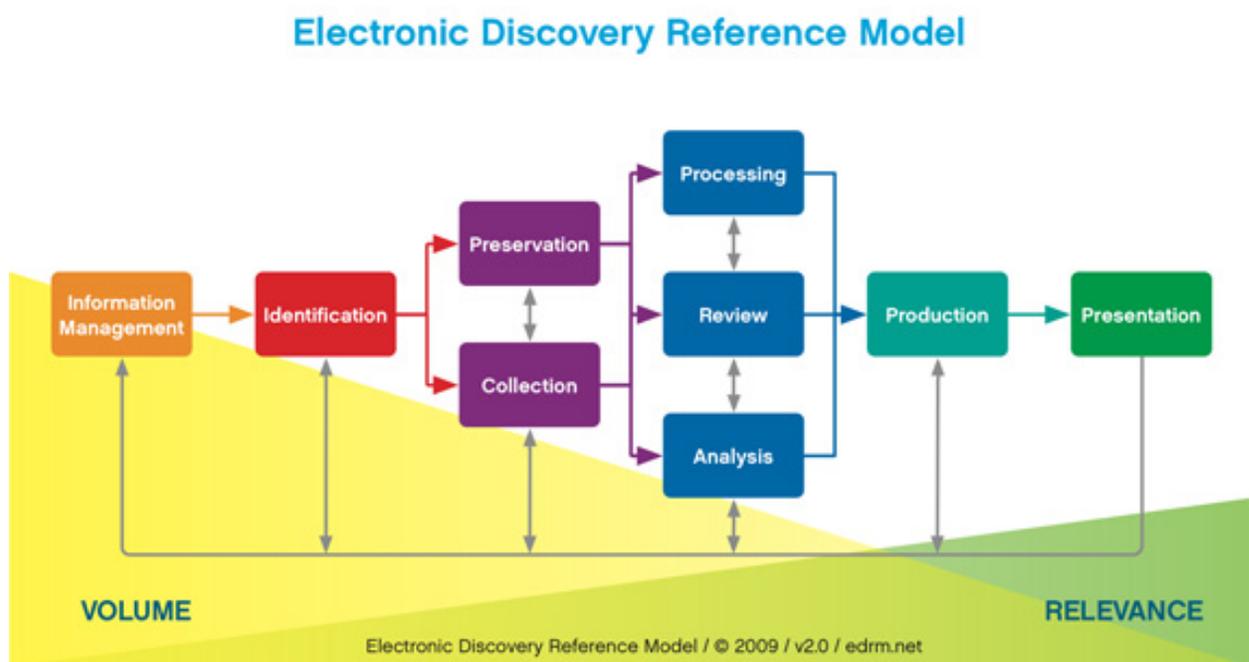
Other substantial reports have been published on juror use of social media which reveal the extent of the problem, the impact of the judicial process and the rights of parties and others and proposed solutions, including the formulation and use of model jury instructions and other measures taken by judges. (See P. Hannaford-Agor, D.B. Rottman and N.L. Waters. *Juror and Jury Use of New Media: A Baseline Exploration*. Perspectives on State Court Leadership Series, n.d.; and M. Dunn. *Jurors’ Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management*. Federal Judicial Center, November 22, 2011 – see especially Appendices C through I for sample jury instructions from participating judges and pages 5-10 on strategies for preventing jurors’ use of social media during trials and deliberations.)

The Proposed Model Jury Instructions related to use of social media from The Judicial Conference Committee on Court Administration and Case Management (June 2012) are included as Appendix A. Many state courts are also struggling how to handle the issue of jury members accessing social media. For example, New Jersey state courts have adopted Charge 1.11C, titled Jurors Not to Visit Accident Scene or Do Investigations, or Conduct Any Independent Research of Any Nature, Including Use of the Internet or Other Media, as part of the instructions to be given after the jury is sworn in but before the opening statements. (See Appendix B).

F. Attorney Use of Social Media at Trial

Fortunately, there are a number of recent cases that illuminate some of the issues with handling social media as part of an electronic discovery process. It is important to note that information from social media has nearly always been deemed discoverable and admissible, even in criminal cases. Many social media users are shocked to learn that they can have little to no expectation of privacy for the material that they post on social media sites, irrespective of the settings they choose. (See A.D. Crews. In Civil Litigation, 'Private' Social Media Data isn't Private. *Computerworld*, January 20, 2012.) In fact, there are cases that suggest that someone who removes information from his or her social media site because of concerns about impending litigation may be liable for spoliation and faced with sanctions. Hence, the lawyer and legal team, the parties and any third-party vendors, contractors or consultants must be fully aware of the duties to collect, preserve, review and produce information from social media sites as electronically stored information (ESI) as outlined under the Federal Rules of Civil Procedures, the Federal Rules of Evidence and other state or specialized court rules.

It is helpful to review the Electronic Discovery Reference Model (EDRM) to trace the handling of information on social media from its creation to its presentation in court. At each stage of the EDRM, there are many opportunities for mistakes and mishaps that may jeopardize a client's case as well as result in sanctions against the client and the lawyer and/or disciplinary action against the lawyer under the Rules of Professional Conduct in the state or states where the lawyer is licensed to practice law.



(Electronic Discovery Reference Model, <http://www.edrm.net/resources/guides/edrm-framework-guides>, accessed 10/9/13)

A number of recent cases (2013) discussing issues related to the proper handling and production of information from social media sites were located from the K&L Gates and Kroll Ontrack case summary databases. Several of these cases will be discussed in detail during the seminar to further illuminate a wide spectrum of issues with collecting, preserving and presenting this type of ESI as part of litigation.

- *Fawcett v. Altieri*, ---N.Y.S.2d---, 2013 WL 150247 (N.Y. Sup. Ct. Jan. 11, 2013).
- *Gatto v. United Air Lines, Inc.*, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).
- *Giacchetto v. Patchogue-Medford Union Free School Dist.*, No. CV-11-6323(ADS)(AKT), 2013 WL 2897054 (E.D.N.Y. May 6, 2013).
- *Keller v. Nat'l Farmers Union Prop. & Cas. Co.*, No. CV 12-72-m-DLC-JCL, 2013 WL 27731 (D. Mont. Jan. 2, 2013).
- *Moore v. Miller*, 2013 WL 2456114 (D. Colo. June 6, 2013).
- *NOLA Spice Designs, LLC v. Haydel Enters., Inc.*, 2013 WL 3974535 (E.D. La. Aug. 2, 2013).
- *People v. Kucharski*, 2013 WL 1281844 (Ill. App. 2nd Dist. Mar. 29, 2013).
- *Potts v. Dollar Tree Stores, Inc.*, 2013 WL 1176504 (M.D. Tenn. March 20, 2013).
- *Salvato v. Miley*, 2013 WL 2712206 (M.D. Fla. June 11, 2013).
- *Tapp v. New York State Urban Dev. Corp.*, No. 9131N, 2013 WL 3622969 (N.Y. App. Div. Jan. 31, 2013).
- *Youkers v. State*, 2013 WL 2077196 (Tex. App.—Dallas May 15, 2013).

It is interesting to review the nature of these cases, which illustrate how social media has permeated every facet of our work and daily lives. For example, these cases include personal injury, wrongful death, trademark infringement, employment issues, harassment, assault and denial of insurance coverage. Among the disputes and mistakes outlined in these cases are relevance, scope of discovery requests, spoliation, admissibility, production, motions to compel, authentication, *ex parte* communication, bias and privacy.

Several articles provide guidance on best practices for collecting, preserving and producing electronically stored information (ESI) from social media sites as part of an electronic discovery process. Among these articles are Cloud Computing and Social Media: Electronic Discovery Considerations And Best Practices (A.S. Prasad, in *The Metropolitan Corporate Counsel*, February 2012, pp. 26-27), E-Discovery in the Age of Social Media (S. Strnad, ABA

Section of Litigation, 2012 Section Annual Conference, April 18-20, 2012, pp. 1-11) and Social Media Data Collection Best Practices (Thought Leadership Team. *The Ediscovery Blog*, <http://www.theedcoveryblog.com/2010/12/30/social-media-data-collection-best-practices/>, December 30, 2010, accessed 10/8/13).