SOCIAL MEDIA & LEGAL ETHICS
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Forty years ago, lawyers had rotary dial telephones, they did their research in a library with real books, and if they wanted personal information on someone, they hired an investigator. Today, lawyers have access to more information through the cell phones in their pockets. With such great power comes great ethical responsibility.

There are over 2.07 billion active monthly Facebook users world-wide, with 1.37 billion of those people logging onto their accounts daily. Every second, five new Facebook profiles are created, and every sixty seconds, 510,000 comments are posted, 293,000 statuses are updated, and 136,000 photos are uploaded. There are over 695 million registered Twitter users tweeting on average 58 million times a day. YouTube has over a billion users who each day watch a billion hours of video. Instagram introduced the ability to post videos in June 2013, and within the first 24 hours, users uploaded 5 million videos.

The proliferation of social media has turned trial lawyers into online investigators. As we stand at the crossroads, every lawyer should stop and consider how our ethical and professional standards both restrict and require online investigation. The following are common questions regarding online investigation and communication.

1. Are social networking sites potential sources of evidence for use in litigation?

   The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Obtaining Evidence From Social Networking Websites, Formal Opinion 2010-2 states:

   Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation. In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall. Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in

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1 This information is current as of September 2017 and represents 57% and 65% increases respectively from June 2014, shortly before the author began presenting on these issues. http://investor.fb.com/releasesdetail.cfm?ReleaseID=842071.


3 http://www.statisticbrain.com/twitter-statistics/

4 https://www.youtube.com/yt/about/press/

5 https://www.cnet.com/g00/news/instagram-users-upload-5m-clips-in-vid-sharing-features-first-day/?i10c.encReferrer=aHR0cHM6Ly93d3cuYmluZy5jb20v
a lawyer’s arsenal of formal and informal discovery devices. The prevalence of these and other social networking websites, and the potential benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

2. Does a lawyer have an obligation to investigate social media? If so, what is the scope of a lawyer’s duty to investigate?

Louisiana Rule of Professional Conduct 1.1 states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The commentary to ABA Model Rule 1.1 provides that “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem.” Id., comment ¶ 5. “The history of Rule 1.1 notes that the rule and accompanying commentary was unchanged from the Rules’ adoption by the ABA in 1983 through 2001. The commentary accompanying the 2002 amendments provides that the evaluation of evidence is “required in all legal problems.” Bozeman v. Bazzle, 07-01344, at fn. 15 (D.S.C. 7/24/08)(citing Model Rules of Prof’l Conduct R. 1.1 cmt. ¶ 2 (2002)). 2008 WL 3850703, rev’d & remanded, 364 Fed.Appx 796 (C.A. 4 (S.C.) 2/9/10), cert denied, 131 S.Ct. 174, 178 L.Ed.2d 104 (2010). In 2012, Comment 8 to Model Rule 1.1 was amended to specifically address the issue of technology: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…..” (emphasis added).

West Virginia has specifically interpreted Rule 1.1 to apply to social media: “in order to comply with Rule 1.1 of the Rules of Professional Conduct, attorneys should both have an understanding of how social media and social networking websites function, as well as be equipped to advise their clients about various issues they may encounter as a result of their use of social media and social networking websites.” Lawyer Disciplinary Board of W. Va., Social Media and Attorneys, L.E.O. 2015-02, at 6 (Sept. 22, 2015).

Louisiana Rule of Professional Conduct 1.3 also states: “A lawyer shall act with reasonable diligence and promptness in representing a client.” That duty has been interpreted in other states to include the obligation to undertake research and to collect documents to support or defend against the complaint. See Attorney Grievance Com’n of Maryland v. Patterson, 421 Md. 708, 737, 28 A.3d 1196 (Md. 9/21/11) (accepting as not clearly erroneous finding that Respondent violated Rule 1.3 when he “neglected to perform any kind of services or undertake research, to collect documents to support the complaint”).

3. Have the courts recognized the failure to use technology as grounds for relief?

Litigation on this issue is not yet common, with courts only alluding to the issue. In State v. Hales, (Utah, 1/30/07), 152 P.3d 321, the Utah Supreme Court granted a defendant’s claim of ineffective assistance of counsel because his attorneys failed to retain a qualified expert to examine CT scans of the victim’s brain injuries. In support of that motion, the defendant attached an affidavit by a pediatric neuroradiologist interpreting the CT scans. The court found that an expert opinion consistent with that post-trial affidavit could have been obtained before trial, and stated in support of that conclusion: “In fact, the State noted in its argument on a
separate point of appeal that Dr. Barnes’s testimony did not meet the standard for new evidence because Dr. Barnes was a prominent physician in his field whom the defense could have discovered with a ‘30-second’ search on ‘Google’.” Id., at 342.

In Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010), a juror falsely denied that she was ever a litigant. After a defense verdict, plaintiff’s counsel researched Case.net, the State of Missouri’s equivalent of PACER, and found several cases involving the juror. The district court granted a new trial. The Missouri Supreme Court affirmed, noting that “in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court’s attention at an earlier stage.” Id. at 558-59. The Missouri Supreme Court Rules were changed to affirmatively require attorneys to conduct a review of Case.net before the jury is sworn.

Ironically, in Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189 (Mo. Ct. App. 2012), the required Case.net search was performed, but then an empanelled juror had to be stricken anyway when the defendant’s social media research revealed that the juror maintained a corporate blog called “The Insane Citizen: Ramblings of a Political Madman,” which included statements such as “F— McDonald’s.” Id. The appellate court noted:

Neither Johnson nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that any and all research—Internet based or otherwise—into a juror’s alleged material nondisclosure must be performed and brought to the attention of the trial court before the jury is empanelled or the complaining party waives the right to seek relief from the trial court. While the day may come that technological advances may compel our Supreme Court to rethink the scope of required “reasonable investigation” into the background of jurors that may impact challenges to the veracity of responses given in voir dire before the jury is empanelled—that day has not arrived as of yet. Id. at 193, 202-03.

Id. at 203-04.

4. May I access publicly available information on a party’s social media page?

This is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service, which is permitted. Therefore, an attorney can access publicly available social media so as long as the lawyer does not “friend” the other party or direct a third person to do so. New Hampshire Bar Association Ethics Committee Advisory Opinion #2012-13/05; San Diego County Bar Legal Ethics Committee, Legal Ethics Opinion 2011-2; New York State Bar Association, Committee on Professional Ethics Opinion # 843 (09/10/2010).

5. May I send a Facebook “friend” request to a party or witness?

Louisiana Rule of Professional Conduct 4.2 states: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other
lawyer or is authorized to do so by law or a court order.” This, of course, means that you cannot “friend” a represented party or witness. New Hampshire Bar Association Ethics Committee Advisory Opinion #2012-13/05.

6. May I accept a Facebook “friend” request sent to me by a plaintiff or a represented witness?

Comment 3 to ABA Model Rule 4.2 states: “The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.”

7. May I send a Facebook “friend” request to an unrepresented third party without disclosing my true purpose for “friending”?

Louisiana Rule of Professional Conduct 4.1(a) states: “In the course of representing a client a lawyer shall not knowingly… make a false statement of material fact or law to a third person.” Comment 1 to ABA Model Rule 4.1 provides: “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.” (emphasis added).

Louisiana Rule of Professional Conduct 4.3 states, in pertinent part: “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.” (emphasis added).

Comment 1 to ABA Model Rule 4.3 states, in pertinent part: “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.”

Philadelphia Bar Association Opinion 2009-02 concluded that it would be unethical for a non-lawyer personnel to attempt to “friend” a non-party witness for the purpose of accessing information on the witness’ Facebook page unless the employee disclosed his identity and the purpose of the “friending”. The Oregon Bar Association does not seem to go as far, recognizing that the potential “friend” can ask for more information before accepting a request, and then the attorney has the obligation of candor. Oregon Bar Association Formal Opinion No. 2013-189.

8. May a lawyer send a Facebook “friend” request to an unrepresented third party if the lawyer uses his or her real name?

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Obtaining Evidence From Social Networking Websites, Formal Opinion 2010-2 has long been regarded as a leading opinion on this issue:
Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a “friend request” to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such “friending,” in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., [Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007)] (“Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party’s former employee].” (citations omitted)).

The opinion makes it clear that the key is whether the attorney is honest in the “friending”:

Rather than engage in “trickery,” lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful “friending” of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual’s social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line. Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

9. **May a lawyer have an employee send a Facebook “friend” request?**

The same prohibitions apply against having an associate, paralegal or investigator send requests. Louisiana Rule of Professional Conduct 5.3(c)(1) states: “With respect to a nonlawyer employed or retained by or associated with a lawyer…a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.”

Louisiana Rule of Professional Conduct 8.4 states: “It is professional misconduct for a lawyer to… violate or attempt to violate the Rule of Professional conduct, knowingly assist or induce another to do so, or do so through the acts of another….”

Louisiana Rule of Professional Conduct 4.1(a) states: “In the course of representing a client a lawyer shall not knowingly… make a false statement of material fact or law to a third person.”

The Philadelphia Bar Association, Professional Guidance Committee, issued Opinion 2009-02 (March 2009) involving an “inquirer [who] proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and MySpace websites, contact the witness and seek to ‘friend’ her, to obtain access to the information on the pages.” *Id.*, p. 2 of 6. The Committee concluded that the proposed conduct would violate Pennsylvania Rule of
Professional Conduct 5.3(c)(1) and Rule 8.4, and Rule 4.1. See also New Hampshire Bar Association Ethics Committee Advisory Opinion #2012-13/05.

At least one disciplinary action has been filed involving this issue. *Robertelli v. The New Jersey Office of Attorney Ethics*, explains the background. To obtain information about a plaintiff, two defense attorneys directed their paralegal to search the internet. The paralegal accessed the plaintiff’s Facebook page, which was initially public. Later, the plaintiff changed his privacy settings to limit access to his Facebook friends. The defense attorneys allegedly directed the paralegal to access and continue to monitor the non-public pages of the plaintiff’s Facebook account. The paralegal submitted a friend request to the plaintiff, without revealing that she worked for defense firm or that she was investigating the plaintiff in connection with the lawsuit. The plaintiff accepted the friend request, and the paralegal obtained non-public information that then was used in discovery. The plaintiff filed a grievance and the Director of the New Jersey Office of Attorney Ethics filed a complaint against the defense attorneys alleging violations of Rule 4.2; Rule 5.1(b) and (c) (failure to supervise a subordinate lawyer); Rule 5.3(a), (b), and (c) (failure to supervise a non-lawyer assistant); Rule 8.4(a) (violation of the Rules by inducing another person to violate them or doing so through the acts of another); Rule 8.4(c) (conduct involving dishonesty, fraud, deceit, and misrepresentation); and Rule 8.4(d) (conduct prejudicial to the administration of justice). The attorneys denied the complaint and argued, in part, that they were unfamiliar with Facebook’s different privacy settings. The complaint is still pending.

10. May I counsel my client to remove online information, video, entries, posts, or comments that have potential evidentiary value?

A lawyer cannot obstruct another party’s access to evidence, alter, destroy or conceal anything having potential evidentiary value, or counsel his client or anyone else to do so. Louisiana Rule of Professional Conduct 3.4(a). Whether or not deleted videos, blogs, Facebook entries, and posts can be electronically recovered, the question then becomes whether the deletion “obstructs” or “conceals” the information. Several bar associations have issued opinions concluding that lawyers may advise their clients to use the highest privacy settings for their social media pages and may advise clients to remove information if it would not violate rules or substantive law pertaining to the preservation and/or spoliation of evidence. See Florida Professional Ethics Committee Advisory Opn. 14-1 (2015); New York State Bar Association Commercial and Federal Litigation Section Social Media Ethics Guideline No. 4.A (2015); New York County Lawyers Association Ethics Opn. 745 (2013); North Carolina Formal Ethics Opn. 5 (2012); Pennsylvania Bar Association Opn. 2014-300; Philadelphia Bar Association Professional Guidance Committee Opn. 2014-5. Violation of these rules has resulted in severe sanctions. *Gatto v. United Airlines*, 2013 WL 1285285 (D. N.J. March 25, 2013) (adverse inferences plaintiff permanently deleted social media accounts after defendants requested access), *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013) ($542,000 fine against lawyer and $180,000 against client where lawyer told client to “clean up” accounts after receiving discovery request and client deleted photographs from Facebook page) *In the Matter of Matthew B. Murray*, 2013 WL 5630414 (Va.St.Disp. July 17, 2013) (5 year suspension for attorney in *Allied Concrete Co. v. Lester*).
11. **May I counsel my client against future online communications, including posts, blogs, and Facebook entries?**

With respect to future online communications, in civil cases, a civil lawyer has the right to advise his client not to speak with anyone about the case, and to refrain from any communication, online or otherwise, which is contrary to his or her interests. In a criminal case, a defendant has a constitutional right against self-incrimination that is guaranteed by the Fifth Amendment; and a criminal defense lawyer may advise his client of that right.

12. **May I counsel my client to post misleading or inaccurate information online to deceive or confuse counsel?**

Louisiana Rule of Professional Conduct 3.4(b) states: “A lawyer shall not… falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”

Louisiana Rule of Professional Conduct 8.4 states: “It is professional misconduct for a lawyer to… engage in conduct involving dishonesty, fraud, deceit or misrepresentation…”

13. **May I post inaccurate information online about an investigation or litigation in which I am participating?**

Louisiana Rule of Professional Conduct 4.1(a) states: “In the course of representing a client a lawyer shall not knowingly... make a false statement of material fact or law to a third person.” Comment 1 to ABA Model Rule 4.1 states: “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.”

In June 2013, an assistant Cuyahoga County, Ohio, prosecutor was fired after he posed as a murder defendant’s fictional “baby mama” on Facebook. He was trying to communicate with two female alibi witnesses for the defense to persuade them not to testify. The County Prosecutor had to withdraw his office from the case and hand it over to the Ohio Attorney General. It did not help the defendant’s appeal of his conviction. *State v. Dunn*, 2015 WL 4656534 (Ohio Ct. App. August 6, 2015), *writ denied*, 144 Ohio St.3d 1410 (Ohio 2015).

14. **May I post online about an investigation or litigation in which I am participating when that post will have a substantial likelihood of materially prejudicing an adjudicative proceeding?**

Louisiana Rule of Professional Conduct 3.6(a) states: “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Comment 5 to ABA Model Rule 3.6(a) contains a list of “certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury.”
Louisiana finally makes it on the board with *In re: McCool*, No. 2015-B-0284 (La. 6/30/15); 172 So.3d 1058. McCool represented a mother claiming abuse by the father of her children in a custody and visitation battle. Unhappy with the decisions rendered in the litigation and exhausting any other procedural options, among other things, McCool launched a social media campaign to publish misleading and inflammatory statements about the presiding judges, to promote an online petition, and to try to influence the judges in the pending litigation. The Office of Disciplinary Counsel alleged that McCool violated Rules 3.5(a) (prohibiting an attorney seeking to influence a judge, juror, prospective juror or other official by means prohibited by law), Rule 3.5(b) (prohibits attorneys from communicating *ex parte* with judges and jurors during trial, Rule 8.4(a) (violating or attempting to violate the Rules, knowingly assisting or inducing another to do so, or doing so through the acts of another, 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). The Disciplinary Counsel and Hearing Board agreed with a one year and one day suspension, but the Supreme Court ordered disbarment.

15. **What may I post online about an investigation or litigation being handled by another attorney in my firm?**

Louisiana Rule of Professional Conduct 3.6(d) states: “No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).”

16. **May I perform an online investigation of potential jurors during *voir dire*?**

Louisiana Rule of Professional Conduct 3.5 (a) prohibits an attorney seeking to influence a juror by means prohibited by law, while Rule 3.5(b) prohibits attorneys from communicating *ex parte* with jurors during trial. New York County Lawyers’ Association Committee on Professional Ethics Opinion 743 (2011) was one of the early opinions to address the impact of Rule 3.5 on online juror research: “It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror’s social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to ‘friend’ jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them.” This has generally been interpreted as prohibiting any research that notifies a juror of the search, *e.g.*, with LinkedIn’s notification that someone is searching a user’s site. See, *e.g.*, N.Y.S.B.A. Social Media Ethics Guidelines, Guideline 6.B (a lawyer may not “communicate” with a prospective or sitting juror by using a website that generates automatic messages notifying an individual that his/her profile has been accessed).

The ABA broke with this approach in ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 (April 24, 2014). The committee which noted “three levels of lawyer review of juror Internet presence”:

1. passive lawyer review of a juror’s website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror’s ESM; and
3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

The opinion continues to prohibit any direct or indirect request to access jurors’ private social media but permits passive review even if the juror is notified of the access. Colorado and West Virginia have followed the ABA’s opinion. Colo. Bar Ass’n Ethics Comm., Use of Social Media for Investigative Purposes, Formal Op. 127 (Sept. 2015); Lawyer Disciplinary Board of W. Va., Social Media and Attorneys, L.E.O. 2015-02, at 18 (Sept. 22, 2015). Oregon has gone further and allows attorneys to request access to private information on a juror’s or prospective juror’s social media websites as long as the lawyer accurately represents his role in a case if asked by the juror. Or. St. Bar, Accessing Information about Third Parties Through a Social Networking Website, Formal Op. 2013-189 (Feb. 2013).

17. Do I have an obligation to my client to recognize the danger of online jurors?

The reality is that potential jurors and sworn jurors are going online to investigate the cases. In In re Methyl Tertiary Butyl Ether (MTBE) Products Liability, 739 F.Supp.2d 576 (S.D.N.Y. 2010), Juror No. 5 learned that ExxonMobil was the only remaining defendant in this case and that many of the other defendants had settled for approximately one million dollars each.” The district court dismissed the juror but was asked to grant a mistrial after the jury returned a $100 million verdict. The court found that the jury was not too polluted by the receipt of extra-judicial information such as to prevent it from rendering a fair verdict based on the evidence introduced at trial but noted numerous instances of jurors conducting their own investigations in other cases:

- Christina Hall, Facebook Juror Gets Homework Assignment, The Detroit Free Press, Sept. 2, 2010 (reporting that a Michigan juror who posted on Facebook that a defendant was guilty before the completion of trial was dismissed from the jury, held in contempt of court, ordered to pay a $250 fine and required to write a five page essay on the defendant’s Sixth Amendment right to a jury trial)
- Noeleen G. Walter, Access to Internet, Social Media by Jurors Pose Challenges for Bench, N.Y. L.J., Mar. 3, 2010 (reporting that a state trial court in the Bronx determined that a woman breached her obligations as a juror by sending a Facebook “friend” request to a government witness but rejected the defense’s argument that this act had tainted the jury’s guilty verdict)
- Andrea F. Siegel, Judges Confounded by Jury’s Access to Cyberspace: Panelists Can Do Own Research on Web, Confer Outside of Courthouse, The Balt. Sun, Dec. 13, 2009 (discussing the increasing trend in Maryland courts of defendants seeking a mistrial on the ground that one or more of the jurors conducted Internet research about the defendant’s case while the trial was ongoing)
- Debra C. Weiss, Juror Whose Revelation Forced a Mistrial Will Pay $1,200, A.B.A. J., Oct. 13, 2009 (reporting that a New Hampshire juror charged with contempt of court for revealing during deliberations that the defendant was a
convicted child molester pleaded guilty to a reduced charge and agreed to pay $1,200 to reimburse the county for expenses related to two days of deliberations.

- Daniel A. Ross, Juror Abuse of the Internet, N.Y. L. J., Sept. 8, 2009 (examining the problem of "Internet-tainted" juries across the United States and abroad

- John Schwartz, As Jurors Turn to Web, Mistrials Are Popping Up, N.Y. Times, Mar. 18, 2009 ("It might be called a Google mistrial. The use of BlackBerry’s and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges.").

18. **Is there an instruction that I can ask the trial court to give to reduce the likelihood of online jurors?**

At least twelve states jurisdictions have adopted a model instruction regarding a juror’s online usage during the pendency of a trial. In December of 2009, the Judicial Conference Committee on Court Administration and Case Management prepared “Proposed Model Jury Instructions for the Use of Electronic Technology to Conduct Research on or Communicate about a Case,” which included the following instruction at the close of the case:

> During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

19. **May I monitor jurors’ publicly available blog or Facebook pages?**

The analysis here is generally the same as for *voir dire* as discussed above. At least one opinion has addressed the issue of post-*voir dire* access: “During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not ‘friend’ the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites.” New York County Lawyers’ Association Committee on Professional Ethics Opinion 743 (2011).

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20. What if I learn that a juror is communicating online or tweeting about the trial, and I know that juror’s opinion is favorable to my client?

Comment 12 to ABA Model Rule 3.3 states: “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.”

“In the event the lawyer learns of juror misconduct, including deliberations that violate the court’s instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer’s client, but must promptly comply with Rule 3.5(d) and bring such misconduct to the attention of the court before engaging in any further significant activity in the case.” New York County Lawyers’ Association Committee on Professional Ethics Opinion 743 (2011).

“Any 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. This is so even should the client notify the lawyer that she does not wish the lawyer to comply with the requirements of RPC 3.5. Of course, the lawyer has no ethical duty to routinely monitor the web posting or Twitter musings of jurors, but merely to promptly notify the court of any impropriety of which the lawyer becomes aware.” New York County Lawyers’ Association Committee on Professional Ethics Opinion 743 (2011)(citing RPC 3.5(d)).

“Lawyers who learn of impeachment or other useful material about an adverse party, assuming that they otherwise conform with the rules of the court, have no obligation to come forward affirmatively to inform the court of their findings. Such lawyers, absent other obligations under court rules or the RPC, may sit back confidently, waiting to spring their trap at trial. On the other hand, a lawyer who learns of juror impropriety is bound by RPC 3.5 to promptly report such impropriety to the court. That rule provides that: ‘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 his or her family of which the lawyer has knowledge.’” New York County Lawyers’ Association Committee on Professional Ethics Opinion 743 (2011)(citing RPC 3.5(d)).

21. May I friend judges?

ABA Standing Comm. on Ethics & Professional Responsibility, Formal Op. 462 (2013) concluded that a judge may participate in electronic social networking. Likewise, the federal Guide to Judiciary Policy recognizes that judges may participate in social media but must be mindful of ethical considerations. Committee on Codes of Conduct Advisory Op. No. 112:

There has also been a spate of cases focusing on whether a judge’s social media relationship with attorneys in a case requires recusal. In State v. Ferguson, 2014 WL 631246 at * 13 (Tenn.Crim.App. Feb.18, 2014), because the record failed to show “the length of the Facebook relationship between the trial court and the confidential informant, the extent of their internet interaction or the nature of the interactions,” the court found that there was not sufficient proof showing that the trial court could not impartially fulfill its duty as thirteenth juror. Cf. Youkers v. State, 400 S.W.3d 200 (Tex.App. 2013) (designation of Facebook friend alone provides no insight into the nature of the relationship); with Chace v. Loisel, 170 So.3d 802 (Fla.App. 5 Dist. 2014) (relying on judicial ethics opinion prohibiting trial judges from engaging in social media with attorneys to require recusal based solely on “Facebook friendship” with prosecutor).

22. Can judges use social media to research parties or jurors?

This month the ABA Committee on Ethics & Professional Responsibility responded in the negative in Formal Opinion 478 (December 8, 2017). ABA Model Code of Judicial Conduct Rule 2.9(C) states: “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.” Comment [6] to Rule 2.9 clarifies that this “extends to information available in all mediums, including electronic.” Therefore, the committee concluded that “[o]n-line research to gather information about a juror or party in a pending or impending case is independent fact research that is prohibited by Model Rule 2.9(C).”