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## TRIAL CONDUCT

### TWITTERING JURORS AND THE RULES OF PROFESSIONAL CONDUCT: Should Lawyers Avert Their Eyes From Juror Social Network Postings?



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Jurors are increasingly accustomed to acquiring most of the information they need in their daily lives through electronic sources, especially the internet. This is a habit that is difficult for jurors, particularly tech-savvy jurors, to suspend during their jury service, notwithstanding explicit judicial instructions to the contrary. Jurors are blithely blogging, Twittering, and otherwise commenting on social internet sites about their jury duty. This phenomenon raises many ethical questions for lawyers. For example, during the evidentiary stage of a jury trial, may a lawyer ethically conduct on-

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going research about jurors on Twitter, Facebook, and other social networking sites? In particular, should a lawyer undertake investigation of a prospective juror's publicly available social network throughout the evidentiary stage of a trial, even though the trial judge may have instructed the jury to cease all out-of-court communications about the case? Equally important, what are the ethical duties of a lawyer who learns of jurors' electronic deliberations or evidence-gathering during a trial?

This article examines the ethical obligations of lawyers who learn of unauthorized juror blogging and Twittering during a trial, and, in particular, whether a lawyer may capitalize on this electronically eavesdropped information to inform the lawyer's settlement strategy. As explained in detail below, some but not all jurisdictions require lawyers promptly to report juror improprieties to the judge.<sup>1</sup> However, there is little authority explicitly addressing whether trial lawyers may act upon publicly posted juror musings to benefit the

<sup>1</sup> See, e.g., NY Rules of Professional Conduct 3.5, 22 NYCRR Section 1200.0 *et seq.*; Texas RPC 3.06; Maine RPC 3.5(e); Maryland RPC 3.5.

lawyers' clients, for example, in settlement negotiations. A lawyer who stumbles upon—or trolls for—juror blogging during a trial may have opened a Pandora's box of potential information that the lawyer may seek to exploit to benefit the lawyer's client. Best practice, as explained below, is for lawyers to abstain from exploiting such information for the benefit of their clients, even if publicly posted by jurors on internet sites.

### Jury Instructions and the Rules of Evidence

The rules of evidence are designed to ensure that juries make their decisions based on the evidence that the judge chooses to admit, which in turn is based on the evidence's quality and reliability. A quick glance at Wikipedia or a poll conducted on an individual juror's Facebook network during a trial will not meet this standard. To this end, pattern jury instructions admonish jurors, in both civil and criminal cases, not to visit the scene of the incident or crime—not even on Google Earth.<sup>2</sup> Jury instructions ask jurors not to discuss the case with anyone outside the courtroom, not to conduct any independent investigations, and, these days, specifically not to perform any independent research on the internet. For example, according to New York's pattern jury instructions:

It is important to remember that you may not use any internet services such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties or the lawyers or the court.<sup>3</sup>

New jury instructions proposed by the Federal Judicial Conference similarly admonish jurors to avoid blogging, tweeting or other electronic communications to research or communicate about a trial:

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 about this case or to conduct any research about this case. . .<sup>4</sup>

Several federal courts have adopted similar instructions warning jurors not to investigate the case or post their deliberations on the internet.<sup>5</sup>

There is a growing body of evidence that such judicial instructions are frequently ignored by jurors. In fact, there is a virtual epidemic of jurors running amok

electronically.<sup>6</sup> For example, in a recent South Dakota case, a jury verdict was set aside after a juror performed his own internet research, which he shared with the rest of the jury.<sup>7</sup> In that case, a pro-defense juror Googled the defendant's product in a products liability case. Armed with evidence of the defendant's clean safety record—which the trial judge had not admitted into evidence—the wayward juror persuaded his fellow jurors to return a verdict in favor of the defendant. In another case, five jurors became Facebook friends during the criminal trial of former Baltimore Mayor Sheila Dixon and posted public messages about the trial, leading Dixon's attorneys to call for a new trial after the defendant's conviction.<sup>8</sup> In a third example, a New York juror Googled defense counsel during a criminal trial, and discussed her findings with a stranger at a social dinner.<sup>9</sup>

In addition, there are numerous documented instances of jurors posting their thoughts and deliberations during trial.<sup>10</sup> Jurors have been known to post publicly their views on the strengths and weaknesses of a case, even mid-trial. NBC Today Show Host Al Roker was caught tweeting<sup>11</sup> about his own jury service, prompting the *New York Post*, predictably, to call him a "twit."<sup>12</sup> Roker's improprieties included posting photos of his fellow jurors.<sup>13</sup>

*New York Law Journal* columnist Michael Hoenic, a partner at Herzfeld and Rubin, reports instances of jurors who blogged and shared their thoughts via Twitter throughout criminal trials.<sup>14</sup> In the corruption trial of a disgraced sheriff, one juror conducted a sort of impromptu (and unauthorized) internet poll via Twitter: "Be Carona's judge, what should ex-sheriff get?"<sup>15</sup> The same juror announced the sentencing: "I'll be twittering Mike Carona's sentencing from the courtroom on Monday, so log on."<sup>16</sup> In another criminal case, a juror conducted an impromptu poll on her Facebook page, eliciting

<sup>6</sup> See Caren Myers Morrison, *Can The Jury Trial Survive Google?*, 25 Criminal Justice 4 (Winter 2011) (collecting stories, cases, and articles about jurors tweeting and Googling about their jury service); Michael Hoenic, *Juror Misconduct on the Internet*, *New York Law Journal*, October 6, 2009, at 2; *Are You My Friend?*, *supra* note 5, at 18.

<sup>7</sup> *Russo v. Takata Corp.*, 2009 S.D. 83, 2009 S.D. Lexis 155 (2009).

<sup>8</sup> Julie Bykowicz, "5 Dixon Jurors Recalled as Witnesses," *Baltimore Sun*, Dec. 30, 2009, available at [http://articles.baltimoresun.com/2009-12-30/news/bal-md.dixon30dec30\\_1\\_juror-misconduct-new-trial-arnold-m-weiner](http://articles.baltimoresun.com/2009-12-30/news/bal-md.dixon30dec30_1_juror-misconduct-new-trial-arnold-m-weiner).

<sup>9</sup> *People v. Jamison*, 24 Misc.2d 1238A; 899 N.Y.S.2d 62 (N.Y. Sup. Ct. Kings Cnty. 2009).

<sup>10</sup> See Morrison, *supra* note 6.

<sup>11</sup> Messages posted and sent on Twitter are referred to as "tweets."

<sup>12</sup> Dareh Gregorian, "Oh What A Twit, Tweeting Roker Sorry for Taking Juror Pix," *N.Y. Post*, May 29, 2009, available at [http://www.nypost.com/p/news/regional/item\\_orPeW3RKHabFGbsbXOYCXI](http://www.nypost.com/p/news/regional/item_orPeW3RKHabFGbsbXOYCXI); see also Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, 84 Fla. Bar J. 8 (Jan. 2010), available at <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/8c9f13012b96736985256aa900624829/d9a2f95a71f304778525769b006dd8d5f?OpenDocument>.

<sup>13</sup> Gregorian, *supra* note 12.

<sup>14</sup> Hoenic, *supra* note 5, at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>2</sup> New York Pattern Jury Instructions [hereinafter PJI] 1:10 (2010) at 37.

<sup>3</sup> PJI 1:11 at 39.

<sup>4</sup> JUDICIAL CONFERENCE COMM. ON COURT ADMIN. AND CASE MGMT., Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case, available at <http://www.uscourts.gov/newsroom/2010/DIR-10-018.pdf>.

<sup>5</sup> See MARISSA PEREZ-GARCIA & AZALEA ALEMAN, *Are You My Friend? Social Networking: Impact on Jurors*, Federal Public Defender Annual Staff Conference and Seminar, Aug. 13-14, 2010 [hereinafter *Are You My Friend?*], at 20 fn. 24, available at <http://www.fpdspot.org/documents/Investigative/FINALVERSION.pdf>.

ing advice about how she should vote.<sup>17</sup> The court was not amused.<sup>18</sup>

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**The lawyer should not use any social networking method that transmits a message to the juror.**

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In addition to incurring the wrath of the presiding judge, such activities raise ethical issues for trial lawyers. Should trial lawyers be routinely scouring the internet for juror postings or other misconduct during trial? Putting aside for the moment the question of due diligence during voir dire, should lawyers be searching for juror Facebook and Twitter postings? And upon discovering such postings, what are the lawyer's ethical duties?

Analyzing these issues is difficult: many people, including lawyers, go all a-twitter when thinking about the internet. Some lawyers may have difficulty conceptualizing or applying ethics rules from the pre-internet era to the cyber age. And the rules themselves require constant revisions to keep up with the changes in technology.

### Four Hypotheticals

The analogy between virtual reality and real reality can be illustrated by several hypotheticals, each of which assumes that a civil products liability trial has progressed past the voir dire stage and is in the midst of the evidentiary phase.

#### Hypothetical 1: Fortuitously Overheard Conversation

Larry Lawyer, counsel for the plaintiff, is engrossed in his preparation for the cross examination of the defense expert in a products liability case. Since he only has 45 minutes for lunch, he ducks into Mom's Courthouse Café for a quick bite while he pores over his notes in preparation for the big cross examination. Larry is so wrapped up in his thoughts that he does not recognize two jurors seated at a nearby table. His attention, however, is caught when he overhears parts of the jurors' conversation drifting his way, which identify the testifying expert witness by name, and express skepticism about the defense's case. "I don't believe a word that so-called expert says," one of the jurors says. "I know," sighs the other, "Why don't they just pay that poor plaintiff?" Does he have an obligation to inform the court of the jurors' conversation? If Larry Lawyer is contemplating whether or not to recommend the acceptance of a significant settlement offer, may he take into consideration (and advise his client about) the eavesdropped communication?

#### Hypothetical 2: Deliberately Overheard Conversation

Larry Lawyer once again represents the plaintiff in a products liability case. He suspects that two of the jurors may be hostile to the plaintiff's case. These two jurors, who sport navy blue Brooks Brothers suits with

red striped neckties, sit stone-faced with their arms crossed during the plaintiff's tearful testimony. Fearing the worst, Larry Lawyer dispatches his youngest and least obtrusive investigator, Lisbeth Salander, to slink into Mom's Courthouse Café during the lunch break, which is frequented by the nightmare jurors, to silently overhear their luncheon banter. Salander is instructed to make no contact, eye or otherwise, with the jurors. She overhears the following conversation: "What a malingering that plaintiff is! Why doesn't she get a job like everybody else?" Must Larry Lawyer report the information Salander overheard to the court? Has the lawyer crossed the line with his low-tech sleuthing? And if Larry has received a settlement offer, may he consider the eavesdropped intelligence in determining whether to recommend acceptance or rejection of the offer?

#### Hypothetical 3: Social Network Snooping

Larry Lawyer, who represents the same plaintiff in the same products liability case, has completed the evidentiary portion of the trial, and is preparing his closing argument. Although the trial judge sternly admonishes the jury to have no contact with any of the lawyers and discuss the case with no one, electronically or otherwise, outside the courtroom, Larry suspects that this instruction is honored in the breach. He assigns crack investigator Lisbeth Salander to monitor the nightly blog, Twitter, and Facebook postings of the six jurors. As they leave the courtroom on the eve of closing arguments, Larry's opposing counsel, Dana Defendant, makes him a settlement offer of \$300,000, an amount in excess of his settlement authority, but less than his demand of \$500,000. As Larry later contemplates whether to accept or reject the settlement offer, Lisbeth walks into his office with some news. The jury foreman, Lisbeth reports, has been blogging about the case, and plans to award the injured plaintiff \$1 million after the jury completes its deliberations. Moreover, the foreman seems to think that the other jurors are in accord with his recommendation. Armed with this new information, Larry now believes that the jury is likely to award his client triple the amount of the latest settlement offer. A rational lawyer might reject the \$300,000 offer and, assuming it's credible, go to the bank with the \$1 million verdict. But while doing the latter may make business sense, Larry Lawyer may have other professional obligations which trump his duty to maximize his client's recovery. What are his duties to the court, and to his client?

#### Hypothetical 4: Website Declaration

Larry Lawyer, once again representing the plaintiff, is anxious about a potential defendant's verdict due to hostility from the arm-crossed, Brooks Brothers-dressed, hostile jurors described in Hypothetical 2, above. His investigator visits the website of the aforementioned nightmare jurors, who announce the following: "We have already made up our mind: To bounce the plaintiff and award her no money." Larry has received the same \$300,000 settlement offer described in Hypothetical 3. Should he accept the offer, and if he does, would he violate the ethics rules? If he rejects the offer, does he violate a different ethics rule?

#### Different Facts, Same Temptation

These four hypotheticals place the lawyer in varying dilemmas in his duties to his client on the one hand, and

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<sup>17</sup> *Id.* A British juror similarly hosted a Facebook poll on a criminal case, posting: "I don't know which way to go, so I'm holding a poll." See *Are You My Friend?*, *supra* note 5, at 18-19.

<sup>18</sup> Hoenig, *supra* note 5.

to the court on the other. In Hypothetical 1, the lawyer inadvertently stumbles upon information, in a public place, which is favorable to his client. In Hypotheticals 2-4, the lawyer sends an investigator specifically to learn the jurors' thoughts about a pending trial, presumably in order to benefit the lawyer's client and better inform his trial strategy and settlement negotiations. In Hypothetical 2 (investigator in coffee shop), the investigator overhears a private conversation. In Hypotheticals 3 and 4, the jurors affirmatively post their leanings on a publicly available web page. In all four hypotheticals, Larry is tempted to use the intercepted information to inform his settlement strategy. But is it permissible for the lawyer to affirmatively seek out jurors' publicly posted social network musings? Is that conduct different from surreptitiously intercepting the same conversation in a Court Street coffee shop? And at which point does Larry Lawyer cross the line from diligence to contempt, and does the answer depend on the lawyer's subjective intent?

In order to analyze these questions, it is necessary to examine the American Bar Association Model Rules of Professional Conduct (RPC or Model Rules). Interestingly, not all states adhere to the same ethics rules. For example, New York's recently adopted 2009 Rules of Professional Conduct explicitly impose ethical duties beyond those suggested in the ABA Model Rules. Under either set of rules, the answers are not entirely clear.

### The Rules of Professional Conduct

The ABA Model Rules of Professional Conduct address contact between trial counsel and jurors, prospective or trial, in Model Rule 3.5. This rule explicitly draws a distinction between conduct during trial, which is governed by RPC 3.5(b), and conduct after discharge of the jury, which is subject to a somewhat different standard under RPC 3.5(c). In fact, a lawyer's contact with jurors is divided, at least in practice, into three distinct areas. These are voir dire or jury selection, actual conduct of the trial, and post verdict contact with jurors. Any contact, direct or indirect, is proscribed as a matter of attorney ethics during the conduct of the trial, but permitted with certain conditions after discharge pursuant to RPC 3.5(c).

Model Rule 3.5, entitled Impartiality and Decorum of The Tribunal, provides that 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. . .<sup>19</sup>

Thus, the rules proscribe any ex parte communication with a juror or potential juror during trial, and prohibit certain categories of communication after jury service is complete. Is visiting a juror's website, as described in Hypotheticals 3 and 4, direct

<sup>19</sup> ABA Model Rule 3.5.

communication? And is the lawyer responsible for the investigator's contact with the juror?

Under some circumstances, a juror may become aware of a lawyer's visit to the juror's website. In particular, a juror may become aware of a lawyer's visit if the lawyer sends the juror a "friend request," or a request to connect on LinkedIn.com, subscribes to a blog's RSS feed, or "follows" the juror on Twitter. Twitter sends a notification to the account holder when a follower signs up to follow the Twitterer's tweets. Such conduct would constitute improper contact between a lawyer and a juror in violation of RPC 3.5, if the contact took place during the trial. Furthermore, the ethics rules explicitly state that a lawyer may not do indirectly, through a proxy, that which is directly proscribed.<sup>20</sup> Thus, a lawyer who actively "friends" a juror or otherwise establishes contact is probably violating RPC 3.5. But what if the lawyer just passively views the juror's publicly posted webpage or blog?

Let's assume, as posited in Hypotheticals 3 and 4, that the lawyer comes to learn of at least some aspect of juror deliberations from the Twitter or Facebook postings of two jurors in the hypothetical products liability case. In Hypothetical 3, the lawyer learns that the jury plans to award damages greatly in excess of the offered \$300,000 settlement. In Hypothetical 4, plaintiff's counsel learns that at least two of the jurors are planning to turn his client away with no award, thereby making the same \$300,000 settlement offer look substantially more attractive. In both hypotheticals, the lawyer learns information from the juror's public postings that he may wish to use to the benefit of his client. Neither disclosure was inadvertent (unlike Hypothetical 1). The lawyer does not friend or otherwise notify the juror of the lawyer's surveillance. May the lawyer ethically use the tweeted information to inform his settlement strategy? And does the lawyer have any obligation to the tribunal upon learning of the jurors' public musings?

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**Lawyers may monitor a juror's social network sites if they conform with the rules of the court, don't engage in deception to gain access to nonpublic web pages, and don't contact jurors through "friending" or following their Twitter feeds.**

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The ABA Model Rules do not address the question of what an attorney should do upon learning about juror deliberations through the internet. Nor does the *Restatement (Third) of the Law Governing Lawyers* directly address the point.<sup>21</sup> Several states, notably New York, have adopted variations of the ABA Model Rules which furnish some guidance.<sup>22</sup> New York's Rules of Professional Conduct (NY RPC), like their ABA coun-

<sup>20</sup> ABA Model Rule 8.4; 3.5.

<sup>21</sup> See Rest. of Law Governing Lawyers § 112.

<sup>22</sup> NY RPC 3.5(a)(2), 22 NYCRR Section 1200.0 et seq.; see also Texas RPC 3.06; Minnesota RPC 3.5(f); Nebraska RPC 3-503.5(b); North Carolina RPC 3.5(c); Ohio RPC 3.5(b); Virginia RPC 3.5(c); Maine RPC 3.5(e); Maryland RPC 3.5.

terparts, enjoin lawyers scrupulously to avoid contact with jurors during the conduct of a trial:

A lawyer shall not:

Communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case, or during the trial of a case, with any member of the jury unless authorized to do so by the law or court order. . . .<sup>23</sup>

If the lawyer were to learn of a juror's improper conduct, the lawyer must promptly report that fact to the court. The New York Rules of Professional Conduct require a lawyer to disclose to the court any improper conduct by a juror: "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."<sup>24</sup> The New York rules, unlike the ABA Model Rules, explicitly obligate lawyers to report to the court any juror misconduct, upon pain of professional discipline. The rules in at least eight other states are similar.<sup>25</sup>

A lawyer who learns of juror misconduct (or presumably, any violations of the court's instructions) is ethically bound to report such misconduct to the court under New York RPC 3.5. 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 routinely to monitor the web postings or Twitter musings of jurors, but merely to notify the court of any impropriety of which the lawyer becomes aware.

### Analogy to Contact With Witnesses: Two EOs

In light of the dearth of authority specifically on lawyer surveillance of jurors' social network pages, it might be helpful to analyze recent opinions concerning lawyer visits to the social network pages of unrepresented witnesses. Of course, any analogies to such contact must be limited by the fact that Model Rule 3.5 simply doesn't apply to contact with anyone other than judges and jurors. Thus a lawyer who learns of witness impropriety short of fraud or perjury does not have the same obligation imposed by New York Rule 3.5 to bring such impropriety promptly to the court's attention. However, some recent ethics opinions do furnish some guidance.

The New York State Bar Association Committee on Professional Ethics, in Ethics Opinion 843, recently considered whether a lawyer may ethically access the publicly available social networking page of another party in litigation for use in the litigation, including possible impeachment.<sup>26</sup> The NYSBA concluded that RPC 8.4 prohibits a lawyer, directly or through a proxy, from "friending" the party by means of deception or misrepresentation, without disclosing that the lawyer is oper-

ating as an agent for a client. Friending the party could constitute deception if the lawyer fails to reveal her true purpose: seeking to garner information to be used to cross examine the owner of the social networking site. The State Bar opined however, that the lawyer would not engage in deception by merely viewing the publicly available portions of the party's website.<sup>27</sup>

However, another New York bar association more or less simultaneously issued a differing opinion. The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, in Formal Opinion 2010-2, opined that a lawyer may ethically "friend" an unrepresented party or witness without revealing the lawyer's true motives for the request, provided that the lawyer does not misrepresent her identity.<sup>28</sup> According to the New York City Bar, "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.*"<sup>29</sup> While lawyers (and the investigators they supervise), needn't disclose their true intentions, according to the City Bar, they cross the line when they resort to deception about their identity. "We believe that [RPC 8.4 and 4.1] are violated whenever an attorney 'friends' an individual under false pretenses to obtain evidence from a social networking website."<sup>30</sup> Thus, the New York City bar concludes that a lawyer may contact and even friend a witness, using the lawyer's real name, but without revealing the lawyer's identity as counsel for a client, provided that there is no overt trickery.

Thus, while both New York ethics opinions prohibit overt misrepresentations, NYSBA Eth. Op. 843 instructs that there is a difference between passively reading a party's publicly available social networking information and actively crossing the Rubicon by friending that adverse party without revealing that the lawyer is doing so on behalf of a client.

It seems that the New York State Bar has the upper hand in this argument. After all, there are authorities holding that lawyers sometimes improperly engage in misrepresentations by omission, without moving their lips.<sup>31</sup> The witness or unrepresented party is likely to complain when subject to cross-examination based on information furnished, under false pretenses, to an erstwhile "friend."<sup>32</sup> There are authorities supporting pretexting—nondisclosure of an investigator's purpose

<sup>27</sup> "Accordingly, we conclude that the lawyer may ethically view and access the Facebook and My Space profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so." *Id.* at 2-3.

<sup>28</sup> ABCNY Ethics Op. 2010-2, available at <http://www.abcny.org/Ethics/eth2010.htm>.

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> *Id.* at 2.

<sup>31</sup> See Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent, Safe Harbor?*, 18 *Geo. J. Legal Ethics* 179 (2004).

<sup>32</sup> Compare *In re Pautler*, 47 P.3d 1175, 18 *Law. Man. Prof. Conduct* 310 (Colo. 2002) (upholding discipline against deputy district attorney who misrepresented his identity to criminal suspect), and *In re Gatti* 8 P.3d 966, 16 *Law. Man. Prof. Conduct* 468 (Or. 2000) (upholding discipline against lawyer who misrepresented his identity to insurance company), with *Apple Corps. Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp.2d 456 (D.N.J. 1998) (lawyer may contact adverse party in intellectual prop-

<sup>23</sup> NY RPC 3.5(a)(4), 22 NYCRR Section 1200.0 et seq.

<sup>24</sup> NY RPC 3.5(d).

<sup>25</sup> See also Texas RPC 3.06; Minnesota RPC 3.5(f); Nebraska RPC 3-503.5(b); North Carolina RPC 3.5(c); Ohio RPC 3.5(b); Virginia RPC 3.5(c); Maine RPC 3.5(e); Maryland RPC 3.5.

<sup>26</sup> NYSBA Ethics Op. 843, available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208>.

or identity—in certain situations, notably undercover civil rights, law enforcement, and intellectual property investigations.<sup>33</sup> But no authority has permitted lawyers to engage in unlimited pretexting in all contexts without qualification.

The New York State Bar Association's analogy—between reading publicly available internet material, and actively “friending” a witness—may be helpful in analyzing lawyer internet surveillance of jurors. As mentioned, the lawyer may not friend or tweet the jurors or otherwise engage in conduct that notifies the jurors that the lawyer is observing them, or that otherwise constitutes contact with the jurors. Reading a juror's blog posts may not constitute contact if the content is available to all publicly, but might constitute improper contact if the juror were to become aware of the contact, such as by being friended by the lawyer or notified by Twitter that the lawyer was “following” the juror's Twitter account.

There is no ethical provision in the New York Rules of Professional Conduct (which, as mentioned, differ from the ABA Model Rules) which prevents lawyers from reading and monitoring, directly or indirectly, juror internet postings on social networking sites during trial. However, lawyers should examine their motives in surveilling juror blogs. In the event a lawyer learns of juror misconduct, the lawyer should not unilaterally act upon such knowledge to benefit the lawyer's client, but is required promptly to bring such misconduct to the attention of the court, before engaging in any further significant activity in the case. Thus while it is arguably permissible to engage in passive monitoring of juror social media sites during trial, it would be wise to eschew actual contact or communication with jurors, and equally prudent promptly to report juror misconduct to the court—without taking action on the deliberations to the benefit of the client.

## Four Hypotheticals Revisited

Armed with our analysis of the ABA Model Rules and New York RPC, let's return to our four hypotheticals. In Hypothetical 1, a distracted lawyer inadvertently overhears, in a public place, the private discussions of two jurors who should not be discussing the evidence between themselves. In Hypothetical 2, the same lawyer deliberately dispatches an investigator surreptitiously to eavesdrop on other jurors in the same diner. In Hypotheticals 3 and 4, a lawyer intentionally trolls the public blogosphere for insight into juror deliberations, which he knows to be improper, and which he contemplates using to his client's advantage. How do we analyze these differing scenarios under the ethics rules? In all four scenarios, the lawyer is tempted to act to the benefit of his client, either by turning down a settlement offer which is lower than the likely jury verdict, or by accepting the same settlement offer when the lawyer has reason to believe that the jury verdict may be zero.

First, as mentioned, the conduct of the investigator is imputed to the lawyer under RPC 3.5 and 8.4. In addition, the lawyer is ethically responsible under Model

Rule 5.3 for the actions of the investigator to the extent that he directs, controls, or ratifies them.<sup>34</sup> Thus, the snooping of fictitious hypothetical cyber-sleuth Sallander is imputed to Larry Lawyer under any of the four hypotheticals.

Second, under the ABA Model Rules, the lawyer's conduct during the trial is evaluated differently from posttrial phases, in which far more leeway is accorded to lawyers' investigations of jurors. Additionally, lawyers are granted more leeway during the voir dire phase of trial. In fact, a recent Missouri case suggests that lawyers may have a *duty* to perform research on jurors prior to trial. In *Johnson v. McCullough*,<sup>35</sup> a potential juror denied having been a party to any civil litigation; it was later discovered after a verdict for the defendant was rendered that she had indeed been a defendant in multiple cases. The court chided an attorney for failing to perform internet research on the juror. The plaintiff's lawyer moved for a new trial and the state's highest court affirmed an order for a new trial, stating that a party should use reasonable efforts to examine the litigation history of jurors.<sup>36</sup>

A New Jersey court, in *Carino v. Muenzen*,<sup>37</sup> allowed a lawyer to Google potential jurors during voir dire. The court wrote that the fact “that plaintiff's counsel had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of ‘fairness’.”<sup>38</sup>

Third, the New York/minority rule is that juror misconduct must be reported to the judge. This principle is consistent with practice in a growing minority of other jurisdictions.<sup>39</sup> Given the lawyer's duty to report misconduct to the tribunal, the question arises as to whether a lawyer may seek to benefit an individual client by acting on the information gleaned from the juror's public webpage. In other words, may the lawyer in Hypothetical 3 ethically advise his client to turn down the \$300,000 settlement offer because he has reason to anticipate a much larger future verdict, due to the unauthorized juror Facebook disclosures? If the lawyer acts on the Facebook information, does he still have any obligation to notify the court of the juror's public musings? And if the lawyer decides not to take action, is he exposing himself to a malpractice claim or ethics complaint from his client?

As is so often the case in matters of legal ethics, the answer probably depends, at least in part, on the lawyer's intent and motivation. Jurors are instructed to keep their deliberations private. Lawyers should report to the court any known instances of juror misconduct. Thus, a lawyer who comes to learn of juror deliberations, public or private, should promptly report that knowledge to the court and should not seek to capitalize on it. The lawyer in Hypothetical 3 may be tempted to turn down the \$300,000 settlement offer, since he has learned that at least some of the jurors seem to have richer plans for his client. If Larry Lawyer keeps mum on the juror internet postings and turns down the offer, has he engaged in good lawyering or unprofessional

erty investigation without revealing lawyer's motive to prosecute recipient of call).

<sup>33</sup> See Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 *Seattle U. L. Rev.* 123 (2008); see also NYCLA Ethics Op. 737, available at <http://www.nycla.org/ethicsopinions>.

<sup>34</sup> ABA Model Rule 5.3.

<sup>35</sup> 306 S.W.3d 551 (Mo. 2010).

<sup>36</sup> 306 S.W.3d 551.

<sup>37</sup> *Carino v. Muenzen*, 2010 N.J. Super. Unpub. Lexis 2154 (N.J. Super. Ct. App. Div. 2010).

<sup>38</sup> *Id.*

<sup>39</sup> *Supra* note 25.

conduct? In my opinion, the lawyer should not seek to benefit her individual client based on improper juror deliberations and should report such misconduct promptly to the judge—before acting on a settlement offer. The jury deliberations are supposed to be private, and the hypothetical juror’s breach of that obligation, by posting her own deliberations on the internet, does not relieve the lawyer from his obligations as an officer of the court.

Few ethicists would defend the lawyer’s conduct in Hypothetical 2, in which the lawyer dispatches an investigator to eavesdrop on a private juror conversation. But is the rule different when the juror affirmatively posts her thoughts on the public blogosphere?

A blanket rule prohibiting any lawyer monitoring of juror websites during trial is likely to prove unworkable and unenforceable, yet an ethicist or court analyzing this issue might inquire: What is the lawyer doing surfing the net for juror deliberations in the first place? Lawyers tend to be result-oriented people, who generally do things for reasons, and those reasons are very often intended to generate results for clients. If a lawyer is sleuthing the net to uncover suspected juror misconduct, that is one thing. But it is highly problematic for a lawyer to surf the net to seek an insight into juror deliberations that the lawyer knows are improper, when the lawyer plans to use the information to benefit his client and not disclose it to the court. Thus, under Hypotheticals 2 and 3, the lawyer dispatches an investigator specifically to garner evidence that the lawyer intends to use to inform the lawyer’s settlement strategy. To the extent that the lawyer plans to benefit his individual client and not notify the trial judge, that lawyer would be risking a violation of RPC 3.5.

On the other hand, assume that the lawyer is not seeking to maximize a settlement offer, but rather to uncover suspected juror misconduct. In that situation, the lawyer may plausibly argue that he is acting as an officer of the court, provided that the lawyer’s intent is promptly to notify the court of the juror misconduct. Thus, lawyers may seek to monitor the juror’s social network sites, or employ an investigator to do so, provided of course that they conform with the rules of the court and not engage in any deception to gain access to any web pages that are not public, and do not contact the jurors through friending or following their Twitter feeds.

## Conclusion

There is no proscription on lawyers’ reading the social networking sites of prospective jurors during the voir dire phase of a trial, provided that there is no direct contact with the juror, the lawyer does not “friend” the juror, and there is no other communication. The lawyer should not use any social networking method that transmits a message to the juror. During the evidentiary stage of a trial, a lawyer must refrain from contacting jurors, directly or indirectly. Surveillance of sitting jurors’ social networking sites can give rise to significant ethical issues, particularly if the lawyer seeks to garner information about juror deliberations in order to inform trial or negotiation strategies without notifying the court. A lawyer who suspects juror misconduct may surveil juror social networking sites if the lawyer promptly advises the court of all findings, and does not contact jurors to gain access to their social networking sites or engage in deception, either directly or through a proxy, to gain such access.