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Internet Investigations Of Jurors: Ethical and Strategic Considerations

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Recent decisions in New York and California have crystallized a question that many attorneys may have faced but to which few had an answer: What should an attorney do if he or she determines that a juror provided false information during voir dire? Because lawyers now have the ability to conduct real-time Internet investigations of jurors both before and during trial, courts are now confronting the question of when, if ever, attorneys are obligated to conduct basic research into jurors' backgrounds and what, if anything, they should do if they uncover troubling information.

The Basics of Juror Investigations

The impartiality of prospective jurors is examined through the voir dire process. As courthouses throughout the country have installed wireless networks that allow people inside the courtroom to access the Internet, attorneys increasingly are researching jury panels in real time during voir dire. Courts have endorsed the practice as proper; one New Jersey appellate court explained that "the opportunity to learn about potential jurors [is] one of the most fundamental rights of litigation" in finding that attorneys must be permitted to perform Internet investigations during voir dire.[1]

Thus far, courts have accepted the practice of reviewing jurors' profiles on social media sites where an attorney's visit cannot be detected. In *Sluss v. Kentucky*,[2] the Kentucky Supreme Court concluded that a party may have suffered prejudice where a juror who was Facebook friends with a crime victim's family member stated during voir dire that she did not have a Facebook account. Because the juror lied during voir dire, the defendant's attorney did not look up the juror's Facebook profile and thus did not discover her connection to the victim's family. In light of this discovery, which occurred after the defendant was convicted, the court remanded the case to the trial court for a hearing to determine if the juror's potential bias merited a retrial.

In addition to social media sites, attorneys also are increasingly reviewing information available on online court dockets, Lexis and Westlaw to determine if jurors have provided misleading information about their criminal or litigation histories during voir dire. In fact, the Missouri Supreme Court now requires that attorneys use "reasonable efforts to examine the litigation history" of jurors and "promptly bring to the court's attention information about jurors' prior litigation history."[3] This is the only opinion where a court has imposed an affirmative obligation on litigants to investigate jurors in the absence of any suspicion of misconduct. As the court explained, requiring a basic investigation will prevent retrials that become neces-

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sary when a nondisclosure that easily could have been discovered pre-verdict is not revealed until the verdict is issued.

As a practical matter, the ability to conduct a thorough Internet investigation of a potential juror may be limited prior to empanelment by a number of factors, including: (1) time constraints, especially for shorter trials where the voir dire process might take only two or three hours; (2) resource constraints, which are particularly acute for attorneys trying cases without the assistance of associates or paralegals who can be tasked with conducting investigations while voir dire is ongoing; and (3) technology constraints, as some courts still forbid the use of computers or do not provide wireless Internet access.

Thus, depending on the circumstances, an attorney might only be able to conduct a very basic investigation into the backgrounds of potential jurors. Attorneys should be aware, however, that if they discover information prior to the empanelment of the jury that, if revealed, might result in the disqualification of a juror, the attorney will be "barred from later challenging the composition of the jury" if he chooses not to explore the issue during voir dire.[4] In other words, if an attorney does discover information that leads the attorney to believe that a potential juror might have given an untruthful or misleading answer during voir dire, "the right to challenge [the] juror is waived by failure to object at the time the jury is empanelled…."[5]

Ethical Rules

In the event that an attorney discovers a prospective juror has provided false information during voir dire, the ethical obligation of that attorney depends on which state's ethical rules apply. The minority view, to which New York subscribes, explicitly obligates the attorney to report any juror misconduct to the court, as do the ethical rules for California, Connecticut, Ohio, Texas, and Virginia, which contain similar language mandating disclosure of juror misconduct.[6]

The ABA Model Rules and ethical rules in the majority of states, on the other hand, do not directly address this scenario, and therefore do not provide guidance to the attorney who discovers that a prospective juror has been untruthful during voir dire.[7]

Recent Developments

In the most widely discussed decision on the subject, Judge William H. Pauley III held in *United States v. Daugerdas*[8] that attorneys for a convicted criminal defendant had waived the right to raise the issue of juror misconduct post-trial where they had substantial knowledge of the misconduct pre-verdict. Pauley granted a new trial to the three defendants whose lawyers did not learn of the misconduct pre-verdict, while affirming the conviction of the defendant whose lawyers did have knowledge despite the fact that they never told their client about the information they had uncovered.

In *Daugerdas*, four defendants were tried together on charges stemming from a federal investigation into fraudulent tax shelters. After the attorneys were provided basic information about the prospective jurors but prior to voir dire, the attorneys for one of the defendants, David Parse, conducted a Google search of the prospective jurors and discovered that someone sharing the name of a prospective juror, Catherine Conrad, was an attorney whose license to practice in New York had been suspended. The prospective juror, however, indicated that her highest level of education was college, which apparently led Parse's attorneys to conclude that the panel member was not the suspended attorney. Conrad subsequently was selected for the jury that ultimately rendered guilty verdicts against the defendants.

During the course of the trial, Parse's attorneys continued to investigate Conrad and learned that she had lied during voir dire, concealing: (1) that she had attended law school and been admitted to the bar; (2) her suspension from practice; (3) her civil litigation history; and (4) her criminal record. Pauley's review of the investigation conducted by Parse's attorneys led him to conclude that they "had actionable intelligence that Conrad was an imposter" before the issuance of the verdict that "demanded swift action to bring the matter to the Court's attention." Instead, Parse's attorneys took no action.

Conrad's misrepresentations came to light when she sent a post-verdict letter to one of the prosecutors praising the government's performance. The government then shared the letter with the court and defense counsel, leading to an investigation into Conrad's background. At the time, Parse's attorneys claimed that Conrad's "fan letter" prompted their investigation; the fact of their prior investigation only became known after Pauley demanded that all counsel disclose what they knew about Conrad pre-verdict.

In ruling that Parse had waived the right to complain of juror misconduct post-verdict, Pauley explained that Parse's attorneys "knew—or with a modicum of diligence would have known—that Conrad's testimony was false and misleading." He further explained that a "defendant can waive certain rights through the actions of his attorneys, even if the defendant himself was unaware of the circumstances and actions giving rise to the waiver." Because Parse's attorneys were charged with knowledge of Conrad's misrepresentations, they waived the right to seek a new trial on that basis. Thus, Pauley's determination that Conrad's misconduct prevented the defendants from obtaining a fair trial resulted in a new trial for Parse's codefendants, but not Parse.[9]

A situation similar to *Daugerdas* arose in *Apple v. Samsung*,[10] where the foreperson of a jury that awarded Apple $1.05 billion in damages in a patent infringement suit against Samsung failed to disclose during voir dire that he had been sued by a company, Seagate, in which Samsung held a substantial stake. The court denied Samsung's motion for a new trial, finding that because the juror, Velvin Hogan, revealed during voir dire that he had worked for Seagate, "Samsung could have discovered Mr. Hogan's litigation with Seagate, had Samsung acted with reasonable diligence" based on Hogan's disclosure that he had worked for Seagate. Unlike the *Daugerdas* situation, the court did not find that Samsung's attorneys had actual knowledge of Hogan's litigation with Seagate; rather, Judge Lucy H. Koh found that Samsung had waived the right to seek a new trial due to Hogan's nondisclosure because Samsung could have uncovered Hogan's litigation history if it followed up on the answers Hogan gave during voir dire. She found that Samsung's "obligation to investigate" Hogan was triggered after it learned of Hogan's personal bankruptcy filing and his employment history with Seagate, both of which were disclosed during voir dire.

Although *Apple* suggests that attorneys may have some affirmative obligation to investigate jurors, most courts still seem reluctant to impose such a requirement. West Virginia's highest court recently ordered a new trial for a defendant convicted

of three felonies where a juror concealed her connections to the defendant and several witnesses during voir dire.[11] After the verdict was delivered, the court learned that one of the jurors, Amber Hyre, had sent the defendant a MySpace message shortly before the trial began. Hyre also failed to disclose that she was related by marriage to one trial witness and that her brother-in-law was employed by a second witness. Although the prospective jurors were asked whether they had personal connections to the defendant or any of the potential witnesses during voir dire, Hyre did not disclose her connections.

In reversing the trial court's denial of defendant's motion for a new trial, the court explained that "Hyre's repeated lack of candor clearly undermined the purpose of voir dire, and, as a result, deprived [defendant] of the ability to determine whether [Hyre] harbored any prejudices or biases against him or in favor of the state." The court concluded that Hyre's misrepresentations "foreclosed any challenge for cause or use of a peremptory challenge," and thus denied defendant the right to a fair and impartial jury. Unlike *Apple*, the West Virginia court ignored the question of whether the defendant and/or his attorneys could have discovered Hyre's connections to both the defendant and the witnesses, instead focusing on their lack of actual knowledge of those connections.

Ethical and Strategic Considerations

If an attorney learns that a juror has concealed information, and that concealment suggests that the juror might be predisposed to side with the attorney's client during deliberations, when, if ever, should the attorney "gamble on a favorable verdict" by not disclosing the results of his investigation?

The decision should be primarily driven by two factors: first, whether the jurisdiction in which a trial is taking place requires an attorney to disclose juror misconduct; and second, whether information discovered by an attorney is sufficient to constitute "knowledge" of juror misconduct, such that the failure to disclose the information prior to the issuance of a verdict will result in waiver.

In New York, where attorneys have an affirmative obligation to inform the court of juror misconduct, the decision point occurs before any investigation begins. Because an attorney will be obligated to disclose any juror misconduct he uncovers, an attorney might decide not to conduct any juror investigations at all or to wait until an adverse verdict is issued before doing so. But the cost of that decision could exceed the benefits. The primary purpose of investigating prospective jurors is not the remote possibility that a juror has misled the court, but rather to gather information to determine whether to seek to strike a panel member. The decision to continue investigating jurors post-empanelment is driven largely by two considerations: first, to enable attorneys to tailor their presentation to individual jurors; and second, to determine if jurors are actively engaging in misconduct by, for example, discussing an ongoing trial on Twitter or Facebook. *Daugerdas* represents the rare situation in which an investigation reveals that a juror lied during voir dire.

The decision to proceed with the Internet juror investigation also faces strategic considerations as to when to stop the investigation. As *Apple* suggests, once attorneys begin an investigation, they may be found to waive a juror misconduct claim if follow-up research would have uncovered a basis for disqualifying a juror.

In jurisdictions where no affirmative disclosure obligation exists, an attorney may be confronted with the decision of whether to disclose juror misconduct when the attorney believes that the juror likely will vote for his client. Deciding what to do in this situation is obviously fact-dependent. In *Apple*, Koh suggested that Samsung's attorneys likely took a "calculated risk" in not further investigating Hogan, hoping that his patent background might lead him to be biased in Samsung's favor. Where courts find that such a risk was taken, they will likely find waiver.

Although the *Daugerdas* opinion does not discuss the motives of Parse's attorneys, the facts surrounding the decision made by Parse's attorneys not to inform the court of Conrad's misconduct suggest that they may have felt that she was a sympathetic juror and thus decided to take the "calculated risk" Koh references in *Apple*. For example, Conrad did not disclose that both she and her husband were convicted criminals; once they discovered this, Parse's attorneys may have made the determination that Conrad's criminal history might mean that Conrad was hostile to prosecutors or sympathetic to criminal defendants.[12] Of course, if this were what Parse's attorneys were thinking, the verdict proved them wrong.

Perhaps the clearest lesson here is that if an attorney does decide not to disclose juror misconduct because of his belief that the juror will vote for his client, the attorney must have the full consent of the client, including the client's understanding that the attorney's information could be wrong or the juror could change her mind during deliberations. As the *Daugerdas* situation illustrates, the attorney's knowledge will be imputed to his client regardless of whether the attorney has informed his client of the results of his investigation. Because of this, an attorney always must disclose evidence of juror misconduct to his client in addition to considering whether to make any disclosure to the court in light of the possibility that the court will find that the attorney has waived the right to complain of the misconduct post-verdict.

1. *Carino v. Muenzen*, 2010 WL 3448071, at *9-10 (N.J. App. Div. Aug. 30, 2010).
2. 381 S.W.3d 215 (Ky. 2012)
3. *Johnson v. McCullough*, 306 S.W. 3d 551, 554 (Mo. 2010).
4. *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 551 n.2 (1984).
5. *Robinson v. Monsanto Company*, 758 F. 2d 331, 335 (8th Cir. 1985).
6. New York Rule of Professional Conduct 3.5 provides in relevant part: "A lawyer shall reveal promptly to the court improper conduct by a member of the venire of a juror, or by another toward a member of the venire or a juror or a member of his or her family to which the lawyer has knowledge."
7. The ABA's Model Rule of Professional Conduct 3.5 does not speak to an attorney's obligations in the face of juror misconduct. Instead, it merely states that attorneys cannot seek to improperly influence jurors or make contact with them.
8. 867 F. Supp. 2d 445 (S.D.N.Y. 2012)
9. Parse retained new counsel, who then filed a motion for a new trial premised on the claim that his trial attorney's mishandling of the Conrad investigation denied him effective assistance of counsel. That motion was denied. Pauley sentenced Parse to 42 months in prison.
10. *Apple v. Samsung*, No. 11-CV-01846-LHK, 2012 WL 6574785, at *5 (N.D. Cal. Dec. 17, 2012).
11. *State v. Dellinger*, 225 W. Va. 736 (W. Va. 2010)
12. Neither the government's brief opposing Parse's motion for a new trial nor the opinion itself raises the concern that Parse's attorneys violated New York Rule of Professional Conduct 3.5, which mandates disclosure of juror misconduct. Considering that they had an affirmative disclosure misconduct, it is somewhat puzzling that the government did not point this out to the court as a further reason to deny their motion for a new trial.