

Use of Social Media in Voir Dire

2014 Idaho Federal Court Bench-Bar
Conference
October 3, 2014

Facebook



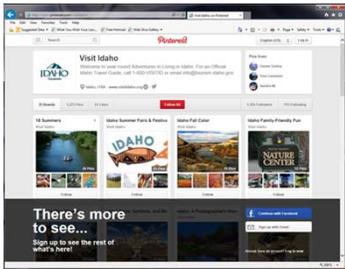
Instagram



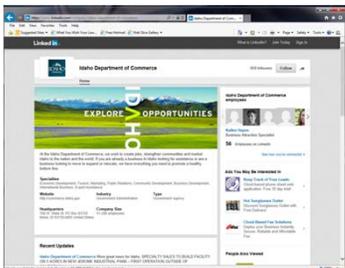
Twitter



Pinterest



LinkedIn



Attorney Responsibilities

- Competence—Rule 1.1
 - Note Comment 8 (eff. 7-1-14): requisite knowledge/ skill including benefits/ risks associated with relevant technology.
 - Applies to attorney and those working for...

Lawyer's Responsibility

- Review juror or potential juror's internet presence.
 - *Carino v. Muenzen*, No. A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154 (N.J. Super. Ct. App. Div. 2010), *cert denied Carino v. Muenzen*, 2011 N.J. LEXIS 189 (N.J., Feb. 1, 2011)
 - Just because Plaintiff's Counsel had foresight to bring laptop to Court, did not prejudice defense counsel who did not requiring Judge to "level the playing field."
- Proposed Local Rule 47.2
 - Must research anonymously

Anonymous on LinkedIn

- To browse anonymously:
 - Move your cursor over your profile photo in the top right of your homepage and click *Privacy & Settings*. For verification purposes, you may be prompted to sign in again.
 - Click [Select what others see when you've viewed their profile](#).
 - Choose *You will be totally anonymous*.
 - Click *Save Changes*.
 - *Note:* When you choose not to show your name and headline when viewing other people's profiles, you won't be able to see who's viewed your profile.

Limitations

- May not friend or request access
 - Personally or through another
- Prohibited by Rule 3.5(b).
- Cannot pretend to be someone else.
- Cannot follow on Twitter, Pinterest, Instagram
- Can only access publicly accessible pages

Be Aware

- Jurors have access to internet
 - Types of issues
 - Self research through Google/ Wikipedia
 - Conversations through Facebook
 - Juror in England took a poll on guilt.

If you find something

- Discovery of evidence of potential juror or juror misconduct that is criminal or fraudulent.
 - Must take remedial measures including disclosure to the court.
 - Once aware of presence—monitor throughout the trial

Court Inquiry of Juror

- *State v. Smith*, 2013 WL 4804845 (Tenn. Sep. 10, 2013).
 - Juror “A-dele!! I thought you did a great job today on the witness stand...I was in the jury...”
 - Trial judge informed jurors of communication and declined Defense Counsel’s suggestion to examine the juror.
 - Tennessee Supreme Court reversed verdict and indicated that Court must insure that verdict relies solely on evidence introduced at trial.

Friend?

- *Sluss v. Commonwealth*, 381 S.W.3d. 215 (Ky. 2012).
- Defendant claimed juror bias based on undisclosed juror Facebook friends with victim’s mother.
- Jurors were asked if they knew victim or family. Later discovered the two juror’s were Facebook friend’s with victim’s mother.
- Counsel moved for new trial and proffered screenshots
- Juror who is Facebook friend is not enough evidence alone of bias—but Court reversed and remanded based on the nondisclosure and trial court’s lack of investigation of the relationship.

Stay Reasonable

- *Steiner v. Superior Court*, 164 Cal.Rptr.3d 155 (Cal.Ct.App. 2013).
 - Defense counsel was concerned jurors would “Google” plaintiff’s attorney and see victories, thus asked Court to order material taken down.
 - Court ordered material removed and admonished jury against “googling.”
 - On appeal, measures directed at website not related to case went too far. Juror admonitions/ instructions are presumptively adequate.

Managing Juror Social Media

- Know the technology.
- Stay as anonymous as possible.
- Do not friend or request access.
- Look at friends (and know who yours are).
- Actively Monitor.
- Propose jury instructions and admonitions.
- Bring to the Court's attention as soon as possible.
- Recommend an inquiry.
- Insure verdict relies only on evidence presented in Court.

Rule 47.2 Social Media Juror Inquiries₁

- a) Attorneys may use websites available to the public, including social media websites, for juror or prospective juror research, so long as:
1. The website or information is available and accessible to the public;
 2. The attorney does not send an access request to a juror's electronic social media;
 3. No direct communication or contact occurs between the attorney and a juror or prospective juror as a result of the research, including, but not limited to Facebook "friend" requests, Twitter or Instagram "follow" requests, LinkedIn "connection" requests, or other forms of internet and social media contact;
 4. Social media research is done anonymously. For example, a search on a social media site must not disclose to the juror who is making the inquiry, and it must only seek information available and accessible to the public and not the result of an attorney's account on said social media site;₂ and
 5. Deception is not used to gain access to any website or to obtain any information.

Rule 47.2 Social Media Juror Inquiries ...cont'd

6. Third parties working for the benefit of or on behalf of any attorney must comply with all the same restrictions as set forth above for attorneys.
7. If an attorney becomes aware of a juror's or prospective juror's conduct that is criminal or fraudulent, IRPC 3.3(b) requires the attorney to take remedial measures including, if necessary, reporting the matter to the court.
8. If an attorney becomes aware of a juror's posting on the internet about the case in which she or he is serving, the attorney shall report the posting to the court.
9. If there is not a method of conducting the internet research in a manner which prevents the juror or prospective juror from discovering who is doing the research, the research shall not be done because it would constitute an inappropriate communication. Attorneys must be familiar with the technology and internet tools they use to be able to do searches, including automatic, subscriber-notification features so as to maintain anonymity in any search.

**Rule 47.2 - Footnotes
Social Media Juror Inquiries ...cont'd**

1. Jurors will be advised during the orientation process that their backgrounds will be of interest to the litigants and that the attorneys in the case may investigate their backgrounds, including a review of internet websites and social media.
2. If there is not a method of conducting the internet research in a manner which prevents the juror or prospective juror from discovering who is doing the research, the research shall not be done because it would constitute an inappropriate communication. Attorneys must be familiar with the technology and internet tools they use to be able to do searches, including automatic, subscriber-notification features so as to maintain anonymity in any search.

**US District Court Proposed Civil & Criminal
Rule Changes – Public Notice**

The United States District Court's Local Rules Committee invites the public to review and provide comment on the amendments to the District Court's Local Rules of Criminal Procedures 32.1 and Local Rules of Civil Procedures 16.1 and the new proposed 47.2. The proposed rule changes can be found on our website at www.id.uscourts.gov in the announcement section.

The proposed Local Civil Rule 47.2 addresses the appropriate use of social media searches in regards to jurors or prospective jurors. The purpose of this proposed Rule is to provide guidance to Counsel in regards to what this District considers appropriate in the use of Social Media searches regarding jurors. There is a divergence of opinions regarding (1) the responsibility of attorneys to use social media to investigate the jury (*Cajamarca v. Regal Entertainment Group*), (2) the scope of a social media investigation and (3) where the line should be drawn between properly investigating jurors and improperly communicating with them.

**US District Court Proposed Civil & Criminal
Rule Changes – Public Notice ... cont'd**

One divergence of the proposed Rule from the ABA Formal Opinion 466 issued on April 24, 2014 is whether or not the search needs to be done "anonymously." While the ABA came down on the side of not requiring anonymous searches, other groups have held that (1) you must know what technology exists (ABA Formal Opinion 466 @p5, last paragraph) and (2) must do any searches anonymously (Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2012-2.)

It is also contemplated under the proposed Local Civil Rule 47.2 that the Court instruct the jurors in their orientation session as to the potential use of social media and that the attorneys in the case may research them. This is a recommendation of the ABA Formal Opinion 466 @ p.3. fn.4.

**US District Court Proposed Civil & Criminal
Rule Changes – Public Notice ... cont'd**

All public comments are due by July 18, 2014 at 5 p.m. (MST). Please send your comments by email to local_rulesDC@id.uscourts.gov, or by mail at the following address: U.S. District Court, District of Idaho, Attn: Kirsten Wilkinson, Chief Deputy of Operations, 550 West Fort Street, Boise, ID 83724.

Paper copies of the proposed rules are available upon request at the United States Courthouses in Boise, Coeur d'Alene, Moscow and Pocatello. If you are unable to access the website or to able to travel to a courthouse location, please call Kirsten Wilkinson, Chief Deputy of Operations at (208)334.9464.
