

## The Information Age, Part II: Juror Investigation on the Internet— Implications for the Trial Lawyer

Jonathan M. Redgrave & Jason J. Stover



---

Recommended Citation: Jonathan M. Redgrave & Jason J. Stover, *The Information Age, Part II: Juror Investigation on the Internet—Implications for the Trial Lawyer*, 2 SEDONA CONF. J. 211 (2001).

Copyright 2001, The Sedona Conference

For this and additional publications see:

<https://thesedonaconference.org/publications>

# THE INFORMATION AGE, PART II: JUROR INVESTIGATION ON THE INTERNET – IMPLICATIONS FOR THE TRIAL LAWYER

---

*Jonathan M. Redgrave, Jones Day, Washington, D.C. and  
Jason J. Stover, Gray Plant Mooty, Minneapolis, MN\**

## INTRODUCTION

The selection of the jury panel, once considered a trial lawyer's art, today relies on professional jury consultants, who purport to employ the methods of psychology and social science to select a jury that will reach a favorable verdict. Jury research has become so common in civil litigation that one lawyer has opined "no self-respecting trial lawyer will go through the process of jury selection in an important case without the assistance of highly paid trial consultants."<sup>1</sup>

The marketplace truly reflects this reality. The jury consulting industry has experienced astonishing growth during the past 30 years, undergoing a transformation from a tool used only in multi-million dollar cases to a practice now regularly used even in much smaller civil trials. So pervasive has the use of jury consultants become that the field has grown into a 400 million dollar a year industry, with more than 700 practitioners located across the country.<sup>2</sup>

One technique employed both by trial attorneys and jury consultants is the pretrial investigation of prospective jurors. The advantages to learning as much about prospective jurors as possible are obvious. Given the limits placed on peremptory challenges by both state and federal courts, each challenge must be exercised carefully. Information about a particular juror's background, personality, and disposition can prove invaluable in exercising these challenges and, more generally, in conducting an effective voir dire examination. Any insight into a juror's personality permits a trial attorney to tailor his or her voir dire questions in such a way as to maximize the likelihood of revealing a particular trait that may support a challenge for cause. Even if a challenge for cause fails, pretrial investigation often reveals characteristics that may lead an attorney to exercise a peremptory challenge to remove that juror from the venire.

Such characteristics can be determined by conducting a thorough investigation of prospective jurors, including review of public records, interviews with a juror's friends and acquaintances, and even surveillance of a juror's home. While such activities have traditionally been the province of jury consultants or private investigators, the dawn of the internet age has provided a powerful new investigatory tool that can be utilized by attorneys

\* Mr. Redgrave is Of Counsel with the firm of Jones, Day, Reavis & Pogue in its Washington, D.C. office and Mr. Stover is an attorney with the firm of Gray, Plant, Mooty, Mooty & Bennett, P.A. in Minneapolis, Minnesota. The views expressed in this article are solely those of the authors and do not reflect the views or positions of their firms or any of their respective firm's clients.

1 Gordon T. Walker, Editorial, Lawyers Must Show Restraint If Our Jury System Is To Survive, Boston Herald, October 22, 1995, at 34, quoted in Franklin Strier and Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, its Impact on Trial Justice and What, if Anything, to Do About It*, 1999 Wis. L. Rev. 441, 443 (1999).

2 See Franklin Strier and Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, its Impact on Trial Justice and What, if Anything, to Do About It*, 1999 Wis. L. Rev. 441, 444 (1999).

themselves. Where once a thorough review of public records would have been too time consuming for an attorney to conduct for an entire venire, much of the information contained in such records can now be found in just a few moments spent online. The internet's vast information resources permit litigators, even in small cases, to immediately access information about prospective jurors that once would have been difficult to obtain. This ability will increasingly level the playing field between the plaintiff's and defendant's bar, as plaintiffs will increasingly be able to conduct investigations of panel members without incurring the expense typically associated with such an endeavor. As more and more attorneys begin to be comfortable with the idea of conducting research online, the nature of pretrial jury research will be dramatically transformed.

### HISTORIC METHODS OF JURY INVESTIGATION<sup>3</sup>

The law has long permitted attorneys involved in civil litigation to conduct reasonable investigations of prospective jurors. While ethical concerns, discussed later, may apply, such investigation is a time-honored technique of trial lawyers. Courts have long recognized that such investigations occur and are a proper means of making intelligent use of the voir dire process.<sup>4</sup> Given the general paucity of information concerning prospective jurors officially provided to counsel, such investigation may be necessary in order to accurately identify those jurors who should be challenged. Subject to reasonable restrictions imposed by the court or by local statute, attorneys may employ a variety of techniques to investigate prospective jurors. Long ago, commentators recognized that the only real limitations on jury investigation are "a lawyer's ingenuity, available time, and available funds."<sup>5</sup>

In fact, contrary to the belief of many trial lawyers, in the absence of a local rule or court order to the contrary, no generally applicable rule prohibits attorneys or agents of attorneys from interviewing persons other than the jurors themselves or their families.<sup>6</sup> Thus, an attorney, jury consultant, or private investigator may travel to a juror's neighborhood to inquire of his neighbors about his opinions, personal habits, or general lifestyle. Such tactics have repeatedly been upheld by the courts, so long as not used to intimidate or harass prospective jurors.<sup>7</sup> Not only has jury investigation been permitted, it has actually been facilitated by numerous state laws that provide for the release of jury lists prior to trial.<sup>8</sup> In fact, many of these state laws explicitly state that the reason for releasing jury lists prior to voir dire is to permit counsel to undertake pretrial investigation of prospective jurors.<sup>9</sup>

As early as 1955, courts recognized the practice of jury investigation and accepted it as part of the voir dire process. In *Dow v. Carnegie-Illinois Steel Corp.*, 224 F.2d 414 (3<sup>rd</sup> Cir. 1955), the Third Circuit Court of Appeals upheld the trial court's refusal to dismiss a jury panel that had allegedly been the subject of "surveillance and investigation" by agents of trial counsel. The Court described the investigatory activities as follows:

"[E]vidence was adduced that a jury investigation service was in existence in the Western District. When jury lists were made up, the investigator obtained copies from various lawyers who gave them to him. The investigator then proceeded to converse, usually by telephone, with the various jurors' friends and neighbors, whose names were obtained from

<sup>3</sup> This article provides an overview of historic methods of investigation used at different points in time; it is not intended to be a catalogue of all methods or a timeline of when the industry changed its standards and methods. Instead, it is hoped that this brief overview of jury investigations will show how the evolution of standards and traditional methods of investigation will now need to be reapplied in the world of the internet.

<sup>4</sup> See *State of Iowa v. Knerl*, 426 N.W.2d 654, 656 (Iowa Ct. App. 1988) ("It is a recognized practice for an attorney to make investigations of prospective jurors so that challenges can be utilized intelligently. There is no doubt that pretrial investigations of prospective jurors are both legal and common").

<sup>5</sup> See Joshua Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 Geo. L.J. 839, 851 (1968).

<sup>6</sup> See *Commonwealth v. Allen*, 400 N.E.2d 229, 238 (Mass. 1980).

<sup>7</sup> See *Dow v. Carnegie-Illinois Steel Corp.*, 224 F.2d 414, 431 (3<sup>rd</sup> Cir. 1955); see also *United States v. White*, 78 F.Supp. 2d 1025, 1027 (D.S.D. 1999) ("...the Court is not troubled by less intrusive means of investigating prospective jurors, such as examining public records on voter registration, driver registration and property valuation, or driving down public streets to view the residences and neighborhoods of prospective jurors").

<sup>8</sup> See *United States v. Credit*, 2 M.J. 631, 640 (A.F.C.M.R. 1976) ("The laws of many of the states provide for the release of lists of persons selected for jury duty prior to trial...by rule of court in some of the Federal circuits and by Federal statute a more limited right of access to jury lists exists").

<sup>9</sup> See id.

street directories. The investigator testified as to the extent of his questioning of those whom he contacted: 'I ask the neighbor if they know this particular person that is called, and if it is a man where he is employed, if he is married, if he has any children, whether they'd be old enough to work, and if they did work if the neighbor would know where they worked; if they were younger, were they of school age or still younger than that; about how old the man was; if he owned his own property there; if he knew if he ever had any cases in court litigation; if he had ever been hurt in any accident; and if they knew their politics or religion.'<sup>10</sup>

Courts permitted such questioning even in 1955. Today, attorneys and jury consultants conduct much more vigorous and intrusive investigations of prospective jurors. Perhaps the most common technique employed by investigators is surveillance of the juror's home and neighborhood. Investigators routinely drive by the homes of prospective jurors and take photographs to be examined later for any hint of bias or other relevant information. Investigators also drive through jurors' neighborhoods to get a sense of what type of beliefs or attitudes a juror may bring to court.<sup>11</sup> Some investigators have even gone so far as to record their observations of jurors' pets and the bumper stickers on their cars.<sup>12</sup>

While the questions asked by the investigator in *Dow* involved fairly straightforward information that a typical neighbor might know, investigators today probe much more deeply into the juror's private life when they question neighbors and acquaintances. It is commonplace for investigators to inquire about a juror's religious affiliation, political beliefs, and even credit history.<sup>13</sup> To say the least, such questions are intrusive and, because of their intrusive nature, will likely be reported to the prospective juror by whatever neighbor is asked to provide this information.

In addition to face-to-face interviews with friends and neighbors, investigators in the past have frequently review public records to learn about prospective jurors. Investigators obtain credit reports, tax records, property assessments, police reports, and even employment records.<sup>14</sup> In some cases, investigators have even gone so far as to conduct professional analysis on the handwriting of a prospective juror.<sup>15</sup> While use of this technique is of only dubious utility, it illustrates how far some litigants will go to ferret out potential bias or seek a more favorable jury.

Finally, a favorite technique of jury consultants is to prepare a community assessment for each prospective juror. Community attitudinal surveys consist of survey questions asked over the telephone of those in the same community as the jurors. From these surveys, jury consultants purport to be able to determine what type of juror will be favorable for a litigant.<sup>16</sup> When these surveys are combined with more specific information about a particular juror's characteristics, an attorney may be able to tailor his or her case to fit the community's belief structure.

## THE INTERNET'S POTENTIAL TO TRANSFORM JURY RESEARCH

The internet offers trial attorneys a significant new tool to supplement existing research techniques. Whereas prior juror-specific investigations relied on searches of public records and intrusive fact to face interviews with neighbors and acquaintances of prospective

<sup>10</sup> *Dow*, 224 F.2d at 430.

<sup>11</sup> See Strier, *supra* note 2, at fn. 36.

<sup>12</sup> See David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 Temple L. Rev. 1, 33 (1997).

<sup>13</sup> See *id.*

<sup>14</sup> See *Credit*, 2 M.J. at 640.

<sup>15</sup> See Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 Suffolk U. L. Rev. 463, 473 (1999).

<sup>16</sup> See John Charles S. Pierce, *Selecting the Perfect Jury: Use of Jury Consultants in Voir Dire*, 14 Law and Psych. Rev. 167, 176 (1990) (describing the community attitude assessment as "A systematic process of measuring attitudes or opinions which exist within a given community and which may influence the way individuals respond to new information or evidence. It can be used to identify the percentage of the individuals who are most likely to vote for or against a particular party").

jurors, the internet now permits attorneys and consultants to quickly and anonymously discover extensive information about each juror's background. The internet's most profound effects can be seen in the type and scope of information that can be discovered, as well as the anonymity with which attorneys can now learn intimate details about a juror's personal life.<sup>17</sup>

Traditionally, jury investigators were limited in the amount of information they could obtain from public records. While much information about an individual juror was available, the process of visiting several different departments and making many requests for documents was both costly and time consuming. Since many states provide only a limited interval for jury investigation, as a practical matter, much of the information that could have been obtained from diligent investigation into public records was simply not gathered.

The internet now permits investigators to quickly obtain a wealth of information from public records, without ever leaving the office. With no more than the limited information provided by the court, an internet savvy investigator can access such information as driver's licenses and criminal records.<sup>18</sup> From the information gained from these records, an investigator will be able to access any public record available anywhere on the internet. While public records have always been a fruitful source of information, the internet now brings these records to any investigator's desktop, and permits the rapid and thorough search of the backgrounds of dozens of individuals at one time.

The amount of information available on the internet continues to grow at a staggering pace. Currently, many websites employ software that tracks other internet sites visited by that site's patrons. Many internet retailers keep detailed information about their customer's purchase preferences and which other retailers they are likely to visit. It is not difficult to imagine that such information may one day be available to a jury investigator. In the not too distant future, an investigator may be able to log onto the internet, and within minutes access not only very personal information contained in various public records databases, but also the particular beliefs, preferences, and tastes of particular jurors. In many cases, the same information valuable to retailers would be equally valuable to litigants, as they seek to determine what type of people will decide their case. Knowing the types of music a juror listens to, or the type of books she prefers to read, may provide valuable insight into that juror's temperament. Depending on the nature of the case, such information could prove highly useful during voir dire.

The internet also permits attorneys to obtain a much more complete picture of a juror's beliefs and biases than traditional methods. To learn about a juror's beliefs, investigators have typically had to resort to conversations with a juror's neighbors or acquaintances. This technique is not only time consuming, but runs the very real risk of alienating the jury, not to mention the Court. Confronted with very personal questions about a friend or neighbor, most people would not only be hesitant to provide information, but would almost certainly report the incident to the juror. If the juror too is offended by the nature of the inquiry, he or she may resent the attorney who initiated the investigation. Such resentment may be difficult to observe during voir dire. Thus, traditional inquiries into jurors' private beliefs and attitudes ran the risk of doing more harm than good.

The internet permits attorneys to gather such information in arguably complete anonymity. In addition to public records, the internet contains a wealth of additional information about jurors. For example, newsgroups exist on the internet whereby a juror may post messages to a particular site or chat room. These messages often reflect a juror at

---

<sup>17</sup> Indeed, many consultants who have eschewed prior methods and techniques that focused on particular jurors may now be forced to reevaluate those positions insofar as they relate to the retrieval and use of information readily available on the internet.

<sup>18</sup> See Paul J. Johns, *Technology-Augmented Advocacy: Raising the Trial Lawyer's Standard of Care; Changing Traditional Legal Education; and Creating New Judicial Responsibilities*, 25 Ohio N.U.L. Rev. 569, 575 (1999).

his or her most candid, since he or she also recognizes the anonymity of the internet. One online service, Dejanews, maintains an archive of ten years' worth of newsgroup postings.<sup>19</sup> This archive may be searched by juror name, and once a message posted by a particular juror has been located, the search engine will make available a complete listing of every message in its database authored by that juror.<sup>20</sup> Even if the juror himself has not posted any messages to the group, the search engine permits an investigator to search for any messages posted by anyone affiliated with the juror, such as co-workers, neighbors, or friends.<sup>21</sup> These messages may provide valuable insight into the views of the people with whom the juror is affiliated.<sup>22</sup> While traditional jury investigators could only infer individual juror attitudes, tools such as Dejanews permit an attorney to read the juror's own words and determine firsthand the beliefs of the juror and his friends and co-workers. This capability gives the trial lawyer a powerful new weapon to use during voir dire.<sup>23</sup>

The internet also permits counsel to determine a juror's group affiliations. By entering a juror's name into any standard search engine, such as Yahoo or Alta Vista, an investigator can locate any web page containing that juror's name.<sup>24</sup> These web pages will often provide personal information about the juror, and may give counsel an idea of the juror's attitudes and beliefs. If a prospective juror has acknowledged membership or affiliation with a particular group, then that group's website can be reviewed to determine what beliefs its members hold. If these beliefs are antithetical to the position to be presented at trial, that juror can be removed from the panel.

In the State of Minnesota's suit against several tobacco companies, the trial judge masked the identity of the jurors due to the intense publicity surrounding the case. As such, the parties relied exclusively upon questionnaires and voir dire to learn about the potential jurors. During voir dire, an anonymous juror acknowledged that he supported an organization named "INFACT" because of its positions and had contributed financially to the group for a number of years. Upon learning of this affiliation, defense counsel viewed the website of INFACT to determine what type of views it promoted. Counsel for defendants submitted exhibits to the Court demonstrating that INFACT opposed the tobacco industry and advocated a boycott of all products produced by tobacco companies, including food products. The website also revealed that INFACT was in the process of organizing a "Hall of Shame" for tobacco executives, and that the group had taken dramatic actions to gain favorable media attention and to denounce the tobacco industry.<sup>25</sup>

Defendants sought to exclude the juror based on the information it had found on INFACT's website. While this motion was denied, this case illustrates the power of the internet to shape voir dire. Once a juror has acknowledged membership in or agreement with a particular group, that group's beliefs and ideology can be learned in a matter of minutes. Even if the court refuses to grant a challenge for cause based on a juror's group affiliation, as was the case in Minnesota, this information is certainly useful to counsel as it conducts voir dire and presents its case.

---

19 See Frederick S. Lane III, *How to Use the Web to Select a Jury*, *The Internet Lawyer*, September 1998.

20 See id.

21 See id.

22 See id.

23 Of course, as with all information on the Internet, there is precious little that can be verified immediately as accurate. As such, there is a certain degree of caution that must be appended to any results of internet searches and investigations without other indicia of reliability in the information obtained.

24 See id.

25 See Defendant's motion to excuse juror 18 in *State of Minnesota, et al. v. Philip Morris, et al.*

## JUROR PRIVACY ISSUES

The issue of juror privacy has been only infrequently addressed by the courts. While litigants are permitted to engage in virtually any type of pretrial investigation that does not harass or intimidate jurors, jurors do have some privacy rights which must be respected. In *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511 (1984), the Supreme Court acknowledged that jurors may, in some circumstances, have a compelling interest in refusing to disclose certain information related to deeply personal matters. This compelling interest arises when the prospective juror has legitimate reasons for keeping this information out of the public domain.<sup>26</sup> In *Press-Enterprise*, the Court found such a privacy interest arose when a prospective juror was questioned about the rape of a family member.<sup>27</sup>

State courts have also limited inquiry during voir dire in order to protect the privacy interests of prospective jurors. Courts have limited inquiry into venire members' criminal background, voting record, medical conditions, reading habits, and political opinions.<sup>28</sup> Some courts have also expressed concern about the effect of pretrial investigation on the willingness of prospective jurors to serve.<sup>29</sup> However, other courts have analogized jury service to the acceptance of a high government post, and opined that jurors must be prepared for the same loss of privacy that accompanies service in a government post.<sup>30</sup> The majority of courts have adopted this latter view, and hold that, while jurors do have some compelling privacy rights, the right of the litigants to conduct a thorough voir dire examination can not be denied.

Nonetheless, prospective jurors certainly have the right to be free from harassment and intimidation. The Supreme Court has said that activities which "destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration tend to obstruct the honest and fair administration of justice and cannot be tolerated."<sup>31</sup> While the Court in *Sinclair* was referring to an investigation conducted during trial, the principle applies equally to pretrial investigation. In *Dow*, 224 F.2d at 431, the 3<sup>rd</sup> Circuit Court of Appeals applied the analysis of *Sinclair* to a pretrial investigation of prospective jurors, finding that no direct contact with jurors is necessary to violate their right to privacy.<sup>32</sup> However, investigatory techniques will be curtailed only when the reasonable tendency of the acts is to intimidate prospective jurors.<sup>33</sup> In *Dow*, the court held that merely interviewing acquaintances of prospective jurors did not so infringe the jurors' privacy interests that the practice must be curtailed.<sup>34</sup>

### THE INTERNET'S EFFECT ON JUROR PRIVACY

The increasing use of the internet in conducting jury investigation can be seen as either less intrusive upon the privacy of prospective jurors, or more intrusive, depending on one's perspective. Most obviously, the internet permits litigants to learn more about a prospective juror's private affairs than could previously be learned by traditional means. As discussed above, a skilled investigator can now accomplish more in a few hours than could previously be discovered during several days of diligent research. In addition, the internet permits investigation into much more than the public records which were once parties' best

<sup>26</sup> See *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511 (1983).

<sup>27</sup> *Id.*

<sup>28</sup> See Weinstein, *supra* note 11, at 17.

<sup>29</sup> See *Sinclair v. United States*, 279 U.S. 749, 765 (1929), quoted in Weinstein, *supra* note 11, at 36 ("if those fit for juries understand that they may be freely subjected to treatment like that here disclosed [surveillance of family members], they will either shun the burdens of the service or perform it with disquiet and disgust").

<sup>30</sup> See *United States v. Costello*, 255 F.2d 876 (2d Cir. 1958), quoted in Weinstein, *supra* note 11, at 37.

<sup>31</sup> *Sinclair*, 279 U.S. at 765.

<sup>32</sup> See *Dow*, 224 F.2d at 431.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*



source of information. The internet may provide access to the private thoughts and opinions of those jurors who operate websites or post to internet newsgroups. These candid snapshots provide invaluable insight for attorneys, but come at a potentially high price to the prospective juror. While it may be disconcerting for a juror to learn that his private life has been delved into, it is even more disconcerting to be confronted during voir dire with statements he made during an internet chat session. While the internet is certainly a public medium, many users forget this fact and divulge information they would be reluctant to share in another form of communication. Being confronted with this information in open court could realistically diminish a prospective juror's feeling of privacy, and lead to resentment of the attorney who conducted the inquiry.

The internet also has the potential to reduce a juror's privacy by becoming a repository for personal information to be used by parties after the trial is completed.<sup>35</sup> Once an investigator has gathered personal information relevant to a particular case, no safeguard exists to prevent that information from being widely disseminated via the internet or otherwise. This issue has been addressed by the California Court of Appeals. In *Pantos v. San Francisco*, 198 Cal. Rptr. 489 (Cal. Ct. App. 1984), the court discussed its reservations about permitting a jury investigation service to view the information contained in jury questionnaires. The court noted, "There is a risk of unreasonable intrusion into the juror's privacy by extensive dissemination of the questionnaire answers with the ubiquitous availability of integrated computer information circulating freely. Importantly, the court does not have the power to contain the extent to which the data may be used to yield information about a juror's life."<sup>36</sup>

The highly personal nature of information acquired by jury investigators makes this information valuable to a number of entities. In *Pantos*, the California court recognized that the proliferation of the internet has provided a perfect medium for an unscrupulous investigator to sell this information. Even if few investigators would actually engage in this practice, the very threat that they could do so can not help but discourage potential jurors from service. While many jurors balk at the idea of extensive investigation into their personal lives prior to trial, it is the rare juror indeed who would not outright refuse to serve, knowing that any personal information learned by either counsel would be posted on the internet for all to see.

While the internet permits counsel to conduct a more personal investigation of a juror, and potentially widely disseminate a juror's personal information, not all uses of the internet make jury investigation more intrusive. A strong argument can be made that widespread use of the internet will actually make jury investigation a less intrusive process.

Traditionally, jury investigators have been forced to gather most of their information from a prospective juror's friends and neighbors. Because of the unusual nature of the questions asked, it is almost certain that jurors learn of the investigation being conducted. Consequently, the process seems intrusive, because jurors are intimately aware that they are being investigated and understandably may resent the party responsible.

The internet allows this investigation to take place anonymously. Rather than relying on friends and neighbors, an investigator may now simply view postings to chat rooms or information contained on a website. To get a sense of the community in which the trial will be held, a consultant need no longer interview members of the community, but can instead visit the websites of local individuals and institutions. These techniques are no less thorough, but are certainly less intrusive.

<sup>35</sup> Of course, the court may attempt to shield jurors by sealing court records and keeping the identity of jurors secret during the pendency of a case. Such orders are rare and, not unexpectedly, raise concerns for parties and the public.

<sup>36</sup> *Pantos v. San Francisco*, 198 Cal. Rptr. 489, 494 (Cal. Ct. App. 1984).



Courts have recognized that a juror's privacy interest is less affected when the juror is unaware of the investigation taking place. In *Costello*, the 2d Circuit Court of Appeals upheld the review of jurors' tax returns by government attorneys.<sup>37</sup> The court reasoned that the jurors' right to privacy was not implicated, because they had no knowledge of the investigation prior to an objection by defendant's counsel.<sup>38</sup> If the venire's right to privacy is not implicated until it learns of an investigation, then the internet offers a less, rather than more, intrusive means of conducting pretrial research. A search of the internet does not require any contact at all with anyone associated with the jury. Since it is the knowledge of an investigation, rather than the investigation itself, which may violate a juror's right to privacy, the internet may offer a better way to conduct a pretrial inquiry without interfering with the jury's privacy rights.

### COUNSEL'S ETHICAL DUTY TO USE THE INTERNET

Model Rule of Professional Conduct 1.3 provides that "a lawyer shall act with reasonable diligence and promptness in representing a client." The official comment to the rule emphasizes that an attorney is ethically obligated to zealously represent his or her client. "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>39</sup> Since the internet now contains unquestionably relevant information about prospective jurors, attorneys may soon find themselves ethically bound to make use of easily accessible, inexpensive online resources.

The thrust of the Model Rules of Professional Conduct and the ABA Code of Professional Responsibility is that attorneys should use all legal means reasonably available to advance a client's interests.<sup>40</sup> There can be no question that the internet will, in many cases, provide an attorney with access to information that will bolster the client's case. One commentator has postulated that, if a client walks into an attorney's office with a case as simple as a dog bite, an attorney would almost certainly be able to find some information relevant to the client's case on the internet.<sup>41</sup> In fact, an attorney should never again be surprised in court by any fact that could be found by a diligent search of the records contained on the internet. The classic example of the triumphant cross examination of a witness who could not possibly have seen anything on the night in question, because the Farmer's Almanac confirms that there was no moon, should never occur in the internet age.<sup>42</sup> The attorney conducting the direct examination need only go online to any of a number of weather related sites to access detailed weather reports and records, to verify the proposed testimony *before* the witness ever takes the stand.

Use of the internet today closely resembles the early phases of the jury consultant revolution. While the resources are available and often useful, they have not yet become widely utilized. One attorney has opined that "It's gotten to the point where if the case is large enough, it's almost malpractice not to use trial consultants."<sup>43</sup> The same statement may soon be applied to use of the internet. Just as jury consultants have become almost standard procedure in any large case, internet research may soon become part of the trial attorney's standard jury selection process. Not only will clients demand that attorneys make use of this powerful tool to learn about prospective jurors, but attorneys who fail to do so may find themselves increasingly at a disadvantage during voir dire. Just as jury consultants replaced the intuition of trial lawyers with scientific jury selection procedures, the internet has the

37 See *Costello*, 255 F.2d at 883-84, quoted in Weinstein, *supra* note 11, at 36.

38 See Weinstein, *supra* note 11, at 36.

39 Model Rules of Professional Conduct, Rule 1.3 (comment).

40 See Debra Sahler, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 Alb. L.J. Sci. & Tech. 383, 401 (1996).

41 See Johns, *supra* note 16, at 575.

42 See *id.* at 574.

43 Donald Zoeller, quoted in Strier, *supra* note 2, at 443.

potential to replace the often fuzzy information provided by jury consultants with specific information about each prospective juror. Failure to utilize such a tool may well raise serious questions concerning the level of care used by the attorney in the case.

### ETHICAL RESTRICTIONS ON INTERNET USE

While trial attorneys may arguably have an ethical obligation to use the internet during jury selection, ethical rules place restrictions on the way such online research can be conducted. As noted above, traditional jury investigation is subject to a number of restrictions. Jury investigators may not directly communicate with a prospective juror or his family during their inquiry.<sup>44</sup> Under the ABA standards relating to criminal justice, prosecution and defense counsel must take care to employ only “investigatory methods that neither harass nor unduly embarrass potential jurors or invade their privacy.”<sup>45</sup> Investigations which seek to intimidate prospective jurors violate federal law and may subject counsel to a charge of obstructing justice.<sup>46</sup>

While use of the internet actually permits counsel to have *less* contact with prospective jurors and their associates than traditional methods, the internet poses some unique ethical problems for the jury investigator. While most internet jury research involves the review of public records, websites, or newsgroup postings, an unscrupulous investigator could certainly use the internet in more direct ways to learn about prospective jurors. Many websites permit visitors to post comments to the site administrator. If an investigator discovers that a prospective juror operates a website, a message could be posted to the administrator in order to provoke some type of response from the juror. Such responses could then become the basis for questioning during voir dire. Similarly, an investigator could enter a chat room known to be frequented by a prospective juror and post messages to the group, not the individual juror, which relate to an aspect of the case. If the juror responds to such messages, these responses could then be used during voir dire.

While such techniques certainly violate the spirit of the rule against direct contact with jurors, it is not clear they violate the rule’s letter. In the above situations, the investigator never directly contacts the prospective juror, but only posts messages of general interest to which he anticipates the prospective juror will respond. Since no “direct contact” is ever made, any posting by the juror may become the basis for inquiry during voir dire. As the internet becomes a more popular tool for jury research, the law must evolve to address this issue, and courts should anticipate potential problems.

Another issue that must be addressed concerns online review of juror records. While the review of public records has long been accepted as a legitimate tool of jury investigators, the internet permits records of a much more personal nature to be accessed. While it may once have been difficult and time consuming to obtain sensitive credit information, many online sources now routinely provide such information to anyone with a party’s social security number. Property records, accident reports, and even criminal records may now be accessed with the click of a mouse. While many of these records have been available to attorneys for many years, the ease with which they may now be accessed virtually guarantees that a prospective juror can expect to face questions during voir dire about sensitive personal information.

Such questioning may deter prospective jurors from voluntarily serving during a trial. Few jurors would be willing to have intimate personal details investigated prior to jury service,

<sup>44</sup> See Weinstein, *supra* note 11, at 37.

<sup>45</sup> *Id.*

<sup>46</sup> See Strier, *supra* note 2, at 479.

especially if such details would be brought to light during voir dire. Pretrial jury investigation has always had the potential to discourage jury service and lead to resentment by those eventually selected. Review of personal information online may increase juror disenchantment with the selection process. Also, if not conducted properly, online investigation may give jurors the impression that they are being stalked or harassed by counsel. Some jurors may even believe that the investigators are attempting to intimidate them into stepping down from jury service.<sup>47</sup> These risks have always accompanied pretrial investigations, but the wealth of information available on the internet exacerbates this problem.

## CONCLUSION

The internet has radically altered the business landscape during the past decade. E-retailers have abounded, and even traditional large retailers have established a presence to remain competitive. The internet revolution has not been as pronounced in the legal profession, but its effects have begun to be felt, and will continue to revolutionize the way law is practiced.<sup>48</sup>

Trial lawyers must not permit a reluctance to use technology to overshadow the benefits offered by online jury research. The ability to discover detailed, relevant information about prospective jurors should give trial attorneys incentive to learn how to take advantage of the vast information resources offered by the internet. And as clients seek to control costs, the internet gives attorneys a means to conduct their own jury research in certain cases without the need for expensive jury consulting services. At the same time, judges and lawyers should not ignore the potential impact upon juror rights and privacy. As with all aspects of litigation, counsel must carefully balance their ethical duties to clients with the rights of jurors. Therefore, courts should remain vigilant to ensure that any abuses are quickly and effectively curbed.

---

<sup>47</sup> See *Credit*, 2 M.J. at 642.

<sup>48</sup> See Jonathan M. Redgrave, *Litigation and Technology: How the Internet is Changing the Practice*, 47 *The Federal Lawyer* 1 (January 2000).