IADC Committee Newsletter

TRIAL TECHNIQUES AND TACTICS

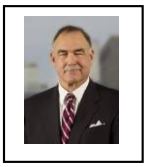
July 2014

IN THIS ISSUE

While online research of jurors has become an accepted practice, trial counsel must be wary of ethical considerations and other obligations when researching potential or sitting jurors as the courts and the law have not yet provided specific guidance.

Jury Panel Investigation in Missouri

ABOUT THE AUTHORS



Tom Seigfreid, of Baker Sterchi Cowden & Rice, is an experienced trial lawyer and has successfully defended automotive, agricultural, heavy truck, power tool and marine product manufacturers for more than 25 years. He has tried significant product liability cases for a variety of Fortune 100 companies both locally and nationally. He can be reached at seigfreid@bscr-law.com.

Ambika Behal joined Baker Sterchi Cowden & Rice as an associate after graduating *cum laude* from Washington University in St. Louis School of Law in 2012. She practices in the areas of product liability, premises liability, financial institution litigation, and general civil litigation. She has in-house experience and has been recognized by the Missouri Bar for her dedication to providing *pro bono* legal services. She can be reached at abehal@bscr-law.com.

ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org.

To contribute a newsletter article, contact:

Asim K. Desai
Vice Chair of Newsletters
Carlson Calladine & Peterson LLP
(213) 613-1191
adesai@ccplaw.com

The Digital Age presents several issues when it comes to an attorney's investigation of a jury panel. Jurors today are likely to have some sort of Internet presence, leaving their views, beliefs, and previous activity at the fingertips of trial counsel. Internet research of jurors has become an accepted practice, but with no specific guidance from the courts or the law, trial counsel must be wary of ethical considerations and other obligations when conducting research on potential or sitting jurors.

Missouri, notably, was one of the first states to adopt a position on a litigant's obligation to investigate the backgrounds of potential jurors. In *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. banc 2010), the Supreme Court affirmed the trial court's granting of a new trial based on juror nondisclosure during *voir dire*. Plaintiff's counsel asked the venire whether anyone had ever been a party to a lawsuit. *Id.* at 554. One juror, Mims, remained silent. *Id.* at 554-55.

After the jury returned a verdict in favor for Defendant, Plaintiff's counsel conducted Internet research on the jury. *Id.* at 555. He discovered through Missouri's automated case record service, Case.net, that Juror Mims had not only been involved in very recent litigation, but that she was even a defendant in a personal injury matter. *Id.* The trial court granted Plaintiff's motion for a new trial based on the juror's intentional nondisclosure of prior litigation, despite Defendant's challenge of the Plaintiff's lack of timeliness in bringing the matter to the trial court's attention. *Id.*

Although the Supreme Court affirmed the trial court's granting of a new trial, it put litigants on notice that they should not expect to succeed in such motions in the future if they wait until after a verdict is returned to perform juror research:

Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled. Litigants should endeavor to prevent retrials by completing an early investigation. Until a Supreme Court rule can be promulgated to provide specific direction, **to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial**. To facilitate this search, the trial courts are directed to ensure the parties have an opportunity to make a timely search prior to the jury being empanelled and shall provide the means to do so, if counsel indicates that such means are not reasonably otherwise available.

Johnson v. McCullough, 306 S.W.3d at 559.

In 2011, the Supreme Court approved new Rule 69.025 related to juror nondisclosure of litigation history:

69.025. Juror Nondisclosure
(a) Proposed Questions. A party seeking to inquire as to the litigation history of potential jurors shall make a record of the proposed initial questions before voir dire. Failure to follow this procedure shall result in waiver of the right to inquire as to litigation history.

(b) Reasonable Investigation. For purposes of this Rule 69.025, a "reasonable investigation" means review of Case.net before the jury is sworn.
(c) Opportunity to Investigate. The court shall give all parties an opportunity to conduct a reasonable investigation as to whether a prospective juror has been a party to litigation.
(d) Procedure When Nondisclosure is Suspected. A party who has reasonable grounds to believe that a prospective juror has failed to disclose that he or she has been a party to litigation must so inform the court before the jury is sworn. The court shall then question the prospective juror or jurors outside the presence of the other prospective jurors.
(e) Waiver. A party waives the right to seek relief based on juror nondisclosure if the party fails to do either of the following before the jury is sworn:

> (1) Conduct a reasonable investigation; or
> (2) If the party has reasonable grounds to believe a prospective juror has failed to disclose that he or she has been a party to litigation, inform the court of the basis for the reasonable grounds.

(f) Post-Trial Proceedings. A party seeking post-trail relief based on juror nondisclosure has the burden of demonstrating compliance with Rule 69.025(d) and Rule 69.025(e) and may satisfy that burden by affidavit. The court shall then conduct an evidentiary hearing to determine if relief should be granted.

Rule 69.025 and *Johnson v. McCullough* expressly apply only to a potential juror's litigation history. *See also Khoury v. Conagra Foods, Inc.*, 368 S.W.3d 189, 202 (Mo. App. W.D. 2012). In *Khoury*, the court upheld the striking of a juror after he was impaneled, but before evidence was presented, on the grounds of the juror's potential bias, where the juror had posted anti-corporate sentiments on his Facebook page and blog. *Khoury*, 368 S.W.3d at 193, 201-202. While it was appropriate to remove the juror, the Court of Appeals noted that Rule 69.025 was expressly limited to litigation history and, therefore, that the requirement that such challenges be made before the jury was empanelled did not apply in this case. *Id.* at 202, n.12. The court did note, however, that it has previously encouraged litigants to make challenges to a juror for nondisclosure in *voir dire* "before submission of the case whenever practicable." *Id.* at 203.

Failure to conduct a search of Case.net before the jury is impaneled will likely deprive a party of a basis for seeking a new trial or appealing the judgment. While the courts have not yet created an obligation to conduct more extensive Internet research on prospective or seated jurors, it certainly would appear to be a best practice to do so. Litigants should be aware that any broader Internet research should be performed as soon as possible, and *Khoury* strongly implies that any challenge based upon that research must be made prior to submission of the case or it is waived. Attorneys should also be sensitive to potential exposure to professional liability from failing to undertake a reasonable Internet investigation of potential jurors.

Any such broad Internet research on potential or actual jurors must be undertaken with caution, however, and with a clear understanding of the "digital footprint" that the researcher might leave

upon the prospective or seated juror's social media accounts or websites. Missouri Rule of Professional Conduct 4-3.5 prohibits a lawyer from communicating *ex parte* with a juror or prospective juror unless authorized to do so by law or court order. This certainly prohibits any research of a juror that would require an attorney (or an agent or employee of an attorney) to "friend" or otherwise connect with that that juror.

While a mere Internet search of a juror or potential juror may seem innocent enough, an attorney has to be aware of social networking and other sites that alert a user that someone—such as the attorney or his or her employee—has viewed the juror's page or profile. Although the attorney may not actively send the communication to the juror, if viewing the page causes the communication to be sent, many jurisdictions (including, for example, New York) conclude that this is a prohibited *ex parte* communication from the attorney. If an attorney is not certain whether a communication will be sent to the person he or she is investigating, he or she should enlist the assistance of IT professionals or refrain from such research until further guidance is provided by the courts or the law.

PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MAY 2014
Tips for Young Lawyers: The Rules of the Road
Michael Upchurch

APRIL 2014
Tips for Young Lawyers: Five Problems and Solutions
Michael Upchurch

MARCH 2014
Tips for Young Lawyers: Mediation
Michael Upchurch

FEBRUARY 2014
Tips for Young Lawyers: How to Handle a Hearing
Michael Upchurch

NOVEMBER 2013
Tips for Young Lawyers: How to Depose an Expert
Michael Upchurch

OCTOBER 2013
Tips For Young Lawyers: Depositions 101
Michael Upchurch

APRIL 2013
Essential Hardware and Configuration for iPad Use in Courtroom
Matt Cairns

APRIL 2012
Use With Care: Trial Graphics in Canada
S. Gordon McKee, Jill M. Lawrie, Robin L. Reinertson and Nicole Henderson

MARCH 2012
Pre-Service Removal Exception to the Forum Defendant Rule Post Amendment of the Federal Jurisdictional Statutes
David M. Melancon, Ali A. Spindler, and Quentin F. Urquhart, Jr.