

## Applying Rules of Discovery to Information Uncovered About Jurors

Thaddeus Hoffmeister



### ABSTRACT

Once reserved for high profile cases or clients with “deep pockets,” juror investigations have become increasingly common in the digital age. With a couple of keystrokes, attorneys can now uncover a wealth of information about jurors online. This Article examines the positive impact of technology on juror investigations in criminal trials, such as improving the use of peremptory challenges, creating more effective voir dire questioning, and ultimately leading to excluding unqualified or rogue jurors. However beneficial the use of technology may be, it also comes with some negatives. By turning to the rules of discovery, this Article provides a unique solution to help balance the pros and cons of investigating jurors.

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## INTRODUCTION

As more and more personal information is placed online, attorneys are increasingly turning to the internet to investigate and research jurors.<sup>1</sup> In certain jurisdictions, the practice has become fairly commonplace.<sup>2</sup> One prominent trial consultant has gone so far as to claim, “Anyone who doesn’t make use of [internet searches] is bordering on malpractice.”<sup>3</sup> While this may somewhat overstate the importance of investigating jurors online, it nonetheless demonstrates just how routine the practice has become.<sup>4</sup> Aside from increased acceptance among practitioners, courts have both approved of and encouraged online investigation of jurors.<sup>5</sup>

While many view this practice as a benefit to the legal system because it helps identify dishonest and biased jurors and works to limit juror misconduct, it is not without critics.<sup>6</sup> This Article examines the positive and negative aspects of legal professionals investigating jurors online and offers a proposal that, if implemented, should dull some of the criticism associated with the practice. Specifically, this Article proposes that the Advisory Committee on Criminal Rules of the Judicial Conference of the United States make certain juror information uncovered by attorneys in criminal trials subject to the rules of discovery.

### I. METHODS OF INVESTIGATING JURORS

The practice of obtaining information about jurors outside of the traditional voir dire process is not a new concept.<sup>7</sup> Historically, criminal defense attorneys gathered information about potential jurors through private detectives, while

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1. Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW360, Oct. 23, 2009, <http://www.law360.com/topnews/articles/128603> (“Everybody has something on them on the Web, and everybody can look it up.” (quoting Interview With Daniel Ross, Partner, Stroock & Stroock & Lavan LLP) (internal quotation marks omitted)).
  2. See Beth Germano, *Social Media Changing the Way Juries Are Picked*, CBS BOS., Nov. 15, 2010, <http://boston.cbslocal.com/2010/11/15/social-media-changing-the-way-juries-are-picked>.
  3. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. TIMES, Sept. 29, 2008, <http://articles.latimes.com/2008/sep/29/nation/na-jury29> (alteration in original).
  4. Some trial consultants have gone so far as to offer “personality profiling” of jurors based on internet research. Julie Kay, *Vetting Jurors via MySpace*, NAT’L L.J., Aug. 11, 2008, at 1.
  5. See *Johnson v. McCullough*, 306 S.W.3d 551, 558–59 (Mo. 2010) (en banc); Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at \*7–8 (N.J. Super. Ct. App. Div. Aug. 30, 2010).
  6. See Jamilla Johnson, *Voir Dire: To Google or Not to Google*, KING CNTY. B. BULL. (Aug. 2008).
  7. Depending on the level of public interest in a specific trial, the media also researches jurors. See, e.g., Karen Flax, *Why the Tribune—and Other News Outlets—Are Seeking the Names of Blagojevich Jurors*, CHI. TRIB., July 9, 2010, <http://newsblogs.chicagotribune.com/tribnation/2010/07/why-the-tribune-and-other-news-outlets-are-seeking-the-names-of-bлагоjevich-jurors.html>.

prosecutors relied on law enforcement.<sup>8</sup> These investigators, both private and public, were employed to learn basic background information on jurors such as age, religion, neighborhood, type of residence, employer, socioeconomic and marital status, and political affiliation.<sup>9</sup> Because criminal statutes and ethical rules prohibit direct contact with jurors, investigators practiced their craft by talking with the jurors' neighbors or conducting drive-bys of the jurors' residence.<sup>10</sup>

As concerns about juror privacy started to capture the attention of judges, academics, and the public as a whole, it became increasingly difficult to investigate jurors in certain jurisdictions. Courts were less willing to make juror information readily available. Some waited until the eve or day of trial to release the names of prospective jurors,<sup>11</sup> while others stopped publicly publishing jury lists.<sup>12</sup> Also, anonymous juries, in which juror names are sometimes even withheld from the attorneys trying the case, became more common.<sup>13</sup> This in turn made it extremely difficult to conduct any type of pre-voir dire investigation into the backgrounds of jurors. However, with the technological advancements brought by the digital age, the practice has been resurrected, albeit in a modified form.

Unlike in the past, when investigators canvassed the neighborhoods of prospective jurors, today's investigations occur primarily online, as most jurors have at least one online reference, either placed there personally or by someone else.<sup>14</sup> At present, the investigation process can take various forms. At the most basic level is a name search on an internet search engine.<sup>15</sup> However, many attorneys employ far more sophisticated procedures to include extracting

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8. Joshua Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839, 851–53 (1968).
  9. *Id.* at 855 (citing *Dow v. Carnegie-Ill. Steel Corp.*, 224 F.2d 414, 430 (3d Cir. 1955)).
  10. *Id.*
  11. Generally speaking, there is no right for a party to access the jury list. See *Wagner v. United States*, 264 F.2d 524, 528 (9th Cir. 1959); *Hamer v. United States*, 259 F.2d 274, 278–79 (9th Cir. 1958); Seth A. Fersko, Comment, *United States v. Wecht: When Anonymous Juries, the Right of Access, and Judicial Discretion Collide*, 40 SETON HALL L. REV. 763, 771 (2010).
  12. Mick Hinton, *House Votes to Shut Lists of Jurors*, DAILY OKLAHOMAN, Apr. 21, 1993, at N1.
  13. Thaddeus Hoffmeister, *Judges Posner and Easterbrook Disagree Over Anonymous Jury Issue*, JURIES (July 16, 2010, 10:55 AM), <http://juries.typepad.com/juries/2010/07/judges-posner-and-easterbrook-disagree-over-anonymous-jury-issue.html>.
  14. *Potential Jurors Are an Open Book Online*, L.A. TIMES, Oct. 26, 2008, <http://beta2.tbo.com/news/metro/2008/oct/26/na-potential-jurors-are-an-open-book-online-ar-106400/>.
  15. Peter Vieth, *Internet Juror Research Is Revealing, Trained P.I. Can Uncover Even More*, VA. LAW. WKLY., Nov. 23, 2009, <http://valawyersweekly.com/2009/11/23/internet-juror-research-is-revealing-trained-pi-can-uncover-even-more/>.

information from social networking sites and databases<sup>16</sup> and monitoring jurors' online activities.<sup>17</sup>

Also, attorneys today no longer need juror names weeks or days in advance of trial because online investigation primarily takes place in the courtroom during voir dire.<sup>18</sup> Because fewer resources are needed, the practice occurs even in routine cases.<sup>19</sup> And jurors in the digital age are increasingly investigated throughout a trial, not just prior to jury selection.<sup>20</sup>

The last major difference from the past is the amount of personal data now available. A juror's digital trail—or internet footprint—affords attorneys a virtual treasure trove of information.<sup>21</sup> With so much information available, sorting through it and finding something relevant is a challenge. But, as demonstrated by the attorneys defending José Padilla—the would-be “Dirty Bomber”—it is possible, even with a small window of time, to uncover sufficient information to have a potential juror dismissed.<sup>22</sup> Besides the Padilla case,<sup>23</sup> numerous examples exist of attorneys finding sufficient information to have a juror challenged for cause both in the civil and criminal context.<sup>24</sup>

In certain instances, attorneys investigating jurors learn things that would rarely, if ever, come up or be discussed during voir dire.<sup>25</sup> This is because the attorney or judge never thought to pose the question, the topic was too personal in nature, or the information arose after jury selection. For example, judges generally prohibit attorneys from questioning a potential juror during voir dire about her political ideology or who she voted for in the last presidential election.<sup>26</sup> By going online, however, the attorney may discover which political candidates the juror donated to in the most recent election and whether the juror belongs

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16. *Id.*

17. *Id.*

18. *See, e.g.*, Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at \*4 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

19. *See Internet Juror Research Can Be Revealing*, WIS. L.J., Nov. 30, 2009, <http://wislawjournal.com/2009/11/30/internet-juror-research-can-be-revealing>.

20. *See* Kay, *supra* note 4, at 1, 18.

21. *Id.*

22. *Id.*

23. United States v. Hassoun, No.0:04cr60001 (S.D. Fla. Aug. 16, 2007).

24. *See* Ken Strutin, *Juror Behavior in the Information Age*, LLRX.COM, Dec. 26, 2010, <http://www.llrx.com/features/jurorbehavior.htm>.

25. NANCY S. MARDER, *THE JURY PROCESS* 82–83 (2005) (“For example, lawyers have sometimes wanted to ask prospective jurors about their religion or sexual orientation during voir dire, but judges have usually denied such inquiries on the ground that it is an intrusion into the juror’s privacy and not necessary for the parties to know.”).

26. *See, e.g.*, Connors v. United States, 158 U.S. 408, 412–13 (1895).

to any particular political organizations.<sup>27</sup> Thus, in a way, online research provides an alternative route or “end run” by which attorneys learn additional information about jurors.

An attorney’s ability and desire to go online to learn a juror’s political views also demonstrates that the investigation of jurors, like voir dire itself, is not limited necessarily to ferreting out dishonesty or finding impartial jurors. Rather, attorneys use these opportunities to gather information on jurors for various purposes and for use at different stages of the trial.<sup>28</sup> Depending on the information discovered, an attorney might format an opening statement or craft specific witness questions to fit the interests of a particular juror.<sup>29</sup> For example, if an attorney discovers through his or her online investigation that one particular juror follows sports closely, the attorney may use athletic references or metaphors in the courtroom in an attempt to better connect with that juror. Other attorneys, particularly those who at the end of the trial find themselves on the losing side, might research a juror online in an attempt to find some act of misconduct that could serve as grounds for appeal.<sup>30</sup> For example, an attorney might search a juror’s blog or social networking site in an effort to discover an inappropriate remark or comment made to or by the juror during trial.<sup>31</sup>

## II. POSITIVES OF INVESTIGATING JURORS

Proponents of online juror investigation claim that the practice improves the legal system as a whole.<sup>32</sup> These benefits can be found throughout a trial but primarily occur during jury selection. For example, attorneys are allowed a certain number of peremptory challenges to remove potential jurors during voir

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27. See, e.g., *Campaign Donors: Fundrace 2010*, HUFFINGTON POST, <http://fundrace.huffingtonpost.com> (last visited July 24, 2011).

28. See *Sinclair v. United States*, 279 U.S. 749, 765–66 (1929) (critiquing the practice of shadowing of jurors).

29. Kay, *supra* note 4, at 1, 18 (“Last year, Fort Lauderdale, Fla., jury consultant Amy Singer was doing Internet research on potential jurors for a products liability case involving a maintenance worker who was severely injured after being forced to get inside a machine to clean it. Singer—who was working for the plaintiff’s attorney—hit pay dirt when she found out that one of the jurors divulged on his MySpace page that he belonged to a support group for claustrophobics. Singer instantly knew this juror would be sympathetic to her client and advised her client to keep him on the panel. He wound up becoming the foreman. The plaintiff prevailed.”).

30. See *Edwards v. Hyundai Motor Mfg. Ala., L.L.C.*, 701 F. Supp. 2d 1226, 1235 (M.D. Ala. 2010) (granting a motion for a new trial on grounds of juror misconduct when a juror was dishonest about previously being denied employment with the defendant company, resulting in potential bias).

31. See, e.g., *Juror No. One v. Superior Court*, No. C067309 (Cal. Ct. App. Feb. 10, 2011).

32. Molly McDonough, *Rogue Jurors*, A.B.A. J., Oct. 2006, at 39.

dire. Unlike challenges for cause, peremptories can be used to strike a juror even if that juror can be impartial and fair to both sides. In fact, attorneys need only to offer little to no reason for using peremptories.<sup>33</sup> This in turn has led to one of the major criticisms of peremptory challenges: Attorneys exercise them based on outdated stereotypes and hunches premised on a juror's physical appearance.<sup>34</sup>

By allowing attorneys to gather more information about potential jurors, attorneys are less likely to strike a juror solely because of gender or race, which is unconstitutional,<sup>35</sup> or because of physical size, which is illogical.<sup>36</sup> This idea may best be summed up by Professor Stephen Saltzburg who has advocated for providing attorneys with more information about prospective jurors: "I think most lawyers resort to stereotypes not because they want to but because they have to. . . . I've never met a lawyer who would prefer a jury of a particular racial composition over one that will win a verdict for him."<sup>37</sup> With the additional information gleaned from online investigations, attorneys can exercise peremptory challenges constitutionally and more intelligently.<sup>38</sup> Peremptories exercised on facts rather than unproven stereotypes give defendants and society as a whole greater confidence that the legal system is functioning properly.

Besides improving peremptory strikes, online investigations also allow verification of juror answers, which in turn facilitates greater truth-telling during voir dire. Once jurors realize that many of their voir dire answers can be verified online, they will likely be more truthful or request dismissal from the case. At least one legal practitioner has noted that "[b]ecause judges are emphasizing [juror background] checks, . . . more jurors drop out before the jury is formally seated and thus 'fewer and fewer people are coming up with a criminal record in contradiction of their jury questionnaire.'"<sup>39</sup>

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33. Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 167–69 (1989).

34. *Id.* at 202.

35. *J.E.B. v. Alabama*, 511 U.S. 127, 145 (1994) (holding a peremptory strike based on gender unconstitutional); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that peremptory strikes may not be made on the basis of race).

36. See *Dolphy v. Mantello*, 552 F.3d 236, 237 (2d Cir. 2009). The prosecutor in *Dolphy* stated that he struck overweight potential jurors because, "based on [his] reading and past experience[,] . . . heavy-set people tend to be very sympathetic toward any defendant." *Id.* (internal quotation marks omitted).

37. Stephanie B. Goldberg, *Batson and the Straight-Face Test: Courts Split on Gender-Based Jury Picks, Permissible Stereotyping*, A. B. A. J., Aug. 2002, at 82, 88 (quoting Professor Stephen A. Saltzburg of George Washington University National Law Center).

38. See Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1190–91 (2003).

39. McDonough, *supra* note 32, at 43 (quoting District Attorney Daniel Conley).

Greater honesty during voir dire also reduces the risk of empaneling a rogue juror.<sup>40</sup> According to Professor Bennett Gershman, rogue or stealth jurors are those “who seek to inject themselves into the [trial] process for self-serving reasons.”<sup>41</sup> This is an issue of heightened concern in high-profile cases.<sup>42</sup> Traditionally, attorneys and judges had little outside information to rely on, save for maybe a criminal records check, when determining the honesty or suitability of a juror. Today, the internet makes verification of juror responses much easier.

Online investigations also provide benefits beyond the initial jury selection process. For example, in the digital age, jurors are increasingly violating courts’ prohibitions against researching, blogging, posting, or emailing information about the case.<sup>43</sup> Once jurors learn that their public online activities are subject to monitoring, they will be less inclined to violate court rules for fear of being caught. In light of the growing number of instances of juror misconduct associated with improper communications and research, this benefit should not be underestimated.<sup>44</sup>

### III. NEGATIVES OF INVESTIGATING JURORS

Obviously, a big concern with online juror research is the encroachment on juror privacy.<sup>45</sup> According to Judge Richard Posner, “Most people dread jury duty—partly because of privacy concerns.”<sup>46</sup> The following quotation reflects the view held by many on this issue: “The Internet in so many areas creates an extraordinary conflict between the desire for information and the desire for

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40. See Jerry Markon, *Jurors With Hidden Agendas—Lawyers See Rise in People Who Don’t Disclose Bias, Then Seek to Sway Peers*, WALL ST. J., July 31, 2001, at B1 (describing the growing phenomenon of jurors representing themselves as fair but hiding a bias or motivation).

41. Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 345 (2005).

42. Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL’Y REV. 389, 396–98 (1994) (discussing the potential problems caused by a self-interested juror working to profit from jury duty in high-profile cases).

43. See, e.g., JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2009), available at <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>.

44. See Denise Zamore, *Can Social Media Be Banned From Playing a Role in Our Judicial System?*, MINORITY TRIAL LAW., Spring 2010, [http://apps.americanbar.org/litigation/litigationnews/practice\\_areas/minority-jury-social-media.html](http://apps.americanbar.org/litigation/litigationnews/practice_areas/minority-jury-social-media.html) (noting that the use of social media creates problems that can escalate to mistrials); see also Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: The Digital Age’s Effect on Juries*, 83 U. COLO. L. REV. (forthcoming 2011).

45. Due to the nature and length of this Article, the topic of juror privacy, which is worthy of further discussion, is only briefly touched upon.

46. *United States v. Blagojevich*, 614 F.3d 287, 293 (7th Cir. 2010).

privacy.<sup>47</sup> Thus, as more citizens realize that jury duty now includes online background checks and monitoring, the national jury summons reply rate of 48 percent<sup>48</sup> may fall even lower.<sup>49</sup>

Juror concerns over privacy, however, are neither new nor unique to the digital age. The legal community has long struggled with where to draw the line between empaneling and maintaining an impartial jury and safeguarding the privacy of jurors.<sup>50</sup> In the past, numerous jurors have complained that voir dire questions and court questionnaires delved too far into personal matters.<sup>51</sup>

With respect to online juror investigation, worries over privacy may be lessened somewhat if jurors are told ahead of time that their backgrounds will be researched and why the search is being done. One district attorney claims that prospective jurors generally do not mind background checks on social networking sites if he informs them that the information will only be used to determine their disposition towards certain issues, will help streamline the judicial process, and will be disposed of after trial.<sup>52</sup>

In addition, it should be remembered that the online information sought by attorneys is public information. Unlike in the past, attorneys are no longer relying on detectives or law enforcement to canvass neighborhoods for information.<sup>53</sup> Rather, attorneys are seeking information, which, for the most part, is in the public domain. Thus, those concerned with juror privacy may be better served by focusing their attention on the individuals who place the information online, rather than those who search for it.

Aside from the concerns surrounding privacy and the potential drop in jury participation rates, another issue—which is the focus of this Article—exists regarding an assumption many make about the information discovered.

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47. Kay, *supra* note 4, at 18 (quoting litigator and former prosecutor Dan Small) (internal quotation marks omitted).

48. Robert G. Boatright & Beth Murphy, *How Judges Can Help Deliberating Juries: Using the Guide for Jury Deliberations*, CT. REV., Summer 1999, at 38, 40, available at <http://aja.ncsc.dni.us/courtrv/cr36-2/CR36-2Boatright.pdf>.

49. See John E. Nowak, *Jury Trials and First Amendment Values in "Cyber World,"* 34 U. RICH. L. REV. 1213, 1247 (2000) (“[T]he thought that one’s entire life will be open to the government and public through jury service certainly may well deter most people from wanting to serve on a jury.”).

50. *Brandborg v. Lucas*, 891 F. Supp. 352, 356 (E.D. Tex. 1995).

51. See *United States v. Barnes*, 604 F.2d 121, 140 (2d Cir. 1979) (noting that people will “be less . . . willing to serve [on a jury] if they know that inquiry into their essentially private concerns will be pressed”); David Weinstein, *Protecting a Juror’s Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 3 (1997).

52. See Laura B. Martinez, *District Attorney to Use Facebook Profiles in Jury Selection*, BROWNSVILLE HERALD, Jan. 17, 2011, <http://www.brownsvilleherald.com/articles/district-121729-attorney-use.html>.

53. See Okun, *supra* note 8, at 851–53.

Most assume all disqualifying juror information is turned over to the court or released to the public. While this is probably true in cases where the media discover the information, the same cannot be said for those situations in which attorneys make the discovery.<sup>54</sup> As discussed above, when attorneys investigate jurors, they are not doing it necessarily to seat an impartial jury or ensure a fair trial.<sup>55</sup> Rather, attorneys want to remove an unfavorable juror, learn the interests and viewpoints of sitting jurors, or uncover grounds for an appeal.<sup>56</sup>

An attorney who discovers improper conduct by a juror in voir dire or during trial may not relay such information to the court, especially if the conduct is neither criminal nor fraudulent and the attorney thinks that keeping the particular juror will prove advantageous to her case.<sup>57</sup> This is because few rules exist today that require attorneys to reveal such information. For example, only a small number of states make information about jurors discoverable.<sup>58</sup> Those states requiring disclosure of juror information place the burden on the prosecution to disclose it and generally require disclosure only after a request from defense counsel.<sup>59</sup>

As for an attorney's ethical obligation to reveal such information, the Model Rules of Professional Conduct have not kept pace with the technological

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54. Like attorneys, the media have been quite adept at discovering juror misconduct.

55. See *supra* notes 24–27 and accompanying text. Just as voir dire is not necessarily conducted to seat an impartial juror, the same can be said for online research of jurors: “[V]oir dire examinations are theoretically designed to detect and eliminate bias, [but] they are almost universally employed for quite different objectives. Most counsel seek to employ any bias in favor of their client and eliminate only such bias as is directed against him.” Okun, *supra* note 8, at 841–42 (second alteration in original).

56. Kay, *supra* note 4, at 1 (“Some jury consultants and lawyers, however, still want to research their juries even after jury selection, for different reasons. For one thing, the information can be used to get a case overturned on appeal if it turns out a juror lied on a questionnaire. Additionally, some consultants and lawyers are beginning to use Internet information they’ve obtained about jurors to influence them during the trial, particularly during closing arguments.”).

57. See Nowak, *supra* note 49, at 1225 (“The attorney with information about cyber activities of potential jurors will be able to use jury challenges for cause, and use preemptive challenges, in a strategically wise manner.”).

58. See, e.g., *State v. Bessenecker*, 404 N.W.2d 134, 138–39 (Iowa 1987) (limiting access to juror information by county attorneys, and requiring county attorneys to disclose to the defense any juror information obtained); *Commonwealth v. Smith*, 215 N.E.2d 897, 901 (Mass. 1966) (allowing the defense access to juror information obtained by the government); Jeffrey F. Ghent, Annotation, *Right of Defense in Criminal Prosecution to Disclosure of Prosecution Information Regarding Prospective Jurors*, 86 A.L.R.3d 571, 574 (1978 & Supp. 2010).

59. See Ghent, *supra* note 58, at 574–75 (“Rule 421(a) of the Uniform Rules of Criminal Procedure makes it the duty of the prosecuting attorney, on the defendant’s written request . . . to allow access [to prospective juror reports].”). Some jurisdictions not requiring the release of such information by the prosecutor to defense counsel include Florida, Louisiana, and Texas. See *Monahan v. State*, 294 So. 2d 401, 402 (Fla. Dist. Ct. App. 1974); *State v. Jackson*, 450 So. 2d 621, 628 (La. 1984); *Martin v. State*, 577 S.W.2d 490, 491 (Tex. Crim. App. 1979).

advancements brought by the digital age. Furthermore, these rules, for the most part, are unclear as to when an attorney must report a juror to the court. The most relevant and applicable section of the Model Rules of Professional Conduct, Rule 3.3 Comment 12, reads:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.<sup>60</sup>

Applying this comment to two real-life situations may help demonstrate the lack of ethical guidance in this area. The first is the case of José Padilla,<sup>61</sup> which presents a traditional example of juror dishonesty. During voir dire in Padilla's trial, several of his attorneys ran internet searches on prospective jurors as they were called to sit in the jury box.<sup>62</sup> One attorney discovered that a prospective juror had lied on her juror questionnaire about her involvement with the criminal justice system.<sup>63</sup> The attorney informed the court, and the prospective juror was subsequently removed from the jury pool entirely.<sup>64</sup>

Applying Rule 3.3 Comment 12 to Padilla's case, it appears that the defense team, upon learning of the juror's dishonest statement, had an ethical duty to make the court aware of the information because it was fraudulent—the juror had lied on a questionnaire.<sup>65</sup> Thus, the ulterior motives of the defense team, such as the desire to remove a guilty vote, were irrelevant because the defense was ethically required to report the juror's misconduct.

The second scenario involves a juror who sat on a two-day criminal trial. After the first day of trial, the juror wrote the following on her Facebook

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60. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 12 (2008). Tennessee is one of the few states that have a much more expansive rule. TENN. RULES OF PROF'L CONDUCT R. 3.3(i) (2011) ("A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.").

61. U.S. v. Hassoun, No. 0:04cr60001 (S.D. Fla. Aug. 16, 2007).

62. See Kay, *supra* note 4, at 1.

63. *Id.*

64. *Id.*

65. See MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 12 (requiring a lawyer "to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person . . . intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding").

page: “[A]ctually excited for jury duty tomorrow. It’s gonna be fun to tell the defendant they’re GUILTY. :P.”<sup>66</sup>

Later, the defense counsel’s son discovered the Facebook post while running internet searches on the jurors, and the court promptly removed the juror from the case.<sup>67</sup> Obviously, here, defense counsel had an interest in removing this juror. But did counsel have an ethical duty to reveal the information discovered? What if the prosecutor had discovered the information?

In applying Rule 3.3 Comment 12 to this scenario, it does not appear that either the defense counsel or the prosecutor had an ethical duty to present this information to the court.<sup>68</sup> The juror’s act was neither fraudulent nor criminal, but it was definitely improper, and the court found it sufficient to remove her.<sup>69</sup> An argument could be made that the juror’s actions were in contempt of court and thus required the attorneys to report it. This argument, however, is very tenuous and requires several assumptions: first, that the juror was indeed told not to post her thoughts about the case online;<sup>70</sup> second, that the instructions were clearly and accurately given to the juror; and third, that the juror understood the instructions and purposefully violated the court’s order.<sup>71</sup> These assumptions make it unlikely that the Model Rules would apply.

Padilla’s case and the Facebook juror scenario illustrate the disparate results that may occur under the current Model Rules. As the practice of investigating jurors online continues to grow, it is highly likely that similar issues will arise in the future. At present, the legal system lacks adequate safeguards to ensure that all disqualifying juror information is brought forward. Thus, this Article recommends subjecting certain juror information to the rules of discovery, as discussed below.<sup>72</sup>

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66. Jameson Cook, *Facebook Post Is Trouble for Juror*, MACOMB DAILY, Aug. 28, 2010, <http://www.macombdaily.com/articles/2010/08/28/news/doc4c79c743c66e8112001724.txt>.

67. *Id.*

68. See MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 12.

69. See Cook, *supra* note 66.

70. At present, many jurisdictions have not updated their jury instructions to keep up with technological changes. Hoffmeister, *supra* note 44.

71. *In re Stoelting*, 784 F. Supp. 886, 886 (S.D. Fla. 1992) (finding a juror who, contrary to the court’s instructions, “view[ed] story pertaining to case in news media and express[ed] her opinion concerning case to another member of jury panel” to be in contempt and fining the juror \$250).

72. Due to the length of this Article, I do not have space to explain why changing the rules of discovery is superior to changing the Model Rules. However, for a general discussion of this topic, see Michael Cassidy, *Plea Bargaining, Discovery and the Looming Battle Over Impeachment Evidence*, 64 VAND. L. REV. 5 (2011).

#### IV. PROPOSED SOLUTION: DISCLOSING JUROR INFORMATION TO THE OPPOSING PARTY

The rule advocated by this Article is to subject any juror information discovered by an attorney to the rules of discovery if such information would result in a juror being either challenged for cause or disqualified from serving.<sup>73</sup> Because attorneys research jurors throughout a trial, the rule would be open-ended and not limited to voir dire. In addition, the rule would apply equally to prosecutors and criminal defense attorneys.

The proposed rule might read as follows:

Any attorney who discovers or learns of information before, during, or after trial that would disqualify a juror from serving, or serve as sufficient grounds for challenging the juror for cause, shall turn over such information to the opposing party.

If enacted, this rule might lessen society's concern about attorneys investigating jurors because it demonstrates that the practice is not solely for the benefit of one side, but instead to ensure a fair and unbiased jury.<sup>74</sup> Arguably, citizens will be less accepting of online investigations of jurors if done solely for the advantage of one attorney over the other and without any requirement to reveal such information.<sup>75</sup>

In addition, this rule helps level the playing field, as some attorneys are still in the dark about investigating jurors and others lack the resources to perform such research.<sup>76</sup> One of the reasons José Padilla's legal team was able

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73. At least one other legal commentator has made a similar suggestion. See Nowak, *supra* note 49, at 1244 ("Statutes or court rules should be adopted at the state and federal level requiring any party to a litigation to provide to the opposing party all information in the party's possession regarding cyber activities of potential jurors or witnesses.").

74. See Karen Monsen, *Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights From Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 REV. LITIG. 285, 286–88 (2002) (detailing the dilemma faced by jurors' wish to protect their privacy, which must be balanced against society's desire for this information "to ensure a fair trial for defendants").

75. Jurors, like most people, do not relish the idea of attorneys researching their backgrounds. This displeasure would most likely increase if jurors knew that the information uncovered was used solely for the benefit of one attorney. See *Sinclair v. United States*, 279 U.S. 749, 765 (1929) ("If those fit for juries understand that they may be freely subjected to treatment like that . . . disclosed [through investigation by detectives], they will either shun the burdens of the service or perform it with disquiet and disgust.").

76. Former University of Chicago law professor emeritus and jury research expert Hans Zeisel noted this potential problem with juror research many decades ago when he stated, "I hate things that benefit the richer side. . . . One side obtains an advantage over the other. . . . If this thing gets out of hand, the courts might begin to say that you have to disclose whatever you have learned

to go online and discover the untruthful juror during voir dire is that it had the staff to do it, which is not always the case in criminal trials.<sup>77</sup> As for those attorneys who have the resources but decline to conduct such investigations, because they do not want to turn over what they find, they run the risk of claims of ineffective assistance of counsel or legal malpractice, especially in jurisdictions where this practice has been sanctioned by the court or is the norm among practitioners.<sup>78</sup>

A common argument against making juror information discoverable is that such information is protected by the attorney work-product privilege.<sup>79</sup> Generally speaking, this privilege prevents the disclosure of an attorney's opinions, theories, or conclusions of law to opposing counsel.<sup>80</sup> To lessen the possible impact on this privilege, the new rule of discovery as written does not require the disclosure of all information about jurors. In fact, the vast majority of the information an attorney might learn about a juror, such as the juror's profile, would not be discoverable. Rather, this rule would only require the turning over of information that may disqualify a juror or would serve as a challenge for cause, and not information that would merely lead opposing counsel to exercise a peremptory challenge.

Assuming the disqualifying information fell under the work-product privilege, it should be remembered that the privilege is qualified, not absolute. Thus, the court could still override the privilege.<sup>81</sup> Also, the work-product privilege should not serve as justification for an attorney to withhold information crucial to empaneling and maintaining an impartial jury, just as it would not prevent the prosecution from disclosing exculpatory information to the defense.<sup>82</sup>

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to the other side." Tamar Lewin, *Business and the Law; Jury Research: Ethics Argued*, N.Y. TIMES, Mar. 9, 1982, at D2 (quoting Hans Ziesel) (internal quotation marks omitted).

77. See, e.g., Ken Armstrong & Justin Mayo, *Frustrated Attorney: 'You Just Can't Help People,'* SEATTLE TIMES, Apr. 6, 2004, <http://seattletimes.nwsourc.com/news/local/unequaldefense/stories/three> (detailing a public defender's overwhelming caseload).

78. See *Johnson v. McCullough*, 306 S.W.3d 551, 554 (Mo. 2010) (en banc) (adopting a formal rule that, before the issue of a juror's nondisclosure may be presented for appeal, the "party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled").

79. See, e.g., *Reddicks v. State*, 10 S.W.3d 360, 363 (Tex. Ct. App. 1999); *Saur v. State*, 918 S.W.2d 64, 66 (Tex. Ct. App. 1996); *Salazar v. State*, 795 S.W.2d 187, 192 (Tex. Crim. App. 1990).

80. See, e.g., *People v. Martin*, 225 N.W.2d 174, 175 (Mich. 1974).

81. Richard L. Moskitis, Note, *The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies*, 49 S. CAL. L. REV. 597, 632 (1976).

82. See *Brady v. Maryland*, 373 U.S. 83, 88 (1963). It should be noted that to date the U.S. Supreme Court has yet to determine whether *Brady* applies to attorney work product. *Mincey v. Head*, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000).

### CONCLUSION

At least for now, it appears society is willing to accept the online investigation of jurors, as many believe such activity serves the greater good of empaneling a fair and unbiased jury. While some see this as an intrusion into jurors' personal lives, others believe attorneys, like everyone else, should be able to use this information, especially when it is in the public domain. Proponents of juror research point to its tremendous upside, claiming that with the information uncovered, courts increase the likelihood of empaneling unbiased and honest jurors, and decrease the possibility of juror misconduct—or at least keep it from going undetected. This point of view incorrectly assumes all disqualifying information about jurors will be brought to light. Allowing such information to be obtained, but making it subject to the rules of discovery, will correct this misconception and should help to curb much of the criticism aimed at the investigation of jurors.