Ethics in Intellectual Property:
Key Insights from Application to Jury Verdict

December 3, 2019

6:00 p.m. – 9:00 p.m.

Robinson + Cole

Hartford, CT

CT Bar Institute, Inc.

CT: 2.0 CLE Credits (2.0 Ethics)
NY: 2.0 CLE Credits (2.0 Ethics)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Table of Contents

Ethics in Intellectual Property: Key Insights from Application to Jury Verdict CLE (EIP191203)

December 3, 2019

Agenda

I. Ethical issues arising in patent prosecution presented by Justin Durelli (40 minutes)

II. Ethical considerations for trademark attorneys presented by Alison Caless (40 minutes)

III. Should you Google the jury presented by Drew Hillier (40 minutes)

Moderated by John L. Cordani

Cantor Colburn LLP

Alison Caless

Associate
p. 860.286.2929 f. 860.286.0115
e-mail. acaless@cantorcolburn.com
20 Church Street, 22nd Floor, Hartford, CT 06103

Ali Caless assists clients with trademark clearance, prosecution, monitoring, and enforcement. She advises clients in both U.S. and foreign portfolio development and management. Ali is involved in drafting settlement agreements to resolve trademark disputes. She also provides assistance with other intellectual property agreements including assignments, licenses, and consent agreements. Ali also has experience in copyright matters and domain name disputes, including arbitrations under the Uniform Domain Name Dispute Resolution Policy.

Experience Highlights

- Associate, Cantor Colburn LLP, 2017-present
- Law Clerk, Cantor Colburn LLP, 2012-2017
- Law Clerk, Woodbridge Group of Companies, January 2016-July 2016

Events

IP Ethics Presentation for CLE Credits
December 3, 2019
Hartford, Connecticut
Alison Caless will participate on an IP Ethics CLE panel for the IP section of the Connecticut Bar on December 3, 2019; 2 CLE Ethics credits are available in CT and NY. Alison is a member of the CBA's IP Section.

Trademark Basics
October 23, 2019
West Hartford, Connecticut
Trademark attorneys Alison Caless and Benjamin Cantor will present an introductory workshop on trademarks to the Greater Hartford Chapter of SCORE on October 23, 2019 from 1-3 PM at the Noah Webster Library in West Hartford, Connecticut.

Practice Areas

Advertising and Marketing Law

Anti-Counterfeiting

Copyright

Due Diligence in IP Acquisitions

Internet and Domain Names

IP Transactional

Licensing

Right of Publicity

Strategic IP Portfolio Development and Management

Trademark and Copyright Litigation

Trademark and Copyright Practice

Trademarks and Trade Dress

Unfair Competition and False Advertising

Admissions

State of Connecticut, 2017

Education

University of Connecticut School of Law, J.D. with Intellectual Property Certificate, with honors, 2017

Trinity College, B.A., Public Policy and Law, *cum laude*, 2014

UCONN Law School Annual Meeting & Awards Dinner 2019
October 15, 2019
Plantsville, Connecticut
Alison Caless, Benjamin Cantor, and Chris Cillie will attend UCONN's Law School Annual Meeting and Awards Dinner on Tuesday, October 15, 2019, at The Aqua Turf Club, Plantsville, Connecticut.

MARQUES Annual Conference 2019
September 17, 2019
Dublin, Ireland
Michelle Ciotola, Tom Mango, and Ali Caless will attend The MARQUES 33rd Annual Conference that takes place on September 17-19, 2019 in Dublin, Ireland. This year's conference theme is "Brands Confronting Change."

International Trademark Association Annual Meeting 2019
May 18, 2019
Boston, Massachusetts
The 141st annual meeting of the International Trademark Association (INTA) will take place in Boston, Massachusetts from May 18-22, 2018. Nearly 10,000 intellectual property professionals from around the world will attend, including a large delegation from Cantor Colburn.

Connecticut Invention Convention 2019
May 4, 2019
University of Connecticut, Storrs, CT
Several Cantor Colburn attorneys will be judges at the regional and statewide Connecticut Invention Convention (CIC), competitions, including Eric Baron, who is also a CIC board member, Lynn Stewart, Dennis Jakiela, Ph.D., Wanli Wu, Derek Jennings, Ali Caless, Dmitry Zuev, Chris Boehm, Luann Liang, and Sandy Sawwan. Michael Cantor ill attend to represent the firm during the program, which will recognize Cantor Colburn's support. This year's convention will take place on Saturday, May 4, 2019 at UConn's Storrs campus.

ASIPI Sports Law Conference
April 12, 2019
New York City
Trademark and copyright attorney Alison Caless attended the ASIPI Sports Law Conference on April 12, 2019 in New York City.

Creativity and the Law: What Every Artist Should Know About Their Creations
January 30, 2019
Cantor Colburn's Hartford Office
The Copyright Team at Cantor Colburn will present, “Creativity and the Law: What Every Artist Should Know About Their Creations,” presented in partnership with the Greater Hartford Arts Council. This session is a copyright basics seminar for artists in all media.
Presenting are Michelle Ciotola, Partner and Trademark & Copyright Department Vice Chair, Associates Ali Caless and Ben Cantor, and Senior Trademark paralegal Crysta Lemon Schmidt.

2018 Women of Innovation Awards Gala
March 28, 2018
Southington, Connecticut
The Women of Innovation® awards gala on March 28, 2018, celebrates the women who make Connecticut's businesses and institutions strong leaders on the cutting edge. The event is presented by the Connecticut Technology Council.

Creativity & the Law Seminar
December 5, 2017
Hartford, Connecticut
Cantor Colburn's copyright attorneys are pleased to partner with the Greater Hartford Arts Council and present a copyright basics seminar for artists in all media. This session will inform artists about the rights and protections available to them regarding their creations.

Professional Affiliations

Connecticut Bar Association

- Intellectual Property Law Section
- Young Lawyers Section

International Trademark Association

Intellectual Property Owners Association

MARQUES

- Education Team

John L. Cordani

Partner

jcordani@rc.com

Hartford Office
280 Trumbull Street
Hartford, CT 06103
Phone: 860.275.8287
Fax: 860.275.8299

Practice Areas

Business Litigation and Dispute Resolution

Appellate

Litigation

Intellectual Property

Intellectual Property Litigation

Industries

Manufacturing Law

Technology

Biography

John Cordani is a member of the firm's Business Litigation Group and focuses his practice on Intellectual Property litigation. He has litigated patent, trade secret, trademark, and antitrust cases through trial and appeal in federal courts across the United States, obtaining successful results in cases involving a diverse array of technology from specialty chemical products to automated pitching machines.

John maintains a world-wide patent litigation, prosecution, licensing and counselling practice. He is a registered patent attorney with extensive experience before the U.S. Patent & Trademark Office and the U.S. Court of Appeals for the Federal Circuit in document-intensive and scientific disputes.

John handles all phases of the patent litigation process, including claim construction, summary judgment, trials, and appeals in infringement matters. He has also tried complex commercial litigations, products liability cases, and land use matters through verdict and appeal.

John is a contributor to the firm's *Manufacturing Law Blog*.

Prior to attending Cornell Law School, where he was the salutatorian of his class, John worked as a chemist, and is a named inventor on multiple patents covering aspects of his research. He currently serves as an Adjunct Professor at Quinnipiac University School of Law, where he teaches a course on Patent Litigation and Strategy, and serves as the co-chair of the Connecticut Bar Association's Intellectual Property Section. He has also served as a Special Public Defender in a pro bono capacity providing representation for indigent defendants in criminal matters.

Education

Cornell Law School
J.D.
summa cum laude

Cornell University
B.A.
magna cum laude

Admissions

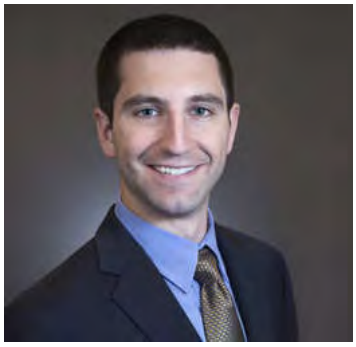
- State of Connecticut
- U.S. Court of Appeals, 2nd Circuit
- U.S. Court of Appeals, Federal Circuit
- U.S. District Court, District of Connecticut
- U.S. District Court, Eastern District of New York
- U.S. District Court, Southern District of New York
- U.S. Patent and Trademark Office

Robinson+Cole

ATTORNEYS

- JOHN C. LINDERMAN
- MARINA F. CUNNINGHAM
- TUCKER GRIFFITH
- GERALD L. DEPARDO
- SCOTT A. LYDON
- SERGIO F. CHUNG
- EMILY J. KASPEROWSKI
- GEOFFREY G. DELLENBAUGH
- MALLORY HEIN
- JOHN C. HILTON
- DONALD K. HUBER
- JUSTIN DURELLI
- JEANNE M. TANNER

Justin Durelli



Contact Justin Durelli
Phone: 860-838-8718
Fax: 860-527-0464

Justin has patent prosecution experience in the areas of mechanical and electro-mechanical devices, chemical sensors, protective surface coatings, microfluid devices, chemical processes, medical devices, heat transfer systems and industrial equipment. Justin also has a strong understanding of international patent filing strategies. Prior to joining McCormick, Paulding & Huber, Justin worked in General Electric's Global Patent Operation.

As part of his Master's program, Justin studied in a research laboratory focused on innovative membrane fabrication techniques designed for water purification applications. Justin's research experience includes characterization of polymer blends, particularly, ionomer blends.

Education

B.S., Chemical Engineering, University of Connecticut, Honors Scholar
M.S., Chemical Engineering, University of Connecticut
J.D., Quinnipiac University School of Law, magna cum laude
Associate Editor of the Quinnipiac Health Law Journal

Awards and Recognition

Selected by New England *Super Lawyers® Magazine* to the 2017 Connecticut Rising Stars list
Distinguished Academic Achievement Award in Intellectual Property

Associations

Connecticut Bar Association
International Trademark Association

Admissions

Connecticut
U.S. Patent and Trademark Office

Publications and Speaking Engagements

Speaker, "*Aqua Products, Inc. v. Joseph Matal*: Burden Shifted for Proving Patentability of Amended Claims in *Inter Partes* Review," Joint Patent Practice Seminar, May 2, 2018

Speaker, "IP Year in Review – Patents," Connecticut Bar Association, IP Section's IP Year in Review, March 3, 2016

Article co-author, "Anti-Troll Legislation: Too Much of a Good Thing?," CT Law Tribune, April 20, 2015

Article co-author, "Patents: Beyond the Basics – Current Risks and Opportunities," Connecticut Innovations blog, March 3, 2015

Speaker, "Key Supreme Court and T.T.A.B. Decisions of 2014," International Trademark Association (INTA) Roundtable Discussion, January 20, 2015

CONTACT US AT:

185 Asylum Street, City Place II, 18th Floor
Hartford, Connecticut 06103

Phone: +1.860.549.5290

Fax: +1.860.527.0464

Email: mph@ip-lawyers.com

Drew A. Hillier, Associate, Axinn Veltrop & Harkrider LLP

Drew litigates complex intellectual property cases and high-stakes commercial disputes. Drew graduated first in his class and was Editor-in-Chief of the law review at the University of Connecticut School of Law, which he attended on a full-tuition merit scholarship. He is a Phi Beta Kappa graduate of Saint Louis University, where he earned his BA, *summa cum laude*.

Drew joined Axinn as a summer associate. He returned to Axinn's Intellectual Property group as an associate in 2016, following a clerkship with Judge Michael P. Shea of the United States District Court for the District of Connecticut. He served previously as a judicial intern to Judge Janet Bond Arterton of the United States District Court for the District of Connecticut.

Drew is an active member of an alumni leadership committee for Saint Louis University. In his *pro bono* practice, Drew tries civil rights cases by judicial appointment in federal district court.

Clerkships

- Law Clerk to the Honorable Michael P. Shea of the United States District Court for the District of Connecticut (2015 – 2016)

Experience

- Litigated in federal district court on behalf of pharmaceutical company involving roughly three dozen patents from seven patent families directed to controlled release or abuse deterrent dosage forms.
- Counseled makers of biologic medical products about litigation and development strategies.
- Represented innovator-company and manufacturer of spinal implants in state and federal lawsuits over patent royalties and disputed inventorship.
- After being appointed by a federal district court to represent a pro bono client in a civil rights suit, obtained a settlement with an economic value of more than $1 million.
- Counseled tissue-provider about licensing of osteochondral-graft technology.

Education

- JD, highest honors – University of Connecticut School of Law (2015)
- BA, summa cum laude – Saint Louis University (2010), Phi Beta Kappa
- Diplôme Universitaire de Langue et de Culture Françaises – Université Catholique de Lyon (2009)

Admissions

- Connecticut
- US District Court District of Connecticut
- US District Court Southern District of New York
- US Court of Appeals for the Federal Circuit

CBA IP Section

Ethics in Intellectual Property: Key Insights From Application to Jury Verdict

Ethical Issues Arising In Patent Prosecution

Justin Durelli

December 3rd, 2019

Outline

- Conflicts of Interest
  - Competitors
  - Joint development agreements
  - Who is the client?
- Application Quota
- Attorney Leaves For Competitor

Conflicts of Interest

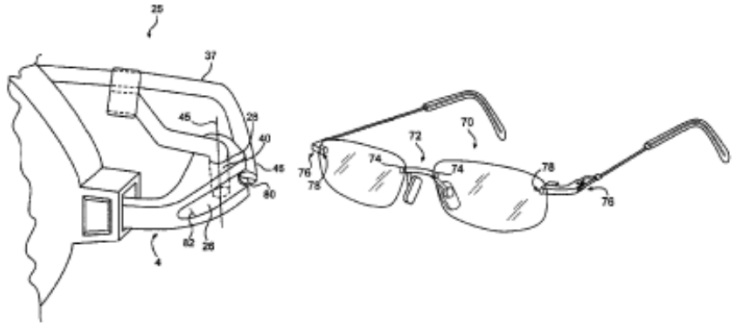
- Connecticut Rules of Professional Conduct Rule 1.7: Conflict of Interest: Current Clients
- (a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- USPTO rule is substantively the same. (*See* 37 C.F.R. § 11.107).

Conflicts of Interest

- *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336 (Mass. 2015).

Conflicts of Interest

- Maling engaged Finnegan for prosecution of Maling's inventions related to a screwless eyeglass assembly.



- Attorneys in Boston, MA office secured four patents from 2003 through 2009.
- Afterwards, Maling learned that attorneys in Finnegan's Washington, D.C. office were representing Masunaga Optical Manufacturing Co., Ltd.

Conflicts of Interest

- The Massachusetts Supreme Judicial Court held that:

  …although subject matter conflicts in patent prosecutions often may present a number of potential legal, ethical, and practical problems for lawyers and their clients, they do not, standing alone, constitute an actionable conflict of interest that violates rule 1.7.

- However, the court cautioned that:

  Nothing we say here today, however, should be construed to absolve law firms from the obligation to implement robust processes that will detect potential conflicts.

Conflicts of Interest

- *Axcess Int'l, Inc. v. Baker Botts, L.L.P.*, 2016 Tex. App. LEXIS 3081 (Tex. App. 2016)

Conflicts of Interest

- Axcess International, Inc. and Savi Technologies, Inc. were both represented by Baker Botts L.L.P through different attorneys.
  - Axcess and Savi both are in the business of active-radio-frequency identification products and services.
- Patents issued to both Axcess and Savi.
- Axcess sued Baker Botts for conflicted representation.
  - Relied on a patent attorney expert witness to opine on what would have happened had Baker Botts not been conflicted.
- Court of Appeals of Texas held that Axcess's evidence for damages was too speculative.
  - "In other words, Axcess's causation evidence depended upon how third parties would react under different hypothetical circumstances. Under such circumstances, Axcess had to prove—not just suggest or theorize, but prove with competent, non-speculative evidence—that the third parties would have actually taken such action."

Maling and the America Invents Act

- The America Invents Act (AIA) changed the U.S. from a *First to Invent* system to a *First to File* system.
  - Prior art references are effective the day that they are *filed*.

- *Maling* involved pre-AIA patents.

- What if counsel represents two different parties with similar inventions in the prosecution of AIA patents?
  - Counsel's choice to prepare/file an application for one client may be to the detriment of the other.

Joint Development Agreements

- Court decisions are very fact specific and vary in determining whether an attorney-client relationship exists with a single client or joint clients in the context of joint development agreements.

Joint Development Agreements

What to do:

- Clearly establish the identity of the client in the license agreement or joint development agreement, and the engagement letter.

- License agreement or joint development agreement can expressly state that Outside Counsel would not owe fiduciary duties to Secondary Party, but that all communications would be made in furtherance of a common interest in prosecuting the cases.

Who is the Client?

- The entity paying the bills?
- The entity signing the power of attorney?
- The inventor?
- The entity being given legal advice by the attorney?

Who is the Client?

What to do:

- Establish assignment or absolute obligation to assign in employment agreement.
- Have Employee Inventor sign assignment as soon as possible or at least remind Employee Inventor of absolute obligation to assign.
- Make clear that Outside Counsel represents Client Company, NOT Employee Inventor.
- File patent applications in the name of Client Company.
- Client Company executes Power of Attorney.

Attorney Application Quota

- Trzaska v. L'Oreal USA, Inc., 865 F.3d 155 (3rd Cir. July 25, 2017).

Attorney Application Quota

- Steven Trzaska was in-house counsel for L'Oreal.
- L'Oreal established a patent application annual quota.
  - Trzaska's team had a 40-application quota.
- Trzaska informed his superiors he would not violate his ethical obligations.
- L'Oreal subsequently fired Trzaska on the basis that "his position was no longer needed."

Attorney Application Quota

- Trzaska filed a lawsuit against L'Oreal for wrongful retaliatory discharge in violation of the New Jersey Conscientious Employee Protection Act ("CEPA").
- The district court dismissed Trzaska's case because, in the district court's view, there was an inadequate basis to maintain the CEPA claim.
- The Court of Appeals for the Third Circuit reversed.

  "*An instruction, coercion, or threat by an employer that would result in the disregard of obligatory ethical standards of one's profession violates a clear mandate of public policy within the meaning of CEPA*."

Attorney Leaves For Competitor

- *Gillette Co. v. Provost*, 2016 Mass. Super. LEXIS 40 (2016).

Attorney Leaves For Competitor

- Chester Cekala worked as a patent attorney for Gillette from 1987 to 1990 and again from 1992 through May 2006.
- Cekala began working on patent matters for ShaveLogic in 2012.
  - Became general counsel in 2013.
- ShaveLogic told investors and prospective business partner's that Cekala's "intimate knowledge of Gillette's intellectual property portfolio and patent strategy" gives ShaveLogic "a competitive edge in the market."
- Gillette brought a breach of fiduciary duty claim against Cekala.

Attorney Leaves For Competitor

- Rule 1.9. Duties to Former Clients
  - (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Attorney Leaves For Competitor

- Massachusetts Superior Court sided with ShaveLogic:
  - "In contrast, questions about whether any ShaveLogic product or planned product infringes on a Gillette patent do not implicate information known to Gillette but not disclosed in the patent or the accompanying, and now public, patent prosecution history. Gillette's undisclosed intentions and understandings regarding its patented technology or its patent strategy have no bearing on whether ShaveLogic's products infringe on any patent held by Gillette."

Gillette Co. v. Provost, 2016 Mass. Super. LEXIS 40, *16

Thank You

- Questions?

Cantor Colburn LLP

Ethical Considerations for Trademark Attorneys

Sponsored by Connecticut Bar Association – Intellectual Property Section

Presented by Ali Caless
Trademark & Copyright Department, Cantor Colburn LLP

Overview

- Trademark Clearance
- Third-Party Use Investigations
- Trademark Bullying
- Use of Paralegals / Abiding by Rules for Unauthorized Practice of Law

Ethical Obligations During Trademark Clearance

Trademark Clearance

- Does a client need to conduct trademark clearance?
  - Answer: No, but…
  - Oath when filing new application stating that "to the best of the verifier's knowledge and belief, no other person has the right to use such mark (same or confusingly similar) in commerce…"
- Be careful with language in full and knockout clearances
  - Could be relevant in a bad faith and/or willful infringement claim
  - Ex.) If the attorney suggests a use investigation for a particular reference, and the client does not proceed with this strategy, there is a risk that this fact could weigh in favor of bad faith, even if the opinion advises that the mark is likely available

Trademark Clearance

- Clearance hypos:
  - New client requests a search and you are concerned that an existing client may object to the new client's mark
  - Client A's mark appears in Client B's search results
- Be proactive in identifying conflicts
  - Consider conflict checks for new clients, use investigations, mark names
  - Searchable internal database, ideally including related companies

Third-Party Use Investigations

Use Investigations

- Trademark use investigations appear in many contexts: infringement, counterfeiting, non-use/abandonment, etc.
- Model Rule 4.1 prohibits attorneys from:

  "mak[ing] a false statement of material fact or law to a third person; or fail[ing] to disclose a material fact to a third person."
- Model Rule 8.4 further provides that:

  "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Use Investigations

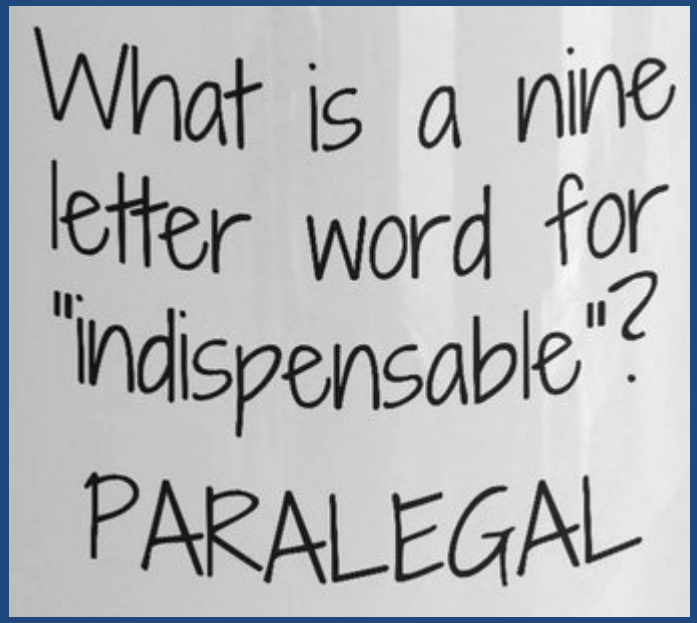
- Courts have determined that use investigations serve an important policy objective: preventing consumer confusion or deception and protecting consumers against fraud and at times against health and safety risks (counterfeit goods).
- Investigations are generally permissible if:
  - are conducted by a non-lawyer investigator;
  - only contact low-level employees without access to privileged information;
  - only seek information that an ordinary customer could obtain; and
  - for the purpose of determining if violations of intellectual property rights are occurring; and collecting information regarding use/non-use/abandonment of mark

Trademark Bullying

Trademark Bullying

- Unethical or unreasonable tactics used to enforce trademark rights beyond a reasonable interpretation of the scope of those rights
- Typically involves large entity with substantial financial and legal resources vs. small entity with limited resources
- Forms of Bullying:
  - Cease and Desist letters that overstate rights/remedies
  - Use of egregious tone/language
  - Aggressive Litigation Tactics used to harass, delay, increase cost

Unauthorized Practice of Law: Utilizing Support Staff



Unauthorized Practice of Law

- Model Rule 5.5: A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
  - "the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client"

Unauthorized Practice of Law

- Paralegals and support staff cannot:
  - exercise independent legal judgment

    Ex.) appear in court, signing pleadings, accepting cases and establishing attorney-client relationship, setting fees, negotiating a settlement
  - *independently* prepare and file an application, response, or other document with the USPTO
  - sign submissions to the USPTO under the direction of, or on behalf of, an attorney
  - authorize Examiner's Amendments

Unauthorized Practice of Law

- Paralegals and support staff can:
  - conduct supervised, substantive legal research and factual investigation, including researching the availability of proposed trademarks
  - prepare trademark applications and other prosecution documents that are subsequently reviewed and approved by an attorney
  - collect deposit materials and fees
  - research suspected trademark infringements
  - sign client correspondence, as long as their title and status are clearly conveyed

Unauthorized Practice of Law

- Proper supervision generally requires clear instructions from the outset of a task, effective monitoring during the period of time that the work is underway, and review of the final work product. See USPTO Rule 11.50.
- Must make reasonable efforts to ensure that the firm has measures that offer “reasonable assurance” that the conduct of non-practitioner assistants is in accord with the lawyer’s professional obligations.
- Lawyers who instructed or agreed to the misconduct of an assistant or paralegal are responsible for that conduct.

Questions / Discussion

Thank you for your time.

Ali Caless, Cantor Colburn LLP
acaless@cantorcolburn.com

Cantor Colburn LLP

Disclaimer

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of Cantor Colburn LLP on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Cantor Colburn LLP. No individual who is a member, partner, shareholder, director, employee or consultant of, in, or to Cantor Colburn LLP (whether or not such individual is described as a 'partner') accepts or assumes responsibility, or has any liability, to any person in respect of this communication.

Cantor Colburn LLP

AXINN

Should You “Google” the Jury?

Drew Hillier

Social Media Threatens the Right to an Impartial Jury

"The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program."

United States v. Fumo,
655 F.3d 288, 331 (3rd Cir. 2011)
(Nygaard, J., concurring)

Social Media Threatens the Right to an Impartial Jury

"[T]he extensive use of social networking sites, such as Twitter and Facebook, have exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors."

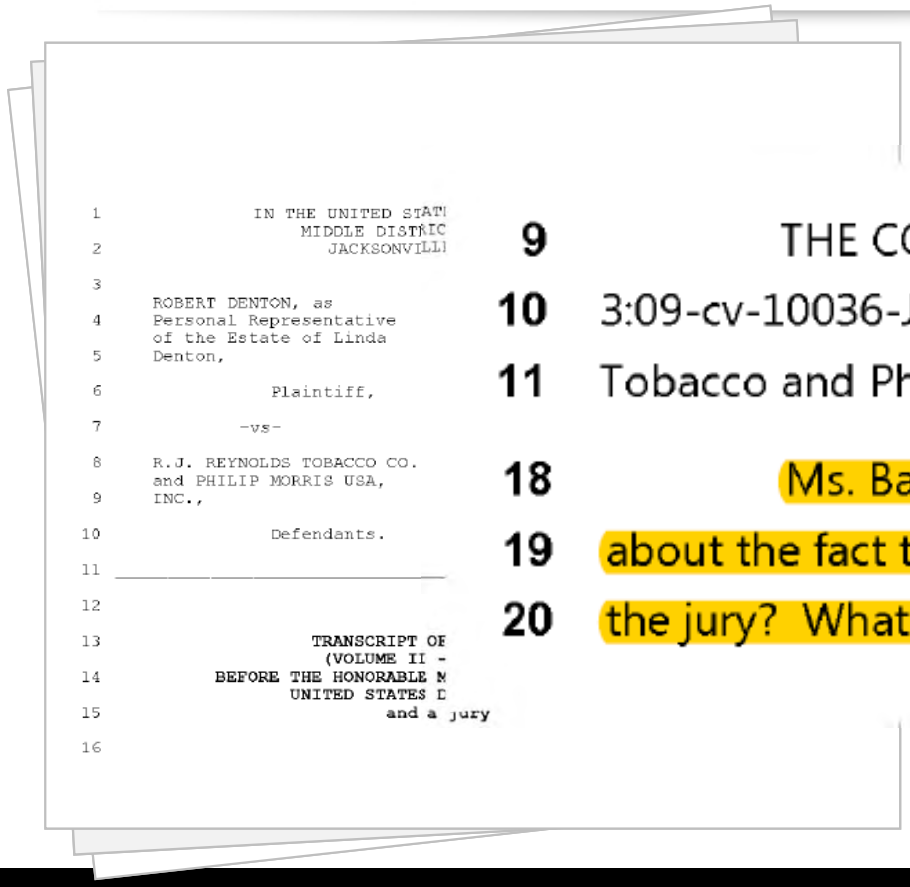
United States v. Juror Number One,
866 F.Supp.2d 442, 451 (E.D. Pa. 2011)

Social Media Threatens the Right to an Impartial Jury

"Search engines have indeed created significant new dangers for the judicial system. It is all too easy for a juror to find out more than he or she should by typing a few carefully chosen words into a search engine."

In re MTBE Products Liability Litig., 793 F. Supp. 576, 609 (S.D.N.Y. 2010)

Know Your Jurors – Public Records



IN THE UNITED STATES
MIDDLE DISTRICT
JACKSONVILLE

ROBERT DENTON, as Personal Representative of the Estate of Linda Denton,

Plaintiff,

-vs-

R.J. REYNOLDS TOBACCO CO. and PHILIP MORRIS USA, INC.,

Defendants.

TRANSCRIPT OF
(VOLUME II -
BEFORE THE HONORABLE
UNITED STATES
and a jury

THE COURT: We are back on the record in Case No. 3:09-cv-10036-J-37JBT, Robert Denton versus R.J. Reynolds Tobacco and Philip Morris.

Ms. Barnett, what is -- what do you have to say about the fact that you seated one of your own clients on the jury? What do we do about that at this point?

Social Media Protects the Right to an Impartial Jury

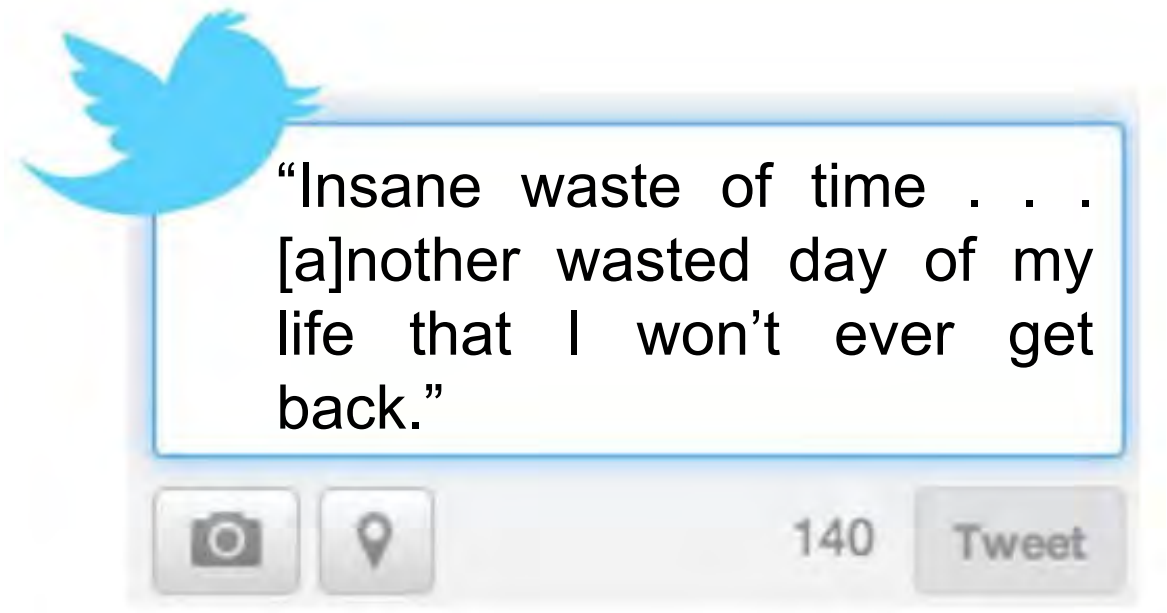
- In the Courtroom
  - Tobacco companies "**are a business**"

- On Facebook
  - Tobacco companies are **"leaches [sic] who prey on smokers, including addicts like me."**

Social Media Protects the Right to an Impartial Jury

- In the Courtroom
  - Addicted smokers are "**accountable for their own actions**"
  - It's a **free country**
- On Facebook
  - Addicted smokers are **"slaves"** to the **"rich guy who sells tobacco products"**
  - The Government should "**mak[e] the tobacco companies stop**"

Social Media Allows a Party to Identify Unqualified Jurors

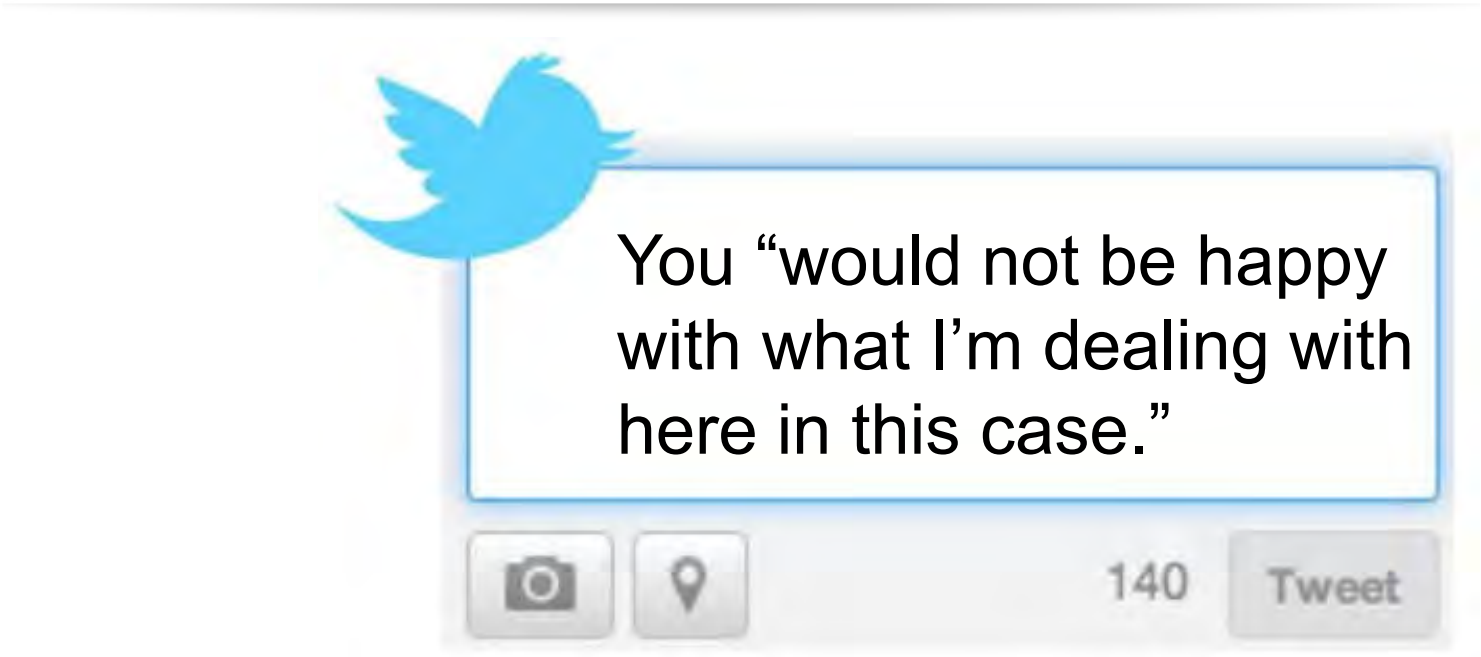


Gonzalez v. R.J. Reynolds Company, Case No. 09-53850-CA-23 (Fla. 11th Jud. Cir.), Defendants' Motion to Disqualify Juror No. 756 For Cause, filed January 27, 2014, at 1-2.

Social Media Allows a Party to Identify Unqualified Jurors

Gonzalez v. R.J. Reynolds Company, Case No. 09-53850-CA-23 (Fla. 11th Jud. Cir.), Defendants' Motion to Disqualify Juror No. 756 For Cause, filed January 27, 2014, at 1-2.

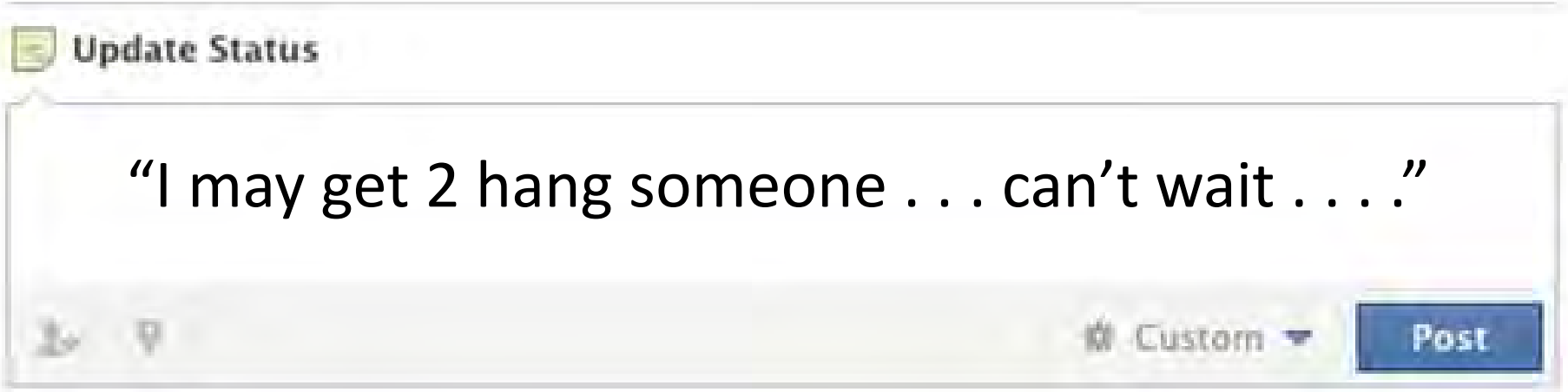
Social Media Allows a Party to Identify Unqualified Jurors



Gonzalez v. R.J. Reynolds Company, Case No. 09-53850-CA-23 (Fla. 11th Jud. Cir.), Defendants’ Motion to Disqualify Juror No. 756 For Cause, filed January 27, 2014, at 1-2.

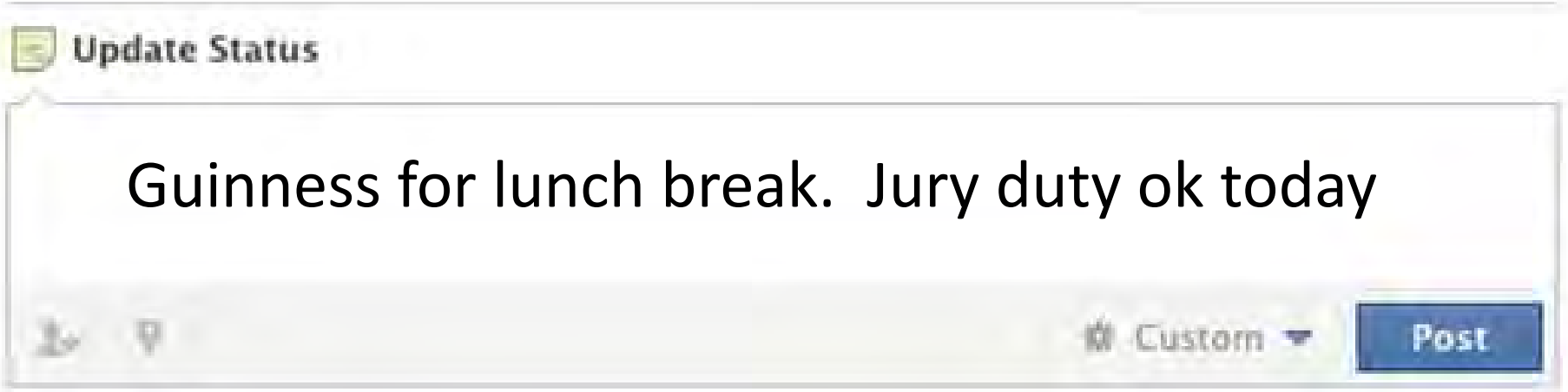
Social Media Allows a Party to Identify Unqualified Jurors

Posts discovered after jury selection:



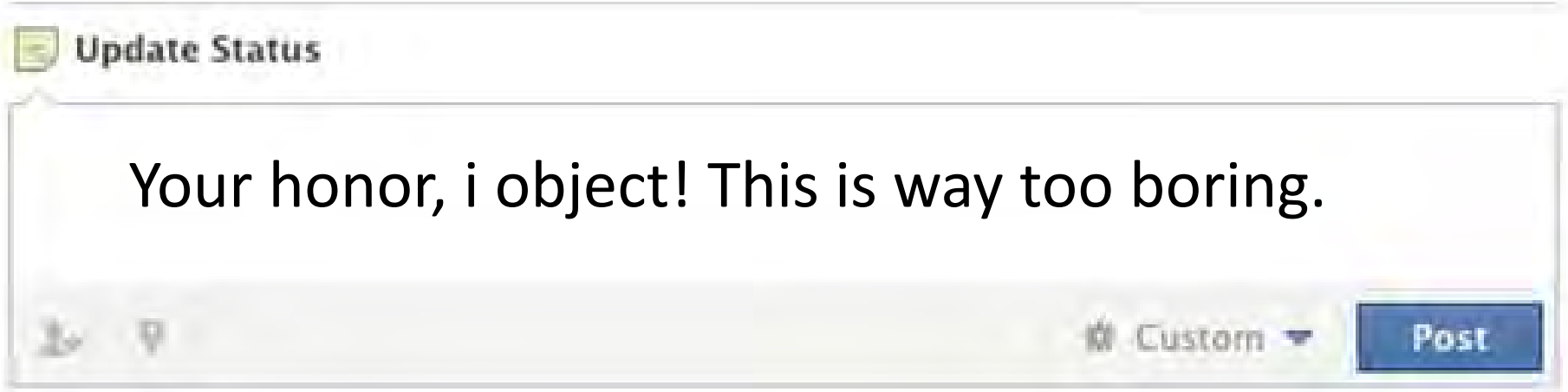
United States v. Ganias, No. 3:08CR224 EBB, 2011 WL 4738684, at *2 (D. Conn. Oct. 5, 2011) (motion for new trial denied), aff'd, 755 F.3d 125 (2d Cir. 2014)

Posts discovered after jury selection:



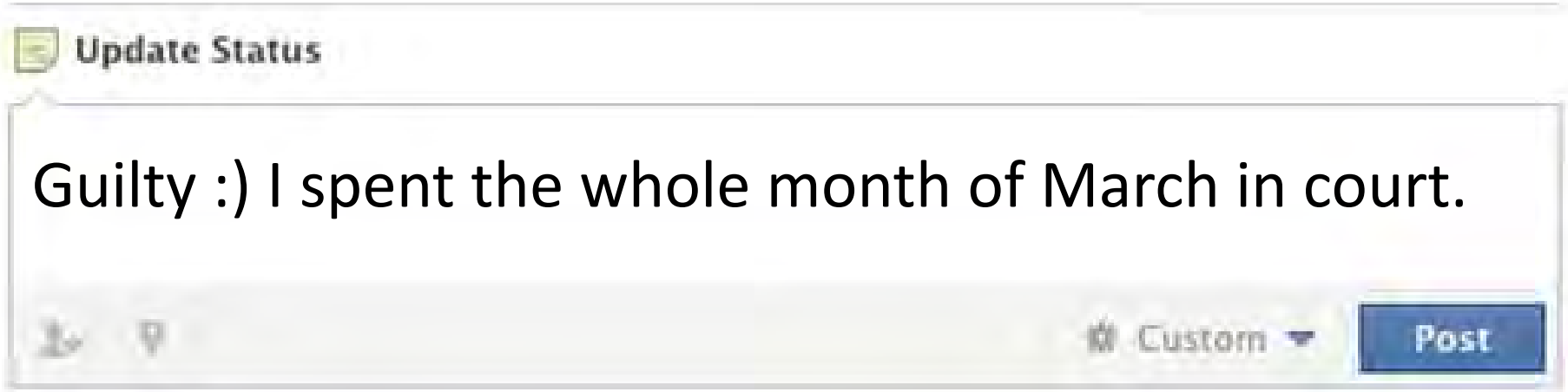
United States v. Ganias, No. 3:08CR224 EBB, 2011 WL 4738684, at *2 (D. Conn. Oct. 5, 2011) (motion for new trial denied), aff'd, 755 F.3d 125 (2d Cir. 2014)

Posts discovered after jury selection:



United States v. Ganias, No. 3:08CR224 EBB, 2011 WL 4738684, at *2 (D. Conn. Oct. 5, 2011) (motion for new trial denied), aff'd, 755 F.3d 125 (2d Cir. 2014)

Posts discovered after jury selection:



United States v. Ganias, No. 3:08CR224 EBB, 2011 WL 4738684, at *2 (D. Conn. Oct. 5, 2011) (motion for new trial denied), aff'd, 755 F.3d 125 (2d Cir. 2014)

Ethical Rules That May Require Social Media Research

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Rule 1.1)

Ethical Rules That May Require Social Media Research

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the r

Comment: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."

Ethical Rules That May Require Social Media Research

"A lawyer shall act with reasonable diligence and promptness in representing a client." (Rule 1.3.)

But Some Ethical Rules Restrict Social Media Research

Rule 3.5: Impartiality & Decorum of the Tribunal

- A lawyer shall not:

  (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; . . .

Rule 3.5: Impartiality & Decorum of the Tribunal

- A lawyer shall not:

  . . . **(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order**; . . .

Rule 3.5: Impartiality & Decorum of the Tribunal

- A lawyer shall not:

  . . . (c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment; or

  (d) engage in conduct intended to disrupt a tribunal.

Other Ethical Rules That May Restrict Social Media Research

Rule 4.1: In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.

Other Ethical Rules That May Restrict Social Media Research

Rule 4.3: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Other Ethical Rules That May Restrict Social Media Research

Rule 4.4: In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Other Ethical Rules That May Restrict Social Media Research

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance.

Select Ethics Opinions - ABA

"Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror."

American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466

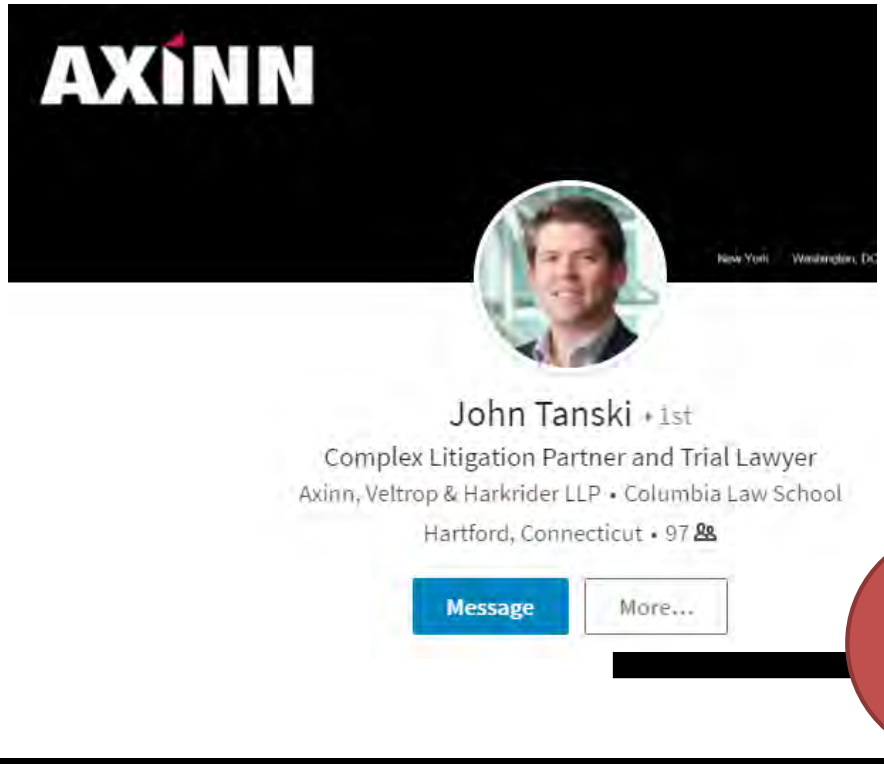
Select Ethics Opinions - ABA

Select Ethics Opinions - ABA

"A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b)."

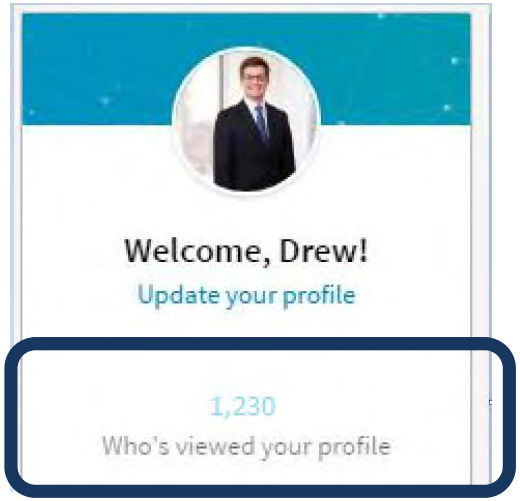
American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466

Select Ethics Opinions - ABA



Select Ethics Opinions - ABA

"The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b)."

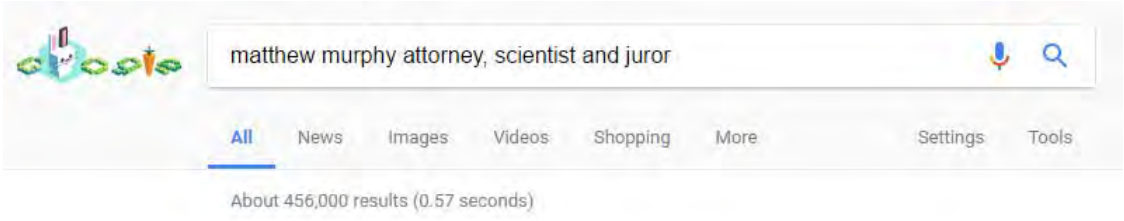


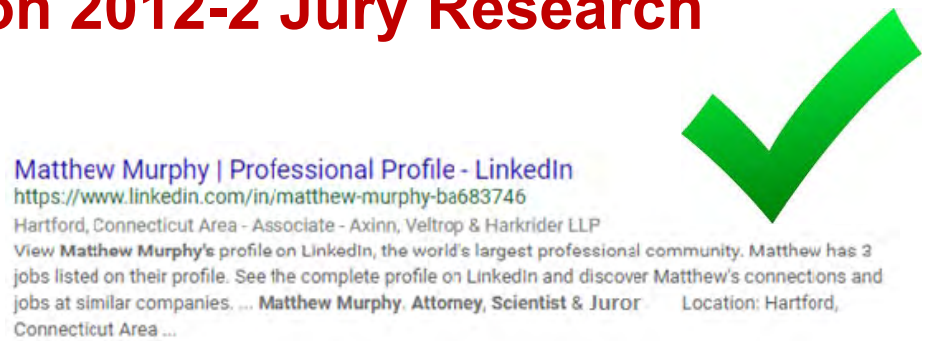
American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466

Select Ethics Opinions – New York

"Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research."

New York City Bar, Formal Opinion 2012-2 Jury Research and Social Media





Select Ethics Opinions – New York

"In general, attorneys should only view information that potential jurors intend to be—and make—public. Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption. The potential juror is aware that her information and images are available for public consumption."

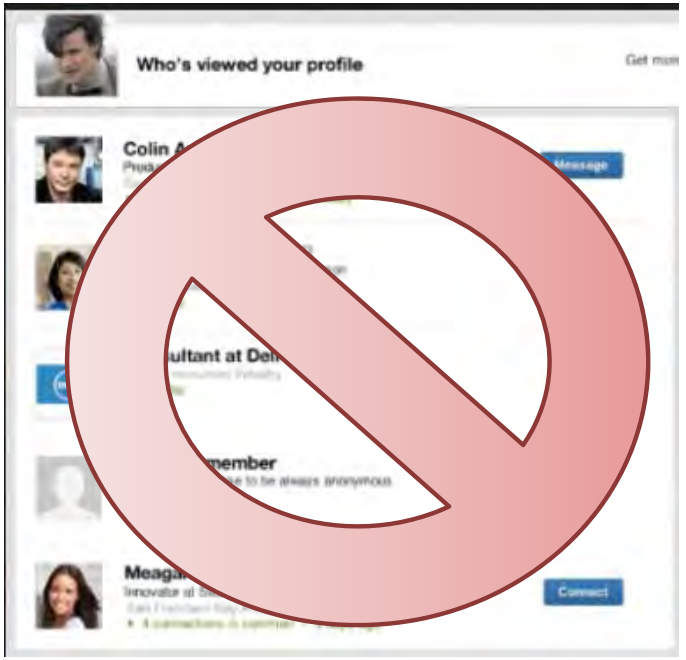
New York City Bar, Formal Opinion 2012-2 Jury Research and Social Media

Select Ethics Opinions – New York

Attorneys may not research jurors if the result of the research is that the juror will receive a communication.

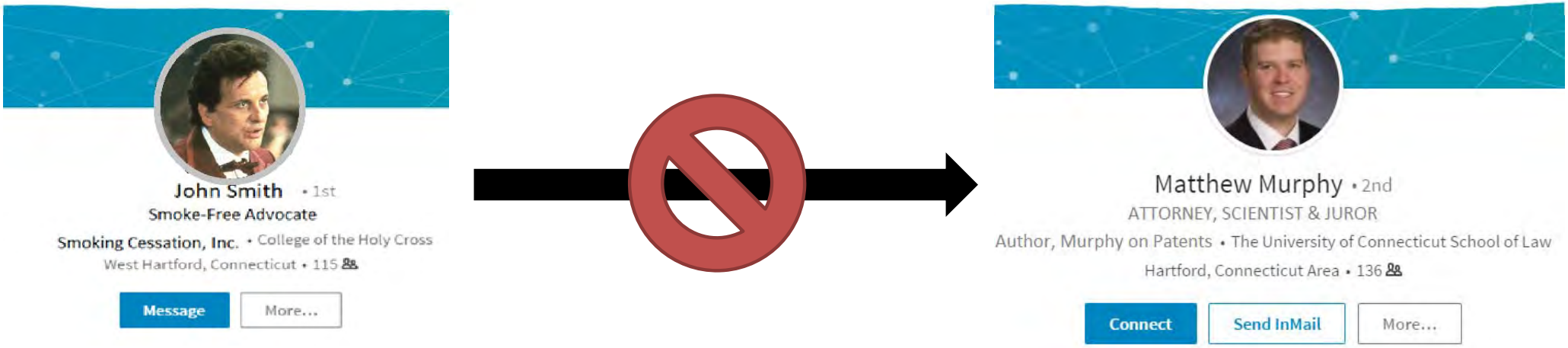
New York City Bar, Formal Opinion 2012-2 Jury Research and Social Media

Unlike ABA Opinion, some LinkedIn searches would be ex parte contact.



Select Ethics Opinions – New York

"The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney."



Select Ethics Opinions – New York

"The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. **Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court."**

New York City Bar, Formal Opinion 2012-2 Jury Research and Social Media

Select Ethics Opinions – New York

Conducting On-Going Research During Trial

- Research permitted as to potential jurors is permitted as to sitting jurors.

New York City Bar, Formal Opinion 2012-2 Jury Research and Social Media

Select Ethics Opinions – New York

Conducting On-Going Research During Trial

- While an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial.

New York City Bar, Formal Opinion 2012-2 Jury Research and Social Media

Select Ethics Opinions – New York

Conducting On-Going Research During Trial

– If an attorney learns of juror misconduct through such research, she *must* promptly notify the court.

New York City Bar, Formal Opinion 2012-2 Jury Research and Social Media

Select Ethics Opinions – New York

Conducting On-Going Research During Trial

- Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney.

New York City Bar, Formal Opinion 2012-2 Jury Research and Social Media

Case Study – California

ORACLE® V. Google

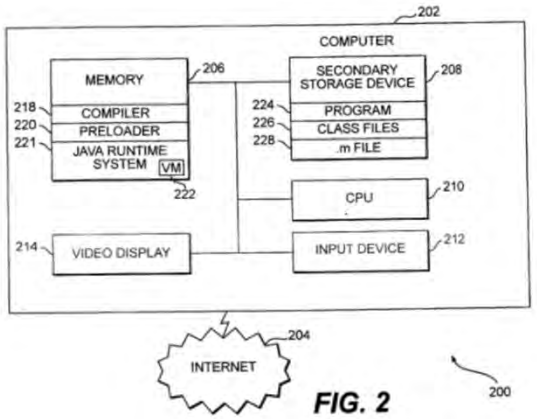


FIG. 2

Case Study – California

"Wondering about the delay allocated to reviewing two pages, the judge eventually realized that counsel wanted the names and residences from the questionnaire so that, during the delay, their teams could scrub Facebook, Twitter, LinkedIn, and other Internet sites to extract personal data on the venire. Upon inquiry, counsel admitted this."

***Oracle America, Inc. v. Google Inc.*, No. C 10-03561 (March 25, 2016, N.D. Calif.) (William Alsup, U.S.D.J.)**

Case Study – California

"Trial judges have such respect for juries — reverential respect would not be too strong to say — that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information."

***Oracle America, Inc. v. Google Inc.*, No. C 10-03561 (March 25, 2016, N.D. Calif.) (William Alsup, U.S.D.J.)**

Case Study – California

Judge Alsup's Three Concerns:

- "Apparent unfairness in allowing the lawyers to do to the venire what the venire cannot do to the lawyers."
- "[F]acilitating improper personal appeals to particular jurors via jury argument."
- "[T]o protect the privacy of the venire. They are not celebrities or public figures. The jury is not a fantasy team composed by consultants . . . ."

Case Study – California

Judge Alsup's Three Concerns:

- "Apparent unfairness in allowing the lawyers to do to the venire what the venire cannot do to the lawyers."
- "[F]acilitating improper personal appeals to particular jurors via jury argument."
- "[T]o protect the privacy of the venire. They are not celebrities or public figures. The jury is not a fantasy team composed by consultants . . . ."

Case Study – California

Judge Alsup's Three Concerns:

- "Apparent unfairness in allowing the lawyers to do to the venire what the venire cannot do to the lawyers."
- "[F]acilitating improper personal appeals to particular jurors via jury argument."
- "[T]o protect the privacy of the venire. They are not celebrities or public figures. **The jury is not a fantasy team composed by consultants . . . .**"

Case Study – California

But an outright ban on jury research would preclude the lawyers from “learning information readily available to the press and every member of the public in the gallery.”

Case Study – California

Judge Alsup's Solution:

(1) Inform the Jury:

"At the outset of jury selection, **each side shall inform the venire** of the **specific extent** to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to **monitor jurors**, including specifically searches on Facebook, LinkedIn, Twitter, and so on, including the extent to which they will log onto their own social media accounts to conduct searches and the **extent to which they will perform ongoing searches** while the trial is underway."

Case Study – California

Judge Alsup's Solution:

(2) No excuses:

"**Counsel shall not explain away their searches** on the ground that the other side will do it, so they have to do it too. **Nor may counsel** intimate to the venire that the Court has allowed such searches and thereby **leave the false impression that the judge approves of the intrusion**. Counsel may simply explain that they feel obliged to their clients to consider all information available to the public about candidates to serve as jurors."

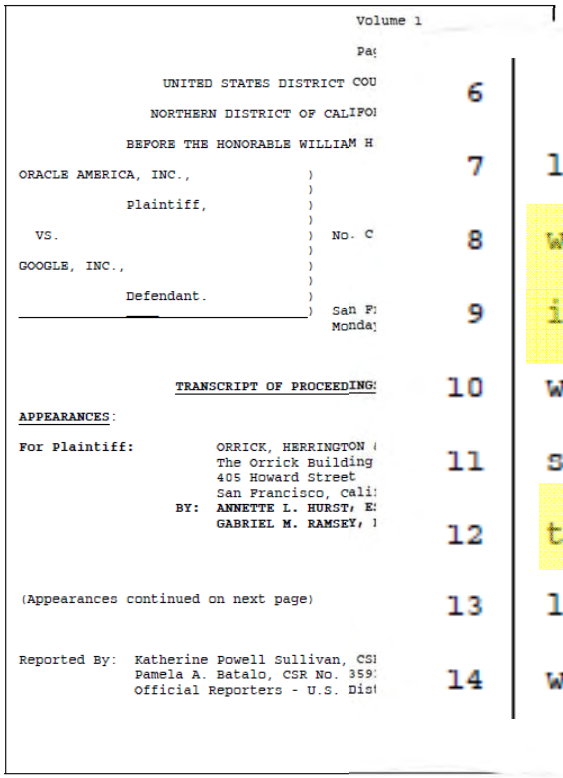
Case Study – California

Judge Alsup's Solution:

(3) Let the jurors fix their privacy settings:

"By this disclosure, the venire will be informed that the trial teams will soon learn their names and places of residence and will soon discover and review their social media profiles and postings, depending on the social media privacy settings in place. **The venire persons will then be given a few minutes to use their mobile devices to adjust their privacy settings, if they wish.**"

Case Study – California



Volume 1

Pa

UNITED STATES DISTRICT COU

NORTHERN DISTRICT OF CALIFOI

BEFORE THE HONORABLE WILLIAM H

ORACLE AMERICA, INC.,

Plaintiff,

VS.

GOOGLE, INC.,

Defendant.

No. C

San F
Monda

TRANSCRIPT OF PROCEEDING

APPEARANCES:

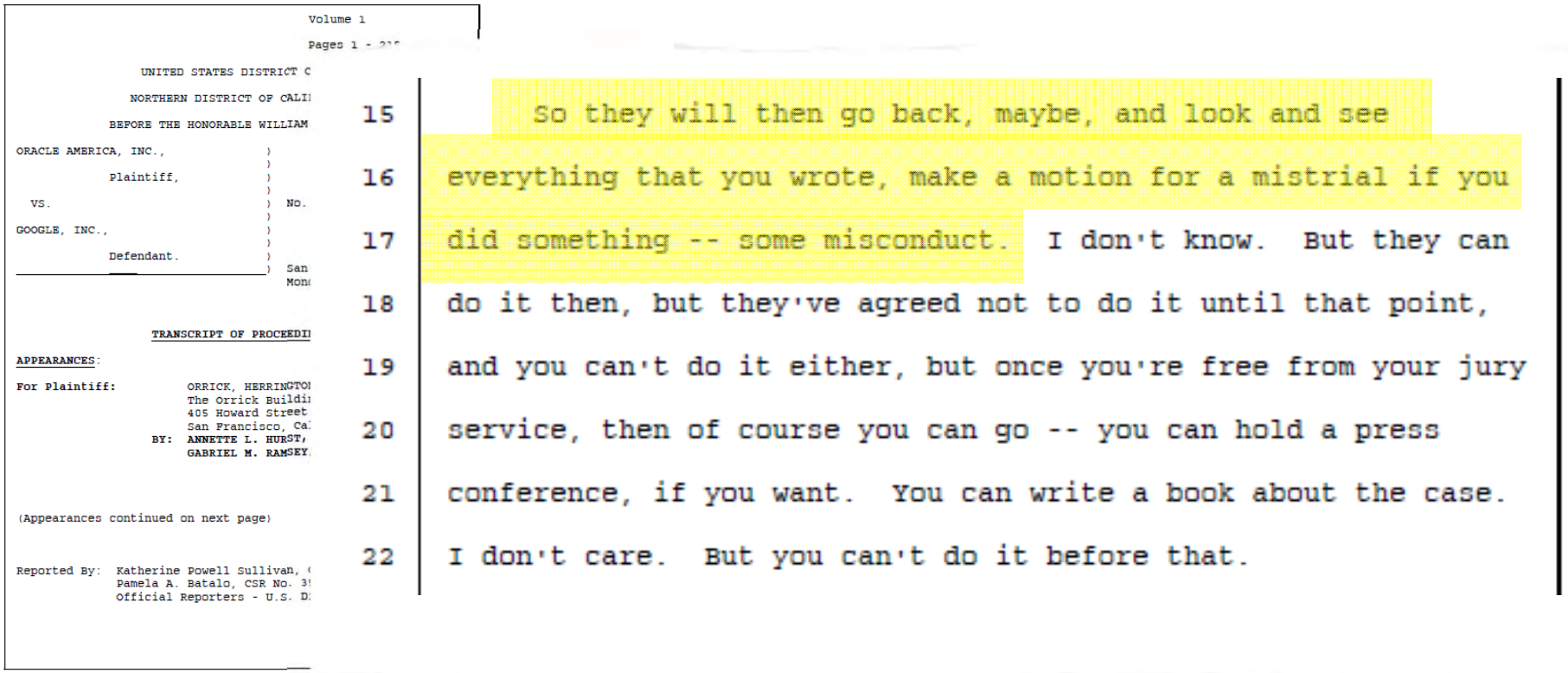
For Plaintiff: ORRICK, HERRINGTON
The Orrick Building
405 Howard Street
San Francisco, Cali
BY: ANNETTE L. HURST, E
GABRIEL M. RAMSEY,

(Appearances continued on next page)

Reported By: Katherine Powell Sullivan, CSI
Pamela A. Batalo, CSR No. 359
Official Reporters - U.S. Dist

Now, part of the good news of this is that these excellent lawyers on both sides have both agreed with the Court that they will not try during -- what sometimes happens in jury selection is to do searches on you, so they're not going to be going out while you're being considered to serve on the jury and searching your background on social media. So you're safe there. Until the very end of the case, then you and the lawyers and everyone in the world can do all the research they want to do once the verdict is in.

Case Study – California



Volume 1
Pages 1 - 215

UNITED STATES DISTRICT C
NORTHERN DISTRICT OF CALI
BEFORE THE HONORABLE WILLIAM

ORACLE AMERICA, INC.,
Plaintiff,
VS.
GOOGLE, INC.,
Defendant.
No.
San
Mon

TRANSCRIPT OF PROCEEDI

APPEARANCES:

For Plaintiff: ORRICK, HERRINGTO
The Orrick Buildi
405 Howard Street
San Francisco, Ca
BY: ANNETTE L. HURST,
GABRIEL M. RAMSEY

(Appearances continued on next page)

Reported By: Katherine Powell Sullivan,
Pamela A. Batalo, CSR No. 3
Official Reporters - U.S. D

So they will then go back, maybe, and look and see everything that you wrote, make a motion for a mistrial if you did something -- some misconduct. I don't know. But they can do it then, but they've agreed not to do it until that point, and you can't do it either, but once you're free from your jury service, then of course you can go -- you can hold a press conference, if you want. You can write a book about the case. I don't care. But you can't do it before that.

Case Study – California

UNITED STATES DIST

NORTHERN DISTRICT OF

BEFORE THE HONORABLE WI

ORACLE AMERICA, INC.,

Plaintiff,

VS.

GOOGLE, INC.,

Defendant.

So at some point, if you know how to adjust your privacy settings on your Facebook, if you have that, you might want to do that. But that's up to you.

TRANSCRIPT OF PRC

APPEARANCES:

For Plaintiff: ORRICK, HERR...

The Orrick Building
405 Howard Street
San Francisco, California 94105

BY: ANNETTE L. HURST, ESQUIRE
GABRIEL M. RAMSEY, ESQUIRE

(Appearances continued on next page)

Reported By: Katherine Powell Sullivan, CSR #5812, RMR, CRR
Pamela A. Batalo, CSR No. 3593, RMR, FCRR
Official Reporters - U.S. District Court

Select Ethics Opinions – District of Columbia

"Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of jurors or potential jurors to discover bias or other relevant information for jury selection."

D.C. Bar Ethics Opinion 371

Select Ethics Opinions – District of Columbia

"Review of juror or potential juror social media could reveal misconduct by the juror or others."

D.C. Bar Ethics Opinion 371

Select Ethics Opinions – District of Columbia

"[S]ome social media networks automatically provide information to registered users or members about persons who access their information. In the Committee's view, such notification does not constitute a communication between the lawyer and the juror or prospective juror."

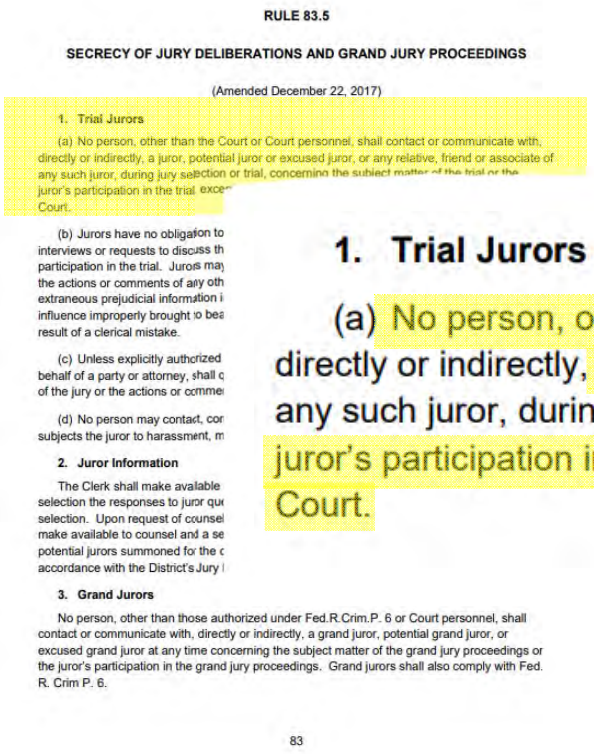
D.C. Bar Ethics Opinion 371

Select Ethics Opinions – District of Columbia

"Because requesting access to a juror's or potential juror's private media sites involves communication with the juror, such requests would violate the Rule. In addition, if a court or judge forbids access to the social media of jurors and potential jurors, then a violation of a court rule or order could raise questions under Rule 3.4(c)."

D.C. Bar Ethics Opinion 371

Case Study – Connecticut



RULE 83.5

SECRECY OF JURY DELIBERATIONS AND GRAND JURY PROCEEDINGS

(Amended December 22, 2017)

1. Trial Jurors

(a) No person, other than the Court or Court personnel, shall contact or communicate with, directly or indirectly, a juror, potential juror or excused juror, or any relative, friend or associate of any such juror, during jury selection or trial, concerning the subject matter of the trial or the juror's participation in the trial, except with the permission of and under the supervision of the Court.

(b) Jurors have no obligation to interviews or requests to discuss th participation in the trial. Jurors may the actions or comments of any oth extraneous prejudicial information i influence improperly brought to bea result of a clerical mistake.

(c) Unless explicitly authorized behalf of a party or attorney, shall c of the jury or the actions or comme

(d) No person may contact, cor subjects the juror to harassment, m

2. Juror Information

The Clerk shall make available selection the responses to juror qu selection. Upon request of counsel make available to counsel and a se potential jurors summoned for the c accordance with the District's Jury

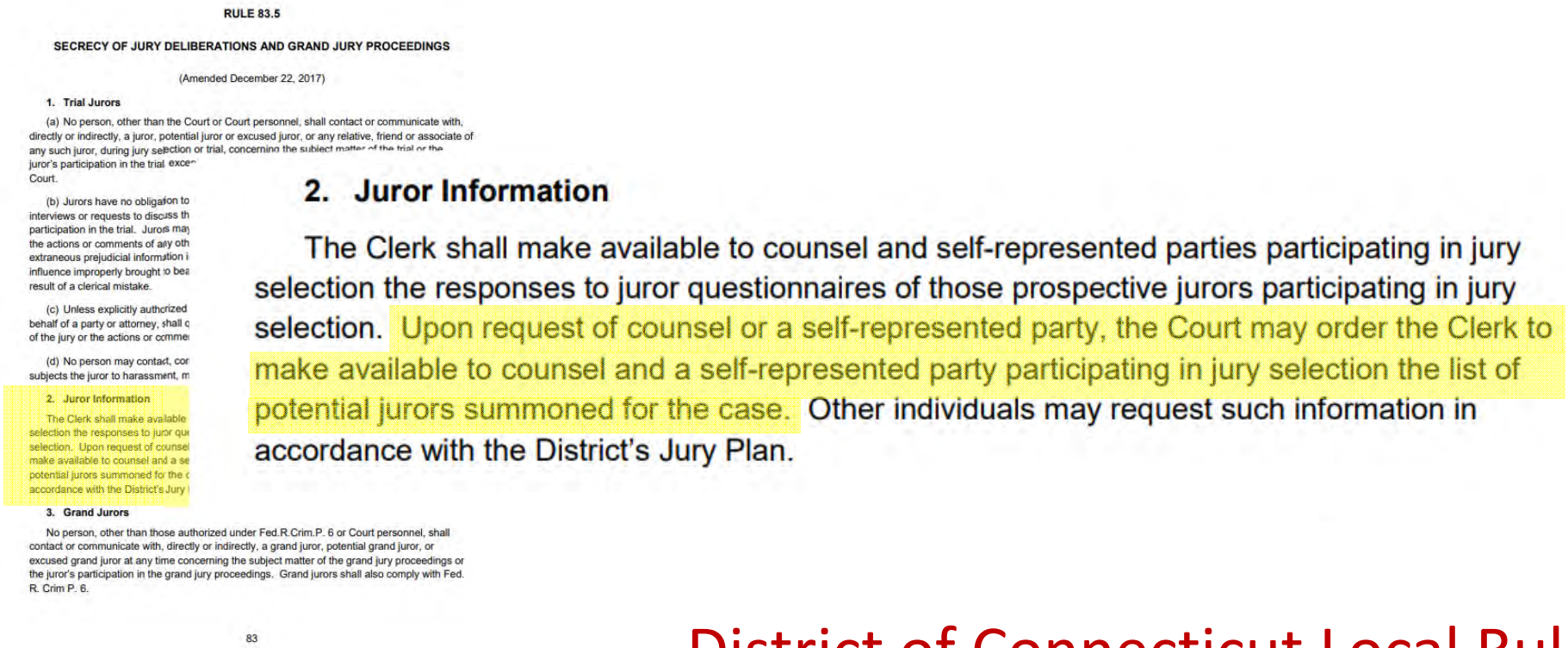
3. Grand Jurors

No person, other than those authorized under Fed.R.Crim.P. 6 or Court personnel, shall contact or communicate with, directly or indirectly, a grand juror, potential grand juror, or excused grand juror at any time concerning the subject matter of the grand jury proceedings or the juror's participation in the grand jury proceedings. Grand jurors shall also comply with Fed. R. Crim P. 6.

83

District of Connecticut Local Rule 83.5

Case Study – Connecticut



RULE 83.5

SECRECY OF JURY DELIBERATIONS AND GRAND JURY PROCEEDINGS

(Amended December 22, 2017)

1. Trial Jurors

(a) No person, other than the Court or Court personnel, shall contact or communicate with, directly or indirectly, a juror, potential juror or excused juror, or any relative, friend or associate of any such juror, during jury selection or trial, concerning the subject matter of the trial or the juror's participation in the trial except Court.

(b) Jurors have no obligation to interviews or requests to discuss th participation in the trial. Jurors may the actions or comments of any oth extraneous prejudicial information i influence improperly brought to bea result of a clerical mistake.

(c) Unless explicitly authorized behalf of a party or attorney, shall c of the jury or the actions or comme

(d) No person may contact, cor subjects the juror to harassment, m

2. Juror Information

The Clerk shall make available selection the responses to juror qu selection. Upon request of counsel make available to counsel and a se potential jurors summoned for the c accordance with the District's Jury

3. Grand Jurors

No person, other than those authorized under Fed.R.Crim.P. 6 or Court personnel, shall contact or communicate with, directly or indirectly, a grand juror, potential grand juror, or excused grand juror at any time concerning the subject matter of the grand jury proceedings or the juror's participation in the grand jury proceedings. Grand jurors shall also comply with Fed. R. Crim P. 6.

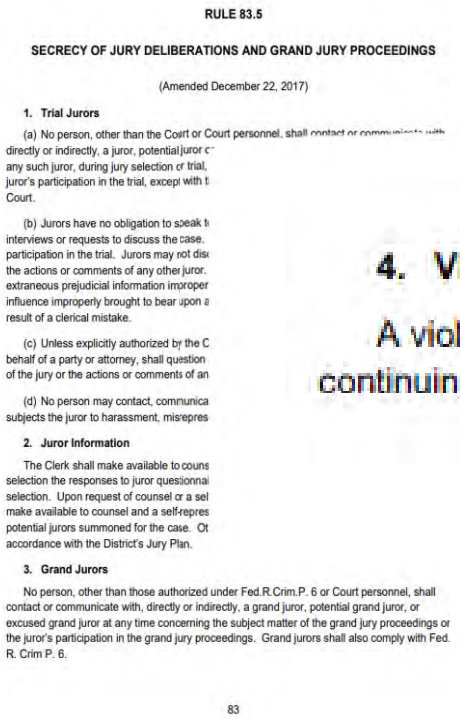
83

2. Juror Information

The Clerk shall make available to counsel and self-represented parties participating in jury selection the responses to juror questionnaires of those prospective jurors participating in jury selection. Upon request of counsel or a self-represented party, the Court may order the Clerk to make available to counsel and a self-represented party participating in jury selection the list of potential jurors summoned for the case. Other individuals may request such information in accordance with the District's Jury Plan.

District of Connecticut Local Rule 83.5

Case Study – Connecticut



RULE 83.5

SECRECY OF JURY DELIBERATIONS AND GRAND JURY PROCEEDINGS

(Amended December 22, 2017)

1. Trial Jurors

(a) No person, other than the Court or Court personnel, shall contact or communicate with directly or indirectly, a juror, potential juror or any such juror, during jury selection or trial, juror's participation in the trial, except with t Court.

(b) Jurors have no obligation to speak t interviews or requests to discuss the case. participation in the trial. Jurors may not dis the actions or comments of any other juror. extraneous prejudicial information improper influence improperly brought to bear upon a result of a clerical mistake.

(c) Unless explicitly authorized by the C behalf of a party or attorney, shall question of the jury or the actions or comments of an

(d) No person may contact, communica subjects the juror to harassment, misrepres

2. Juror Information

The Clerk shall make available to couns selection the responses to juror questionnai selection. Upon request of counsel or a sel make available to counsel and a self-repres potential jurors summoned for the case. Ot accordance with the District's Jury Plan.

3. Grand Jurors

No person, other than those authorized under Fed.R.Crim.P. 6 or Court personnel, shall contact or communicate with, directly or indirectly, a grand juror, potential grand juror, or excused grand juror at any time concerning the subject matter of the grand jury proceedings or the juror's participation in the grand jury proceedings. Grand jurors shall also comply with Fed. R. Crim P. 6.

83

4. Violations

A violation of this rule may be treated as a contempt of Court. The Court shall have continuing supervision over communications with jurors, even after a trial has been completed.

District of Connecticut Local Rule 83.5

Case Study – Connecticut

***Philip Morris v. Bifolk*, D. Conn.**
(Stefan Underhill, U.S.D.J.)

Pretrial Preference:

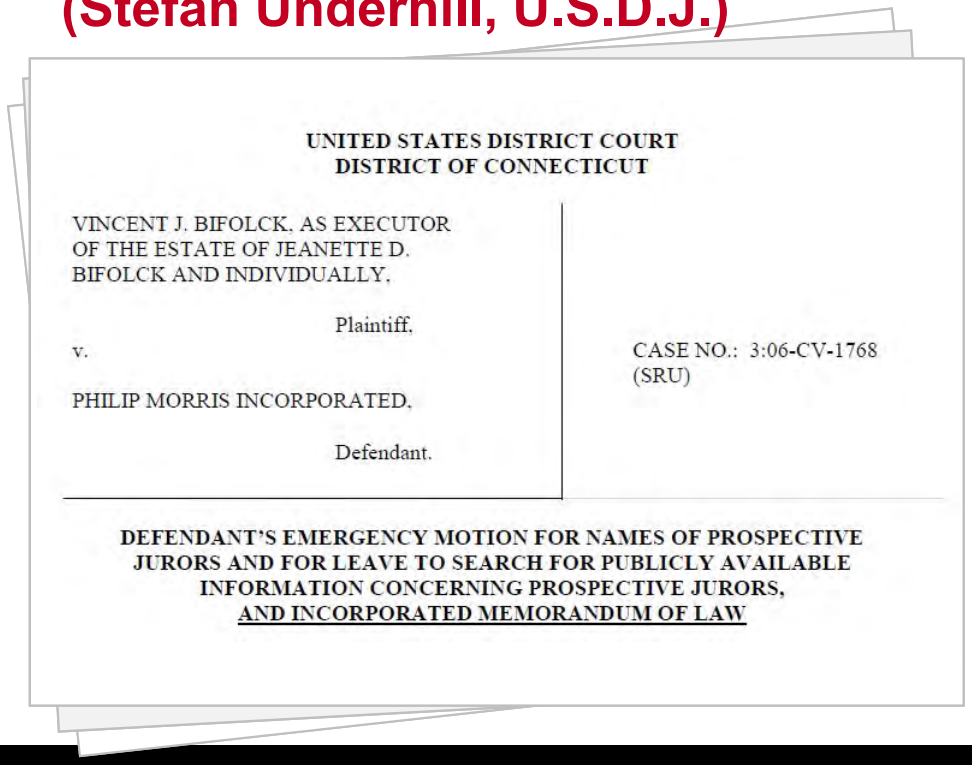
Jury Profiles

Judge Underhill feels uncomfortable about counsel conducting online searches for information about potential jurors.

http://www.ctd.uscourts.gov/content/stefan-r-underhill

Case Study – Connecticut

Philip Morris v. Bifolk, D. Conn. (Stefan Underhill, U.S.D.J.)



UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VINCENT J. BIFOLCK, AS EXECUTOR OF THE ESTATE OF JEANETTE D. BIFOLCK AND INDIVIDUALLY,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,

Defendant.

CASE NO.: 3:06-CV-1768 (SRU)

DEFENDANT'S EMERGENCY MOTION FOR NAMES OF PROSPECTIVE JURORS AND FOR LEAVE TO SEARCH FOR PUBLICLY AVAILABLE INFORMATION CONCERNING PROSPECTIVE JURORS, AND INCORPORATED MEMORANDUM OF LAW

- Google and news-compilation websites (e.g., Westlaw, Lexis)
- Social-media websites, including Facebook, Myspace, Instagram, Pinterest, LinkedIn, and Twitter
- Civil and criminal case databases
- Governmental records

Case Study – Connecticut

***Philip Morris v. Bifolk*, D. Conn. (Stefan Underhill, U.S.D.J.)**

up. Let's start with the emergency motion for names of prospective jurors. I've read the papers. I'll tell you, as I indicated before, I really don't like the concept. It appears to be more accepted by others than by me, and so I'm willing to kind of hold my nose and let you do it,

Case Study – Connecticut

Philip Morris v. Bifolk, D. Conn. (Stefan Underhill, U.S.D.J.)

couple of concerns. The motion implies that there will be continuing searches run following the jury selection, and I want to just raise an even stronger concern about that. There may be some merit in allowing parties to figure out what they can from publicly available sources in aid of jury selection, but it's not clear to me that the jurors ought to be monitored by counsel during the course of the trial. So if that's the intent, I'd like to hear support

Case Study – Connecticut

Philip Morris v. Bifolk, D. Conn. (Stefan Underhill, U.S.D.J.)

THE COURT: I don't think it's appropriate to monitor jurors, frankly, during the trial. I'm not even going to bless the search. I don't think I can do anything to stop you from searching, but I think it would be improper to monitor the selected jurors in hopes of finding some misconduct that could be raised. I will

A Better Practice? — Standing Orders

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

STANDING ORDER REGARDING RESEARCH AS TO POTENTIAL JURORS
IN ALL CASES ASSIGNED TO U.S. DISTRICT JUDGE RODNEY GILSTRAP

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

A Better Practice? — Standing Orders

- Vexatious or harassing investigations are prohibited
- "Access Requests" are prohibited
  - Facebook friend request
  - Instagram request to "Follow"

A Better Practice? — Standing Orders

- Research is not prohibited merely because network setting will alert a juror or potential juror that a lawyer from the case has reviewed her LinkedIn account.

Practical Advice

- **Do:**
  - Consider whether to raise internet research with the Court
    - Some courts will threaten to inform jurors of your activity
  - Google search safely
  - Supervise non-lawyer professionals

Practical Advice

- **Do:**
  - Establish demonstrable safeguards to prevent ex parte juror contact
  - Regularly review social media privacy settings
  - Check your jurisdiction

Practical Advice

- **Don't:**
  - Search while logged-in to Google, Facebook, LinkedIn, etc.
  - Ask a non-lawyer to search without supervision
  - Create fake profiles
  - Rely on case law for accurate or up-to-date descriptions of how social media works

Practical Advice

- **Don't:**
  - Friend Request
  - Message
  - "Like," "Follow," or "Connect"
  - Re-tweet

Questions?

860.275.8134
dhillier@axinn.com

Formal Opinion 2012-2:
JURY RESEARCH AND SOCIAL MEDIA

TOPIC: Jury Research and Social Media

DIGEST: Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror"s website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror"s social media activities, the lawyer must reveal the improper conduct to the court.

RULES: 3.5(a)(4); 3.5(a)(5); 3.5(d); 8.4

QUESTION: What ethical restrictions, if any, apply to an attorney"s use of social media websites to research potential or sitting jurors?

OPINION

I. Introduction

Ex parte attorney communication with prospective jurors and members of a sitting jury has long been prohibited by state rules of professional conduct (*see* American Bar Association Formal Opinion 319 ("ABA 319")), and attorneys have long sought ways to gather information about potential jurors during voir dire (and perhaps during trial) within these proscribed bounds. However, as the internet and social media have changed the ways in which we all communicate, conducting juror research while complying with the rule prohibiting juror communication has become more complicated.

In addition, the internet appears to have increased the opportunity for juror misconduct, and attorneys are responding by researching not only members of the venire but sitting jurors as well. Juror misconduct over the internet is problematic and has even led to mistrials. Jurors have begun to use social media services as a platform to communicate about a trial, during the trial (*see WSJ Law Blog* (March 12, 2012), http://blogs.wsj.com/law/2012/03/12/jury-files-the-temptation-of-twitter/), and jurors also turn to the internet to conduct their own out of court research. For example, the Vermont Supreme Court recently overturned a child sexual assault conviction because a juror conducted his own research on the cultural significance of the alleged crime in Somali Bantu culture. *State v. Abdi*, No. 2012-255, 2012 WL 231555 (Vt. Jan. 26, 2012). In a case in Arkansas, a murder conviction was overturned because a juror tweeted during the trial, and in a Maryland corruption trial in 2009, jurors used Facebook

to discuss their views of the case before deliberations. (*Juror's Tweets Upend Trials,* Wall Street Journal, March 2, 2012.) Courts have responded in various ways to this problem. Some judges have held jurors in contempt or declared mistrials (see *id.*) and other courts now include jury instructions on juror use of the internet. (*See* New York Pattern Jury Instructions, Section III, *infra*.) However, 79% of judges who responded to a Federal Judicial Center survey admitted that "they had no way of knowing whether jurors had violated a social-media ban." (*Juror's Tweets, supra*.) In this context, attorneys have also taken it upon themselves to monitor jurors throughout a trial.

Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case. However, social media services and websites can blur the line between independent, private research and interactive, interpersonal "communication." Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations. This opinion applies the New York Rules of Professional Conduct (the "Rules"), specifically Rule 3.5, to juror research in the internet context, and particularly to research using social networking services and websites.[1]

The Committee believes that the principal interpretive issue is what constitutes a "communication" under Rule 3.5. We conclude that if a juror were to (i) receive a "friend" request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended. In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror's social media activities, the lawyer must promptly reveal the improper conduct to the court.

[1] Rule 3.5(a)(4) states: "a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order."

II. Analysis Of Ethical Issues Relevant To Juror Research

A. Prior Authority Regarding An Attorney's Ability To Conduct Juror Research Over Social Networking Websites

Prior ethics and judicial opinions provide some guidance as to what is permitted and prohibited in social media juror research. First, it should be noted that lawyers have long tried to learn as much as possible about potential jurors using various methods of information gathering permitted by courts, including checking and verifying voir dire answers. Lawyers have even been chastised for *not* conducting such research on potential jurors. For example, in a recent Missouri case, a juror failed to disclose her prior litigation history in response to a voir dire question. After a verdict was rendered, plaintiff's counsel investigated the juror's civil litigation history using Missouri's automated case record service and found that the juror had failed to disclosure that she was previously a defendant in several debt collection cases and a personal injury action.[2] Although the court upheld plaintiff's request for a new trial based on juror nondisclosure, the court noted that "in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage." *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010). The court also stated that "litigants should endeavor to prevent retrials by completing an early investigation." *Id.* at 559.

Similarly, the Superior Court of New Jersey recently held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using the internet to research potential jurors during voir dire. During jury selection in a medical malpractice case, plaintiff's counsel began using a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff's attorney could not use her laptop during jury selection because she gave no notice of her intent to conduct internet research during selection. Although the Superior Court found that the trial court's ruling was not prejudicial, the Superior Court stated that "there was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.' The 'playing field' was, in fact, already 'level' because internet access was open to both counsel." *Carino v. Muenzen*, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010).[3]

---

[2] Missouri Rule of Professional Conduct 3.5 states: "A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order."

[3] The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that "if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the

Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 ("SDCBA 2011-2") examined whether an attorney can send a "friend request" to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to "friend" a party, even if the "friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication" and is therefore *prohibited* by the rule against *ex parte* communications with represented parties.[4] In addition, the New York State Bar Association ("NYSBA") found that obtaining information from an adverse party's social networking personal webpage, which is accessible to all website users, "is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Niexi or Factiva and that is plainly *permitted*." (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers' Association ("NYCLA") published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 ("NYCLA 743") examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is "proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not 'friend' the juror, email, send tweets or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring." (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety "before taking any further significant action in the case." *Id*. NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

As set forth below, we largely agree with our colleagues at NYCLA. However, despite the guidance of the opinions discussed above, the question at the core of applying Rule 3.5 to social media—what constitutes a communication—has not been specifically addressed, and the Committee therefore analyzes this question below.

---

in court voir dire, the Court's supervisory control over the jury selection process would, as a practical matter, be obliterated." (Aug. 30, 2011 letter from R. Rosenstein to Hon. Richard Bennet.) The Committee is unable to determine the court's ruling from the public file.

[4] California Rule of Profession Conduct 2-100 states, in part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror

1. Discussion of Features of Various Potential Research Websites

Given the popularity and widespread usage of social media services, other websites and general search engines, it has become common for lawyers to use the internet as a tool to research members of the jury venire in preparation for jury selection as well as to monitor jurors throughout the trial. Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend in part on, among other things, the technology, privacy settings and mechanics of each service.

The use of search engines for research is already ubiquitous. As social media services have grown in popularity, they have become additional sources to research potential jurors. As we discuss below, the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research. However, the functionality, policies and features of social media services change often, and any description of a particular website may well become obsolete quickly. Rather than attempt to catalog all existing social media services and their ever-changing offerings, policies and limitations, the Committee adopts a functional definition.[5]

We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives. Professional networking sites have also become popular. The amount of information that users can view about each other depends on the particular service and also each user's chosen privacy settings. The information the service communicates or makes available to visitors as well as members also varies. Indeed, some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction. Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney's duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.

2. What Constitutes a "Communication"?

Any research conducted by an attorney into a juror or member of the venire's background or behavior is governed in part by Rule 3.5(a)(4), which states: "a lawyer shall not . . . (4)

[5] As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.

communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order." The Rule does not contain a *mens rea* requirement; by its literal terms, it prohibits *all* communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney's purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for the very purpose of communication, and automatic features or user settings may cause a "communication" to occur even if the attorney does intend not for one to happen or know that one may happen. This raises several ethical questions: is every visit to a juror's social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of "communicate" and "communication," which are not defined either in the Rule or the American Bar Association Model Rules.[6]

Black's Law Dictionary (9th Ed.) defines "communication" as: "1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. 2. The information so expressed or exchanged." The Oxford English Dictionary defines "communicate" as: "To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across." Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines "communication" (for the purposes of discovery requests) as: "the transmittal of information (in the form of facts, ideas, inquiries or otherwise)."

Under the above definitions, whether the communicator intends to "impart" a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the "transmission of," "exchange of" or "process of bringing" information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

---

[6] Although the New York City Bar Association Formal Opinion 2010-2 ("NYCBA 2010-2") and SDCBA 2011-2 (both addressing social media "communication" in the context of the "No Contact" rule) were helpful precedent for the Committee's analysis, the Committee is unaware of any opinion setting forth a definition of "communicate" as that term is used in Rule 4.2 or any other ethics rule.

3. An Attorney May Research A Juror Through Social Media Websites As Long As No Communication Occurs

The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror's social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably "communicated" with the juror. The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), *infra.*

Although the text of Rule 3.5(a)(4) would appear to make any "communication"—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee's current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney's research or actions. However, other services may be more difficult to navigate depending on their functionality and each user's particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites' social functionality. An attorney may not, for example, send a chat, message or "friend request" to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that

their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a "communication" would be generated by the website.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

C. An Attorney May Not Engage in Deception or Misrepresentation In Researching Jurors On Social Media Websites

Rule 8.4(c), which governs all attorney conduct, prohibits deception and misrepresentation.[7] In the jury research context, this rule prohibits attorneys from, for instance, misrepresenting their identity during online communications in order to access otherwise unavailable information, including misrepresenting the attorney's associations or membership in a network or group in order to access a juror's information. Thus, for example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror's personal webpage that is accessible only to members of a certain alumni network.

Furthermore, an attorney may not use a third party to do what she could not otherwise do. Rule 8.4(a) prohibits an attorney from violating *any* Rule "through the acts of another." Using a third party to communicate with a juror is deception and violates Rule 8.4(c), as well as Rule 8.4(a), even if the third party provides the potential juror only with truthful information. The attorney violates both rules whether she instructs the third party to communicate via a social network or whether the third party takes it upon herself to communicate with a member of the jury or venire for the attorney's benefit. On this issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 ("PBA 2009-02") concluded that if an attorney uses a third party to "friend" a witness in order to access information, she is guilty of deception because "[this action] omits a highly material fact, namely, that the third party who asks to be allowed access to the witness' pages is doing so only because she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit." (PBA 2009-02 at 3.) New York City Bar Association Formal Opinion 2010-2 similarly held that a lawyer may not gain access to a social networking website under false pretenses, either directly or through an agent,

[7] Rule 8.4 prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," and also states "a lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts or another." (Rule 8.4(c),(a).)

and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to "friend" an adverse party. (NYCLA 743 at 2.) We agree with these conclusions; attorneys *may not* shift their conduct or assignments to non-attorneys in order to evade the Rules.

D. The Impact On Jury Service Of Attorney Use Of Social Media Websites For Research

Although the Committee concludes that attorneys may conduct jury research using social media websites as long as no "communication" occurs, the Committee notes the potential impact of jury research on potential jurors' perception of jury service. It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives. The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.

In general, attorneys should only view information that potential jurors intend to be—and make—public. Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption. The potential juror is aware that her information and images are available for public consumption. The Committee notes that some potential jurors may be unsophisticated in terms of setting their privacy modes or other website functionality, or may otherwise misunderstand when information they post is publicly available. However, in the Committee's view, neither Rule 3.5 nor Rule 8.4(c) prohibit attorneys from viewing public information that a juror might be unaware is publicly available, except in the rare instance where it is clear that the juror intended the information to be private. Just as the attorney must monitor technological updates and understand websites that she uses for research, the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries. Research permitted as to potential jurors is permitted as to sitting jurors. Although there is, in light of the discussion in Section III, *infra*, great benefit that can be derived from detecting instances when jurors are not following a court's instructions for behavior while empanelled, researching jurors mid-trial is not without risk. For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.

III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge." Although the Committee concludes that an attorney may conduct jury research on social media websites as long as "communication" is avoided, if an attorney learns of juror misconduct through such research, she *must* promptly[8] notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney.[9]

On this issue, the Committee notes that New York Pattern Jury Instructions ("PJI") now include suggested jury charges that expressly prohibit *juror* use of the internet to discuss or research the case. PJI 1:11 Discussion with Others - Independent Research states: "please do not discuss this case either among yourselves or with anyone else during the course of the trial. . . . It is important to remember that you may not use any internet service, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial . . . For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as juror but you are not in the courtroom." Moreover, PJI 1:10 states, in part, "in addition, please do not attempt to view the scene by using computer programs such as Goggle Earth. Viewing the scene either in person or through a computer program would be unfair to the parties . . . ." New York criminal courts also instruct jurors that they may not converse among themselves or with anyone else upon any subject connected with the trial. NY Crim. Pro. §270.40 (McKinney's 2002).

The law requires jurors to comply with the judge's charge[10] and courts are increasingly called upon to determine whether jurors' social media postings require a new trial. *See, e.g., Smead v. CL Financial Corp.,* No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror's posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror's conduct is *mis*conduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a "conversation," it may

---

[8] New York City Bar Association Formal Opinion 2012-1 defined "promptly" to mean "as soon as reasonably possible."

[9] Although the Committee is not opining on the obligations of jurors (which is beyond the Committee's purview), the Committee does note that if a juror contacts an attorney, the attorney must promptly notify the court under Rule 3.5(d).

[10] *People v. Clarke*, 168 A.D.2d 686 (2d Dep't 1990) (holding that jurors must comply with the jury charge).

not always be obvious whether a particular post is "connected with" the trial. Moreover, a juror may be permitted to post a comment "about the fact [of] service on jury duty."[11]

IV. Post-Trial

In contrast to Rule 3.4(a)(4), Rule 3.5(a)(5) allows attorneys to communicate with a juror after discharge of the jury. After the jury is discharged, attorneys may contact jurors and communicate, including through social media, unless "(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service." Rule 3.5(a)(5). For instance, NYSBA Opinion 246 found that "lawyers may communicate with jurors concerning the verdict and case." (NYSBA 246 (interpreting former EC 7-28; DR 7-108(D).) The Committee concludes that this rule should also permit communication via social media services after the jury is discharged, but the attorney must, of course, comply with all ethical obligations in any communication with a juror after the discharge of the jury. However, the Committee notes that "it [is] unethical for a lawyer to harass, entice, or induce or exert influence on a juror" to obtain information or her testimony to support a motion for a new trial. (ABA 319.)

V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. "Communication," in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney's research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is *the process of bringing an idea, information or knowledge to another's perception*—including the fact that they have been researched. In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in

---

[11] *US v. Fumo*, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) *aff'd*, 655 F.3d 288 (3d Cir. 2011) ("[The juror's] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.") (internal citations omitted).

conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.

[(/index.cfm)](/index.cfm)

Ethics Opinion 371

Social Media II: Use of Social Media in Providing Legal Services

Introduction

Information posted on social media and use of social media in the substantive practice of law raise multiple issues under the Rules of Professional Conduct in all practice areas. This Opinion provides the Committee's guidance about advice and conduct by lawyers related to social media in the provision of legal services, including whether certain advice and conduct are required, permitted, or prohibited by the Rules. The Opinion also identifies issues for lawyers to spot as they provide legal services. Opinion 370 (Social Media I) addresses lawyers' use of social media in marketing and personal use.

The Committee defines social media as follows:

> Social media include any electronic platform through which people may communicate or interact in a public, semi-private, or private way. Through blogs, public and private chat rooms, listservs, other online locations, social networks, and websites such as Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo, and Lawyers.com, users of social media can share information, messages, e-mail, instant messages, photographs, video, voice, or videoconferencing content.[1] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn1) This definition includes social networks, public and private chat rooms, listservs, and other online locations where attorneys communicate with the public, other attorneys, or clients. Varying degrees of privacy exist in these online communities as users may have the ability to limit who may see their posted content and who may post content to their pages.[2] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn2)

Applicable Rules of Professional Conduct

- Rule 1.1 (Competence)
- Rule 1.2 (Scope of Representation)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 3.1 (Meritorious Claims and Contentions)
- Rule 3.3 (Candor to Tribunal)
- Rule 3.4 (Fairness to Opposing Party and Counsel)
- Rule 3.5 (Impartiality and Decorum of the Tribunal)
- Rule 3.6 (Trial Publicity)
- Rule 3.8 (Special Responsibilities of a Prosecutor)
- Rule 4.1 (Truthfulness in Statements to Others)
- Rule 4.2 (Communication Between Lawyer and Person Represented by Counsel)
- Rule 4.3 (Dealing with Unrepresented Person)
- Rule 4.4 (Respect for Rights of Third Persons)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.4 (Misconduct)

I. Understanding Social Media

Because the practice of law involves use or potential use of social media in many ways, competent representation under Rule 1.1[3] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn3) requires a lawyer to understand how social media work and how they can be used to represent a client zealously and diligently[4] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn4) under Rule 1.3.[5] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn5) Recognizing the pervasive use of social media in modern society, lawyers must at least consider whether and how social media may benefit or harm client matters in a variety of circumstances. We do not advise that every legal representation requires a lawyer to

use social media. What is required is the ability to exercise informed professional judgment reasonably necessary to carry out the representation. Such understanding can be acquired and exercised with the assistance of other lawyers and staff.[6] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn6)

We agree with ABA Comment [8] to Model Rule 1.1 that to be competent "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Although the District's Comments to Rule 1.1 do not specifically reference technology, competent representation always requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to carry out the representation. Because of society's embrace of technology, a lawyer's ignorance or disregard of it, including social media, presents a risk of ethical misconduct.

Similarly, the requirement of D.C. Rule 1.3(b)(1) to "seek the lawful objectives of a client through reasonably available means" may require that a lawyer utilize social media if it would assist zealous and diligent representation. In using social media for representation, however, a lawyer must at all times stay within the "bounds of the law,"[7] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn7) including for example the general prohibition on misrepresentation by pretexting and the duty of truthfulness discussed in this and other Opinions.[8] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn8)

II. Communication with Clients

The duty to maintain client confidences under Rule 1.6,[9] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn9) the duty to provide competent representation under Rule 1.1, and the duty to communicate with clients under Rule 1.4[10] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn10) are all implicated by lawyer-client social media communication. Because social media communication often is public or semi-public, confidentiality of lawyer-client communication is an important concern.

Protecting the confidentiality of lawyer-client communication under Rule 1.6 requires a lawyer to understand in particular how non-clients can access client social media communication and postings.[11] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn11) For example, social media sites usually have a range of privacy settings, and clients may give others access to content posted behind private settings. In addition, site privacy settings can unexpectedly change with new terms and conditions imposed by the site host. Rules 1.1, 1.4 and 1.6 may require[12] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn12) that a lawyer advise clients about how non-client access to posted information about legal matters risks inappropriate disclosure of the information, waiver of the attorney-client privilege, and loss of litigation work-product protection.[13] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn13) *See, e.g., Lenz v. Universal Music Corp.*, in which the plaintiff "made comments in emails and electronic 'chats' with friends, [and] postings on her blog," which comments disclosed her discussions with counsel.[14] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn14) The Court held that the emails and chats waived the attorney-client privilege regarding the matters discussed.

A lawyer should consider reaching agreement with clients about how their attorney-client communication will occur, including whether or not social media should ever be used for such communication because of the confidentiality risks. Agreements about these subjects could be included in engagement letters.

III. Social Media as Sources of Information about Cases or Matters

Social media have become sources of relevant information in litigation and other adversarial proceedings, as well as in a broad array of transactional and advisory practices, including regulatory work.

A. Client Social Media

Rules 1.1 and 1.3 require a lawyer to consider the potential risks and benefits that client social media could have on litigation, regulatory, and transactional matters undertaken by the lawyer, and Rule 1.4 requires a lawyer to discuss such risks and benefits with clients.[15] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn15)

1. Review by Client's Lawyer

Competent and zealous representation under Rules 1.1 and 1.3 may require lawyer review of client social media postings relevant to client matters.[16] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn16) In litigation, client social media postings could be inconsistent with claims, defenses,

pleadings, filings, or litigation/regulatory positions. For example, if a client initiated an action claiming serious injuries, the client's social media profile could disclose activity inconsistent with the injuries alleged.[17] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn17) A lawyer must address any such known inconsistencies before submitting court or agency filings to ensure that claims and positions are meritorious under Rule 3.1, which requires a non-frivolous basis in law and fact,[18] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn18) and that misrepresentations are not made to courts or agencies[19] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn19) in violation of Rules 3.3 and 8.4.[20] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn20)

Client social media also can present risks and benefits for transactions and regulatory compliance. For example, review of client social media for their consistency with representations, warranties, covenants, conditions, restrictions, and other terms or proposed terms of agreements could be important because inconsistency could create rights or remedies for counterparties. Similarly, competent and zealous representation under Rules 1.1 and 1.3 in regulatory matters may require ensuring that representations to agencies are consistent with social media postings and that advice to clients takes such postings into account.

2. Review by Adversaries

In litigation and adversarial regulatory matters, social media postings without privacy settings are subject to investigation. Lawyers can and do look at the public social media postings of their opponents, witnesses, and other relevant parties, and as discussed below, may even have an ethical obligation to do so. Postings with privacy settings on client social media are subject to formal discovery and subpoenas.[21] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn21) To provide competent advice, a lawyer should understand that privacy settings do not create any expectation of confidentiality to establish privilege or work-product protection against discovery and subpoenas.[22] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn22)

3. Document Preservation

Because social media postings are subject to discovery and subpoenas, a lawyer may need to include social media in advice and instructions to clients about litigation holds, document preservation, and document collection.[23] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn23) A lawyer also may need to determine whether under applicable law, which varies from jurisdiction to jurisdiction, clients may modify their social media presence once litigation or regulatory proceedings are anticipated. For example, are clients permitted to change privacy settings or to remove information altogether from social media postings? Such analysis may need to include consideration of obstruction statutes, spoliation law,[24] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn24) and procedural rules applicable to criminal and regulatory investigations and cases;procedural rules and spoliation law in civil cases;and the duty under Rule 3.4(a) not to "[o]bstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so. . . ."[25] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn25) Before any lawyer-counseled or lawyer-assisted removal or change in content of client social media, at a minimum, an accurate copy of such social media should be made and preserved, consistent with Rule 3.4(a).[26] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn26)

Transactional and regulatory representation also can include advice about adjusting client social media. In the absence of unlawful activity or anticipation of litigation or adversary proceedings, that advice may not be constrained by spoliation or obstruction of justice considerations. In order to comply with Rule 1.1, however, a lawyer should not advise a client to make fraudulent or unlawful adjustments;nor should a lawyer participate in such activity or in misrepresentations or material omissions in violation of Rules 1.2(e),[27] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn27) 4.1,[28] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn28) or 8.4(c).

4. Substantive Regulatory Risks

In regulatory practice, competent and zealous representation also may require advice about whether social media postings or use violate statutory or rule-based limits on public statements or marketing. The Securities and Exchange Commission, Federal Trade Commission, Consumer Product Safety Commission, Food and Drug Administration, and other federal, state, and local agencies have promulgated such limits or guidelines. For example, in April 2013 the SEC Division of Enforcement applied Regulation FD and the Commission's 2008 Guidance to the use of social media.[29] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-

371.cfm#ftn29) Communications about initial public offerings pose regulatory risk, and those risks apply fully to issuer social media.[30] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn30) Inadequately disclosed interactive internet downloads may constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.[31] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn31) Other agencies have published guidelines, such as a Guidance on social media issued by the Federal Financial Institutions Examination Council.[32] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn32)

B. Social Media of Adverse Parties, Counsel, and Experts

Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of potentially relevant social media postings of adverse parties and their counsel, other agents, and experts.[33] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn33) In litigation, discovery requests should expressly include social media as sources, and discovery responses should not overlook them. Transactional practice may require review of social media both informally by investigation and formally by including social media in due diligence requests. In conducting such investigations, a lawyer should take into consideration that some social media networks automatically provide information to registered users or members about persons who access their information.[34] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn34) This is sometimes referred to as a digital footprint.

1. Media of Represented Persons

Rule 4.2[35] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn35) generally forbids communicating with represented persons without the consent of their counsel. The Rule applies to some aspects of social media investigation. A lawyer's review of a represented person's public social media postings does not violate the Rule because no communication occurs. On the other hand, requesting access to information protected by privacy settings, such as making a "friend" request to a represented person, does constitute a communication that is covered by the Rule.[36] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn36)

2. Media of Unrepresented Persons

Rule 4.3[37] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn37) governs lawyer contacts with unrepresented persons, including when they are adverse parties. This Rule also applies to social media investigation. As with Rule 4.2, review of public postings of an unrepresented person does not implicate the Rule because it does not constitute a communication. On the other hand, requesting access to information protected by privacy settings would trigger the requirements of Rule 4.3(b). Rules 4.1 and 8.4(c) also apply to such social media communication. To comply with these three Rules, in social media communication with unrepresented persons, lawyers should identify themselves, state that they are lawyers, and identify whom they represent and the matter.[38] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn38)

3. Pretexting

Rules 4.1 and 8.4 generally preclude pretexting or other misrepresentation during review of social media by a lawyer or his or her agents, including requesting access to information protected by privacy settings.[39] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn39) Unannounced review of publicly available sites usually does not involve pretexting or misrepresentation.[40] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn40)

4. Document Preservation

Competent and zealous representation under Rules 1.1 and 1.3 may require imposing on adversaries reasonable litigation holds that cover social media and pursuing spoliation remedies of adversaries who have not preserved relevant social media as required by law.[41] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn41)

5. Inadvertent Disclosure

If an investigation of social media reveals inadvertent disclosure of privileged or work product protected information, a lawyer should consider whether Rule 4.4[42] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn42) or other law, rules, or orders apply.[43] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn43) This is consistent with the responsibility of a lawyer to refrain from seeking

information that is protected by the attorney-client privilege of another party.[44] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn44)

6. Trial Evidence and Service of Process

At the time of social media investigation or later, competent and zealous representation under Rules 1.1 and 1.3 may require consideration of how social media information will be authenticated and presented as evidence at trials or hearings.[45] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn45)

In some jurisdictions, social media also may be used to effect alternative service on opposing parties.[46] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn46)

C. Social Media of Fact Witnesses and Other Sources of Facts

All of the above considerations about investigation and use of social media of adverse parties apply to non-party sources of facts, including witnesses.

D. Social Media of Jurors

Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of jurors or potential jurors to discover bias or other relevant information for jury selection.[47] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn47)

Accessing public social media sites of jurors or potential jurors is not prohibited by Rule 3.5 as long as there is no communication by the lawyer with the juror in violation of Rule 3.5(b),[48] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn48) and as long as such access does not violate other applicable Rules of Professional Conduct.[49] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn49) As noted above, some social media networks automatically provide information to registered users or members about persons who access their information. In the Committee's view, such notification does not constitute a communication between the lawyer and the juror or prospective juror.

Ex parte communication with jurors or potential jurors is prohibited by Rule 3.5(b).[50] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn50) Because requesting access to a juror's or potential juror's private media sites involves communication with the juror, such requests would violate the Rule.[51] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn51) In addition, if a court or judge forbids access to the social media of jurors and potential jurors, then a violation of a court rule or order could raise questions under Rule 3.4(c).[52] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn52)

Review of juror or potential juror social media could reveal misconduct by the juror or others. Whether and how such misconduct must or should be disclosed to a court is beyond the scope of the Rules of Professional Conduct, except to the extent that the review has revealed information clearly establishing that a fraud has been perpetrated upon the tribunal[53] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn53) under Rule 3.3(d).[54] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn54)

E. Social Media of Judges, Arbitrators, and Regulators

Social media of judges, arbitrators, regulators, and agencies could contain information relevant to cases and other matters in which a lawyer provides representation.

To the extent not prevented by court, agency, or professional responsibility rules, competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of decision-makers. For example, to formulate regulatory advice, a lawyer may need to review public social media of agencies and their decision-makers, while avoiding inappropriate *ex parte* communication, pretexting not authorized by law, and influence prohibited by law.

As with social media of jurors, lawyer review of public social media of judges, arbitrators, regulators, and other neutrals does not constitute communication and therefore is not an *ex parte* contact in violation of Rule 3.5, even if it occurs during the pendency of a case or matter.

The ABA and several ethics opinions have opined that judges can participate in social media, and a lawyer can be a "friend" of judges on social media sites, as long as the contacts comply with the Code of Judicial Conduct; do not undermine the judges' independence, integrity, or impartiality; and do not create an

appearance of impropriety.[55] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn55) D.C. Rule 3.5(a)[56] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn56) prohibits seeking to influence a judge or other official by means prohibited by law.

When no case or proceeding involving a lawyer is pending, Rule 3.5 does not forbid the lawyer from becoming a "friend" of judges, arbitrators, regulators, or other neutrals. Nor does it forbid public or private social media communication with such persons, as long as Rule 3.5(a) is not violated.[57] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn57) When a case or matter is pending before a decision-maker, the prohibition of *ex parte* communication in Rule 3.5(b) applies to all communication, including by social media.[58] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn58) In such a circumstance a lawyer should consider whether to remove, at least temporarily, the decision-maker as a "friend" or other connection on social media.

F. Lawyer Social Media

Many lawyers and law firms have social media accounts to facilitate review of the internet presence of clients and others as discussed above. In addition, lawyers also use social media sites to comment on legal issues, cases, and matters. Although such social media postings, including about litigation, are not necessarily prohibited, the Rules impose some constraints. *See* Opinion 370, which addresses lawyers' use of social media for their own marketing and other purposes.

As with all communications by a lawyer, Rule 1.6 prohibits disclosure in social media postings of client confidences or secrets unless expressly or impliedly authorized by the client or unless another specific exception is provided by the Rules. When a client consents to social media posting related to a matter, the lawyer should be careful not to disclose, without specific client consent, attorney-client privileged information. Purposeful disclosure of privileged information could result in a subject matter waiver, and even inadvertent disclosure could result in waiver of particular communications.[59] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn59) Such care also should be taken regarding identification, financial, health, and other sensitive personal information. In addition, social media postings should not violate protective orders or confidentiality agreements.

Regarding trials and other adversary proceedings, Rule 3.6[60] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn60) prohibits statements by a lawyer, on social media or otherwise, that the lawyer knows or reasonably should know will create a serious and imminent threat of material prejudice to a proceeding. As noted above, Rule 3.5 forbids communications seeking to influence a judge, juror, prospective juror or other official by means prohibited by law or to disrupt any proceeding or tribunal. Rule 3.8(f)[61] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn61) prohibits statements by prosecutors that heighten condemnation of the accused and do not serve a legitimate law enforcement purpose.[62] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn62) All of these Rules apply to social media postings by a lawyer.

IV. Supervision of Lawyers and Staff

Under Rules 5.1[63] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn63) and 5.3,[64] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn64) a lawyer should take reasonable measures to ensure that any social media investigation or posting by subordinate lawyers and staff—including personal posting—conforms to the Rules of Professional Conduct, including protection of confidential client information.

Conclusion

Social media, like other technology applicable to the practice of law, will continue to change. The principles explained in this Opinion should be applied to such change to ensure continuing compliance with the Rules of Professional Conduct.

[1] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref1) "Content" means any communication, whether for personal or business purposes, disseminated through websites, social media sites, blogs, chat rooms, listservs, instant messaging, or other internet presences, and any attachments or links related thereto.

[2] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref2) The Merriam-Webster Dictionary defines "social media" as "forms of electronic communication … through which users create online

communities to share information, ideas, personal messages, and other content…." More specifically to the legal profession, the New York State Bar Association Committee on Professional Ethics, in its Formal Opinion No. 2012-2 (May 30, 2012), stated:

> We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives.

[3] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref3) Rule 1.1(a) states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

[4] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref4) *See, e.g.*, N.Y. State Bar Ass'n Social Media Comm., *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section* (2015) ("NYSBA Guidelines"); American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014) ("ABA Op. 466"); N.C. State Bar, Formal Ethics Op. 2014-5 (revised 2015) ("N.C. Op. 2014-5"); Pa. Bar Ass'n, Formal Op. 2014-300 ("Pa. Op. 2014-300"). *See generally* D.C. Bar Legal Ethics Op. 281 (1998) (noting in an early internet-related opinion about confidentiality risks from e-mail communication that it was important to understand how e-mails actually traveled over the internet).

[5] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref5) Rule 1.3(a) states:

> A lawyer shall represent a client zealously and diligently within the bounds of the law.

[6] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref6) *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2014).

[7] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref7) *See supra* note 5.

[8] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref8) *See generally* D.C. Legal Ethics Op. 323 (2004) and other Opinions addressing application of D.C. Rule 8.4(c).

[9] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref9) Rule 1.6(a) and (b) states in part:

> (a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:
>
> (1) [R]eveal a confidence or secret of the lawyer's client;. . . .
>
> (b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

[10] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref10) Rule 1.4(a) and (b) states:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[11] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref11) *See supra* note 4.

[12] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref12) In this Opinion the terms "may require" and "may need to" mean that whether the referenced Rules would establish a requirement in any given matter will depend on circumstances such as the scope of a lawyer's representation and the nature of the matter. At the same time, the term reflects the Committee's view that the referenced issue should be given serious consideration and could constitute a requirement. The term "should" has the meaning established in the first paragraph of the Scope page of the Rules. *See* Comment 3 to Rule 1.4.

[13] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref13) *See, e.g.*, NYSBA Guidelines; Pa. Op. 2014-300.

[14] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref14) *Lenz v. Universal Music Corp.*, No. 5:07-CV-03783 JF (PVT), 2010 WL 4789099, at *1 (N.D. Cal. Nov. 17, 2010).

[15] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref15) *See generally* NYSBA Guidelines; N.Y. Cty. Lawyers' Ass'n, Ethics Op. 745 (2013) ("NYCLA Op. 745").

[16] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref16) *See, e.g.*, Pa. Op. 2014-300.

[17] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref17) *See, e.g., McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *1, *13 (Pa. Ct. Com. Pl., Jefferson Cty. Sept. 9, 2010) (plaintiff alleged substantial injures, including "possible permanent impairment," yet public Facebook postings showed him taking several trips, indicating he had exaggerated his injuries).

[18] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref18) Rule 3.1 states in part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

[19] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref19) *See, e.g.*, NYCLA Op. 745; *see* also NYSBA Guidelines.

[20] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref20) Rule 3.3(a)(1) states:

> (a) A lawyer shall not knowingly:
>
> > (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6.

Rule 8.4(c) states:

> It is professional misconduct for a lawyer to:
>
> > (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[21] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref21) *See, e.g., Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 3:12-cv-00127-PK, 2012 WL 3763545, at *1 (D. Or. Aug. 29, 2012) ("I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms."); *Loporcaro v. City of New York*, 950 N.Y.S.2d 723 (Sup. Ct., Richmond Cty. 2012) (unpublished table decision), 2012 WL 1231021, at *7 ("Clearly, our present discovery statutes do not allow that the contents of such [social media] accounts should be treated differently from the rules applied to any other discovery material. . . .").

[22] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref22) *See, e.g., Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) ("[M]aterial posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy."); *see also Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012); *Davenport v. State Farm Mut. Auto. Ins.*, No. 3:11-cv-632, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012) (stating that generally social media content "is neither privileged nor protected by any right of privacy"); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (App. Div. 2011).

[23] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref23) *See, e.g.*, Pa. Op. 2014-300.

[24] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref24) *See, e.g., Gatto v. United Air Lines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285, at *3, 2013 U.S. Dist. LEXIS 41909, at *10 (D.N.J.

Mar. 25, 2013); *Torres v. Lexington Ins.*, 237 F.R.D. 533 (D.P.R. 2006); *Lester v. Allied Concrete Co.*, 83 Va. Cir. 308 (2011), *aff'd in part, rev'd in part?*, 285 Va. 295 (2013).

[25] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref25) D.C. Rule 3.4. *See, e.g.*, NYSBA Guidelines; Pa. Op. 2014-300;N.C. Op. 2014-5; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2014-5.

[26] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref26) *See, e.g.*, Pa. Op. 2014-300. Because adjusting privacy settings does not alter the content of social media postings, Rule 3.4(a) does not require content preservation before such adjustment. *Id*.

[27] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref27) Rule 1.2(e) states:

> (e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

[28] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref28) Rule 4.1 states:

> In the course of representing a client, a lawyer shall not knowingly:
>
> (a) Make a false statement of material fact or law to a third person; or
>
> (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[29] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref29) *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings Exchange Act, Release No. 69279, 105 SEC Docket 4327 (Apr. 2, 2013) (interpreting Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58288 (Aug. 7, 2008)).

[30] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref30) *See id.* at 5 ("[I]ssuer communications through social media channels require careful Regulation FD analysis comparable to communications through more traditional channels [and] the principles outlined in the 2008 Guidance . . . apply with equal force to corporate disclosures made through social media channels.").

[31] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref31) Complaint and Decision and Order, *In Re. Sears Holdings Mgmt. Corp.*, FTC No. C-4264 (Aug. 31, 2009).

[32] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref32) Social Media: Consumer Compliance Risk Management Guidance, 78 Fed. Reg. 76,297 (Dec. 17, 2013).

[33] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref33) *See id.*; *see* also NYCLA Op. 745.

[34] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref34) *See, e.g.*, NYSBA Guidelines; Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("N.Y.C. Op. 2012-2"); *see also* N.Y. Cty. Lawyers' Ass'n Comm. On Prof'l Ethics, Formal Ethics Op. 743 (2011) ("NYCLA Op. 743").

[35] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref35) Rule 4.2(a) states:

> (a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.

[36] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref36) *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010); *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015) ("Colo. Op. 127"); Ore. State Bar, Formal Op. 2013-189 ("Ore. Op. 2013-189"); San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-2 ("SDCBA Op. 2011-2").

[37] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref37) Rule 4.3(a)(2) and (b) states:

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not. . . .:
>
> > (2) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested.
>
> (b) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[38] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref38) *See, e.g.*, Mass Bar Ass'n, Ethics Op. 2014-5; N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05; *see generally* D.C. Bar Legal Ethics Op. 321 (2003). *But* see SDCBA Op. 2011-; N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 2010-02; Colo. Op. 127; Ore. Op. 2013-189; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02; Pa. Op. 2014-300.

[39] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref39) *See, e.g.*, SDCBA Op. 2011-2; *see also* Colo. Op. 127; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02; Ore. Op. 2013-189; N.Y.C. Op. 2010-02. *See generally* D.C. Bar Legal Ethics Op. 323 (2004) (misrepresentation by government lawyers); Hope C. Todd, *Speaking of Ethics: Lies, Damn Lies: Pretexting and D.C. Rule 8.4(c)*, WASHINGTON LAWYER (Jan. 2015).

[40] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref40) The Committee does not express a view about whether pretexting can arise from site publication of terms and conditions for public access.

[41] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref41) *See, e.g.*, Margaret DiBianca, *Discovery and Preservation of Social Media Evidence*, BUS. L. TODAY (Am. Bar Ass'n Jan. 2014) (noting "social media content should be included in litigation-hold notices").

[42] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref42) Rule 4.4(b) states:

> (b) A lawyer who receives a writing relating to the representation of a client and knows, before [reading] the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

[43] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref43) *See* D.C. Bar Legal Ethics Op. 256 (1995).

[44] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref44) *See* D.C. Bar Legal Ethics Op. 287 (1998) ("[A] lawyer may not solicit information . . . that is reasonably known or which reasonably should be known to the lawyer to be protected from disclosure by statute or by an established evidentiary privilege.").

[45] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref45) See generally, *e.g., Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534 (D. Md. 2007) (Grimm, M.J.) (addressing evidence rules applicable to social media and other internet evidence).

[46] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref46) *See, e.g., Baidoo v. Blood-Dzraku*, 5 N.Y.S. 3d 709, (Sup. Ct., N.Y. Cty., 2015) and cases cited therein from the Southern District of New York, the Eastern District of Virginia and the Supreme Court of Richmond County, New York allowing alternative service by Facebook; and from the Southern District of New York, the Eastern District of Missouri, and the Supreme Court of Oklahoma not allowing such service. *See generally Christopher M. Finke, Internet Service Provided: The Movement Towards Service of Process Via Social Media*, U. BALT. L. REV.: ISSUES TO WATCH (Nov. 12, 2015), ubaltlawreview.org/2015/11/12/the-movement-towards-service-of-process-via-social-media.

[47] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref47) For example, some courts encourage pretrial investigation of jurors to uncover juror conduct before trials begin. *See, e.g., Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam).

[48] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref48) *See, e.g.*, NYSBA Guidelines; ABA Op. 466; Pa. Op. 2014-300; NYCLA Op. 743; Ore. Op. 2013-189.

[49] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref49) *Accord, e.g.*, ABA Op. 466;Pa. Op. 2014-300. *But see* NYSBA Guidelines;NYCLA Op. 743; N.Y.C. Op. 2010-2.

[50] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref50) Rule 3.5(b) states:

> A lawyer shall not:
>
> > (b) Communicate *ex parte* with [a judge or juror] during the proceeding unless authorized to do so by law or court order.

[51] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref51) *See, e.g.*, NYSBA Guidelines; ABA Op. 466; Pa. Op. 2014-300; Ore. Op. 2013-189; NYCLA Op. 743.

[52] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref52) Rule 3.4(c) states:

> A lawyer shall not:
>
> > (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

[53] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref53) *See, e.g.*, ABA Op. 466; NYCLA Op. 743.

[54] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref54) Rule 3.3(d) states:

> (d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon [a] tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).

[55] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref55) American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) ("ABA Op. 462"); *accord* N.C. State Bar, Formal Ethics Opinion 2014-8 ("N.C. Op. 2014-8") (as long as no communication occurs during the pendency of a lawyer's case before the judge); Pa. Op. 2014-300 (as long as the purpose is not to influence the judge and no *ex parte* communication occurs).

[56] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref56) Rule 3.5(a) states:

> A lawyer shall not:
>
> > (a) Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law.

[57] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref57) *See id.*; Pa. Op. 2014-300.

[58] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref58) *See, e.g.*, NYSBA Guidelines;ABA Op. 462;N.C. Op. 2014-8; *see also Youkers v. State*, 400 S.W.3d 200, 206 (Tex. App. 2013) ("[W]hile the internet and social media websites create new venues for communications, our analysis should not change because an ex parte communication occurs online or offline.").

[59] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref59) *See, e.g.*, NYSBA Guidelines; D.C. Op. 256.

[60] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref60) Rule 3.6 states:

> A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding.

[61] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref61) Rule 3.8(f) states:

> The prosecutor in a criminal case shall not:
>
> (f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial

comments which serve to heighten condemnation of the accused.

[62] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref62) *See, e.g.*, *United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015).

[63] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref63) Rule 5.1(b) states:

> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

[64] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref64) Rules 5.3(b) states:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

November 2016

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466 **April 24, 2014**
Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'[1] presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet-saturated world, the line is increasingly blurred.

2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.[4] If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g.*, *In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

5. Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). *See also* N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, *supra* note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass'n, *supra* note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, *supra* note 5 ("Significant ethical concerns would be raised by sending a 'friend request,' attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog, or 'following' a juror's Twitter account"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass'n, *supra* note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7], concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.
8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

> 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. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). *Reporter's Explanation of Changes, Model Rule 3.3*.[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal*.[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

14. Ethics 2000 Commission, *Model Rule 3.3 Reporter's Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror….").

16. *See, e.g.*, U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Page 569

793 F.Supp. 569 (M.D.Pa. 1992)

Alma M. SEALOVER, individually, and in her capacity as Administratrix of the Estate of Donald Sealover, deceased, Plaintiff,

v.

CAREY CANADA, et al., Defendants.

No. CV-88-0643.

United States District Court, M.D. Pennsylvania.

April 3, 1992

John McN. Broaddus, Deborah K. Hines, Shepard A. Hoffman, Connerton, Ray & Simon, Washington, D.C., for plaintiff.

Robert B. Lawler, Beth Evans Valocchi, Wilbraham & Coleman, Philadelphia, Pa., for defendant U.S. Gypsum Co.

James P. Gannon, Barnard and Gannon, Media, Pa., for defendant W.R. Grace & Co.

MEMORANDUM

McCLURE, District Judge.

BACKGROUND

Plaintiffs Alma M. Sealover and Donald E. Sealover filed this products liability action

Page 570

against defendants W.R. Grace Company, ("W.R. Grace"), United States Gypsum Company ("U.S. Gypsum") [1] among others. Plaintiffs alleged that as a result of Donald Sealover's exposure to asbestos during his sojourn in the Merchant Marines and during his forty-year career as a carpenter, he contracted mesothelioma, [2] asbestosis and other asbestos-related diseases which ultimately led to his death on May 2, 1988. Alma Sealover, acting both individually and as Administratrix of her husband's estate, sought to recover for her husband's illness and for his death.

The trial was bifurcated with the first phase on strict liability only. The first phase of the trial concluded with the jury awarding compensatory damages of $400,000 to the estate and $210,000 to Alma Sealover. The negligence and punitive damage claims have yet to be tried. Defendants W.R. Grace and U.S. Gypsum have moved to defer indefinitely trial of plaintiff's punitive damage claim.

Before the court are: (1) a motion (Record Document No. 234, filed October 29, 1991) by U.S. Gypsum to bar plaintiffs from proceeding with their punitive damage claim or, in the alternative, to defer indefinitely the trial on punitive damages; (2) a motion (Record Document No. 238, filed November 15, 1991) by W.R. Grace for summary judgment on the punitive damage claim; (3) and a motion by U.S. Gypsum to exclude evidence on punitive damages. [3] For the reasons set forth below, the court will grant all three motions and direct entry of summary judgment in defendants' favor on the punitive damage claims. [4]

DISCUSSION

Summary judgment standard

The parties have agreed that the court should treat the motions to bar plaintiff from trying the punitive damage claim as a motion for partial summary judgment. We will, therefore, apply the summary judgment standard in determining the sufficiency of plaintiff's evidence.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*" Fed.R.Civ.P. 56(c) (Emphasis supplied).

... [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, an on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Page 571

The moving party bears the initial responsibility of stating the basis for its motions and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. He or she can discharge that burden

by "showing ... that there is an absence of evidence to support the nonmoving party's case." *Celotex, supra,* 477 U.S. at 323 and 325, 106 S.Ct. at 2553-54.

Issues of fact are "genuine only if a reasonable jury, considering the evidence presented, could find for the non-moving party." *Childers v. Joseph,* 842 F.2d 689, 694 (3d Cir. 1988), citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Material facts are those which will affect the outcome of the trial under governing law. *Anderson, supra,* 477 U.S. at 248, 106 S.Ct. at 2510. In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Electric Company,* 862 F.2d 56, 59 (3d Cir. 1988).

Evidentiary issues

Defendants contend that: (1) plaintiff will be unable to meet the high standard of proof Pennsylvania law requires for an award of punitive damages; (2) plaintiffs in personal injury asbestos actions have in the past been unable to muster such evidence and the Pennsylvania courts [5] have consistently precluded plaintiffs from proceeding to trial on punitive damage claims; and (3) the plaintiff in this case has offered no new evidence which would warrant this court reaching a different conclusion.

In *Martin v. Johns-Manville Corp.,* 508 Pa. 154, 494 A.2d 1088, 1096 (1985), the Pennsylvania Supreme Court held that to recover punitive damages, a plaintiff must show, by a preponderance of the evidence, [6] that the defendant's conduct met the requirements of Section 908(2) of the *Restatement (Second) of Torts:*

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

The court's holding was stated in a plurality opinion written by Justice Hutchinson. Justice Hutchinson rejected a constructive knowledge (i.e. reasonable man) standard in favor of a standard requiring actual knowledge of the hazard on the part of the defendant. Although a majority of the other justices joined in the result, they did not specifically adopt the actual knowledge standard endorsed by Hutchinson, generating confusion as to the appropriate standard.

In *Burke v. Maasen,* 904 F.2d 178, 181 (3d Cir. 1990), the Third Circuit analyzed in considerable detail the state of Pennsylvania law on punitive damages:

... [the plurality in *Martin*] held that a jury may award punitive damages only where the evidence shows the defendant knows, or has reason to know, of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act in conscious disregard of, or indifference to, that risk.... (Citation omitted.)... [I]t is not sufficient to show that a reasonable person in the defendant's position would have realized or appreciated the high degree of risk from his actions ... (Citation omitted.)... The *Martin* plurality opinion rejects Restatement § 500's general definition of 'reckless *disregard* of safety' as the standard for imposition of punitive damages.

Page 572

That section states, 'In order that an actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous.... It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary reasonable man the highly dangerous character of his conduct.' ... Restatement § 500, comment c. Instead, *Martin* requires the more culpable mental state of conscious indifference to another's safety as the test for mental state of conscious indifference to another's safety as the test for 'reckless *indifference'* under Restatement § 908. There must be some evidence that the person actually realized the risk and acted in conscious disregard or indifference to it.... (Citation omitted.)...

The opinion announcing the judgment of the court in *Martin* is not clearly the law of Pennsylvania on this issue. Only Justices Hutchinson and Flaherty joined in the reasoning of the plurality opinion.... Thus, a majority of the Supreme Court has not decided whether punitive damages may be awarded only where there is proof of conscious disregard of a known risk, or whether disregard of a risk that would be obvious to a reasonable person would suffice.... [I]n subsequent cases, Pennsylvania's Superior Court has not applied a 'reasonable man' standard, but followed the lead of Justices Hutchinson and Flaherty, adopting and applying the 'conscious disregard' formulation.... (Citations omitted.).... [T]he rule of the opinion announcing the judgment of the court in *Martin* furthers the purpose of punitive damages, which is to punish and deter 'conduct involving some element of outrage similar to that usually found in crime.' .... In sum, we predict the Pennsylvania Supreme Court would adopt the standard set forth in the *Martin* plurality opinion were it to confront the issue today.

Burke, supra, 904 F.2d at 181 (Emphasis original). Accord: *Villari v. Terminix International, Inc.,* 663 F.Supp. 727, 734 (E.D.Pa.1987).

The only post- *Martin* Pennsylvania Supreme Court decision on this issue is *SHV Coal, Inc. v. Continental Grain Co.,* 526 Pa. 489, 493, 587 A.2d 702, 704-05 (1990). There, the Court excerpted the portion of the Hutchinson opinion in *Martin, supra,* which adopts the actual knowledge standard. *SHV Coal,* coupled with the Third Circuit's analysis in *Burke, supra,* leave no doubt that the actual knowledge standard applies to this case. See also: *Tunis Brothers Company, Inc. v. Ford Motor Company,* 952 F.2d 715, 740 (3d Cir. 1991).

Thus, to recover, Sealover must prove that W.R. Grace and U.S. Gypsum were aware, prior to Donald Sealover's exposure, that the exposure of construction workers to asbestos released during the installation of their products was a health hazard and failed to warn of that risk.

In *Smith v. Celotex Corp.,* 387 Pa.Super. 340, 564 A.2d 209, 211-13 (1989), the Pennsylvania Superior Court discussed the quantum of evidence necessary to prove such knowledge. Using *Martin* as the foundation for its analysis, the court stated:

The evidence deemed insufficient in *Martin* was testimony by two doctors concerning what the medical profession knew of the risks posed to appliers of finished asbestos products and when they knew it.... **Justice Hutchinson ... emphasized that plaintiff had not produced sufficient evidence of the awareness of the defendants of the specific risks associated with application of finished asbestos products, as opposed to risks associated with the manufacture of asbestos products.** Justice Hutchinson distinguished those cases where the plaintiffs were employees of manufacturers of asbestos products and produced evidence of the specific knowledge of the defendants as to the risks posed to manufacturing employees such as the plaintiffs long before the defendants took any measures to protect the employees. See, e.g. *Neal v. Carey Canadian Mines, Inc.,* 662 F.Supp. 64, 70-71 (E.D.Pa.1987).

Page 573

Smith, supra, 564 A.2d at 211 (Emphasis supplied.) Finding such evidence lacking, the Superior Court reversed the jury's award of punitive damages, stating:

[h]ere, the evidence submitted ... did not establish either that the management of appellant knew or had reason to know of facts indicating that appellant's conduct posed a substantial risk of physical harm to an applier of finished products like plaintiff.... **There is no [medical] testimony specifically relating to knowledge by the medical profession as to the risks posed by finished asbestos products to those who installed or applied them.** We, therefore, conclude that Dr. Sturgis offered no testimony in any way probative of outrageous conduct by appellant vis-a-vis plaintiff.

Smith, supra, 564 A.2d at 211. (Emphasis supplied.) The court dismissed as immaterial evidence of workmen's compensation claims filed against the manufacturer, explaining that:

[t]he existence of those claims alone, with no evidence demonstrating anything relating to how they were ultimately resolved, does not indicate anything regarding appellants knowledge of the risks posed to appliers of asbestos products for numerous reasons. **Most importantly, we note that the claimants were manufacturing employees and not appliers. Thus we do not see how the mere fact that these workers' compensation claims were made is relevant to plaintiff's punitive damages claim.**

Smith, supra, 564 A.2d at 212 (Emphasis supplied.). See also: *Catasaugua Area School District v. Raymark Industries, Inc.,* 662 F.Supp. 64, 70-71 (E.D.Pa.1987) (evidence of punitive damages insufficient where plaintiff failed to demonstrate defendant's awareness of risks associated specifically with the installation of finished asbestos products in schools).

In *Moran v. G. & W.H. Corson, Inc.,* 402 Pa.Super. 101, 586 A.2d 416, 422-26 (1991), the outcome was the same. The Pennsylvania Superior Court overturned a verdict assessing punitive damages against Corson, finding insufficient evidence that Corson, an asbestos supplier, was aware of the hazard asbestos posed to construction workers prior to the exposure of plaintiff's husband. There was, the court stated, "no support in the record for the assertion that officials or managerial employees of G. & W.H. Corson were aware in the mid 60's that exposure to asbestos fibers could result in cancer." Plaintiff had attempted to prove such knowledge through: (1) testimony from G. & W.H. Corson Vice President John Evans about general discussions he had, prior to 1969, with business colleagues about the hazards of asbestos; (2) Evans's testimony that he took no action to relay this information to his customers or warn them of the potential danger, but relied instead on the manufacturer, Baldwin Hill, to take such action; (3) Evans's testimony that he had never discussed the issue of asbestos with Baldwin Hill; and (4) articles about the hazards of asbestos published in medical and trade journals circulated in Europe and the United States since the turn-of-the-century. Noting, among other things, the absence of any proof that "anyone at Corson knew or had reason to know of these articles or any medical research studies on the risks involved in the use of insulation materials containing asbestos", the Superior Court found that such evidence did not prove knowledge on the part of Corson that asbestos exposure posed a threat to Moran.

Moran, supra, 586 A.2d at 425.

Pennsylvania is not unique in adhering to the "actual knowledge" standard. Missouri follows the same standard and its courts have likewise rejected punitive damage claims against asbestos suppliers and manufacturers in cases in which there was insufficient evidence that the defendant *actually knew* that even exposure to *relatively* moderate levels of asbestos posed a serious health risk. In *Angotti v. Celotex Corp.,* 812 S.W.2d 742 (Mo.Ct.App.1991), the Missouri Court of Appeals found insufficient evidence that Celotex actually knew, at the time of plaintiff's exposure, of the hazard asbestos posed to construction workers, stating:

....The record here shows that information in regard to the harmful effect of

Page 574

asbestos was still developing, but it does not establish that, at the relevant times ... there was already information available to show that Philip Carey's finished products were actually known to present a health hazard to insulators. In other words, **the record does not reflect that scientific knowledge even existed, at the relevant times [from 1951 through 1973] ... to establish legal causation sufficient to submit punitive damages against Celotex for the injuries of William Angotti as a result of his exposure, as an insulator, to Celotex's products.** Without even a showing of scientific knowledge sufficient to establish legal causation, Celotex can not be held to have had actual knowledge of the danger to William Angotti on the basis of the record in this case.

Angotti, supra, 812 S.W.2d at 746-47. See also: *School District of the City of Independence v. U.S. Gypsum,* 750 S.W.2d 442, 446-48 (Mo.Ct.App.1988), (Court found insufficient evidence that U.S. Gypsum had actual knowledge at the time of sale that the ceiling tiles sold for installation in schools would release asbestos fibers if abraded [rubbed against or scraped], thereby posing a health risk to school employees and students).

Evidence proffered by Sealover

Plaintiff's principal witness on Sealover's exposure to defendants' asbestos products was Martin Brehm. Brehm was Sealover's brother-in-law and, like Sealover, worked as a carpenter in the Harrisburg, Pennsylvania area. Brehm and Sealover worked on the same construction projects on several occasions during the late 1950's and early 1960's. It was during that time that Sealover was exposed to defendants' asbestos products. Brehm testified that Sealover was exposed to (1) Zonolite, a W.R. Grace fireproofing spray, [7] during construction of the Cumberland County Courthouse in Carlisle, Pennsylvania in 1960-61; [8] (2) Red Top plaster, a U.S. Gypsum product, and to Zonolite, during construction of the Archives Building in Harrisburg, Pennsylvania in 1961-62; [9] and (3) Red Top plaster, during construction of the William Penn Museum [10] in Harrisburg, Pennsylvania in 1962-61. [11] As a carpenter, Donald Sealover was not involved in the actual installation of asbestos products, but worked near locations where such products were used.

To recover on her punitive damage claim, the plaintiff must prove that W.R. Grace and U.S. Gypsum had actual knowledge, before 1960 and 1961 respectively, that the installation of their products presented a serious health risk to construction bystanders and failed to warn of the danger.

Plaintiff bases her case against U.S. Gypsum on information derived from two sources: [12] (1) experiments performed on animals at Lake Saranac laboratory in New York during the 1930's by Dr. Leroy Gardner and the reports generated by those experiments (the "Lake Saranac" evidence); and (2) a suit filed by a bookkeeper formerly employed in one of its plants who alleged that he had contracted asbestosis as a result of working in an asbestos plant. [13]

Page 575

Plaintiff bases her case against W.R. Grace on the Lake Saranac evidence as well as on other information allegedly available to it through its acquisition of two companies in the 1950's and 1960's. W.R. Grace did not become involved in manufacturing asbestos-containing products until December, 1954 when it acquired the Dewey and Almy Chemical Company ("Dewey and Almy"). [14] Dewey and Almy had been involved in manufacturing products which incorporated asbestos since the 1930's when its acquired Multibestos, a company which manufactured brake linings. During the 1930's, Multibestos plant employees exhibited symptoms of asbestosis and their conditions and symptoms were reported in two articles published in medical journals.

In April of 1963, W.R. Grace acquired a second company involved with asbestos products, the Zonolite Company ("Zonolite"). Zonolite operated a vermiculite mine in Libby, Montana, a vermiculite mine in South Carolina, and several processing plants at which the ores mined at Libby were used to manufacture fireproof plaster, among other products.

The vermiculite ore mined at Libby was contaminated with asbestos, and Zonolite employees' had exhibited problems stemming from their exposure to asbestos during mining and processing operations. Zonolite was aware of such problems since at least the early 1950's, when it implemented regulations requiring Libby employees to

wear respirators. Despite precautionary measures, such as the use of respirators, x-rays of Libby employees taken in the late 1950's revealed a high incidence of abnormal lung conditions. The conditions observed included pleural thickening, interstitial fibrosis and pneumonocosis or possible asbestosis. Troubling dust conditions in the Libby mine were noted and reported by public health officials. For example, a report generated during a 1956 inspection of the Libby mine by the Montana Board of Health found "the asbestos dust in the air" to be "of considerable toxicity."

Saranac Lake experiments

The Saranac Lake experiments are the cornerstone of plaintiff's case against U.S. Gypsum. The experiments were performed in the late 1930's and the early 1940's by Dr. Leroy Gardner. Dr. Gardner exposed to mice, rabbits, cats and other animals to asbestos dust and other types of dust and documented the effect on their lungs. His initial intent was to study whether the animals exposed to asbestos developed asbestosis, the conditions under which it developed, etc. He was surprised when the results in mice revealed a high incidence of lung tumors which he believed to be cancerous. The population of mice exposed to the asbestos dust was small, numbering only eleven.

The significance of certain aspects of Dr. Gardner's experiments is vigorously disputed, but one point is clear. The experiments did not establish a definite causal relationship between asbestos exposure at levels comparable to those experienced by construction bystanders and cancer. Dr. Gardner found only a possible relationship between exposure to massive amounts of asbestos and malignant tumors of the lung in white mice. He himself stated that the implications were unclear and that the matter required further study before any clear conclusions could be drawn.

Further, possible flaws in the methodology were identified by Dr. Gardner and by others who later reviewed the results. Among the flaws was the fact that the strain of white mice studied was thought to be particularly susceptible to lung tumors. In February of 1943, Dr. Gardner released an "Outline of Proposed Monograph on Asbestosis", in which he characterized the significance of his findings as follows:

These observations are suggestive **but not conclusive evidence of a cancer stimulating action by asbestos dust.** They are open to several criticisms. The strain of mice was not the same in the

Page 576

asbestos experiment as in many of the other cited; apparently, the former were unusually susceptible. Not enough animals survived in the dust for longer than the 15 months apparently necessary to produce many tumors. **There were no unexposed controls of the same strain and age, and no similar controls exposed to other dusts. It is hoped that this experiment can be repeated under properly controlled conditions to determine whether asbestos actually favors cancer of the lung.**

(Record Document No. 245, filed December 11, 1991, p. 19 referencing plaintiff's exhibit USG-152 at 126-66-(7) through 126-66-(8) (emphasis supplied)). See generally: *Angotti, supra,* 812 S.W.2d at 746-49 (Responding to the alleged significance of a prediction by a physician working for the company that someday " 'even the minor use of asbestos may ... be considered ... dangerous to the general populace' ", the court stated: "A forecast of what may be determined in the future does not establish present knowledge that a health hazard existed for those working as insulators.")

In a letter and report to Johns-Manville dated February 24, 1943, Dr. Gardner again described the results as inconclusive and noted the need for further study on the question of a possible link to cancer:

The question of cancer susceptibility now seems more significant than I previously imagined. I believe I can obtain support for repeating it from the cancer research group. As it will take two or three years to complete such a study, I believe it would be better to be omitted from the present report. If it should become possible to make this study, I hope I any [sic] count on some of your members to supply me with enough pure, long fiber asbestos for the purpose ...

(Record Document No. 245, filed December 11, 1991, p. 23, referencing plaintiff's exhibit USG-152 at 126-66-(7) through 126-66-(8)).

Plaintiff argues that the results of the Saranac Lake research were more definite than this and, as support for that assertion, points to a statement in a letter dated August 13, 1936 from W.L. Keady, a U.S. Gypsum executive. Keady summarizes the contents of a report by Dr. Gardner on conditions at a Jersey City plant which U.S. Gypsum had purchased from another asbestos manufacturer. Dr. Keady states at one point that "there was no safe level of exposure to asbestos." Plaintiff argues that, by this, he meant that exposure to any amount of asbestos, however minute, posed a hazard. Plaintiff's interpretation is inconsistent with the rest of the passage. The entire passage reads:

Dr. Gardner points out that various authorities have tentatively suggested a concentration of five million particles of free silica per cubic foot of air as limits above which a silicosis hazard might exist, and this value has met

with some recognition. There is no standard for safe concentration of asbestos dust comparable to the value just given for free silica dust.

(Record Document No. 245, filed December 11, 1991, Exhibit "N").

We are not the first court to consider the import of the Keady letter. The Court of Appeals for the District of Columbia Circuit considered the letter in *Wesley Theological Seminary v. U.S. Gypsum Co.*, 876 F.2d 119, 123 (D.C.Cir. 1989), and rejected plaintiff's proposed interpretation. The court explained:

Dr. Gardner concluded that a serious asbestos dust hazard existed in the plant. He discussed other studies which proposed a maximum safe level of 'five million particles of free silica per cubic foot of air.' He distinguished silica duct from asbestos dust, however, and concluded that this standard was not necessarily applicable to asbestos dust.

Wesley seeks to treat as a smoking gun the letter's observation that '[t]here is no standard for safe concentration of asbestos dust comparable to the value just given for free silica dust.' In context, however, this is simply a statement that, due to the absence of enough research, no one could yet identify the safe level for occupational exposure. Similarly, the letter's discussion of an

Page 577

asbestos dust study which found a 10% asbestosis rate among workers exposed to five million particles per cubic foot of dust was of remote relevance at best. While it suggests that U.S. Gypsum was on notice that the safe level for occupational exposure to asbestos dust on a full-time basis was less than five million particles per cubic foot of air, it does almost nothing to establish Wesley's central thesis--that the defendant was aware that asbestos-containing ceiling tiles, once installed, created hazardous concentrations.

Wesley Theological, supra, 876 F.2d at 123 (Emphasis supplied.)

We are aware of the controversy concerning the alleged attempts of the Saranac study sponsors, a group of asbestos manufacturers which included U.S. Gypsum, to conceal the suspected link to cancer revealed by Dr. Gardner's study. It is not clear from the documents we have reviewed that U.S. Gypsum knowingly participated in any conspiracy to conceal the results by pressuring Dr. Gardner or his successors to omit any mention of cancer from the published reports of the study. This distinguishes its position from that of other asbestos manufacturers, such as Johns-Manville, with respect to which there is clear direct evidence of knowing participation in efforts to block publication of results linking asbestos-exposure in animals to cancer. Moreover, the Pennsylvania courts have found even such knowing participation an insufficient basis for imposing punitive damages. See: *Martin, supra,* and *Angotti, supra,* 812 S.W.2d at 746-49 (Efforts to keep a medical advisor's "observations and evaluation confidential does not show actual knowledge of a health hazard to an individual working as an insulator.") Cf. *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357, 365 (E.D.Pa.1982).

Plaintiff has not pointed to any evidence that U.S. Gypsum was directly or knowingly involved in attempts to conceal Dr. Gardner's finding of a suspected cancer link or to curtail publication of his findings. The Lake Saranac experiments were sponsored by a group of asbestos manufacturers which included U.S. Gypsum. [15] Dr. Gardner was in contact with officers of Johns-Manville and Raybestos-Manhattan about his experiments, and such evidence, as well as attempts by the principals of those companies to suppress the study results, has been the basis for an award of punitive damages against them in a number of cases. Plaintiff has not, however, directed our attention to any evidence similarly linking U.S. Gypsum to efforts to conceal the results or to pressure Dr. Gardner or his successors to limit publication of their findings. Without such direct evidence, U.S. Gypsum cannot be tarred with the same brush as Raybestos or Johns-Manville.

Further, without the underpinnings of evidence establishing actual knowledge of the hazard asbestos posed to those who even indirectly came into contact with their products, plaintiff's evidence of alleged attempts to conceal the Saranac Lake experiments, as well as its alleged failure to use alternatives to asbestos has no probative value. Such evidence alone does not establish culpable conduct.

U.S. Gypsum employee

The other evidence on which plaintiff relies to establish actual knowledge on the part of U.S. Gypsum is evidence that in the 1930's a bookkeeper employed at one of its manufacturing plants in Jersey City, New Jersey contracted asbestosis as a result of his employment. Plaintiff argues that this proves U.S. Gypsum knew that exposure to even relatively moderate levels of asbestos posed a significant health hazard. Such evidence does not equate to knowledge that construction bystanders were at risk. As the court pointed out in *Angotti, supra,* asbestos-plant workers were exposed to far greater quantities of asbestos dust than the average construction worker, because their work environments differed. The manufacturing processes generated enormous

Page 578

quantities of dust. Day-after-day, each worker labored in the same location and was exposed to the same, extremely dusty conditions. Ventilation was ofttimes non-existent during the early manufacturing days, and the worker had no reprieve from the repetitive accumulation of asbestos dust. Knowledge that workers laboring under such conditions suffered from a cumulative exposure to asbestos cannot be equated with knowledge that construction workers, presumably laboring under less disagreeable conditions and less dusty conditions [16] would suffer the same ill-effects to the same degree. In *Angotti, supra,* the court commented:

... While there was evidence that sawing of asbestos products by insulators produced dust in varying degrees, depending on the type of material and the size of the cut, **there was no evidence to show that the exposure of the plant employees with asbestosis was to the same degree as the exposure of an insulator. There are many products and environmental conditions that are known to create a health hazard to individuals exposed to a given degree which do not create a hazard to one exposed to a lesser degree....**

.... [T]he fact that workers at the Philip Carey plant exposed to high volumes of asbestos dust within the manufacturing process contracted asbestosis does not show actual knowledge by Philip Carey that a health hazard existed from the exposure of an insulator, who did not work in the manufacturing process and within the confines of its plant, but who worked with its finished products. The evidence did not establish that Philip Carey had actual knowledge that insulators were exposed to a dangerous level of asbestos fibers by use of their products or that Philip Carey was put on notice and consciously chose to ignore information that showed its products were actually known to be harmful to insulators.

Angotti, supra, 812 S.W.2d at 747-748 (Emphasis supplied.). See also: *Martin, supra,* 494 A.2d at 1099 n. 15 (noting the distinction between articles and research studying the risks associated with mining and manufacturing raw asbestos and the risks associated with installing or applying asbestos-containing products), and *Smith, supra,* 564 A.2d at 212. Clearly, then, evidence that U.S. Gypsum was on notice that a bookkeeper in one of its manufacturing plants contracted asbestosis does not equate to knowledge that construction bystanders, such as Donald Sealover, were equally at risk.

Libby mine workers

Of all of the evidence which plaintiff proffers against W.R. Grace, that which brings her closest to proving actual knowledge of the hazard asbestos posed to construction workers is proof that the workers who experienced problems were, purportedly, exposed to only relatively small amounts of asbestos contained in the vermiculite. Plaintiff argues that this served as notice that even casual or indirect exposure to relatively small amounts of asbestos can cause serious lung problems. She contends that this also distinguishes this case from others decided by the Pennsylvania courts in which the courts refused to equate long-standing knowledge of lung problems in plant workers with knowledge that asbestos would have an equally devastating effect on construction workers exposed to lesser quantities and lower concentrations. [17] See, e.g., *Neal v. Carey Canadian Mines* and *Martin, supra.* The conclusion which plaintiff seeks to draw from the problems experienced by the Libby mine and plant workers does not follow. Knowledge of their health problems does not equate under Pennsylvania law to actual knowledge that construction bystanders would suffer like problems from exposure on construction sites to asbestos-containing products. It stands to reason that exposure during the manufacturing process and during mining, when asbestos-containing

Page 579

raw materials were being crushed, sorted, and otherwise manipulated, would pose a greater risk of more extensive exposure than would the installation of the manufactured product. See, e.g. *Angotti, supra,* 812 S.W.2d at 746-49 ("[A]rticles from medical literature relating to the 'hazards of asbestos exposure in industrial employment, and to the surrounding population.' .... and warnings by a medical advisor of 'possible liability to persons other than employees' does not establish actual knowledge and it does not establish that information was available to show that ... [defendant's] products were actually known to constitute a health hazard to insulators.") Further, the reports upon which plaintiff relies indicate that workers and miners were exposed to a large volume of dust. For example, a 1956 report from the Montana Board of Health states: "dust vibrates almost continuously off the rafters which have become loaded and are continuously loaded with dust generating from many sources." (Record Document No. 248, filed December 11, 1991 at p. 22, referencing W.R. Grace Exhibit 2). A letter written in 1961 by a Zonolite official expresses similar concerns, stating: "There is a relatively large amount of asbestos dust present in our mill and this is difficult to control." (Record Document No. 248, filed December 11, 1991 at p. 23). Thus, even though the dust workers were exposed to may have contained only trace amounts of asbestos, the fact that it was generated continuously and allowed to accumulate day after day distinguishes their situation from that of construction workers, where one would reasonably expect the volume of dust to be less. Once installation was completed installers move to a new location, so that one would assume that there is not the same opportunity for dust to accumulate day after day in the same location and endanger the health of

bystanders. Cf. *Wammock v. Celotex Corp.*, 835 F.2d 818, 822 (11th Cir. 1988) (punitive damages award against National Gypsum upheld based, *inter alia* on evidence that National Gypsum was aware of hazards asbestos exposure posed to miners, plant workers and others exposed to high concentrations of the dust and could be found to be "consciously indifferent" to the threat posed to construction workers by failing to act on that information to protect such workers from exposure).

Post-1961-1962 evidence

Plaintiff's reliance on post-1961-1962 evidence is misplaced. Evidence that W.R. Grace and U.S. Gypsum learned of the hazards of asbestos sometime after Sealover's exposure is in no way probative of what they actually knew prior to Sealover's exposure. Although such evidence is relevant in some cases, depending upon the claims raised, it is not relevant to the issues before this court. Cf. *Rowan County Board of Education v. U.S. Gypsum*, 103 N.C.App. 288, 407 S.E.2d 860 (1991) (post-exposure evidence relevant to refute defendant's assertions that asbestos ceiling tiles it marketed were suitable for installation in schools) and *Eagle-Picher Industries, Inc. v. Balbos*, 84 Md.App. 10, 578 A.2d 228, 249-50 (1990) (post-exposure evidence relevant to prove a duty to alert plaintiff after exposure and avert possibility of him worsening his condition by continuing to smoke cigarettes and/or to prompt the persons exposed to seek treatment earlier and thereby perhaps prolong their lives).

Cases cited by plaintiff

Plaintiff urges the court to follow *Ivins v. Celotex Corporation*, 115 F.R.D. 159 (E.D.Pa.1986), in which Judge Newcomer found the Saranac documents sufficient to support a claim for punitive damages against Owens-Illinois and Owens Corning Fiberglas. *Ivins* is inapposite, because the court did not follow what we now know to be the Pennsylvania standard for imposing punitive damages. Although the court stated that liability had been established under both *Martin* and the line of cases which preceded it (cases which did not require the plaintiff to prove actual knowledge), its holding was framed in terms of what the defendants should have or could have inferred from the Saranac findings, not in terms of what they actually knew

Page 580

about the effect of asbestos on construction workers. The court stated:

[T]he Saranac documents could indicate that Owens-Illinois and OCF had knowledge of the danger sometime between 1948 and 1958. Second ... testimony with respect to OCF's familiarity with asbestos and the contemplated publication of the 'asbestos file' may support the inference that OCF was aware of the hazards of asbestos in mining and factory settings. Such evidence could also show that OCF knew or should have known of such facts as would cause a reasonable person to realize the existence of a serious danger. Since plaintiffs' proofs may support the inference that defendant OCF--long before it took ameliorative action--(1) knew of the risks associated with asbestos or (2) knew or should have known of facts which would cause a reasonable person to realize that exposure to asbestos caused significant health risks, it would be inappropriate to dismiss plaintiff's claim for punitive damages as a matter of law.

Ivins, supra, 115 F.R.D. at 166.

City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 981-83 (4th Cir. 1987) is distinguishable on its facts. The City of Greenville, South Carolina sued W.R. Grace to recover the cost of removing a fireproofing product called Monokote from the Greenville City Hall. The city was awarded compensatory and punitive damages on its negligence and breach of warranty claims. On appeal, the award was upheld by the Fourth Circuit Court of Appeals. Unlike the case before us, W.R. Grace sold the asbestos-containing Monokote to Greenville in 1971 to 1972, at a time when it was fully aware of the hazards associated with asbestos products, knew that the asbestos-containing Monokote was not suitable for the purposes for which it was sold because of its tendency not to bond to the surfaces to which it was applied, and, acting in response to well-publicized concerns about the health risks associated with asbestos exposure, had developed and was marketing commercially a non-asbestos Monokote product.

Repeated punitive damage awards

Defendants raise several policy reasons for not permitting punitive damages in this case, which we will address briefly. Defendants cite: (1) the compensatory and punitive damage judgments assessed against them in prior cases; (2) pending asbestos claims; [18] (3) the dire financial straits of other asbestos manufacturers as reasons for disallowing punitive damages in this case; and the fact that plaintiff has been fully compensated for her injuries. They argue under the circumstances, subjecting them to punitive damages would serve no purpose and "unreasonably endanger future litigants' chances to recovery compensatory damages" by further draining defendants' limited financial resources. If their coffers are further depleted by large punitive damage awards in cases such as this, they argue, the injuries of future claims will go uncompensated. Other injured parties, having an equal right to receive full compensation for their losses, will receive nothing. By allowing plaintiffs to proceed to trial on the punitive damage issue, defendants

argue, the court would be sanctioning a practice contrary to the interests of other injured parties.

The Third Circuit Court of Appeals has recognized the legitimacy of the concerns which defendants raise. In *In Re School Asbestos Litigation,* 789 F.2d 996, 1003-04 (3d Cir. 1986), the court commented on the inappropriateness of punitive damages in mass tort litigation, stating:

In the era when most tort suits were 'one-against-one' contests, a single act triggered a single punishment. The increasingly

Page 581

prevalent mass tort situation, however, exposes a defendant to repetitious punishment for the same culpable conduct. The parallels between the assessment of exemplary damages and a fine levied in criminal courts have led to suggestions that the concepts of double jeopardy and excessive punishment should be invoked in the civil field as well.... (Citations omitted.)....

Similar concerns have prompted highly respected judges to comment on the possibility that the due process clause might contain some constitutional limitation on the amount of exemplary damages to be awarded. 'Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of "fundamental fairness" that is essential to constitutional due process.' *In re Federal Skywalk Cases,* 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J. dissenting). 'There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.' *In re 'Agent Orange' Product Liability Litigation,* 100 F.R.D. 718, 728 (1983).

In addition to a possible federal constitutional limitation, state substantive tort law could place restraints on repetitive punitive damage awards....

....

Thus powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts.

....

... [T]he tens of thousands of personal injury suits in which punitive damage verdicts have been and continue to be assessed ... are satisfied from the same pool of assets to which the school districts now look. If a limit is ever placed on the total punitive damages to be imposed on the asbestos defendants, then that limit probably would apply to all claims whether they arise in property damage or personal injury suits.

....

... [D]espite strong arguments favoring limitations on punitive damages and the increasing number of bankruptcies, the 'business as usual' attitude still prevails.... (Citations omitted.)

School Asbestos Litigation, supra, 789 F.2d at 1003-05 and 1007. Although the Third Circuit recognized the need for controls, it has not thus far adopted a rule limiting the number of punitive damage recoveries against a single defendant for a single product or course of action. The United States Supreme Court has also acknowledged that there are Fourteenth Amendment due process constraints on punitive damage awards. *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

Defendants further argue that allowing plaintiff to proceed with her punitive damage claim would be inconsistent with the order of the Judicial Panel on Multi-District Litigation (the "Panel") dated July 30, 1991 consolidating the pre-trial proceedings of all federal personal injury and wrongful death asbestos cases. In its decision to consolidate, the Panel made reference to concerns along these lines expressed in the March 1991 report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation:

The ... five years [since 1985] have seen ... increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments--if ever obtained--can be collected.

....

The most objectionable aspects of asbestos litigation can be briefly summarized ... exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

In re: Asbestos Products Liability Litigation (No. VI), 771 F.Supp. 415, 418-19 (J.P.M.L.1991) (quoting *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation,* 1-3, 9 (1991)).

Page 582

Although the defendants raise legitimate concerns, this court is not the proper forum for redress. [19] If restrictions are to be imposed on the number of punitive damage awards which may be assessed against a single defendant for the same product or course of action, they must be established

by the Pennsylvania legislature or "a higher judicial authority", but not by this court. See: *Glasscock v. Armstrong Cork Co.,* 946 F.2d 1085, 1096-97 (5th Cir. 1991) ("If there is to be further control of repeated punitive damage awards, the solution must be found through legislation."); *King v. Armstrong World Industries, Inc.,* 906 F.2d 1022, 1031-33 (5th Cir. 1990), *cert. denied,* 500 U.S. 942, 111 S.Ct. 2236, 114 L.Ed.2d 478 (1991); *McCleary v. Armstrong World Industries, Inc.,* 913 F.2d 257, 260-61 (5th Cir. 1990). Cf. *Juzwin v. Amtorg Trading Corp.,* 718 F.Supp. 1233, 1235 (D.N.J.1989) ("[T]his court does not have the power or the authority to prohibit subsequent [punitive damage] awards in other courts notwithstanding its opinion that such subsequent awards violate the due process rights of the defendants against whom such verdicts are entered. Until there is uniformity either through Supreme Court decision or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated.") and *Gogol v. Johns-Manville Sales Corp.,* 595 F.Supp. 971, 975-76 (D.N.J.1984).

ORDER

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT:

1. The motions [1] (Record Document No. 234, filed October 29, 1991 and Record Document Nos. 245 and 246, filed December 11, 1991) by U.S. Gypsum to bar plaintiffs from proceeding with their punitive damage claim and to exclude evidence of punitive damages are granted.

2. The motion (Record Document No. 238, filed November 15, 1991) by W.R. Grace for summary judgment on plaintiff's punitive damage claim is granted.

3. The parties having agreed that the court should treat the above motions filed by W.R. Grace and U.S. Gypsum as motions for summary judgment on plaintiff's punitive damage claim, summary judgment is granted in defendants' favor on that claim.

4. The Clerk is directed to defer entry of final judgment until further order of court.

Notes:

[1] U.S. Gypsum is part of a group of defendants, affiliated for purposes of defending actions such as this, which are known as the Center for Claims Resolution Defendants or "CCR defendants." The other defendants which are part of that group are:

(a) GAF Corporation

(b) National Gypsum Company and

(c) Turner & Newall

Of the four, plaintiff seeks punitive damages only against U.S. Gypsum. (Record Document No. 232, filed Sept. 11, 1991)

[2] Mesothelioma is a terminal cancer of the lining of the lung.

[3] Also outstanding are plaintiff's motion for delay damages; defendants' motions for a new trial or j.n.o.v.; plaintiff's motion to sever the case against GAF; and defendants' motions to treat Johns-Manville as a settled defendant and mold the verdict. These motions will be addressed in a separate memorandum.

[4] The parties have agreed that the court should treat the motions filed by W.R. Grace and U.S. Gypsum as motions for summary judgment on plaintiff's punitive damage claims.

[5] All parties agree that Pennsylvania law applies under *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and its progeny.

[6] Although some courts require a higher standard of proof, the Pennsylvania courts have rejected that approach and require plaintiff to prove entitlement to punitive damages by a preponderance of the evidence only. *Martin, supra,* 494 A.2d at 1098 n. 14 ("We believe the goal of limiting punitive damage awards in the context of products liability litigation is best served by focusing on the nature of the defendant's conduct instead of increasing the plaintiff's burden of persuasion.")

[7] W.R. Grace acquired the assets of the Zonolite Company in April, 1963 and argues that punitive damages should not be assessed against it because it was not a manufacturer of asbestos products prior to 1963. Plaintiff argues W.R. Grace is liable as a successor corporation to Zonolite. Our ruling on the sufficiency of the evidence disposes of plaintiff's claim and eliminates the need to consider this issue.

[8] N.T., July 8, 1991, pp. 23-31 and 64 (Brehm, M.).

[9] N.T., July 8, 1991, pp. 32-35, 38-39 (Brehm, M.).

[10] N.T., July 8, 1991, pp. 36-41, (Brehm, M.).

[11] Brehm testified that Sealover was also exposed to Gold Bond products manufactured by National Gypsum on the three construction projects: the Cumberland County

Courthouse, the Archives Building in Harrisburg, and the William Penn Museum. Plaintiff is not seeking punitive damages against National Gypsum.

[12] We assume, without deciding, that for purposes of ruling on defendants' motions, that all evidence which plaintiff proffers would be admissible at trial.

[13] The bookkeeper worked at an asbestos factory owned by the National Asbestos Manufacturing Co., and the suit was filed against that company. U.S. Gypsum plant acquired the factory in 1936.

[14] Because we find the evidence proffered by plaintiff legally insufficient, we need not address W.R. Grace's contention that it cannot be held liable for punitive damages as a successor corporation to Zonolite, the corporation which manufactured the asbestos products to which Sealover was exposed.

[15] W.R. Grace was not one of the sponsors. At the time the experiments were conducted, it was not involved in the mining or processing of asbestos. It did not acquire asbestos-related industries until the 1950's.

[16] See, e.g., Record Document No. 245, filed December 11, 1991, referencing plaintiff's exhibit USG-16 at p. 2.

[17] (See: Record Document No. 248, filed December 11, 1991 at p. 17. Emphasis supplied.)

[18] Untold numbers of asbestos personal injury actions have already been litigated to conclusion and statistics indicate that the stream of litigation is far from waning. Court records indicate that "presently in the federal system nearly two new asbestos actions are being filed for every action terminated, and that at the current rate, there will be more than 48,000 actions pending in the federal courts at the end of three years." *In re: Asbestos Products Liability Litigation (No. VII)*, 771 F.Supp. 415, 418 (J.P.M.L.1991) (citing *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, 8 (1991)).

[19] Commentators have recognized the legitimacy of these concerns, but have also urged a legislative solution. See: Robert E. Scott, Jr., *Punitive Damages: Constitutionality, Elements and Defense--The Defense Perspective*, 387 PLI 425 (March 1, 1990).

Commentators have urged the need for a restraint on the number of punitive damage awards that may be imposed on any one company for injuries arising from a single product or line of products. See: Jack B. Weinstein and Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U.Ill.L.Rev. 269 (1991).

[1] Also outstanding are plaintiff's motion for delay damages; defendants' motions for a new trial or j.n.o.v.; plaintiff's motion to sever the case against GAF; and defendants' motion to treat Johns-Manville as a settled defendant and mold the verdict. These motions will be addressed in a separate memorandum and order.

Citing References :

295 F.Supp.3d 467 (M.D.Pa. 2018), C. A. 1:13-CV-3087, Advanced Fluid Systems, Inc. v. Huber

_____

United States District Court, M.D. Pennsylvania03/06/2018 295 F.Supp.3d 467

647 A.2d 405 (Md. 1994), 127, U.S. Gypsum Co. v. Mayor and City Council of Baltimore

_____

Court of Appeals of Maryland09/12/1994 647 A.2d 405 336 Md. 145

657 A.2d 379 (Md.App. 1995), 1021, ACandS, Inc. v. Asner

_____

Court of Special Appeals of Maryland04/27/1995 657 A.2d 379 104 Md.App. 608

In re Asbestos Litigation, 083017 DEDC, C. A. 15-681-ER-SRF

_____

United States District Court, D. Delaware08/30/2017

King v. Hasbro, Inc., 092809 PAEDC, 07-4001

_____

United States District Court, E.D. Pennsylvania.09/28/2009

Yates v. Ford Motor Company and Honeywell International, Inc., 051115 NCEDC, 5:12-CV-752-FL

_____

United States District Court, E.D. North Carolina, Western Division05/11/2015

No negative treatment in subsequent cases

Page 288

655 F.3d 288 (3rd Cir. 2011)

UNITED STATES of America, Appellant/Cross-Appellee

v.

Vincent J. FUMO, Appellee/Cross-Appellant.

United States of America, Appellant

v.

Ruth Arnao.

Nos. 09-3388, 09-3389, 09-3390.

United States Court of Appeals, Third Circuit.

August 23, 2011

Argued May 25, 2011.

As Amended Sept. 15, 2011.

On Appeal from the District Court for the Eastern District of Pennsylvania (Nos. 06-cr-00319-003 & 06-cr-00319-004) District Judge: Honorable Ronald L. Buckwalter.

Page 289

[Copyrighted Material Omitted]

Page 290

[Copyrighted Material Omitted]

Page 291

[Copyrighted Material Omitted]

Page 292

[Copyrighted Material Omitted]

Page 293

Zane David Memeger, Esq., Robert A. Zauzmer, Esq. [Argued], John J. Pease, Esq., Office of United States Attorney, Philadelphia, PA, for Appellant/Cross-Appellee.

Samuel J. Buffone, Esq. [Argued], BuckleySandler LLP, Washington, D.C., Peter Goldberger, Esq., Ardmore, PA, for Appellee/Cross-Appellant Fumo.

Patrick J. Egan, Esq. [Argued], Eric E. Reed, Esq., Fox Rothschild LLP, Philadelphia, PA, for Appellee Arnao.

Before: FUENTES, GARTH, NYGAARD, Circuit Judges.

Page 294

OPINION

FUENTES, Circuit Judge:

On July 14, 2010, the United States District Court for the Eastern District of Pennsylvania sentenced former Pennsylvania State Senator Vincent J. Fumo to 55 months' imprisonment, a $411,000 fine, and $2,340,839 in restitution, arising from his jury conviction on 137 counts of fraud, tax evasion, and obstruction of justice. A week later, the District Court sentenced former Fumo aide Ruth Arnao to imprisonment of one year and one day, a $45,000 fine, and joint and several restitution with Fumo of up to $792,802, arising from her jury conviction on 45 counts of fraud, tax evasion, and obstruction of justice. On appeal, the Government argues that the District Court made numerous procedural errors in arriving at both sentences. In particular, the Government asserts that the District Court failed to announce a final guidelines sentencing range for Fumo. Fumo cross-appeals, contending that the District Court erred when it denied his motion for a new trial based on alleged jury partiality and the District Court's admission of evidence related to Pennsylvania's public employee ethics law. For the following reasons, we will affirm Fumo's conviction, vacate the sentences of Fumo and Arnao, and remand both for resentencing before the District Court.

I.

A. Background

Vincent Fumo was a high-profile Pennsylvania state senator at the center of one of the largest political scandals in recent state history. Fumo was first elected to the State Senate in 1978 from a district in South Philadelphia. [1] He eventually became Chairman of the Senate Democratic Appropriations Committee, which put him in control of millions of dollars that could be dispensed at his discretion for legislative purposes. Fumo served in the Pennsylvania State Senate for thirty years, where it is widely agreed that he became one of the most powerful political figures in the state.

During his three decades as a state senator, Fumo frequently directed his publicly paid Senate employees to attend to his personal needs and political interests during

their working hours, as well as at night and on weekends. Fumo's Philadelphia district office was staffed by ten such employees, whose duties included providing constituent services to the residents of Fumo's district. However, the staffers often also provided Fumo with campaign and personal assistance: organizing political fundraisers and mailings, processing bills for business accounts, and handling various aspects of Fumo's personal finances. Various aides also acted as his housekeeper, drove him from place to place, managed the refurbishment of his 33-room house, ran personal errands, and even drove his daughter to school. During Fumo's annual trip to Martha's Vineyard, Massachusetts, his Senate aides would drive two vehicles from Philadelphia and back, filled with the luggage of Fumo and his guests. Staffers also used their time to assist a Philadelphia City Councilman who was Fumo's ally and, for two months, to advance the campaign of an ultimately unsuccessful Pennsylvania Democratic gubernatorial candidate. Moreover, Fumo misused his Senate staff in Harrisburg— several of them renovated and developed a farm he had purchased in 2003 as a residential

Page 295

and business enterprise. In exchange, Fumo arranged salaries for his employees that were substantially greater than those designated by the State Senate for comparable Senate employees.

Fumo also provided non-staffers, such as contractors, family members, and girlfriends with access to Senate resources, including laptops and computer assistance. Further, he used Senate funds to hire contractors for non-legislative tasks. For instance, Fumo obtained a $40,000 state contract for a private investigator who, in addition to his legitimate activities, conducted surveillance on Fumo's former wife, girlfriends, ex-girlfriends' boyfriends, and at times, political rivals. He obtained an $80,000 state contract for a consultant who spent much of his time assisting Fumo with political races and a $45,000 salary for an individual who spent most of his time assisting with Fumo's farm. Mitchell Rubin, the boyfriend and later husband of Ruth Arnao, was paid $30,000 per year for five years, without doing much, if any, work at all.

In order to facilitate his use of public funds for his own purposes, Fumo falsely represented that employees and contractors receiving payment by the Senate were performing proper and legitimate legislative functions that they only partially or never in fact completed, and failed to disclose the private and political services that they were actually performing. Fumo also provided false job descriptions and elevated position classifications that conflicted with the duties that employees actually carried out.

In 1991, Fumo and his staff founded a non-profit organization that became known as the Citizens Alliance for Better Neighborhoods (" Citizens Alliance"). Arnao, a Senate employee on Fumo's staff, became its director. Citizens Alliance's stated purpose was to improve Philadelphia neighborhoods through projects such as removing trash, sweeping streets, trimming trees, clearing snow, and cleaning alleys and abandoned lots. Citizens Alliance received much of its funding from grants obtained by Fumo from the state and other entities. In 1998, after Fumo brought litigation challenging its utility rates, the Philadelphia Electric Company (" PECO") privately agreed to donate $17 million to Citizens Alliance as part of a settlement agreement. The existence of the $17 million contribution only became public knowledge in November 2003, when it was reported by the *Philadelphia Inquirer*. After the influx of $17 million, Citizens Alliance expanded the scope of its work, acquiring properties for renovation, opening a charter school, and attempting to develop an office building for high-tech companies.

However, concurrent with its expanded efforts, Fumo and Arnao began to use Citizens Alliance funds for their personal benefit, including $90,000 for tools and $6,528 for vacuum cleaners and floor machines used in Fumo's homes. Citizens Alliance also provided Fumo and his staff with vehicles, including a $38,000 minivan, a $52,000 luxury SUV, and a $25,000 jeep. In total, more than $387,325 went towards acquiring and maintaining vehicles for the use of Fumo, Arnao, legislative aides, and family members. Further, Citizens Alliance became the landlord of Fumo's office on Tasker Street in Philadelphia. While the Senate spent $90,000 in rent during a five-year period, Citizens Alliance spent over $600,000 to furnish, maintain, and rent Fumo's office to him at a discount. The office also served as his campaign office and ward headquarters. Further, Citizens Alliance paid for cell phones for many of Fumo's staffers, as well as his daughter. It also paid $39,000 for Fumo's trip to Cuba with five friends and $50,000 for a " war dog" memorial in Bucks County.

Page 296

Fumo used Citizens Alliance in violation of federal 501(c)(3) rules for charitable organizations by having it pay $250,000 for political polling, $20,000 for a lawsuit against a Senate rival, and $68,000 to support opposition to the Government's construction of dunes along the Jersey shore, which would have blocked his seaside house's view of the ocean and reduced its property value. In order to oppose the dunes, Fumo had his Senate counsel create a nonprofit entity called " Riparian Defense Fund, Inc." to funnel funds from Citizens Alliance, and then misled the IRS and Pennsylvania Secretary of State as to the nature and purpose of the organization. Further, Fumo misrepresented political and campaign expenses as " community development

consulting" expenses on Citizens Alliance's tax filings, deceiving the IRS yet again.

Just as he had done with his public employees, Fumo directed Citizens Alliance staff to assist with his personal matters, traveling to his house on the Jersey shore to repair and paint his dock and deck, picking up trash, and undertaking other errands and tasks. They also frequently cleaned and served his Philadelphia home, and delivered equipment and personal items to his farm. Additionally, Citizens Alliance paid for a $27,000 bulldozer, a lawn tractor, a dump truck, an all-terrain vehicle, and a Ford F-150 pickup truck for his Harrisburg-area farm. Fumo and Arnao never disclosed the funds used for Fumo's personal benefit to Citizens Alliance's accountants, and when asked about those funds by an accountant, Arnao misstated their purpose. Fumo and Arnao also made repeated misrepresentations to journalists about Citizens Alliance and how it spent its funds.

Fumo served on the board of directors of the Independence Seaport Museum (" ISM"). Board members did not receive compensation or benefits from the museum, but were expected to help the museum develop and solicit donors. While Fumo did not donate or solicit much in the way of donations for the ISM, he did use his influence to obtain grants for the museum from the state and other entities. However, at the expense of the ISM, he also repeatedly used its yachts for pleasure cruises and its ship models for decorations in his home and office. These personal uses of the ISM's resources, which were approved by ISM's president John Carter, were in violation of the museum's policies and bylaws. Fumo later claimed that he used the yachts to help raise money for the museum and that he sometimes paid for their use.

In 2003, the Government began investigating Fumo. In December, the *Philadelphia Inquirer* published a series of articles about Citizens Alliance's use of funds and its relationship with Fumo. Shortly thereafter, Fumo directed a computer technician on his staff to ensure that all emails to and from Fumo and others were deleted. When the *Inquirer* ran an article entitled " FBI Probes Fumo Deal" on January 25, 2004, Fumo involved additional Senate aides and expanded the scope of his attempts to delete emails. Throughout 2004 his aides, including Arnao, deleted email from numerous computers and communication devices, and then " wiped" the computers using sophisticated programs in order to prevent forensic analysis. These efforts included wiping computers at Arnao's home and at Citizens Alliance. Despite Fumo's efforts, two of the aides involved in the deletion kept emails between each other, including emails regarding Fumo's instructions to eliminate computer evidence of the fraud.

B. The Trial

The Government charged Fumo and Arnao under what was to later become a 141

Page 297

count superseding indictment. Counts 1 through 64 related to fraud on the Pennsylvania State Senate, Counts 65 through 98 to fraud on Citizens Alliance, Counts 99 through 103 to tax evasion by Citizens Alliance, Counts 104 through 108 to fraud on ISM, and Counts 109 through 141 to obstruction of justice and conspiracy to commit obstruction of justice. Fumo was charged in 139 counts, including all but Counts 100 and 102. At trial, the Government voluntarily moved to dismiss Counts 36 and 38 against Fumo. Arnao was charged in 45 counts, including Counts 65 through 98, related to the fraud on Citizens Alliance, Counts 99, 100, and 102, related to tax evasion, and Counts 109, 121, 124, 126, 127, 129, 132, and 134, related to obstruction of justice.

The case was originally assigned to the Honorable William H. Yohn, Jr., and after some delay while Fumo found satisfactory defense counsel, jury selection began on September 8, 2008. After the case was reassigned to the Honorable Ronald L. Buckwalter, jury selection resumed on October 20, 2008. The trial lasted an additional five months, with the proceedings halted on Fridays. By the time it rested its case on January 26, 2009, the Government had called 80 witnesses in its case-in-chief. The defendants then called an additional 25 witnesses, including Fumo himself, and rested their case on February 18, 2009. On March 16, 2009, after four days of deliberation, the jury convicted Fumo of all 137 counts presented against him, and Arnao of all 45 counts presented against her.

A number of events occurred during the trial that Fumo now asserts as the bases for his cross-appeal. First, during the trial, the Government called John J. Contino as an expert witness to testify about the Pennsylvania Public Official and Employee Ethics Act, 65 Pa. Con. Stat. Ann. § 1101, *et seq.* (the " Ethics Act"). Contino is the Executive Director of the State Ethics Commission (the " Commission"), the body charged with enforcing the Ethics Act. Section 1103(a) of The Ethics Act prohibits a public official or employee from engaging in conduct that constitutes a " conflict of interest," which is defined at § 1102 as the " [u]se by a public official or public employee of the authority of his office or employment ... for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated."

Prior to the trial, Judge Yohn had found Contino to be " well qualified" as an expert and ruled that it was "

appropriate for him to talk about the Ethics Act." (J.A. 431). During trial, Contino testified as to how and to whom the Ethics Act applied, whether it was mandatory in nature, and as to how the legislature was apprised of the Ethics Act and the Commission's interpretation of it. Contino also referenced abridged versions of the Commission's opinions, summarizing violations that were considered and ruled upon by the Commission. He did not, however, express an opinion as to whether Fumo's own actions violated the Ethics Act or whether Fumo was guilty of the federal charges against him.

The Government also extensively cross-examined Fumo on the subject of the Ethics Act and specifically his knowledge and understanding of it. At the time of the cross-examination, the District Court provided a limiting instruction to the jury, reminding them that no law required Fumo to study the decisions or reports of the Commission.

At the conclusion of the trial, the District Court further instructed the jury on the Ethics Act, telling them that they could " consider [such] evidence ... to the extent that [they] find it sheds light on

Page 298

questions of willfulness, intent to defraud, and good faith" but that " violation of the ethics laws should not be considered by [them] as implying a violation of federal criminal law" and that they " may not convict Fumo of any of the counts alleging that he conspired or attempted to execute a scheme to defraud the Senate of money or property simply on the basis of the conclusion that he may have violated a state ethics law." (J.A. 4363).

On March 15, 2009, while jury deliberations were ongoing, a local television station reported that one of the jurors, hereinafter referred to as " Juror 1," had made postings on both his Facebook and Twitter pages related to the trial. That night, which was the night before the jury returned its verdict, Juror 1 was watching television when he learned that the media was following the comments he had made on the internet. He subsequently panicked and deleted the comments from his Facebook page.

Prior to deleting them, Juror 1 made the following comments on his Facebook " wall" during jury selection and the trial:

— Sept. 18: (apparently upon a continuance of the trial due to judge's illness): " [Juror 1] is glad he got a 5 week reprieve, but still could use the money ..."

— Jan. 11: (apparently referring to the end of the government's case): " [Juror 1] is wondering if this could be the week to end Part 1?"

— Jan. 21: " [Juror 1] wonders if today will really be the end of Part 1?"

— Mar. 4: (conclusion of closing arguments): " [Juror 1] can't believe tomorrow may actually be the end!!!" [2]

— Mar. 8: (Sunday evening before second day of deliberations): " [Juror 1] is not sure about tomorrow ..." [3]

— Mar. 9: (end of second day of deliberations): " [Juror 1] says today was much better than expected and tomorrow looks promising too!"

— Mar. 13: (Friday after completion of first week of deliberations): " Stay tuned for the big announcement on Monday everyone!" (J.A. 587-88).

Juror 1's Facebook comments appeared over the many months of the trial, and in the midst of dozens of other comments he made unrelated to the trial. It was the final, March 13 post that was the subject of media attention. With regard to Twitter, Juror 1 made a single comment or " tweet" on March 13, stating " This is it ... no looking back now!" (J.A. 587).

When Fumo learned of Juror 1's Facebook and Twitter comments, he moved to disqualify Juror 1 from the jury. The District Court held an *in camera* review of the issue, and questioned Juror 1 about his activities on these two websites and his general media consumption. Juror 1 told the judge that he saw the news report that night because he had been watching another show when the local news began. He nevertheless explained that he had avoided television news during the entire trial. He also affirmed that he had not discussed the substance of the case with anyone. Juror 1 further stated that he had made the comments " for my benefit to just get it out of my head, similar to a blog posting or somebody journaling something." (J.A. 589).

Page 299

In a written opinion, the District Court determined that there was no evidence that Juror 1 received outside influence due to his Facebook or Twitter postings and concluded that, although in violation of his instruction not to discuss the case outside of the jury room, they were " nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless." (J.A. 592).

More than three months after the verdict, but before sentencing, Fumo filed a second motion for a new trial, attaching the affidavit of counsel Dennis Cogan. The affidavit asserted that journalist Ralph Cipriano, writing for *Philadelphia Magazine*, had contacted Cogan regarding information he obtained during post-verdict interviews with several jurors. According to an article written by Cipriano,

on the morning of March 16, the day of the verdict, all of the jurors had heard media reports about Juror 1's use of Facebook and Twitter. Further, another juror hereinafter referred to as " Juror 2," indicated that while at her workplace on a Friday, several co-workers informed her of Fumo's prior overturned conviction, as well as the conviction and imprisonment of John Carter, former president of the ISM. Both of these facts had previously been excluded from the trial by the District Court. Specifically, the article stated that Juror 2 had told Cipriano that:

Co-workers stopped by and talked about things in the media, such as Fumo's prior 1980 conviction, subsequently overturned by a judge, for hiring ghost employees. Judge Buckwalter repeatedly turned down prosecution requests to tell the jury about that prior conviction. But [Juror 2] found out anyway, even though she held up her hands and told co-workers: *Please don't talk to me, I can't discuss the case.* Co-workers also told her that John Carter, former president of the Independence Seaport Museum, and the guy who gave Fumo permission to take free yacht trips, was doing time for fraud. The judge didn't want the jury to know about Carter, either.

(J.A. 703-04) (emphasis in original). There was no evidence that any other juror had learned of Fumo's prior conviction or the conviction of Carter, and the other five jurors interviewed by Cipriano did not mention either fact.

The District Court denied the motion, concluding that the information was an insufficient basis to hold a hearing and that, even if everything asserted by Juror 2 were true, it would not constitute the showing of substantial prejudice required to grant a new trial.

C. Sentencing

On July 8, the District Court held a sentencing hearing at which the parties made arguments directed at the sentencing guidelines calculations for both Fumo and Arnao. The Government adopted the position of the Pre-sentence Report (" PSR"), which divided Fumo's crimes into two groups pursuant to § 3D1.2 of the Sentencing Guidelines—the first made up of the 134 fraud and obstruction of justice counts, and the second consisting of the three tax evasion counts (Counts 99, 101, and 103).

As to the first group, the PSR began with a base offense level of 7 under U.S.S.G. § 2B1.1(a)(1). It then added 18 levels under § 2B1.1(b)(1)(J) because it calculated the loss from the fraud to be greater than $2,500,000, and specifically $4,339,041. The PSR then added 2 levels under § 2B1.1(b)(8)(A) because it concluded Fumo misrepresented that he was acting on behalf of a charitable organization, Citizens Alliance. Similarly, it added 2 levels under § 2B1.1(b)(9)(C) because the fraud involved the use of sophisticated means, in that Fumo used a shell corporation,

Page 300

Eastern Leasing Corp., to purchase vehicles for his personal use and conduct political polling, and used a consulting firm as a conduit to conceal his role in a lawsuit against one of his political rivals. The PSR added an additional 4 levels under § 3B1.1(a) for Fumo's role as the organizer or leader of the fraud, and 2 levels under § 3B1.3 because he was in a position of public trust. Finally, under § 3C1.1, it added 2 levels for Fumo's obstruction of justice during the investigation of the offense, and 2 levels for his obstruction of justice in perjuring himself at trial. In total, the PSR calculated Fumo's adjusted offense level for the fraud group as 39.

As to the tax evasion group, the PSR began with a base offense level of 24 under §§ 2T1.1(a)(1) and 2T4.1(J) because the tax loss was more than $2,500,000, and specifically $4,624,300. It then added 2 levels under § 2T1.1(b)(2) because the offense involved sophisticated means, for a total adjusted offense level of 26.

Because the tax evasion group's offense level of 26 was more than 8 levels below the fraud group's offense level of 39, pursuant to § 3D1.4(c), no additional levels were added to the larger of the two. Accordingly, the PSR calculated, and the Government argued, that the District Court should find Fumo's total adjusted offense level to be 39 and his criminal history category to be I, which would mean a guideline range of 262 to 327 months' imprisonment.

The day after the July 8 hearing, the District Court issued an order ruling that it would not apply the 2-level enhancement for charitable misrepresentation, the 2-level enhancement for sophisticated means, or the second 2-level obstruction of justice enhancement for perjury at trial. It also calculated the total loss from the fraud to be $2,379,914— about $2,000,000 less than the Government's calculation and a reduction of 2 additional levels. The District Court also declined to apply the 2-level enhancement for sophisticated means to the tax evasion group. Additionally, Fumo requested two downward departures based on his physical health under § 5H1.4 and for extraordinary public service under § 5H1.11. The District Court denied the former and reserved judgment on the latter until the final sentencing hearing. With reduced adjusted offense levels of 31 and 24 for the fraud and tax evasion groups, respectively, the combined offense level became 32 under § 3D1.4(b), translating into a guideline range of 121 to 151 months' imprisonment.

On July 14, the District Court held another lengthy hearing.

When the Government learned that the Court had calculated a guideline range of 121 to 151 months, it sought an upward variance, arguing that the adjusted range did not adequately represent or take into account the full loss from the fraud, the damage to public institutions, Fumo's alleged perjury at trial, other obstructive conduct, and Fumo's alleged lack of remorse. The District Court declined to vary upwards. It also denied Fumo's request for a departure on the basis of his medical condition. Then, after hearing from six witnesses who spoke on Fumo's behalf, and reviewing hundreds of letters from the public, it found that Fumo had " worked hard for the public and ... worked extraordinarily hard" such that it would " grant a departure from the guidelines." (J.A. 1622-23). Without enunciating any modification to the guideline range of 121 to 151 months, the District Court then sentenced Fumo to a term of imprisonment of 55 months, three years of supervised release, a $411,000 fine, a $13,700 special assessment, $2,084,979 in restitution, and $255,860 in prejudgment interest on the restitution.

Fumo filed a Motion for Correction of Sentence under

Page 301

Federal Rule of Criminal Procedure 35(a), asking the Court to resolve various issues related to the sentence. Among the issues raised was the fact that the District Court had, during the July 14 sentencing hearing, three times referred to the sentence as a " departure" from the guidelines range. The motion papers noted that " [w]hen a sentencing court grants a true ' departure,' [as opposed to a variance,] it must ' state how the departure affects the Guidelines calculation.' This Court[ ] fail[ed] to make such a statement...." (J.A. 1629) (quoting *United States v. Tomko*, 562 F.3d 558, 567 (3d Cir.2009) (en banc)). They also suggested that " [i]n context, it appears that the Court intended the sentence as a statute-based ' variance,' designed to achieve a punishment sufficient but not greater than necessary to fulfill the objectives set forth at 18 U.S.C. § 3553(a)(2), rather than as a Guidelines Manual-based ' departure.' " (J.A. 1629). Fumo asked that the Court " correct this technical error." (J.A. 1629). The Government filed a response, contesting Fumo's characterization of the Court's below-guideline sentence as a variance and noting that " the Court repeatedly stated that it decided to grant the departure motion based on public service." (J.A. 1635).

The following day, the District Court issued a Memorandum and Order, which among other things, explained that " [t]he government correctly states that the court announced it was granting a departure. Thereafter, the court never enunciated the guideline level to which it departed, and, in fact, never reached the sentence it did by consulting any specific level on the guideline chart." (J.A. 1653). The District Court also filed a Judgment and a formal Statement of Reasons. The Statement read, in pertinent part:

I next determined whether there should be a departure from the guidelines and announced at the sentencing hearing that there should be based on my finding extraordinary good works by the defendant. I did not announce what specific guideline level the offense fell into; that is to say, the precise number of levels by which I intended to depart because until I considered all other sentencing factors, I could not determine in precise months the extent that I would vary from the guidelines.

Having advised counsel of the offense level that I found and my intent to depart downward, I then proceeded to hear from counsel their respective analyses of what an appropriate sentence should be.

The procedure I followed was perhaps more akin to that associated with a variance than a downward departure because I never announced nor have I ever determined to what guideline level I had departed. Ultimately, the argument over which it was elevates form over substance.

(Sealed App. 185-86). The Statement of Reasons further indicated that the Court had granted Fumo a departure under § 5H1.11 of the Sentencing Guidelines for " Military Record, Charitable Service, Good Works."

After sentencing Fumo, the District Court held a sentencing hearing for Arnao. The PSR originally recommended, and the Government argued, that the loss from Arnao's fraud was between $1 and $2.5 million, leading to an offense level of 23 under § 2B1.1(b)(1)(I) of the Sentencing Guidelines. The PSR also recommended 2-level enhancements for the use of sophisticated means, misrepresentation on behalf of a charitable organization, and obstructions of justice, generating a total adjusted offense level of 29. Just as for Fumo, the PSR's offense level calculation for the tax evasion group began with a base offense level of 24 and then added 2 levels because the offense involved sophisticated means, for a total adjusted offense

Page 302

level of 26. Under the grouping rules of § 3D1.4, two additional levels were added to the higher offense level of 29, making the combined offense level 31. With a criminal history category of I, this entailed a sentencing range of 108 to 135 months.

At the hearing, the District Court rejected the sophisticated means enhancement and determined that the loss from the Citizens Alliance fraud was less than $1,000,000, and specifically $958,080, thus reducing the fraud and tax evasion group offense levels to 25 and 24, respectively.

This created a combined total offense level of 27 under the grouping rules of § 3D1.4 and a guidelines sentencing range of 70 to 87 months. The District Court then imposed a sentence of one year and one day— a substantial downward variance— to run concurrently on all counts, three years' supervised release, a $45,000 fine, a $4,500 special assessment, and restitution to Citizens Alliance in the amount of $792,802, jointly and severally with Fumo.

II.[4]

Appeal of Fumo's conviction

A. Evidence relating to the Pennsylvania Ethics Act

In his appeal of the conviction, Fumo argues that the evidence presented by the Government with regard to the state Ethics Act was irrelevant to the federal criminal charges against him, and was highly prejudicial because it was likely to confuse the jury and suggest that Fumo was in violation of state law. The District Court's rulings regarding the admissibility of evidence and expert testimony are reviewed for abuse of discretion. *United States v. Mathis,* 264 F.3d 321, 335 (3d Cir.2001); *United States v. Serafini,* 233 F.3d 758, 768 n. 14 (3d Cir.2000).

The Government responds that evidence regarding the Ethics Act was of substantial relevance because it was necessary to show that the Senate did not approve of the kind of expenditures Fumo made using state money, as well as to show that Fumo intended to deceive the Senate by misleading it about how he was spending that money. The Government notes that this was particularly true given Fumo's initial theory of the case at trial— that no rules or laws barred employing Senate resources for his personal use, or that if there were such rules, that they were entirely vague, unclear, and unenforced. Fumo also initially planned to call three experts regarding their experiences with the " customs and practices of the Senate," focusing specific attention on " accepted uses of staff and other resources as they comport with the Ethics Act." (Gov.Supp.App.64).

In light of Fumo's theory of the case, the content and enforcement of the Ethics Act was clearly relevant to the Government's claim that there were rules that Fumo broke repeatedly, that those rules were clear enough for him to understand, and to show that he was deceiving the Senate when he misrepresented or omitted aspects of his actions and expenditures to avoid the perception that he had violated those rules. Without this evidence, it would have been very difficult for the Government to prove fraudulent intent. *SeeUnited States v. Copple,* 24 F.3d 535, 545 (3d Cir.1994) (" Proving specific intent in mail fraud cases is difficult, and, as a result, a liberal policy has developed to allow the government to introduce evidence that even peripherally bears on the question of intent."). Further, the District Court read the jury a jointly drafted instruction, both during the trial and after the closings, which emphasized that Fumo

Page 303

was not on trial for violating the Ethics Act, and that even a violation of the Ethics Act by itself did not imply that he defrauded or conspired to defraud the Senate. The District Court's finding that evidence related to the Ethics Act was relevant and not unfairly prejudicial was not an abuse of discretion.

Similarly, it was not an abuse of discretion for the District Court to permit John Contino, the Director of the State Ethics Commission, to testify about the Ethics Act. We have previously explained that " [w]hile it is not permissible for a witness to testify as to the governing law since it is the district court's duty to explain the law to the jury, our Court has allowed expert testimony concerning business customs and practices." *United States v. Leo,* 941 F.2d 181, 196 (3d Cir.1991). These customs and practices will sometimes include applicable legal regulations, such as registration requirements for securities registration under the Securities Acts, *Berckeley Inv. Grp., Ltd. v. Colkitt,* 455 F.3d 195, 218-19 (3d Cir.2006), or Medicaid rules, *United States v. Davis,* 471 F.3d 783, 789 (7th Cir.2006). Similarly, expert testimony may also concern ethics rules and laws related to public officials and government contractors.

Appropriately, Contino never testified as to whether Fumo himself had violated the Ethics Act, or whether he was guilty of any of the crimes with which he was charged. Contino also properly explained the Commission's disciplinary proceedings, its advisory opinions, and the annual report it publishes, which is distributed to every state legislator. This was evidence relevant to the question of whether Fumo was aware of the Senate ethics rules, and thus had an intent to defraud when he represented and omitted facts in a way that made him falsely appear to be in compliance with those rules. Part of Contino's explanation of the seriousness and mandatory nature of the rules was a description of some of the Commission's disciplinary opinions, and the penalties that were imposed for violations of the rules. The Government also properly posed questions to Contino about whether certain hypothetical facts would constitute violations of the Ethics Act— a line of questioning it had suggested in its pretrial disclosures and later pursued in light of Fumo's theory of the case.

Finally, the Government's cross-examination of Fumo on the subject of the Ethics Act was also appropriate. During direct examination, Fumo testified that " there are no rules[,]" as to his exercise of discretion regarding spending and that " there are no guidelines" as to whether staffers can

do personal errands for lawmakers. (J.A. 3967). He then claimed that " none of this is written down anywhere, and I think it's left up to the discretion of the senator to do that as you see fit and appropriate and as you need it." (J.A. 3967). Accordingly, in order to impeach this testimony, the Government understandably questioned Fumo about his familiarity with the annual reports of the Commission that were sent to him personally. Fumo denied ever having read the annual reports of the Commission, although he admitted being aware of them. Yet merely because this line of questioning did not turn out to be directly fruitful for the Government— although it very well may have undermined Fumo's credibility— does not mean that it was irrelevant or unfairly prejudicial. As a precaution, however, the District Court instructed the jury that Fumo was, among other things, not required to have read the annual reports.

In sum, the District Court was well within the bounds of its discretion in admitting the expert testimony of Contino and permitting the cross-examination of Fumo on the issue of the Ethics Act.

Page 304

B. Challenges to the jury's fairness and impartiality

Fumo challenges two rulings of the District Court denying his motions for a new trial on account of jurors' exposure to extraneous information, and the purported prejudice and partiality that may have resulted. We review a court's order " which denies a new trial based on alleged prejudicial information for abuse of discretion." *United States v. Urban*, 404 F.3d 754, 777 (3d Cir.2005) (internal quotation and citation omitted). " A new trial is warranted if the defendant likely suffered ' substantial prejudice' as a result of the jury's exposure to the extraneous information." *Id.* (quoting *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir.2001)). " In examining for prejudice, we must conduct an objective analysis by considering the probable effect of the allegedly prejudicial information on a hypothetical average juror." *Id.* (quoting *Lloyd*, 269 F.3d at 238 (internal quotation omitted)). Yet, the " court may inquire only into the existence of extraneous information" and not " into the subjective effect of such information on the particular jurors." *Wilson v. Vermont Castings Inc.*, 170 F.3d 391, 394 (3d Cir.1999).

" If there is reason to believe that jurors have been exposed to prejudicial information, the trial judge is obliged to investigate the effect of that exposure on the outcome of the trial." *United States v. Console*, 13 F.3d 641, 669 (3d Cir.1993) (internal quotation omitted). However, the court is not required to conduct an investigation where an insufficient factual basis for it exists. *Id.* Further, even if a foundation has been established for the claim, the court need not hold a hearing " at the behest of a party whose allegations if established would not entitle it to relief." *United States v. Gilsenan*, 949 F.2d 90, 97 (3d Cir.1991). Accordingly, if the Court declines to hold a hearing, it must assume that the party seeking the hearing is able to prove that the jury was presented with extraneous information, *id.*, and determine whether " the defendant likely suffered ' substantial prejudice' as a result of the jury's exposure." *Lloyd*, 269 F.3d at 238 (internal citation omitted).

1. Juror 1's comments on Facebook and Twitter

Fumo argues that Juror 1's comments on Facebook and Twitter brought widespread public attention to the jury's deliberations, creating a " cloud of intense and widespread media coverage ... and [the] public expectation that a verdict [wa]s imminent[,]" thereby violating his Sixth Amendment right to a fair and impartial trial. (Cross-App't Br. 131). Fumo also argues that the fact that Juror 1 watched the evening news, in which his own internet comments were discussed, implies or suggests that he may have been compromised by bias or partiality.

In 2009, the Judicial Conference Committee on Court Administration and Case Management published proposed model jury instructions regarding " The Use of Electronic Technology to Conduct Research on or Communicate about a Case." While the instructions focus on the importance of jurors not consulting websites or blogs to research or obtain information about the case, they also caution and instruct jurors on the use of social media:

Before Trial:

....

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is

Page 305

interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case, Judicial Conference Committee on Court Administration and Case Management, December 2009, *available at* http:// www. uscourts. gov/ uscourts/ News/ 2010/ docs/ DIR 10- 018- Attachment. pdf (last visited August 22, 2011).

We enthusiastically endorse these instructions and strongly encourage district courts to routinely incorporate them or similar language into their own instructions. Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence. If anything, the risk of such prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.

Yet while prohibiting and admonishing jurors from commenting— even obliquely— about a trial on social networking websites and other internet mediums is the preferred and highly recommended practice, it does not follow that every failure of a juror to abide by that prohibition will result in a new trial. Rather, as with other claims of juror partiality and exposure to extraneous information, courts must look to determine if the defendant was substantially prejudiced.

Here, with regard to Juror 1's posts, none of Fumo's theories of bias or partiality is plausible, let alone sufficient for us to find that the District Court abused its discretion in denying his motion for a new trial. [5] The District Court questioned Juror 1 *in camera* at length about both his comments online and his efforts to

Page 306

avoid media coverage of the case. The Court found no evidence that Juror 1 had been contacted regarding the posts, or that Juror 1 had been accessing media sources beyond the single incident when he accidently learned of the attention that the media and public were paying to his comments. The Court also concluded that the posts on Facebook were " so opaque that there was no possible way that members of [Facebook's] Philadelphia network could read them and have any obvious understanding of his discussion." (J.A. 591). It then described the posts as " nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror 1] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit." (J.A. 592). We largely agree with these characterizations of the comments. Finally, the District Court found that despite violating its prohibition against discussing the details of the trial, " [Juror 1] was a trustworthy juror who was very conscientious of his duties. There was no evidence presented by either party showing that his extra-jury misconduct had a prejudicial impact on the Defendants." (J.A. 597-98).

In light of these findings, which were based in large part on Juror 1's in-person testimony and demeanor, there is simply no plausible theory for how Fumo suffered any prejudice, let alone substantial prejudice, from Juror 1's Facebook and Twitter comments. Nor does Fumo provide a plausible theory for how the fact that other jurors may have learned of Juror 1's " vague" and " virtually meaningless" comments on Facebook could have led to substantial prejudice against him. Accordingly, the District Court did not abuse its discretion when it denied Fumo's motion for a new trial on this basis.

2. Juror 2's exposure to excluded evidence

Three months after his conviction, Fumo's counsel alleged that Juror 2 had learned from co-workers, during the trial, about both Fumo's prior overturned conviction for hiring ghost employees, as well as the conviction of the former ISM president, John Carter, on charges of fraud. Both of these pieces of evidence had been excluded from the trial by the District Court. In contrast to allegations of bias made *during* a trial, we " are always reluctant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences. As we have said before, post-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." *Gilsenan,* 949 F.2d at 97 (quoting *United States v. Ianniello,* 866 F.2d 540, 543 (2d Cir.1989)). " It is qualitatively a different thing to conduct a voir dire during an ongoing proceeding at which the jury is part of the adjudicative process than to recall a jury months or years

later for that purpose." *Id.* at 98.

Here, the District Court rejected the foundational basis of the allegations that Juror 2 had learned of excluded evidence from co-workers. It characterized defense counsel's double-hearsay affidavit, which recounted the reporter's interviews with the jurors, as lacking the " clear, strong, substantial, and incontrovertible evidence that a specific, nonspeculative impropriety occurred." (J.A. 692). We need not address the question of whether there was sufficient foundational basis for a hearing, however, because we agree with the District Court that even if everything reported by Cipriano about what Juror 2 learned from her co-workers were true, it

Page 307

would not be sufficient for a showing of " substantial prejudice." We also need not determine which party has the burden of persuasion in deciding this issue, as even if the burden were on the Government to show the lack of substantial prejudice, we find that it pointed to sufficient evidence in the record for the District Court to conclude that it made such a showing.

The factors we have looked to in determining whether there was substantial prejudice include whether (1) " the extraneous information ... relate[s] to one of the elements of the case that was decided against the party moving for a new trial," *Lloyd*, 269 F.3d at 239; (2) " the extent of the jury's exposure to the extraneous information; [(3)] the time at which the jury receives the extraneous information; [(4)] the length of the jury's deliberations and the structure of the verdict; [(5)] the existence of instructions from the court that the jury should consider only evidence developed in the case[,]" *Urban*, 404 F.3d at 778 (quoting *Lloyd*, 269 F.3d at 240-41); and (6) whether there is " a heavy volume of incriminating evidence[.]" *Lloyd*, 269 F.3d at 241 (internal quotation omitted).

Here, while the fourth and to some extent the first factor weigh in Fumo's favor, they are easily overwhelmed by the second, fifth, and sixth factors, which weigh heavily against a finding of substantial prejudice. First, while knowledge of Fumo's earlier conviction had some potential for prejudice, the fact that the conviction occurred nearly thirty years prior, in 1980, as well as the fact that it was overturned, are mitigating factors. Perhaps most importantly, the fact that only one juror was exposed to a brief verbal summary of the excluded evidence from her coworkers is a compelling consideration against a finding of prejudice. *SeeUrban*, 404 F.3d at 778 (finding that the extent of the jury's exposure to a news article " was limited to non-existent, thus supporting the absence of prejudice" where only one juror had read the prejudicial article, and four others had " looked at the picture on the first page ... or glanced at [its] contents"). Moreover, the District Court gave careful and repeated instructions to the jurors, including immediately before deliberation, that they should " not let rumors, suspicions, or anything else that [they] may have seen or heard outside of the court influence [their] decision in any way." (J.A. 4631). Curative instructions cannot fix every mistake, but we do generally presume that juries follow their instructions. *United States v. Liburd*, 607 F.3d 339, 344 (3d Cir.2010). Finally, the sixth factor— the heavy volume of incriminating evidence— also weighs heavily against a finding of prejudice. The Government's case was presented over the course of three months and included an astonishing 80 witnesses. Further, as the Government accurately explains in footnote 16 of its opening brief, " Fumo testified at trial [and] admitted many of the acts alleged in the indictment, but asserted they were not criminal...." (Appellant Br. 44 n. 16). While many of the physical facts related to the fraud were therefore largely undisputed, the active destruction of computer records related to the fraud provided particularly potent evidence of Fumo's motive, knowledge and intent.

In light of these factors, and even assuming that the Government had the burden of persuasion, the District Court did not abuse its discretion when it found that Juror 2's exposure to extraneous information was unlikely to have led to substantial prejudice.[6]

Page 308

III.

Appeal of Fumo's sentence

" In sentencing a defendant, district courts follow a three-step process: At step one, the court calculates the applicable Guidelines range, which includes the application of any sentencing enhancements." *United States v. Wright*, 642 F.3d 148, 152 (3d Cir.2011) (citing *Tomko*, 562 F.3d at 567; *United States v. Shedrick*, 493 F.3d 292, 298 n. 5 (3d Cir.2007)). " At step two, the court considers any motions for departure and, if granted, states how the departure affects the Guidelines calculation." *Id.* (citing *Tomko*, 562 F.3d at 567). " At step three, the court considers the recommended Guidelines range together with the statutory factors listed in 18 U.S.C. § 3553(a) and determines the appropriate sentence, which may vary upward or downward from the range suggested by the Guidelines." *Id.* (citing *Tomko*, 562 F.3d at 567).

" Our review of a criminal sentence ... proceeds in two stages. First, we review for procedural error at any sentencing step, including, for example, failing to make a correct computation of the Guidelines range at step one, failing to rely on appropriate bases for departure at step two, or failing to give meaningful consideration to the §

3553(a) factors at step three." *Id.* (internal citations and quotations omitted). " If there is no procedural error, the second stage of our review is for substantive unreasonableness, and we will affirm the sentence unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided." *Id.* (quoting *Tomko,* 562 F.3d at 568) (internal quotation omitted). Here, the Government does not challenge the substantive reasonableness of either Fumo's or Arnao's sentence— it only alleges procedural error.

" The abuse-of-discretion standard applies to both our procedural and substantive reasonableness inquiries." *Tomko,* 562 F.3d at 567 (citing *Gall v. United States,* 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); *United States v. Wise,* 515 F.3d 207, 217-18 (3d Cir.2008)). " For example, an abuse of discretion has occurred if a district court based its decision on a clearly erroneous factual conclusion or an erroneous legal conclusion." *Id.* at 567-68 (citing *Wise,* 515 F.3d at 217).

Our dissenting colleague argues that the proper standard of review for the District Court's failure to arrive at a final guideline range is plain error because the Government did not object to this failure in its sentencing memoranda or at the sentencing hearing. (Dissenting Op. at 324-26). However, at the July 8 sentencing hearing the Government argued the merits of and objected to Fumo's proposed departures. It also made its position clear that the District Court must first " determine whether there are grounds for departure and, if so, how many levels up or down ... *thus reaching a final guideline range* " before " *then* ... apply[ing] all of

Page 309

the 3553(a) factors, one of which, of course, is the guideline range that [the Court calculated]." (J.A. 1558) (emphasis added).

In light of these arguments, and the District Court's failure to advise the parties that it would not separately calculate a final guideline range after the completion of step two, the Government could not have foreseen that the District Court would fail to determine the extent of the departure when it pronounced its sentence. As our colleague notes, " the Government could not have objected because the decision it claims on appeal to be error had not even been made." (Dissenting Op. at 326).

Under these circumstances, including the lack of an opportunity to object to the District Court's procedures prior to its pronouncement of sentence, we conclude that the Government's substantive objections to Fumo's departure requests as well as its recitation, to the Court, of the three-step sentencing process preserve its claim for appellate review. *SeeUnited States v. Sevilla,* 541 F.3d 226, 230-31 (3d Cir.2008) (defendant's failure to object " at close of sentencing" to the district court's neglect of sentencing procedures related to the § 3553(a) factors did not require plain error review because defendant raised the relevance of those factors in its sentencing memorandum and at the sentencing hearing, so that he was " not require[d] ... to *re* -raise them").

Further, even if we agreed with our colleague that the plain error standard of review applied, we would nevertheless find that the District Court's failure to calculate a final guidelines range— leaving us unable to review the procedural and substantive bases of the sentence— is an error that is plain, that affects the substantial rights of the parties, and that could " seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Vazquez-Lebron,* 582 F.3d 443, 446 (3d Cir.2009) (internal quotation omitted); *id.* at 446-47 (finding plain error where the District Court " did not accurately follow the second and third steps of the procedure set out in [*United States v. Gunter,* 462 F.3d 237, 247 (3d Cir.2006)]," and thus we could not " know the District Court's intention in sentencing [the defendant]").

A. Loss calculation

The parties dispute a number of the calculations that went into the District Court's determination of the loss attributable to Fumo's fraud. Ultimately, the District Court's decisions resulted in a loss calculation for Fumo which fell just short of $2.5 million, the threshold for increasing the offense level. " The appropriate standard of review of a district court's decision regarding the interpretation of the Sentencing Guidelines, including what constitutes ' loss,' is plenary. Factual findings, however, are simply reviewed for clear error." *United States v. Napier,* 273 F.3d 276, 278 (3d Cir.2001) (internal citation omitted).

1. The Pennsylvania State Senate

a. Overpayment of Senate employees

Fumo arranged to have a number of Senate employees under his control classified at higher salary grades than they were entitled to be based on their duties and qualifications. In order to calculate the losses attributable to this fraud, the Government reviewed the human resources manual to determine the proper classification for each employee based on testimony about the work they actually performed and then calculated the loss to the Senate as the difference between the highest salary each could possibly have been entitled to and the salary each actually received, for a total of approximately $1 million. At the sentencing hearing,

Fumo

Page 310

did not dispute the type of work the employees actually performed or the salaries that they actually received. Instead, he argued that the calculations were too speculative because the Chief Clerk of the Senate could not confirm them and because the Senate had failed to fire or reclassify these employees after the fact, implying that the original classifications were somehow justified. Agreeing with Fumo, the District Court excluded the Government's proposed loss altogether.

Of course, the Government bears the burden of establishing, by a preponderance of the evidence, the amount of loss. *United States v. Jimenez,* 513 F.3d 62, 86 (3d Cir.2008). However, although " the burden of persuasion remains with the Government, once the Government makes out a prima facie case of the loss amount, the burden of production shifts to the defendant to provide evidence that the Government's evidence is incomplete or inaccurate." *Id.* In making a loss calculation, " [t]he court need only make a reasonable estimate of the loss." *United States v. Ali,* 508 F.3d 136, 145 (3d Cir.2007) (quoting U.S.S.G. § 2B1.1, Application Note 3(C)).

Here, the Government made out a prima facie case of the loss amount, and in response Fumo made only the most minimal showing of " inaccuracy" in the Government's calculations. In fact, Fumo never really challenges the substance of the Government's calculations, instead relying on surrounding circumstances to cast speculative doubt on them. Yet it is not surprising that the Chief Clerk of the Senate, who had not reviewed in detail the evidence concerning each employee's duties, declined to take a position on the stand as to the accuracy of the Government's calculations. And the Senate's decision not to reclassify certain of the employees involved could have been prompted by any manner of reasoning or purposes. Although it is possible that the Government made errors in the course of its calculations, there is no reason to think that its figure was not a " reasonable estimate" of the loss, established by a preponderance of the evidence. Accordingly, after reviewing the District Court's grounds for rejecting the Government's prima facie showing of the loss amount, we are left with " the definite and firm conviction that a mistake has been committed." *United States v. Grier,* 475 F.3d 556, 570 (3d Cir.2007) (en banc) (internal quotation omitted). Further, because the difference in the loss would place Fumo into a higher offense level, the error was not harmless.

b. Rubin's " no-work" contract

The Government next objects to the District Court's decision to exclude from the loss calculation a $150,000, five-year contract awarded to Arnao's husband Rubin, for which he purportedly performed no services. At the July 8 sentencing hearing, Fumo informed the court that he had gathered additional evidence demonstrating that Rubin had, in fact, completed work under the contract. He submitted the evidence on July 13. The additional material consisted largely of credit card bills and calendar entries, documenting that Rubin had met with people, but not what those meetings had been about. The Government argued that the evidence submitted by Fumo was weak or irrelevant, and noted that Fumo's current theory that Rubin had worked directly with Fumo and met with people on his behalf contradicted Rubin's testimony at trial, that the contract was with Rubin's company, B & R Services, for court services. The District Court declined to rule on the issue of loss from Rubin's contract, stating that " because of the complexity of the Rubin loss argument in light of the defense submissions, I felt I could not properly resolve it before sentencing. Rather

Page 311

than postpone the sentencing, I declined to rule on it." (Sealed App. 184-85). This was an abuse of discretion.

The Federal Rules require a Court to rule on any disputed matters at sentencing unless " a ruling is unnecessary ... because the court will not consider the matter in sentencing." Fed.R.Crim.P. 32(i)(3)(B). Fumo argues that, because the court excluded the $150,000 from its loss calculation, it did not " consider the matter in sentencing," and thus its procedure was acceptable. Yet, if " not considering [a] matter" under Rule 32(i)(3)(B) can mean refusing to resolve a matter that is part of the non-discretionary calculation of the Guideline base offense level, then a district court could, for instance, exclude any and all losses, *simply because they are disputed,* and, consistent with 32(i)(3)(B), calculate a loss amount of $0. In fact, the District Court here effectively *did* resolve the dispute over the loss from Rubin's contract in favor of Fumo when it treated the loss as $0. It simply characterized its decision as " declin[ing] to rule on" the issue and thus requiring no reasoning on its part. A district court should not refuse to find or calculate a loss because of the complexity of the dispute or because spending the time to resolve the dispute might delay sentencing.

Fumo cites to *United States v. Cannistraro,* 871 F.2d 1210, 1215 (3d Cir.1989), for the proposition that the court may simply refuse to determine whether a loss occurred and therefore exclude a proposed loss from the calculation. However, in *Cannistraro,* although there was a dispute over the amount of the loss ($400,000 or $3.5 million), the district court was not engaged in the non-discretionary process of calculating a Guidelines offense level based on

the loss. Rather, because it was a pre-Guidelines case, *id.* at 1215 n. 4, the court was exercising its broad discretion in considering the gravity of the offense as a whole and then arriving at an overall sentence, *Cunningham v. California*, 549 U.S. 270, 300, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (noting the " pre-Guidelines federal sentencing system, under which well-established doctrine barred review of the exercise of sentencing discretion....") (internal quotation omitted). The District Court therefore stated that " [i]t's not necessary for me to make a decision this morning as to whether it was three and a half million or whether it was 400,000." *Cannistraro*, 871 F.2d at 1215. In this case, by contrast, in order to determine the appropriate offense level under the Guidelines, and to comply with the three-step sentencing process under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and its progeny, it was necessary to definitively resolve the issue of the loss amount from Rubin's contract.

Because the Government concedes that this issue must be reviewed under the plain error standard, it must show that the error was plain, that it affected substantial rights, and, if not rectified, that it would " seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Ward*, 626 F.3d 179, 183 (3d Cir.2010) (internal citation omitted). The failure to resolve the disputed loss here meets all three criteria. Under *Booker* and our three-step jurisprudence, the error is clear. Further, if the District Court had found that Rubin's contract was a loss of $150,000, it would have raised the offense level of the defendant, affecting the public's substantial rights. *SeeUnited States v. Dickerson*, 381 F.3d 251, 260 (3d Cir.2004) (district court's impermissibly lenient sentence could constitute " plain error" because " Congress's interest in imprisoning certain ... offenders is a ' right' to which the citizenry is entitled"). Finally, if courts may simply disregard disputed losses on the grounds that they are " not considering"

Page 312

them, the fairness of the proceedings may be called seriously into question. Accordingly, on remand the District Court should carefully consider the evidence and make a determination as to whether, and to what extent, Rubin's contract resulted in a loss to the Senate.

2. Citizens Alliance

a. Tools and equipment

The Government objects to the District Court's calculation of the losses resulting from tools and equipment purchased by Citizens Alliance but actually used by others, including Fumo.[7] The Government reviewed hundreds, perhaps thousands, of receipts and credit card statements in order to assemble a list of tools and equipment bought under the aegis of Citizens Alliance. It then compared this list against the inventory of Citizens Alliance and discussed with its employees whether it would ever have made any use of particular items. Finally, it assembled two charts identifying tools and equipment purchased by Citizens Alliance that it believed were used for the benefit of Fumo and his aides, though it conceded that the charts were approximate. Fumo, in testifying, reviewed the charts and denied having received roughly $50,000 worth of the approximately $130,000 in equipment on the charts. The District Court appears to have credited this assertion and reduced the loss by roughly that amount. In light of this credibility determination, we cannot say on this record that the District Court's factual finding was clearly erroneous. We therefore affirm the District Court's reduction in the loss amount attributable to the tools and equipment.[8]

b. The Tasker Street property

The Government sought to assess $574,000 worth of losses for rental income and unnecessary improvements to the property on Tasker Street, which Fumo induced Citizens Alliance to purchase and lavishly furnish, and then used as his Senate office with little payment from the Senate for rent or maintenance. The District Court, however, credited against that figure the fair market value of the property, which ultimately resulted in a significant credit to Fumo. The Government appeals that decision and its reasoning, and argues in the alternative that if Fumo is given credit for the fair market value of the building, the District Court should set against it the costs of acquiring, maintaining, and improving the building.

Application Note 3(E)(i) to Section 2B1.1 of the Guidelines provides that " [l]oss shall be reduced by ... [t]he money *returned*, and the fair market value of the property *returned* and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." (emphasis added). The use of the word " returned" signifies that for a credit to

Page 313

apply, the defendant must have either *returned* the very same money or property, or have provided services that were applied to the very same money, value, or property that was lost or taken during the fraud. *See alsoUnited States v. Radtke*, 415 F.3d 826, 842 (8th Cir.2005) (noting that fringe benefits paid to defrauded employees by the defendant were " not ... the sort of credit against loss contemplated by the guidelines" because they were " *other* benefits provided to employee-victims that do not correlate directly with the amounts withheld from the third-party administrator as part of the fraud." (emphasis in original)).

Here, the Government argues that the money or value taken was the maintenance and improvement costs as well as the rent that Fumo was not charged by Citizens Alliance as owner of the property. Fumo did not pay or refund any of the maintenance, improvements, or lost rent himself, which would have been " money returned" under Application Note 3(E). Nor did he render services related to these loses, such as assisting with the maintenance or improvements himself. The Government *did not* argue that the loss from the fraud included the funds spent by Citizens Alliance on purchasing the property. Thus, because neither that property itself nor its monetary value were ever alleged to have been taken as part of the fraud in the first place, they could not be " returned" to Citizens Alliance under Application Note 3(E) and credited against the losses.

To explain the error in the District Court's ruling in a less technical way, the maintenance, improvements, and rental income the Government identified as losses were conceptually independent and collateral to any value received because of the purchase of the building. They would have been costs even if Citizens Alliance had owned the building beforehand, or even if it had been a lessee rather than owner, who subleased the space to Fumo. Fumo essentially seeks to set the value of an independent " good" he purportedly secured for Citizens Alliance against the costs his frauds inflicted on it.[9] He offers no cases in support of this theory of loss calculation, which is unsurprising, as it would allow, for instance, an officer of a corporation who embezzled from his employer to claim credits against the loss caused by the embezzlement for overall increases in the company's assets under his watch. Accordingly, we conclude that the District Court's decision to credit the value of the Tasker Street property against the losses resulting from Citizen Alliance's lost rent, improvements, and maintenance costs was an abuse of discretion.

c. The *Gazela* painting

Fumo induced Citizens Alliance to commission a painting of the *Gazela*, a historic ship, from a local painter for $150,000. As the Government's investigation and media reports surfaced, Fumo directed Citizens Alliance to donate the painting to the ISM, rather than retain it in his office. The Government argues that this entire amount should count as loss, because the painting was otherwise unwanted and it and its prints are now in storage. The District Court credited the testimony of an appraiser as to the value of the painting and the prints and the Government does not appear to have offered a competing formal appraisal. Accordingly, the District

Page 314

Court's factual finding is entitled to significant deference, and we will not disturb it. [10]

B. Sentencing enhancements

The Government objects to the District Court's refusal to impose a 2-level enhancement on Fumo for acting on behalf of a charitable organization and a 2-level enhancement for use of sophisticated means. " We review a district court's application of sentencing enhancements for abuse of discretion." *United States v. Robinson*, 603 F.3d 230, 233 (3d Cir.2010).

1. Acting on behalf of a charitable organization

The Government argues that the District Court erred in failing to apply a 2-level enhancement for Fumo's misrepresentation that he was acting on behalf of Citizens Alliance, a charitable organization. The Sentencing Guidelines state: " If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency ... increase by 2 levels." U.S.S.G. § 2B1.1(b)(8)(A). The application notes make it clear that this guideline applies where an individual purports to be raising funds for a charity while intending to divert some or all the funds for another purpose.

Subsection (b)(8)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(8)(A) applies, for example, to the following:

....

(iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.

U.S.S.G. § 2B1.1, Application Note 7(B). The Government contends that Fumo's behavior fits squarely into this guideline because Fumo acquired funds from PECO for Citizens Alliance while intending to divert those funds for his own use. Fumo argued and the District Court agreed that the Government had not shown Fumo's intent to divert the funds at the time he obtained them from PECO. However, the Government points out that Fumo acquired a substantial portion— $10 million— of the PECO funds in 2002, well after he began using Citizens Alliance's funds for his own personal political benefits. Indeed, it strains all credulity to believe that Fumo repeatedly used Citizens Alliance funds

for personal and political purposes, then withdrew his intent to do so at the time he obtained the $10 million from PECO, then regained that intent shortly thereafter as he continued to use Citizens Alliance funds for his own benefit. This evidence of Fumo's intent to divert the funds was overwhelming, and the District Court's refusal to apply a 2-level enhancement was an abuse of discretion.

2. Use of sophisticated means

The Government next argues that the District Court erred in not applying

Page 315

a 2-level enhancement for the use of sophisticated means. The Sentencing Guidelines state: " If ... (C) the offense otherwise involved sophisticated means, increase by 2 levels." U.S.S.G. § 2B1.1(b)(9)(C). As the explanatory note 8(B) amplifies, " ' [s]ophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.... Conduct such as hiding assets or transactions, or both, through the use of *fictitious entities*, *corporate shells*, or offshore financial accounts also ordinarily indicates sophisticated means." U.S.S.G. § 2B1.1, Application Note 8(B) (emphasis added). " Application of the adjustment is proper when the conduct shows a greater level of planning or concealment than a typical fraud of its kind." *United States v. Landwer*, 640 F.3d 769, 771 (7th Cir.2011) (internal quotation omitted); *see alsoUnited States v. Frank*, 354 F.3d 910, 928 (8th Cir.2004) (enhancement appropriate where defendants " use[d] other individuals and businesses to conduct business on [a defendant's] behalf," as well as a " shell entity"); *United States v. Cianci*, 154 F.3d 106, 110 (3d Cir.1998) (finding " sophisticated means" enhancement appropriate where defendant's crime " involved the use of a shell corporation [and] falsified documents").

Here, the District Court rejected the Government's request for a sophisticated means enhancement for the " reasons substantially based upon defense arguments." (Sealed App. 184). Fumo had argued that the conduct here was not " *especially* complex or intricate, relative to other federal criminal fraud cases" under U.S.S.G. § 2B1.1(b)(9)(C). (J.A. 715) (emphasis in original). Yet Fumo induced Citizens Alliance to form for-profit subsidiaries in order to permit purchases on his behalf without the disclosures required for such entities. According to the evidence, these subsidiaries did no business of their own, and at least some of their directors were " recruited" by being asked to sign documents the significance of which they did not understand. These subsidiaries leased cars for Fumo and paid at least one political consultant for work on a campaign Fumo had a political interest in. In its memorandum and order denying Fumo's post-trial motion for acquittal, the District Court itself characterized the entities as:

nothing more than sham corporations designed to hide the activities of Citizens Alliance that were not in conformity with its status as a 501(c)(3) corporation, such as the purchase of the cars for the personal use of Fumo and his staff In a March 23, 2000 memorandum from Arnao to Fumo, Arnao revealed that the two were working in close conjunction to create these sham corporations, with false corporate addresses and purely titular officers.

(J.A. 507). The use of these sham entities, which were created to conceal the flow of funds to Fumo and his associates, strongly resembles the conduct described in Application Note 8(B) as well as conduct that this Court and others have found to fall within the sophisticated means guideline. Here too, we conclude that the District Court abused its discretion in refusing to apply the enhancement.

C. Calculation of the final guidelines range

The Government next argues that the District Court made a fundamental procedural error in the second step of the sentencing process when, after granting Fumo a departure based upon his extraordinary public works, it did not calculate a new, final guidelines range. As we have repeatedly made clear " [c]ourts *must* continue to calculate a defendant's Guidelines sentence precisely as they would have before *Booker* [;] [i]n doing so, they must formally rule on the motions of both parties

Page 316

and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation." *Gunter*, 462 F.3d at 247 (emphasis added) (internal quotations and citations omitted); *see alsoUnited States v. Lofink*, 564 F.3d 232, 238 (3d Cir.2009).

Fumo initially sought a departure based on his health and his " good works" (i.e., his public service). The District Court ultimately awarded him a significant reduction from the guidelines sentencing range of 121 to 151 months that it had calculated at step one. Whether this reduction was ultimately a departure under the Guidelines or a variance under § 3553(a) is itself a contested issue discussed in more detail below. However, at the time the sentence was announced in the courtroom, it appeared that it was a departure. At the July 14 final sentencing hearing, the Court stated: " I have considered what the guidelines have said here and I did make a finding as to what the guidelines are, but I've also added a finding that I'm going to depart from them." (J.A. 1623). Nevertheless, the District Court never actually stated what that departure was in terms of the guidelines range; a fact the parties noticed.

In his post-sentencing Rule 35(a) motion, seeking to have

the Court deem its sentence a variance instead of a departure, Fumo noted that " [w]hen a sentencing court grants a true ' departure' [as opposed to a variance,] it must state how the departure affects the Guidelines calculation. *This Court [ ] fail[ed] to make such a statement* ...." (J.A. 1629) (emphasis added) (internal quotation omitted). While opposing that motion, the Government noted that the court had initially established a " baseline" (i.e., before the resolution of the motion for a departure based on good works) offense level of 33— although later changed to 32— but carefully took no position on whether the court had ever announced a final guideline offense level.

In ruling on the Rule 35(a) motion, the Court held: " The government correctly states that the court announced it was granting a departure. Thereafter, the court never announced the guideline level to which it departed, and, in fact, never reached the sentence it did by consulting any specific level on the guideline chart." (J.A. 1653). Then, in an amendment to the judgment accompanying its ruling, the court stated, " I never announced nor have I ever determined to what guideline level I had departed." (Sealed App. 185-86).

Fumo attempts to argue that the Court adequately completed step two simply by sentencing Fumo to the sentence it did— i.e., that reducing Fumo's sentence by a certain number of months implies what the degree of the departure was. However, the only case that Fumo cites to for the proposition that announcing a departure in terms of months rather than in terms of offense levels and guidelines ranges is *United States v. Torres,* 251 F.3d 138 (3d Cir.2001), a pre- *Booker* case. Such an approach would make little sense under the post- *Booker* sentencing procedure described in *Gall.* Offense levels, cross-referenced with the criminal history of the defendant, now result in a *recommended* range of months incarceration, and the court must then exercise its discretion under § 3553(a) to determine where— whether inside or outside of that range— the sentence should fall. If after step one the court simply decides on a final sentence without separately completing the second (i.e., departures that change the Guidelines range) and third steps (i.e., variances that determine the final sentence), it becomes impossible for an appellate court to reconstruct its logic and reasoning, and therefore to review the sentence. As we note

Page 317

below, this is no idle worry and precisely what occurred here.

As a result, to the extent the District Court's sentencing reduction was a departure rather than a variance under § 3553(a), it erred by failing to calculate a final guideline offense level and guidelines sentencing range.

D. Articulation of the basis for the below-guidelines sentence related to public service

The Government argues that the District Court further erred by failing to clearly articulate whether it was granting Fumo a departure or a variance, and that this error requires remand. There are " two types of sentence that diverge from the original Guidelines range.... A traditional sentencing ' departure' diverges ... from the originally calculated range ' for reasons contemplated by the Guidelines themselves.' In contrast, a ' variance' diverges ... from the Guidelines, including any departures, based on an exercise of the court's discretion under § 3553(a)." *United States v. Floyd,* 499 F.3d 308, 311 (3d Cir.2007) (internal citations omitted). This distinction is more than mere formality. " Although a departure or a variance could, in the end, lead to the same outcome ... it is important for sentencing courts to distinguish between the two, as departures are subject to different requirements than variances." *Id.* " [D]istrict courts should be careful to articulate whether a sentence is a departure or a variance from an advisory Guidelines range." *United States v. Vampire Nation,* 451 F.3d 189, 198 (3d Cir.2006).

When a district court's sentencing decision " leaves us unable to determine whether the court intended to grant [a] ... departure or a variance," the court has not, as it must, " adequately explain[ed] the chosen sentence." *United States v. Brown,* 578 F.3d 221, 226 (3d Cir.2009) (internal quotation omitted). Under such circumstances, " we will remand for resentencing unless we conclude on the record as a whole ... that the error did not affect the district court's selection of the sentence imposed." *Id.* (internal quotation omitted). Therefore, the Government must establish first, that it is impossible to determine with confidence from the record whether the District Court granted a departure or a variance based on Fumo's good works; and second, that the error affected the District Court's selection of its sentence.

Before the July 8 hearing, Fumo moved for a departure based on both good works and ill health. In its July 9 ruling, the District Court denied the request for a departure based on ill health, but stated that " a decision on a departure based upon good works will be reserved until ... July 14, 2009." (J.A. 1566). At the July 14 hearing, the Court initially noted that " I did not deny with regards to the good works." (J.A. 1568). Later on in the hearing, the court announced, " You worked hard for the public ... and I'm therefore going to grant a departure from the guidelines." (J.A. 1622). Finally, the court stated, " I did make a finding as to what the guidelines are, but I've also added a finding that I'm going to depart from them." (J.A. 1623).

Shortly after the hearing, in response to Fumo's Rule 35(a) motion to " correct" the sentence to establish that the sentencing reduction was a variance rather than a departure,

the District Court issued an order stating that " [t]he government correctly states that the court announced it was granting a departure. Thereafter, the court never enunciated the guideline level to which it departed, and, in fact, never reached the sentence it did by consulting any specific level on the guideline chart." (J.A. 1653). The District Court then attached

Page 318

an amendment to the judgment, which included the following passage:

I next determined whether there should be a departure from the guidelines and announced at the sentencing hearing that there should be based on my finding extraordinary good works by the defendant. I did not announce what specific guideline level the offense fell into; that is to say, the precise number of levels by which I intended to depart because until I considered all other sentencing factors, I could not determine in precise months the extent that I would vary from the guidelines.

Having advised counsel of the offense level that I found and my intent to depart downward, I then proceeded to hear from counsel their respective analyses of what an appropriate sentence should be.

The procedure I followed was perhaps more akin to that associated with a variance than a downward departure because I never announced nor have I ever determined to what guideline level I had departed. Ultimately, the argument over which it was elevates form over substance.

(Sealed App. 185-86) (emphasis added). Without the amendment to the judgment, we might have been satisfied that the Court was departing rather than varying. However, the statement in that document that " [t]he procedure I followed was perhaps more akin to that associated with a variance than a downward departure" indicates that the District Court itself was not certain whether it was departing or varying.

This conclusion is reinforced by the District Court's earlier statement in the same filing that " I did not announce what specific guideline level the offense fell into; that is ... the precise number of levels by which I intended to depart because until I considered all other sentencing factors, I could not determine in precise months the extent that I would vary from the guidelines." (Sealed App. 186). This language uses " depart" and " vary" interchangeably and admits that the Court conflated and combined the second and third steps of the sentencing process. The District Court did not need to " consider ... all other sentencing factors" under § 3553(a) before departing to a different guideline level, nor was it appropriate to do so.

We have previously responded to the District Court's criticism that the distinction between departures and variances " elevates form over substance" by noting that " in the sentencing context, it is firmly established that form— *i.e.* procedure— and substance are both of high importance." *Wright,* 642 F.3d at 154. " We have a responsibility ' to ensure that a substantively reasonable sentence has been imposed *in a procedurally fair way.* ' " *Id.* (emphasis added) (quoting *United States v. Levinson,* 543 F.3d 190, 195 (3d Cir.2008)). Moreover, the difference here may be more than a mere formality, given the different scrutiny and standards of review we apply to departures as opposed to variances. In particular, our precedent places certain limitations on courts' abilities to depart based on good works in the case of public officials. *United States v. Serafini,* 233 F.3d 758, 773 (3d Cir.2000) (holding that " if a public servant performs civic and charitable work as part of his daily functions, these should not be considered in his sentencing because we expect such work from our public servants" but that " assistance, in time and money, to individuals and local organizations" that would not ordinarily be part of a defendant's work as a public servant may properly be considered). While we need not decide whether a departure based on good works could be applied here, it is undeniable that a district court has more discretion in imposing a variance, where the substance of the sentence

Page 319

is only subject to substantive reasonableness review.

Because of the substantial uncertainty regarding whether the District Court's reduction was a departure or variance, and because that distinction could very well have practical effects on Fumo's ultimate sentence, we cannot conclusively say based on the record as a whole that " the error did not affect the district court's selection of the sentence imposed." *Brown,* 578 F.3d at 226. Accordingly, on remand the District Court should take care to first address any departures, and if departures are granted, to then calculate a final guidelines range. Taking this final guidelines range as advisory, it should only then consider the sentencing factors included in 18 U.S.C. § 3553(a), decide whether to vary from the guidelines, and determine the appropriate sentence.

E. Consideration of the Government's arguments for an upward variance

After learning that the Court proposed to depart downwards, the Government moved for an upward variance, arguing that the proposed sentence did not adequately represent or take into account the full loss from the fraud, the damage to public institutions, Fumo's perjury at trial, other obstructive conduct, and Fumo's alleged lack

of remorse. The District Court did not vary upwards on any of these bases. At the hearing, the Government also raised the disparity between the sentence imposed on Fumo and other sentences imposed for fraud involving public and charitable funds, as well the disparity between Fumo's sentence and those imposed on his accomplices in the scheme.[11]

In setting forth how a court should respond to a party's request for a variance, the Supreme Court has held that " [t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). " [T]he court must acknowledge and respond to any properly presented sentencing argument which has colorable legal merit and a factual basis." *United States v. Ausburn*, 502 F.3d 313, 329 (3d Cir.2007). Nevertheless, we need not address this argument now, in light of the fact that some or many of the Government's arguments may become moot after the District Court recalculates the guideline range and rules on the parties' motions for departures. On remand, the District Court should consider any colorable arguments for a variance that have a basis in fact, whether made by Fumo or the Government.

F. Prejudgment interest on the order of restitution

Finally, Fumo also challenges one aspect of his sentence, raising two arguments for why prejudgment interest on the restitution awarded was an abuse of discretion.

First, although we previously affirmed an award of prejudgment interest on a restitution award in *Gov't of Virgin Islands v. Davis*, 43 F.3d 41, 47 (3d Cir.1994), Fumo argues that *Davis* has been overturned *sub silentio* by our decision in *United States v. Leahy*, 438 F.3d 328, 333-35 (3d Cir.2006) (en banc). In *Davis*, we

Page 320

noted that as a general matter, it is " well established that criminal penalties do not bear interest." 43 F.3d at 47 (internal citations omitted). However, we also held that the inclusion of prejudgment interest on restitution under the Victim and Witness Protection Act (" VWPA"), as amended by the Mandatory Victims Restitution Act (" MVRA"), 18 U.S.C. § 3663(b)(1), was proper because the " restitution ordered ... is compensatory rather than punitive" and the " [VWPA] [a]wards are designed to compensate victims for their losses, rather than to serve retributive or deterrent purposes." 43 F.3d at 47 (internal citation omitted). Given that the restitution ordered here was awarded under the VWPA, it would seem that prejudgment interest is appropriate under *Davis*.

Fumo argues that in *Leahy*, which determined whether *United States v. Booker* applied to orders of restitution, we concluded " that restitution ordered as part of a criminal sentence is criminal rather than civil in nature" and expressly agreed with three other circuits who we characterized as holding " that restitution, when ordered in connection with a criminal conviction, is a criminal penalty." 438 F.3d at 334-35. Thus, Fumo argues, because restitution is a " criminal penalty," under *Davis* 's own terms prejudgment interest should be unavailable. The underlying tension is that restitution, unlike a criminal fine on the one hand, or compensatory damages, on the other, serves *both* punitive purposes and compensatory ones. Indeed, in *Leahy* we framed our analysis by noting " that restitution combines features of both criminal and civil penalties, as it is, on the one hand, a restoration to the victim by defendant of ill-gotten gains, while it is, at the same time, an aspect of a criminal sentence." 438 F.3d at 333. The question then arises, which dictate should courts follow: that a criminal penalty should not bear interest, *Rodgers v. United States*, 332 U.S. 371, 374, 68 S.Ct. 5, 92 L.Ed. 3 (1947), or that a victim who has suffered actual money damages at the hands of a defendant should be fairly compensated for the loss, *id.* at 373, 68 S.Ct. 5, in situations where both principles are applicable.

In *Rodgers*, a cotton farmer produced and sold more cotton than his quota permitted under the Agricultural Adjustment Act of 1938, and the United States sued to recover " money ' penalties' " that the Act made the farmer subject to. *Id.* at 372, 68 S.Ct. 5. The District Court awarded interest on the approximately $7,000 from the dates the penalties became due to the date of judgment. The Sixth Circuit affirmed, and the Supreme Court reversed. The Supreme Court first affirmed the general rule that " the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest." *Id.* at 373, 68 S.Ct. 5. In this particular case, however, the Court analogized the penalties to criminal penalties, and noted:

[t]he contention is hardly supportable that the Federal Government suffers money damages or loss in the common law sense, to be compensated for by interest, when one convicted of a crime fails promptly to pay a money fine assessed against him. The underlying theory of that penalty is that it is a punishment or deterrent and not a revenue-raising device; unlike a tax, it does not rest on the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures.

Id. at 374, 68 S.Ct. 5. According to *Rodgers* then, it is the

absence of " money damages or loss ... to be compensated for" and the lack of authority for " revenue-

Page 321

raising" that makes prejudgment interest inapplicable to criminal penalties.

Yet in the context of restitution under the VWPA, there are money damages and losses to be compensated. Further, as courts have widely agreed, there is authority to seek " carefully estimated sum[s] of money", *id.*, for victims under the VWPA, as its " purpose ... is to ensure that wrongdoers, to the degree possible, make their victims whole." *United States v. Rochester*, 898 F.2d 971, 983 (5th Cir.1990) (quoting *United States v. Hughey*, 877 F.2d 1256, 1261 (5th Cir.1989) (collecting cases), *rev'd on other grounds*, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990)). And in order to make a victim whole, prejudgment interest may be necessary to " allow an injured party to recoup the time-value of his loss." *William A. Graham Co. v. Haughey*, 646 F.3d 138, 145 (3d Cir.2011). Other circuits have reached the same conclusion that we reached in *Davis*, finding that prejudgment interest is available on orders of restitution under the VWPA and MVRA. *SeeUnited States v. Qurashi*, 634 F.3d 699, 704 (2d Cir.2011); *United States v. Huff*, 609 F.3d 1240, 1247 n. 4 (11th Cir.2010); *United States v. Hoyle*, 33 F.3d 415, 420 (4th Cir.1994); *United States v. Patty*, 992 F.2d 1045, 1049-50 (10th Cir.1993); *United States v. Simpson*, 8 F.3d 546, 552 (7th Cir.1993); *United States v. Smith*, 944 F.2d 618, 626 (9th Cir.1991); *Rochester*, 898 F.2d at 982-83.

Moreover, in *Leahy*, our characterization of restitution as a criminal penalty came in the context of whether it was the type of award to which the Sixth Amendment right to a jury trial applied. For purposes of our Sixth Amendment analysis in *Leahy*, it was constitutionally irrelevant whether restitution under the VWPA *also* has an important, and indeed primary purpose of compensating victims. While *Leahy* shows that restitution under the VWPA has a punitive component that makes it a criminal penalty in the eyes of the Sixth Amendment, that does not modify our ruling in *Davis* that such restitution also serves an important compensatory purpose under the VWPA, which permits courts to award prejudgment interest in order to recoup the time-value of the victim's loss. Accordingly, we reaffirm our holding in *Davis* that prejudgment interest is available for orders of restitution under the VWPA and MVRA.

Fumo also argues that the Government, when it obtained prejudgment interest on the restitution after the date of sentencing, did not give the proper 10 days' notice that it would need more time to ascertain the amount of loss under 18 U.S.C. § 3664(d)(5). Section 3664(d)(5) reads:

If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing.

On its face this language does seem to suggest that the Government should provide prejudgment interest calculations before sentencing or give 10 days' notice that it will need more time to make and present such calculations. However, the Fourth Circuit, in *United States v. Johnson*, 400 F.3d 187, 199 (4th Cir.2005), noted that other circuits have concluded, based on the statute's purpose in protecting victims, that the 90-day " deadline" for determining the victim's losses does not bar a court from ordering restitution even after 90 days as long as there is no substantial prejudice to the defendant. This holding has since been affirmed by the Supreme Court.

Page 322

Dolan v. United States, __ U.S. __, 130 S.Ct. 2533, 2539, 177 L.Ed.2d 108 (2010) (a court's failure to meet the statute's 90-day deadline for restitution, " even through its own fault or that of the Government, does not deprive the court of the power to order restitution"). *Johnson* also held, in light of the treatment of the 90-day deadline, that the 10-day deadline for the Government to provide notice of the need to further ascertain the victim's loss was similarly no bar to the Court postponing or modifying restitution. 400 F.3d at 199. We agree with *Johnson* and see no reason to distinguish between the 10-day deadline at issue here and the 90-day deadline in the same provision that the Supreme Court in *Dolan* held creates a non-enforceable deadline for district courts. We will therefore affirm the order of restitution, including prejudgment interest.

IV.

Appeal of Arnao's sentence

A. Loss calculation

The Government argues that, as it did for Fumo, the District Court erred in calculating the loss that Arnao's fraud caused to Citizens Alliance.

Arnao joins in Fumo's arguments with respect to the Citizens Alliance fraud, which is the only portion of Fumo's fraudulent conduct in which she is implicated. The District Court's calculations of those losses and our review of them affect her sentence as well. Arnao agrees with Fumo's analysis of the Citizens Alliance loss, which calculated the loss at $1,077,943, rather than the $958,080 calculated by the District Court. In addition, as explained above, the District Court abused its discretion in crediting the value of

the Tasker Street property against the losses from maintenance, improvements, and foregone rent. The approximately $574,000 loss from that portion of the Citizens Alliance fraud is also attributable to Arnao. Because these revised calculations create a loss that is greater than $1 million, Arnao will receive an additional 2-level increase (thereby totaling 16 levels) in her base offense level under § 2B1.1(b)(1)(I). Accordingly, these errors were not harmless as to Arnao and her sentence must be vacated and remanded.[12]

B. Procedural reasonableness of the downward variance

Although we vacate and remand Arnao's sentence for consideration of the proper loss amount from the fraud, we also address the Government's argument that we should vacate Arnao's sentence because the District Court failed to adequately explain its reasons for granting Arnao a substantial downward variance from the advisory guideline range. With regard to whether a court's explanation of a sentence demonstrates that it meaningfully considered the § 3553(a) factors, we have stated that " [b]ecause of the fact-bound nature of each sentencing decision, there is no uniform threshold for determining whether a court has supplied sufficient explanation for its sentence." *United States v. Merced*, 603 F.3d 203, 215 (3d Cir.2010) (internal quotation omitted). For some cases, a brief statement will be sufficient, while for others a more extensive explanation of the court's reasoning may be needed. *Id.* However, the greater the magnitude

Page 323

of a court's variance, the greater the burden on the district court to describe its reasoning. *Id.* at 216.

Here, despite the Government's claims to the contrary, the District Court did consider the relevant statutory factors and the arguments presented to it at sentencing. For the most part, the Government's true concern with the sentence appears to be that the District Court did not agree with it on the substance. In its initial brief, for instance, the Government argues that the variance was erroneous because it relied primarily on Arnao's difficult childhood. This is a *substantive* criticism, not a procedural one. Later, in its reply brief, the Government admits that the District Court also considered Arnao's charitable good works, but contends that these good deeds cannot support a large variance. This, again, is a *substantive* criticism, not a procedural one. *See, e.g.,id.* at 217 (rejecting Government's argument, which was framed as procedural, that the district court did not adequately consider defendant's criminal history or the seriousness of the offense because it " is a substantive complaint, not a procedural one").

To the extent its argument is based on alleged procedural deficiencies, the Government appears to argue that the District Court had a duty to address every single permutation of its arguments, counter-arguments and replies. But we have never required such pinpoint precision in addressing statutory sentencing arguments, and have emphasized that review " is necessarily flexible." *Id.* at 215 (quoting *Ausburn*, 502 F.3d at 328). The Government cites three examples of sentences that we have overturned on grounds of procedural unreasonableness: *Id.* at 217-20, *United States v. Lychock*, 578 F.3d 214, 219 (3d Cir.2009), and *Levinson*, 543 F.3d at 199-200. However, each of these involved a sentencing court that varied from the Guidelines because of a policy disagreement under *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), but without sufficiently explaining the reasoning behind that policy disagreement.

In this case, it is true that there was some hint of the District Court's disagreement with the way the Guidelines treat corruption cases. Nevertheless, the District Court did not suggest that this was an actual basis for its variance. Rather, its decision to vary appears to have been based upon the considerations of the statutory § 3553(a) factors. In sum, we find that the District Court's explanation of the variance is sufficiently thorough to demonstrate that it fully considered the Government's arguments and the various statutory factors. It was also specific and reasoned enough to permit us to exercise meaningful appellate review. Accordingly, we find no abuse of discretion in the Court's downward variance.[13]

Page 324

V.

For the foregoing reasons, we affirm Fumo's conviction, vacate the sentences of both Fumo and Arnao, and remand for further proceedings not inconsistent with this opinion.

NYGAARD, J., concurring in part and dissenting in part.

I agree with the majority and join them in affirming Fumo and Arnao's convictions. I do, however, have two specific points of disagreement that cause me to dissent. First, the majority today vacates the sentencing decision of an experienced District Court judge because they claim, *inter alia,* he failed to recalculate the advisory Guidelines range after granting Fumo a downward departure. Without such a recalculation, the majority contends that it cannot reconstruct the District Court's logic and reasoning and, therefore, finds it impossible to review the sentence. Although I question whether such a recalculation is even necessary, my reading of the record reveals that the District Judge did indeed recalculate the advisory Guidelines range after granting the downward departure.[1] Second, I believe the majority employs an incorrect standard to review this

issue.

I.

A.

Quoting our opinion in *United States v. Tomko*, the majority states that " [t]he abuse-of-discretion standard applies to both our procedural and substantive reasonableness inquiries." 562 F.3d 558, 567 (3d Cir.2009) (en banc) (citing *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). That is a correct statement, as far as it goes. What the majority misses, however, is that " [o]ur standard of review differs based on whether the alleged sentencing error was raised below. If so, we review for abuse of discretion; if not, we review for plain error." *United States v. Russell*, 564 F.3d 200, 203 (3d Cir.2009); *see also*

Page 325

United States v. Vazquez-Lebron, 582 F.3d 443, 445 (3d Cir.2009) (holding that failure to raise procedural error before the district court resulted in plain error review); *United States v. Watson*, 482 F.3d 269, 274 (3d Cir.2007) (" [b]ecause [the defendant] did not object to this sentence on this ground during the sentencing hearing, we review the District Court's judgment for plain error."). Indeed, there was no question in *Tomko* that the appellant preserved its challenge to the issue under review: " [a]t the sentencing proceeding, the Government exhaustively asserted, directly in front of the District Court, that a probationary sentence would adversely affect general deterrence." 562 F.3d at 568.

Even though the majority acknowledges that the Government " carefully took no position on whether the court had even announced a final guideline offense level," it incorrectly defaults to the " abuse of discretion" standard of review. Maj. Op. at 315-16. Review for " plain error" is, instead, the appropriate standard of review because, despite ample opportunity to do so, the Government did not object to the District Court's failure to perform a post-departure sentencing recalculation.

Our authority to remedy an improperly preserved error is strictly circumscribed.[2]Federal Rule of Criminal Procedure 52(b), as well as recent Supreme Court precedent, sets forth the proper standard of review applicable to unpreserved procedural sentencing errors: when a party does not preserve an argument in the district court, we review only for plain error. Rule 52(b) provides that, in the absence of proper preservation, plain-error review applies. *See* FED.R.CRIM.P. 52(b). To establish plain error, the appealing party must show that an error (1) was made, (2) is plain (i.e., clear or obvious), and (3) affects substantial rights. *United States v. Lessner*, 498 F.3d 185, 192 (3d Cir.2007). Even if an appellant makes this three-part showing, an appellate court may exercise its discretion to correct the error only if it " seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

The Supreme Court has specifically held that appellate courts can review unpreserved claims for plain error only. *United States v. Olano*, 507 U.S. at 731, 113 S.Ct. 1770. The Supreme Court has recently again instructed that, " [i]f an error is not properly preserved, appellate-court authority to remedy the error ... is strictly circumscribed" to plain-error review. *Puckett v. United States*, 556 U.S. 129, __, 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266 (2009). Applying plain-error review in the sentencing context " serves worthy purposes," including " induc[ing] the timely raising of claims and objections" to give the District Court an opportunity to correct error, if error there be. *SeeId.* at 1428, 1433. Indeed, in *United States v. Booker*, the Supreme Court instructed that we are to " apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the ' plain-error' test" when reviewing sentences. 543 U.S. 220, 268, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

The Federal Rules expressly provide that " [a] party may preserve a claim of error by informing the court— *when the*

Page 326

court ruling or order is made or sought — of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." FED.R.CRIM.P. 51(b) (emphasis added). Furthermore, the " objection must be specific enough not only to put the judge on notice that there is in fact an objection, but to serve notice as to the underlying basis for the objection." *United States v. Russell*, 134 F.3d 171, 179 (3d Cir.1998). Here, the Government's sole request at the end of the sentencing hearing was for a formal determination on prejudgment interest as it affects restitution. J.A. 1625. Nor did the Government avail itself of the opportunity to challenge the District Court's sentencing calculations by filing a Rule 35(a) motion post-sentencing. It did file a response to Fumo's Rule 35(a) motion, but failed to raise the issue, despite acknowledging that such motions can be used to attack technical errors that might otherwise require remand. J.A. 1635-36. *SeeUnited States v. Miller*, 594 F.3d 172, 182 (3d Cir.2010). Neither of these actions preserved the Government's objections nor put the District Court on notice that the Government perceived a problem with its sentencing calculations post-departure.

The Government contends that it challenged the District

Court's failure to undertake a post-departure recalculation in its sentencing memoranda and at the sentencing hearing. Government's Opening Brief at 4. There is no such challenge in the record. Neither in its own sentencing memoranda nor in its response to Fumo's Rule 35(a) motion does the Government object to the failure to recalculate post-departure. The portion of the transcript the Government points to in its brief (J.A. 1558) is not an objection. Aside from the Government's criticism of our opinion in *Gunter*, *infra.*, this transcript portion is merely a discussion with the District Court regarding the application of departures or variances generally. I cannot find an objection to the District Court's departure or its perceived failure to recalculate a Guidelines range noted there. And, of course, the Government could not have objected because the decision it claims on appeal to be error had not even been made. It is obvious to me why the Government did not object: it thought then, as I think now, that the District Court did not err.[3]

I further note that the Government has argued for plain error review time after time in situations where a *defendant* fails to object to a procedural error. *See, e.g.,United States v. Reevey,* 631 F.3d 110, 112 n. 3 (3d Cir.2010); *United States v. Bradica,* No. 09-2420 (Government's Brief); *United States v. Bagdy,* No. 08-4680 (Government's Brief); *United States v. Swift,* No. 09-1985 (Government's Brief). The government knows the rules and cannot have it both ways, arguing for plain error review when the defendant fails to object and abuse of discretion when it slips up. Although I would employ plain error review, I will meet my majority colleagues where they stand and review this issue for an abuse of discretion.

Page 327

B.

The majority faults the District Court's application of step two of the *Gunter* analysis. Specifically, my colleagues fault the District Court for failing to announce a final Guidelines sentencing range after granting a departure and for failing to clearly articulate whether it was granting Fumo a departure or a variance. Maj. Op. at 316-17. I disagree with them on both points.

My reading of the record leaves me with no doubt as to the District Court's decision or its reasoning: Judge Buckwalter granted Fumo a departure under § 5H1.11 for his good works. Fumo specifically moved for a departure on two fronts: his ill health and his good works. The District Court specifically denied his request to depart for ill health, but granted him a departure for his good works: " You worked hard for the public ... and I'm therefore going to grant a departure from the Guidelines." J.A. 1622. Judge Buckwalter reaffirmed this ruling by commenting " I did make a finding as to what the Guidelines are, but I've also added a finding that I'm going to depart from them." J.A. 1623.

The District Court clarified its ruling even further after sentencing. Fumo filed a motion to clarify his sentence, given that Judge Buckwalter ruled on the departure request during a discussion of the § 3553(a) factors. In his motion, Fumo specifically asked the District Court whether it had intended to grant a variance rather than a departure. Interestingly, in reply, the Government argued that " the Court repeatedly stated that it decided to grant the departure motion based on public service." *Id.* at 1635. The Government argued:

But, it was Fumo himself who requested that the Court grant a downward departure on the basis of his public service. In his letter to the Probation Office stating objections to the presentence report, dated June 23, 2009, Fumo's counsel, while noting the possibility of both a departure and a variance, stated the following in a section entitled " Grounds for Departure" : " A downward departure for Mr. Fumo is appropriate because of Mr. Fumo's health issues and his public service, either standing alone or in combination." Letter at 15. *See alsoid.* at 16 (" Mr. Fumo's record is not merely ordinary, rather it is extraordinary. As such, § 5H1.11 it [sic] is a valid basis for a downward departure."). Next, at a hearing on July 8, 2009, regarding the guideline calculation, Fumo's counsel strenuously advanced this position. In response, on July 9, 2009, the Court issued an order which stated in part, " As it now stands, the offense level is 33. The court has already indicated that no departure will be granted based upon health, but a decision on a departure based upon good works will be reserved until time of sentencing on July 14, 2009. Then, at the sentencing hearing on July 14, 2009, the Court repeatedly stated that it decided to grant the departure motion based on public service. As the sentencing hearing for Ruth Arnao on July 21, 2009, the Court reiterated that it had given a departure to Fumo while stating that it would not similarly depart from Arnao's guideline range, but rather would grant a variance."

J.A. 1635. Although the Government had no trouble finding the District Court's intention to grant a downward departure crystal clear at sentencing, on appeal it disingenuously waffles on the issue and points to a statement that Judge Buckwalter added to his official " Statement of Reasons" for sentencing:

I next determined whether there should be a departure from the guidelines and announced at the sentencing hearing that there should be based on my finding

Page 328

extraordinary good works by the defendant. I did not announce what specific guideline level the offense fell into; that is to say, the precise number of levels by which I intended to depart because until I considered all other sentencing factors, I could not determine in precise months the extent that I would vary from the guidelines.

Having advised counsel of the offense level that I found and my intent to depart downward, I then proceeded to hear from counsel their respective analyses of what an appropriate sentence should be.

The procedure I followed was perhaps more akin to that associated with a variance than a downward departure because I never announced nor have I ever determined to what guideline level I had departed. Ultimately, the argument over which it was elevated form over substance.

App. at 185-86. My colleagues seize upon this statement, finding the District Court's use of the words " vary" and " depart" confusing. Indeed, the Majority admits that but for this word choice, they would have found Judge Buckwalter's intentions clear. Reviewing for abuse of discretion, I find none. The record is sufficiently clear for me to bend toward the District Court and defer to its reasoning.

I agree with Fumo here and think this statement clears up any possible ambiguity instead of creating one. Judge Buckwalter identifies the standard for granting a departure based on good works— extraordinary behavior and/or actions. *SeeUnited States v. Kulick*, 629 F.3d 165, 176 (3d Cir.2010). Furthermore, the judge's statement indicates that he granted a downward departure for good works, not a variance: " I next determined that there should be a departure from the guidelines ..." Indeed, the sentence the majority points to as generating all the confusion (" I did not announce what specific guideline level the offense fell into; that is to say, the precise number of levels by which I intended to *depart* because until I considered all other sentencing factors, I could not determine in precise months the extent that I would vary from the guidelines.") contains a concrete statement that the District Court was granting a departure. I read the use of the word " vary" in this particular phrase not hyper-technically or as a term of art, but rather in its everyday sense, meaning to alter or adjust. I am neither confused nor unable to ascertain whether a departure or a variance was granted here. It was a departure, clearly.

And, even were I in need of further clarification, I need turn no further than to Ruth Arnao's sentencing hearing. The record there firmly establishes that the District Court knew it was granting Fumo a departure. At Arnao's sentencing hearing, Judge Buckwalter specifically differentiated between the departure he gave Fumo and the variance he awarded Arnao: " So the fact that you, Ms. Arnao, at least did something in your lifetime to help other people, to help other charities, it's not enough for me to depart from the guidelines, but it's certainly enough for me to consider to vary in some way from what the guidelines suggest here." J.A. 1836.

Let us not split hairs. Judge Buckwalter granted Fumo a § 5H1.11 departure and I see no reason to vacate and remand Fumo's sentence because the District Court's intentions were unclear.

My colleagues also fault Judge Buckwalter for failing to conduct a post-departure recalculation of the advisory sentencing range. I have two points of disagreement with them here. First, to my mind, the requirement of a post-departure recalculation of the advisory sentencing range, post-departure, injects a superfluous layer of computation into an already unnecessarily

Page 329

hyper-technical process. Second, Judge Buckwalter did recalculate the sentencing range post-departure.

In *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir.2006), we established a relatively straightforward procedure for District Courts to follow in sentencing a criminal defendant post- *Booker*. First, district courts are to calculate a defendant's sentencing Guidelines range precisely as they would have pre- *Booker.Id.* Second, district courts were instructed to rule on any motions and state on the record whether they were granting a departure and, if so, how such a departure affects the initial Guidelines calculation. A district court should also take into account our pre- *Booker* case law, which continues to have advisory force. *Id.* Third and finally, district courts are required to exercise their discretion by considering the relevant 18 U.S.C. § 3553(a) factors in setting their sentences, regardless of whether it varies from the original calculation. *Id.*

Although *Gunter* requires a district court to calculate the Guidelines range, that range is only " a starting point and initial benchmark" of the sentencing analysis. *United States v. Grober*, 624 F.3d 592, 609 (3d Cir.2010) (citing *Gall v. United States*, 552 U.S. at 49, 128 S.Ct. 586 (" As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.")). I see no requirement that a district court, after concluding that a departure is warranted, recalculate and specify a new adjusted sentencing range. *Gunter* only requires that a district judge indicate how the departure " affects the Guidelines calculation." *Gunter*, 462 F.3d at 247. A statement indicating whether the departure would go above or below the previously determined sentencing range

would suffice.

The majority finds additional error in what they perceive as the District Court's failure to recalculate Fumo's advisory Guidelines range after announcing it would grant the former state senator a departure. I find no such error. Judge Buckwalter did recalculate the advisory range, albeit in terms of months rather than levels. The advisory Guidelines range was recalculated to be 121 to 151 months. He adopted this range, thereby satisfying step one of the *Gunter* analysis. At step two, he ruled on departure motions, announcing a downward departure to Fumo for his good works under § 5H1.11 and denying the Government's requested upward departure. Judge Buckwalter then reviewed the § 3553(a) factors and decided against any variances, satisfying step three. He then announced a sentence of fifty-five months, revealing a sixty-six month departure.

The recalculation the majority misses is easily found— a departure of sixty-six months from the 121 month bottom of the advisory Guidelines range left Fumo with a fifty-five month sentence. It was not procedurally unreasonable for the District Court to determine the extent of its departure in terms of months instead of levels. *SeeUnited States v. Torres,* 251 F.3d 138 (3d Cir.2001). My colleagues try to brush *Torres* aside as a " pre- *Booker* case." Maj. Op. at 316. This they cannot do. *Torres* retains vitality, post-*Booker,* as an advisory decision which we require district courts to consult. *SeeGunter,* 462 F.3d at 247 (noting that, at *Gunter* 's first and second step, our pre- *Booker* case law is still to be considered, given its advisory force.); *United States v. Floyd,* 499 F.3d 308, 312, n. 6 (3d Cir.2007) (citing *Torres* for the factors to be considered in a § 5K1.1 departure post- *Booker*); *see alsoVazquez-Lebron,* 582 F.3d at 445.

Further, requiring the District Court to recalculate a sentencing range based on its sixty-six month departure is unfair because

Page 330

the sentencing ranges would overlap. As Fumo pointed out, a sixty-six month departure would have put him into levels 23 and 24, leaving the District Court with a quandary: which level's sentencing range should it refer to under § 3553(a)(4)? Asking the sentencing judge to choose a level comes close to requiring him to conceptualize the departure in terms of levels, which, of course, he does not have to do. *SeeTorres,* 251 F.3d at 151.

Looking at this another way, I can easily find a recalculated sentencing range on this record. During the sentencing proceedings, the District Court granted Fumo's motion for a downward departure based on his good works and then chose, in the context of considering the required statutory factors, a sentence that adequately accounted for this finding— fifty-five months. In sentencing Fumo to fifty-five months, Judge Buckwalter implicitly announced a departure of eight levels, and then selected a corresponding range (51 to 63 months) at the § 3553(a) stage. *Id.* (" a departure measured in months is easily translated into offense levels."). I would not require more.

Judge Buckwalter complied with the requirements we have articulated for sentencing. He began by calculating an initial Guidelines range, a range which neither party argued he arrived at incorrectly. He then announced, at step two, that he would grant Fumo's motion for a departure, thereby indicating that his ultimate sentence would be below the advisory Guidelines range. At step three, he reviewed the § 3553(a) factors, determined he would not grant a variance, and announced a sentence of fifty-five months. The District Court touched all the procedural bases and consequently, did not err.

C.

Finally, even were I to agree with the majority and find procedural error in the District Court's failure to recalculate the advisory Guidelines range post-departure, I would still dissent from vacating the sentence. I see no evidence that the District Court would have arrived at another sentence had it engaged in the additional post-departure calculation now required by the majority. As I stated before, Judge Buckwalter presided over this trial for five months and knows more about Fumo than any of us. He granted Fumo a departure based on his good works and, in the context of full consideration of the § 3553(a) factors, chose a sentence that adequately accounted for his findings— fifty-five months imprisonment, a fine and restitution. This sentence would have been no different had the District Court announced its departure in terms of levels (8) and then selected a sentence from the corresponding range (51 to 63 months) at the § 3553(a) stage. This is exactly what Judge Buckwalter may do on re-sentencing to correct what the majority has perceived to be procedural error.[4]

I recognize that if we find procedural error at any step, we will generally " remand the case for re-sentencing, without going any further." *United States v. Merced,* 603 F.3d 203, 214 (3d Cir.2010). This approach, however, opens us up to serial appeals on procedural error issues before we reach our substantive reasonableness review. *United States v. Lychock,* 578 F.3d 214, 219-20 (3d Cir.2009) (finding procedural error yet proceeding to analyze substantive reasonableness). *See alsoUnited States v. Stewart,* 597 F.3d 514, 525 (2d Cir.2010) (Cabranes, J., dissenting sur denial of rehearing). Here,

Page 331

the record clearly demonstrates that the district court departed, why it departed, and the extent to which it departed.

II.

I join my colleagues, however, in affirming Fumo's and Arnao's convictions. As the majority opinion relates, Fumo argues that the District Court abused its discretion in not dismissing juror Eric Wuest as a consequence of Wuest's Internet postings during the trial and jury deliberations.[5] Fumo also charges the District Court with abusing its discretion by refusing to question the other jurors about their exposure to juror Wuest's postings. I agree with my colleagues and find no abuse of discretion. I write separately, however, to briefly highlight the challenges that the proliferation of social media presents to our system of justice.

" The theory of our system," wrote Justice Holmes, " is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907). Justice Holmes, of course, never encountered a juror who " tweets" during the trial. Courts can no longer ignore the impact of social media on the judicial system, the cornerstone of which is trial by jury. We have always understood that, although we operate from the presumption that a jury's verdict will be just and fair, jurors themselves can be influenced by a host of external influences that can call their impartiality into question. The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program. The days of simply instructing a jury to avoid reading the newspaper or watching television are over. Courts must be more aggressive in enforcing their admonitions.

The Internet, especially social networking sites like Facebook and Twitter, have created a society that is " connected" at all times. Facebook, created in 2004, is arguably the most popular social networking platform. Facebook allows people to communicate with their family, friends and co-workers and to share information through the digital mapping of people's real-world social connections. *See* Facebook, Factsheet, available at http:// www. facebook. com/ press/ info. php (last visited July 18, 2011). Currently, Facebook has over 500 million registered users, and these users spend over 700 billion minutes per month using the site. *Id.* The average user is connected to 80 community pages, groups or events. *Id.* Twitter was created in 2006 and is a real-time information network that lets people share and discuss what is happening at a particular moment in time. *See* Twitter, available at http:// twitter. com/ about (last visited July 18, 2011). Twitter has approximately 100 million users and differs from Facebook by allowing its users to send out a text message from their phones (up to 140 characters) to their followers in real time. *Id.* It is estimated that Twitter users send out over 50 million of these messages (or, Tweets) per day. *Id.* In other words, the effects and affects of electronic media are pervasive.

Jurors are not supposed to discuss the cases they hear outside the jury deliberation room. However, we know that jurors have used Twitter and Facebook to discuss their service. For example:

Page 332

* In an Arkansas state court, a defendant attempted to overturn a $12.6 million verdict because a juror used Twitter to send updates during the trial. One post stated " Oh, and nobody buy Stoam. It's bad mojo and they'll probably cease to exist now that their wallet is 12m lighter." [6]

* In Maryland, Baltimore Mayor Sheila Dixon sought a mistrial in her embezzlement trial because, while the trial was going on, five of the jurors became " Facebook friends" and chatted on the social networking site, despite the Judge's instructions not to communicate with each other outside of the jury room. Dixon's attorneys argued that these " Facebook friends" became a clique that altered the jury dynamic.[7]

* In the United Kingdom, a case was thrown out because a juror sitting on a criminal matter wrote on her Facebook page that she was uncertain of the defendant's guilt or innocence and created a poll for her friends to vote. [8]

The examples of this type of behavior are legion. Not only are jurors tweeting, but they have been conducting factual research online, looking up legal definitions, investigating likely prison sentences for a criminal defendant, visiting scenes of crimes via satellite images, blogging about their own experiences and sometimes even reaching out to parties and witnesses through " Facebook friend" requests. *See* David P. Goldstein, *TheAppearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589 (2011).

Of course, jurors doing independent research and/or improperly commenting on a case are not new phenomena. The Internet and social networking sites, however, have simply made it quicker and easier to engage more privately in juror misconduct, compromise the secrecy of their

deliberations, and abase the sanctity of the decision-making process. As we have seen in this case, jurors can use services like Facebook and Twitter to broadcast a virtual play-by-play of a jury's deliberations.

Technology, of course, will continue to evolve and courts must creatively develop ways to deal with these issues. In addition to the endorsement the majority opinion gives the recently proposed model jury instructions, I would encourage district courts to go further. We must first educate jurors that their extra-curial use of social media and, more generally, the Internet, damages the trial process and that their postings on social media sites could result in a mistrial, inflicting additional costs and burdens on the parties specifically, and the judicial system generally. I suggest that district courts specifically caution jurors against accessing the Internet to do research on any issues, concepts or evidence presented in the trial, or to

Page 333

post or seek comments on the case under review.

Indeed, I can envision a situation where a district judge might be called upon to sanction jurors for inappropriate Internet research or postings on social networking sites that threaten the integrity of the trial. Such sanctions are not unheard of: a juror was recently fined $250.00 and ordered to write a five-page essay on the Sixth Amendment by a Michigan judge for posting biased comments about the case on Facebook. Jameson Cook, VIDEO: *Dismissed Juror Ordered to Write Essay About Sixth Amendment*, Daily Tribune Review, September 2, 2010, available at http://www. dailytribune. com/ articles/ 2010/ 09/ 02/ news/ doc 4 c 806 a 7 b 7 e 451383425678. txt (last visited July 19, 2011). The threat of either fining jurors or holding them in contempt of court due to Internet misconduct may become necessary to deter it and convey a public message that the judicial system cannot tolerate such behavior. Finally, the Bar also bears some responsibility. During voir dire, attorneys should routinely question jurors on their Internet usage and social networking habits. A juror's Internet activities have the potential to result in prejudice against a defendant, and counsel must expand the voir dire questioning to include inquiries into online activity.

Facebook, Twitter, and other Internet communication sites are a boon to the law and the courts. Improperly used, however, they could do real harm. Problems with jurors' continued use of these sites and others during their service must be anticipated and deterred.

III.

In conclusion, I would affirm Fumo's and Arnao's convictions. I would also affirm the sentences imposed by the District Court.

Notes:

[1] In 1980, Fumo was convicted of taking part in a scheme to place local Democratic party workers on the state legislative payroll as " ghost employees." Fumo's conviction was later overturned because of a variance between the indictment and the proof offered at trial— a decision that we affirmed on appeal. *SeeUnited States v. Camiel*, 689 F.2d 31 (3d Cir.1982).

[2] A friend responded to the March 4 Facebook post by asking " of what?" Juror 1 responded: " Can't say till tomorrow! LOL." (J.A. 592 n. 30).

[3] A friend responded to the March 8 Facebook post by asking " Why?" Juror 1 responded: " think of the last 5 months dear." (J.A. 592).

[4] The District Court had jurisdiction over this matter under 18 U.S.C. § 3221, and we have jurisdiction pursuant to 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291.

[5] Fumo also highlights the extensive media coverage that was focused on Fumo's trial in the Philadelphia media market. He suggests that the District Court did not adequately recognize or address this media attention, and too infrequently instructed the jury to avoid media coverage of the case. Yet Fumo concedes that the District Court gave such instructions on six different occasions throughout the trial, including at the beginning of *voir dire* on September 8, 2008. The District Court was well within its discretion in how it chose to instruct the jury about media exposure.

[6] Fumo's alternative argument that any exposure to potentially prejudicial extraneous information constitutes a " structural error" in the trial that requires automatic reversal is entirely unsupported and unpersuasive. The cases Fumo cites for this proposition concern a court that presented an erroneous definition of " beyond a reasonable doubt" to the jury, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), and a judge who both presided over a grand jury hearing and then subsequently presided over and found guilty of criminal contempt a witness who had testified at the grand jury hearing. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). While both concerned the right to a fair trial, they addressed very different aspects of that right, where prejudice is presumed and cannot be rebutted.

Similarly, Fumo's argument that the extraneous information violated his right to counsel and his right to confront witnesses against him also fails, as both challenges, like his challenge to the impartiality of the jury,

require that there be prejudice. *United States v. De Peri*, 778 F.2d 963, 976 (3d Cir.1985).

[7] Fumo concedes that there were some " minor" arithmetical errors in calculating the loss to Citizens Alliance, which would pin the loss at $1,077,943, rather than the $958,080 calculated by the District Court. He contends, however, that these errors were insufficient to affect his offense level. They are, however, sufficient to affect Arnao's offense level. *See* Section IV.A., *infra.*

[8] Judge Garth disagrees that the District Court did not err. He would hold that the evidence introduced by the Government, and the exhibits that were put in evidence by the Government, detailing the cost of tools that were purchased and were used by Fumo for personal purposes ($93,409.52) should have been added to the loss calculation in full. The District Court's ruling in this regard eliminated the findings made by the jury beyond a reasonable doubt and significantly the court did not issue its own factual findings until after the sentencing hearings were over. In so doing, the Government was not able to argue that the Court's findings were clearly erroneous.

[9] Further, even if it were appropriate to grant a credit for the fair market value of the building, it would be necessary to set off the costs associated with the purchase and maintenance of the building. Obviously, any gain experienced by Citizens Alliance due to the value of the building can only be calculated after subtracting what it paid to acquire the building in the first place.

[10] Judge Garth disagrees that the District Court did not err. He would hold that the cost of the *Gazela* painting ($150,000), and the prints should be included in the loss calculation.

[11] In particular, John Carter, the former President of the ISM, was sentenced to a term of 15 years' imprisonment. Computer technician Leonard Luchko, who was only involved with the obstruction of justice portion of the case, received a sentence of 30 months' imprisonment. Computer technician Mark Eister, who cooperated with the Government, received a 5K1.1 departure and was sentenced to probation.

[12] Arnao also joins in Fumo's arguments opposing the Government's contention that the District Court erred in failing to apply a 2-level sophisticated means enhancement with regard to the Citizens Alliance fraud. Because we find that the District Court abused its discretion in ruling that the Citizens Alliance fraud did not involve the use of sophisticated means, the same finding of abuse of discretion applies in Arnao's sentence. Accordingly, the 2B1.1(b)(9)(C) additional enhancement of 2 levels applies in the Guideline calculation for Arnao as well as Fumo.

[13] Judge Garth disagrees with this conclusion and would hold that the District Court abused its discretion in granting the large downward variance it granted to Arnao. A " major variance from the Guidelines requires a more significant justification than a minor one." *United States v. Grober*, 624 F.3d 592, 599 (3d Cir.2010). In this case, the District Court imposed a sentence of only 12 months and one day, based on a calculated guideline range of 70-87 months. Other than its conclusory statement that Arnao's challenges were " unusual from the usual challenge" and its nod to the fact that she " did something in [her] lifetime to help other people, to help other charities," the District Court provided little explanation for the sizeable downward variance it granted.

The District Court additionally failed to address, much less give meaningful consideration to, several of the Government's arguments— for example regarding Arnao's egregious obstruction efforts and the reputational harm to Citizens Alliance. Finally, the District Court provided an inadequate explanation in regards to considering unwarranted disparities under § 3553(a)(6). " [A] district court's failure to analyze § 3553(a)(6) may constitute reversible procedural error, even where ... the court engages in thorough and thoughtful analysis of several other sentencing factors." *Merced*, 603 F.3d at 224.

A sentence may be procedurally improper where it is " imposed without considering the risk of creating unwarranted disparities and the sentence in fact creates such a risk," especially where, as here, " the sentence falls outside of the Guidelines, or where ... a party specifically raises a concern about disparities with the district court and that argument is ignored." *Id.* The District Court in this case largely ignored the Government's disparity arguments, and instead concluded, without explanation, that the guideline sentence would " result in a tremendous disparity."

Under these circumstances, Judge Garth would hold that the District Court failed to meet its burden of providing a sufficient explanation for Arnao's variance. *Seeid.*, 603 F.3d at 216. Therefore, the variance ordered by the District Court was an abuse of discretion.

[1] My dissenting opinion will be confined to my disagreement with their finding of procedural error as to the District Court's departure ruling and Guidelines calculation. I also dissent from those portions of the majority opinion that find the District Court's classification of loss to be an abuse of discretion. I further disagree with the majority and cannot find the District Court's refusal to apply sentencing enhancements for acting on behalf of a charity (U.S.S.G. § 2B1.1(b)(8)(A)) and for the use of sophisticated means (U.S.S.G. § 2B1.1(b)(9)(C)) to be an abuse of discretion.

Because I dissent from the majority's resolution of the loss calculation issues, I dissent from that portion of the majority opinion that vacates Arnao's sentence as well. I join Judge Fuentes, however, in finding no abuse of discretion in the District Court's loss calculations concerning the tools and equipment purchased by Citizen's Alliance (Maj. Op. at 311) and the painting of the sailing vessel, *Gazela* (Maj. Op. at 312-13). Finally, I join Judge Fuentes, and find no abuse of discretion with the District Court's grant of variances to Arnao.

[2] As the Supreme Court has noted, there is good reason our review is circumscribed: " anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error could be fatal." *Puckett v. United States*, 556 U.S. 129, __, 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266 (2009) (quoting *United States v. Padilla*, 415 F.3d 211, 224 (1st Cir.2005) (en banc) (Boudin, C.J., concurring)).

[3] The majority's reliance on our decision in *United States v. Sevilla*, 541 F.3d 226 (3d Cir.2008) provides them no cover. In *Sevilla*, we stated that " ' [a]n objection to the reasonableness of the final sentence will be preserved if, during sentencing proceedings, the defendant properly raised a meritorious factual or legal issue relating to one or more of the factors enumerated in 18 U.S.C. § 3553(a).' " *Id.* at 231 (quoting *United States v. Grier*, 475 F.3d 556, 571 n. 11 (3d Cir.2007) (en banc)). But *Sevilla* is readily distinguishable on its facts. In *Sevilla*, the defendant-appellant had raised his legally recognized grounds for downward variance in a written sentencing memorandum prior to the sentencing hearing. 541 F.3d at 231. The Government here never raised the issue of the lack of a post-departure recalculation before sentencing or afterward.

[4] Indeed, why put the District Court through a complete re-sentencing? If the majority finds the record confusing, why not, instead of vacating the judgment of sentence, simply remand for clarification?

[5] An audio recording of the in-chambers examination of Juror Wuest by the District Court and counsel is online and available for listening. See http:// www. philly. com/ inquirer/ special/ 4133127. html and http:// www. philly. com/ inquirer/ special/ 41331457. html.

[6] *See* Renee Loth, Mistrial by Google, Boston Globe, Nov. 6, 2009, at A15, available at http:// www. boston. com/ bostonglobe/ editorial_ opinion/ oped/ articles/ 2009/ 11/ 06/ mistrial_ by_ google/ (moving for a mistrial and reversal of a $12 million judgment based on a juror's Twitter posting stating: " oh, and nobody buy Stoam. Its [sic] bad mojo and they'll probably cease to Exist [sic], now that their wallet is 12m lighter.") (last visited August 1, 2011).

[7] Brendan Kearny, Despite Jurors Warning, Dixon Jurors Went on Facebook (2009), available at http:// mddailyrecord. com/ 2009/ 12/ 02/ despite- judge S‰ rs- warning- dixon- jurors- went- on- facebook/ (last visited August 1, 2011).

[8] Urmee Khan, Juror Dismissed From a Trial After Using Facebook to Help Make a Decision, Telegraph.co.uk, Nov. 24, 2008, http:// www. telegraph. co. uk/ news/ newstopics/ lawreports/ 3510926/ Juror- dismissed- from- a- trial- after- using- Facebook- to- help- make- a- decision. html (last visited August 1, 2011).

Citing References :

385 S.W.3d 238 (Ark. 2011), CR 11-5, Dimas-Martinez v. State

Supreme Court of Arkansas12/08/2011 385 S.W.3d 238 2011 Ark. 515

425 P.3d 1132 (Colo.App.Div. 4 2014), 10CA1476, People v. Jacobson

---

Court of Appeals of Colorado, Fourth Division11/06/2014 425 P.3d 1132 2014 COA 149

755 F.3d 125 (2nd Cir. 2014), 12-240-cr, United States v. Ganias

---

United States Court of Appeals, Second Circuit06/17/2014 755 F.3d 125

325 F.Supp.3d 321 (S.D.N.Y. 2018), 14-cv-02302 (CRK), Lewis v. American Sugar Refining, Inc.

United States District Court, S.D. New York08/17/2018 325 F.Supp.3d 321

378 F.Supp.3d 169 (E.D.N.Y. 2019), 11-cr-424(ENV), Rosemond v. United States

---

United States District Court, E.D. New York05/05/2019 378 F.Supp.3d 169

69 F.Supp.3d 374 (S.D.N.Y. 2014), 12-CR-934 (RA), United States v. Liu

---

United States District Court, S.D. New York11/14/2014 69 F.Supp.3d 374

726 F.3d 496 (3rd Cir. 2013), 12-3462, United States v. Clark

---

United States Court of Appeals, Third Circuit08/13/2013 726 F.3d 496

734 F.3d 180 (3rd Cir. 2013), 12-2012, United States v. Stinson

---

United States Court of Appeals, Third Circuit08/21/2013 734 F.3d 180

792 F.3d 310 (3rd Cir. 2015), 13-3023, United States v. Fountain

---

United States Court of Appeals, Third Circuit07/10/2015 792 F.3d 310

803 F.3d 167 (3rd Cir. 2015), 14-3184, United States v. Nagle

---

United States Court of Appeals, Third Circuit09/30/2015 803 F.3d 167

839 F.3d 308 (3rd Cir. 2016), 15-2939, United States v. Free

United States Court of Appeals, Third Circuit10/06/2016 839 F.3d 308

871 F.3d 261 (3rd Cir. 2017), 16-1224, United States v. Poulson

---

United States Court of Appeals, Third Circuit09/14/2017 871 F.3d 261

904 F.3d 324 (3rd Cir. 2018), 17-3448, United States v. Rivera-Cruz

---

United States Court of Appeals, Third Circuit09/24/2018 904 F.3d 324

905 F.3d 258 (3rd Cir. 2018), 14-2042, United States v. Noel

United States Court of Appeals, Third Circuit09/26/2018 905 F.3d 258

909 F.3d 550 (3rd Cir. 2018), 17-1817, United States v. Baroni

---

United States Court of Appeals, Third Circuit11/27/2018 909 F.3d 550

454 Fed.Appx. 61 (3rd Cir. 2011), 10-3467, United States v. Velez

---

United States Court of Appeals, Third Circuit12/13/2011 454 Fed.Appx. 61

455 Fed.Appx. 184 (3rd Cir. 2011), 10-3287, United States v. Afolabi

---

United States Court of Appeals, Third Circuit12/16/2011 455 Fed.Appx. 184

459 Fed.Appx. 180 (3rd Cir. 2012), 10-4655, United States v. Skinner

---

United States Court of Appeals, Third Circuit01/26/2012 459 Fed.Appx. 180

465 Fed.Appx. 110 (3rd Cir. 2012), 08-1658, United States v. Norman

---

United States Court of Appeals, Third Circuit03/07/2012 465 Fed.Appx. 110

468 Fed.Appx. 133 (3rd Cir. 2012), 10-4703, United States v. Hill

---

United States Court of Appeals, Third Circuit04/27/2012 468 Fed.Appx. 133

No negative treatment in subsequent cases

UNITED STATES OF AMERICA

v.

STAVROS M. GANIAS

Crim. No. 3:08CR224(EBB)

United States District Court, D. Connecticut.

October 5, 2011

RULING ON MOTIONS FOR NEW TRIAL & FOR RECONSIDERATION

ELLEN BREE BURNS, Senior District Judge.

The defendant, Stavros Ganias ("Ganias"), was convicted after a three-week jury trial of two counts of tax evasion in violation of 26 U.S.C. § 7201. On the eve of sentencing, Ganias filed the instant motion for a new trial and for an evidentiary hearing based on alleged juror improprieties, specifically (1) comments a juror ("Juror X") posted on his Facebook account that indicated possible bias and a predisposition to find guilt and (2) improper communications between Juror X and another juror ("Juror Y") during the trial. According to Ganias, such bias and misconduct violated his right to a fair trial in contravention of the Sixth Amendment and warrants a new trial pursuant to Fed. R. Crim. P. 33(a).

The Court permitted Ganias to conduct a limited interview of Juror X to determine if there was any evidence of bias or misconduct, but terminated the inquiry when it became clear that no prejudicial impropriety existed. Ganias then filed a motion asking the Court to reconsider its decision to terminate the inquiry and its denial of his request for subpoenas and an additional interview to enable him to obtain proof to support his claims.

For the following reasons, the Court concludes that Ganias has failed to satisfy the stringent requirements for the relief he seeks and accordingly DENIES both his motion for a new trial [doc. #260] and motion for reconsideration [doc. # 271].

STANDARD

"The sanctity of the jury room is among the basic tenets of our system of justice." *Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc. 836 F.2d 113*, 114 (2d Cir. 1987). Thus, post-verdict inquiries into the jury-deliberation process are greatly disfavored because they could undermine "full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *United States v. Stewart*, 433 F.3d 273, 302 (2d Cir. 2006). Accordingly, a defendant who seeks a new trial on grounds of juror misconduct or undisclosed bias faces a very high hurdle. *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989). Such an investigation is justified only when reasonable grounds exist - *i.e.*, there must be clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial. *Id.*; *United States v. Sun Myung Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) ("Courts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.").

An essential element of a defendant's right to a fair trial is an impartial jury. To ensure the selection of an impartial jury, the court and the parties engage in the *voir dire* process and ask questions of potential jurors which are designed to expose any possible known or unknown biases that they might harbor. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (noting that truthful answers by prospective jurors during *voir dire* is obviously necessary if this process is to serve its purpose). Thus, to warrant a new trial based on undisclosed bias that may have affected a juror's fairness and impartiality, a defendant must first demonstrate that a juror failed to honestly answer a material question and then show that a correct response would have provided a valid basis to assert a for-cause challenge. *Id.* at 556. This analysis, known as the McDonough test, requires a court to first find that a juror answered a question dishonestly, as opposed to merely failing in good faith to respond to a question, and then determine if it would have granted a challenge for cause based on a truthful answer. *Greer v. United States*, 285 F.3d 158, 171 (2d Cir. 2002) (noting that bias is generally a ground to grant a challenge for cause). Only if a defendant satisfies both prongs of the McDonough test - by showing: (1) a juror deliberately omitted or misstated facts during *voir dire* and (2) the juror's nondisclosure concealed some bias or partiality that would have sustained a for-cause challenge - will he be granted a new trial. *United States v. Stewart*, 317 F.Supp.2d 432, 437 (S.D.N.Y. 2004).

In addition, juror misconduct in the form of premature deliberations or intra-jury communications may violate a defendant's Sixth Amendment right to a fair and impartial jury. *United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003) ("Where the district court instructs a jury to refrain from premature deliberations... and the jury nonetheless discusses the case before the close of trial, that premature deliberation may constitute juror misconduct."). Where, as here, an allegation of misconduct involves intra-jury

communications, the probability of some adverse effect on the verdict is far less than where there are extra-jury or extraneous influences or communications. *United States v. Sabhnani*, 529 F.Supp.2d 384 (E.D.N.Y. 2008), aff'd 599 F.3d 215 (2d Cir. 2010); cert. denied 131 S.Ct. 1000 (2011). If this type of juror misconduct is established, a new trial or other remedial measure is required only if it results in actual prejudice to the defendant. *United States v. Abrams*, 137 F.3d 704, 709 (2d Cir. 1998).

A trial judge has broad flexibility in responding to allegations of juror impropriety. United States v. Sabhani, 599 F.3d at 250. If a court determines that reasonable grounds exist to justify a post-verdict investigation to give the defendant an opportunity to prove actual bias or misconduct, the inquiry must be carefully tailored so that it does not violate the provisions of Fed.R.Evid. 606(b) and should be terminated whenever it becomes apparent that there are no reasonable grounds to suspect that a prejudicial impropriety exists. *United States v. Stewart*, 433 F.3d at 302.

BACKGROUND

After the jury returned a guilty verdict and just before sentencing, Ganias moved for an evidentiary hearing and a new trial on the grounds that he had discovered information showing that one of the jurors was predisposed to find him guilty. More specifically, Ganias asserted that the day after Juror X was selected to serve on the jury, but before the start of evidence, he posted the following comment on his Facebook wall: "Jury duty 2morrow. I may get 2 hang someone... can't wait..." In addition, Juror X posted these other comments on his Facebook page during the course of the trial: "Jury duty sucks;" "Guinness for lunch break. Jury duty ok today;" "Your honor, i [sic] object! This is way too boring.... Somebody get me outta here;" and on the day of the verdict he posted "Guilty :)... I spent the whole month of March in court. I do believe justice prevailed! It was no cake walk getting to the end. I am glad it is over and I have a new experience under my belt!" According to Ganias, these postings and the comments a few of Juror X's Facebook friends posted in response constitute improper extraneous third-party contact about the case during the trial.

Ganias further asserts that Juror X and Juror Y became Faceboook friends a few days after the start of trial and, although he has no evidence of any specific misconduct, claims that they had improper intra-jury discussions and premature deliberations about the case and that their friendship posed a high risk that "poisoned the deliberations" of the jury.

Based on the nature of Juror X's Facebook comments, the Court concluded there were reasonable grounds to interview Juror X. On August 30, 2011 Juror X appeared before the Court in chambers and was questioned by Ganias's counsel and the government to determine whether his Facebook postings reflected any bias or predisposition that he did not reveal or disclose during *voir dire.*

In response to Ganias's initial question about his Facebook account, Juror X stated that he "had a Facebook account but recently got rid of it because it was taking too much time for nothing." Later on in the interview he admitted that he closed his Facebook account because he had many female Facebook friends from the bar where he worked and that "bugged" his wife and he didn't want to have her upset. Juror X also acknowledged that he posted the comment about possibly getting to "hang someone," but explained it "was a joke," he was "just joking, joking around" and that it "did not reflect his mindset was [sic] at that time" and asserted that his "mind was not made up until the end." According to Juror X, he "absolutely was an impartial and fair juror."

Juror X further admitted that he became a Facebook friend of Juror Y during the trial. He did so, he said, because he wanted to play golf with her fiance. He said he had no conversations or discussions with Juror Y or any other jurors about the subject matter of the case during the course of the trial either inside or outside the jury room. He noted that all of the jurors became friendly during the trial and even had a reunion picnic after the verdict.

After both parties concluded their questioning of Juror X, the Court concluded that the interview had not produced any reasonable ground, let alone any strong, clear or incontrovertible evidence, to support Ganias's allegations of bias or misconduct and ended the inquiry. The Court also denied Ganias's request to go further and allow him to subpoena Juror X's Facebook records and to interview Juror Y about her discussions and communications with Juror X.

DISCUSSION

In this case, despite giving Ganias an opportunity to interview Juror X to obtain evidence to support his claims of juror bias and misconduct, he has not established the existence of reasonable grounds that warrant a further inquiry or a new trial. The post-verdict examination of Juror X was an appropriate and adequate response to Ganias's initial claims of juror bias and misconduct. The inquiry was broad enough to lead the Court to conclude that Ganias's claims of juror impropriety were purely speculative and unsubstantiated and that a more extensive inquiry along the lines Ganias requested could rise to the level of juror harassment.

Juror X's answers to counsels' questions were unequivocal. With regard to his alleged bias, Juror X testified that he had

not predetermined guilt, did not harbor any pro-government bias and kept an open mind throughout the trial. He adequately and credibly explained that he was just "joking around" with friends when he made the Facebook comment about possibly getting a chance to hang someone. The questioning failed to uncover any evidence whatsoever that Juror X did not honestly answer a material question during *voir dire*. Not only does the Court find that Juror X was credible and his testimony truthful, his answers are presumptively honest. *United States v. Cox*, 324 F.3d at 86 (noting that there is a general presumption that jurors remain true to their oath and conscientiously observe the trial court's instructions); *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997). Ganias has not offered anything that would cause the Court to question its credibility determination or to rebut the presumption that Juror X remained true to his oath and conscientiously observed the Court's instructions. In the absence of any evidence that Juror X did not honestly answer a material question during *voir dire*, the inquiry into undisclosed bias under McDonough can go no further. Based on the entire record before the Court, there are no grounds to doubt Juror X's fairness and impartiality.

Similarly, Ganias has failed to substantiate his allegations of improper intra-jury communications and premature deliberations. Juror X testified credibly and without hesitation that he had no improper communications about the case with Juror Y or any other jurors and that he did not engage in premature deliberations. Ganias has not come forward with any new ground or evidence to warrant further inquiry in this regard. *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (noting that the Second Circuit "has consistently refused to allow a defendant to investigate jurors merely to conduct a fishing expedition.").

Simply put, the Court is satisfied that Juror X kept an open mind throughout the trial and participated in deliberations in good faith. Ganias has failed to demonstrated any juror bias or misconduct, let alone any prejudice. In the absence of any clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative prejudicial impropriety existed, neither an expanded inquiry nor a new trial is warranted.

CONCLUSION

For the foregoing reasons, Ganias's motions for a new trial [doc. #260] and for reconsideration [doc. #271] are DENIED.

A sentencing date will be set forthwith and a calendar will issue.

SO ORDERED.

Page 442

866 F.Supp.2d 442 (E.D.Pa. 2011)

UNITED STATES of America, Plaintiff,

v.

JUROR NUMBER ONE, Defendant.

Criminal Action No. 10-703.

United States District Court, E.D. Pennsylvania.

December 21, 2011

Page 443

Virgil B. Walker, United States Attorney's Office, Philadelphia, PA, for Plaintiff.

MEMORANDUM

EDUARDO C. ROBRENO, District Judge.

I. INTRODUCTION

The issue before the Court involves juror misconduct by unauthorized use of e-mails during deliberations in a criminal trial. After being dismissed, Juror Number One disobeyed the Court's orders and discussed via e-mail with other jurors her opinion on the Defendant's guilt. Juror Number One's conduct led to the dismissal of another juror on the panel and had the potential to lead to a mistrial. On December 16, 2011, the Court found Juror Number One guilty beyond a reasonable doubt of criminal contempt for juror misconduct and sentenced her to a fine of $1,000. This Memorandum is an expanded version of the sentence delivered by the Court from the bench.

Page 444

II. BACKGROUND[1]

On June 2, 2011, Juror Number One was selected for jury service in the above captioned criminal trial, as a member of a twelve-person jury with two alternates. When the jury, in the above captioned case, was empaneled, the Court provided general instructions, including:

Now, a few important words about your conduct as jurors in the case. First, I instruct you that during the trial you are not to discuss the case with anyone or permit anyone to discuss the case with you. Until you retire to the jury room at the end of the case to deliberate, you simply are not to talk about the case. ... Of [sic] anyone tries to talk to you about the case, bring it to my attention immediately.... I instruct you that until the trial is concluded an [sic] you have heard all the evidence and retired to the jury room, you are not to discuss the case with anyone. There are good reasons for this ban in discussion .... I know many of you use cell phones, ... to access the internet and to communicate with others. You must also not talk to anyone about the case or [use] these tools to communicate electronically with anyone about the case ... or use these devices to communicate electronically by messages, ... including e-mails.... This is extremely important, particularly in this era of electronic communication, it is extremely important that you follow this direction not to communicate in that manner ....

Trial Tr. 5:23-7:18, June 2, 2011.

Each time the jury recessed the Court instructed them, "[d]o not discuss the matter among yourselves or with anyone." *See, e.g.*, Trial Tr. 60:17-18, June 3, 2011.

Upon her request, on the second to last day of trial, for reasons associated with her employment, and with no objections of the parties, the Court dismissed Juror Number One and replaced her with the first alternate on June 7, 2011. Trial Tr. 269:21-270:7, June 7, 2011. At the time she was dismissed, and in open court, the Court instructed her individually:

The only thing I want to instruct, as you know, the case has not yet been completed, so please do not discuss the case until it is completed. [The Deputy Clerk] will give you a call and let you know how things turn out and at that point you will be free to discuss the case and your experience, if you want to. If you don't want to, you don't have to discuss it with anybody. It would be entirely up to you, but don't do that until the matter is complete.

Id. at 270:7-16.

On June 7, 2011, the night she was dismissed, Juror Number One sent an e-mail to Juror Number Eight and Juror Number Nine, jurors that were still on the panel, stating:

Dear [Juror Number Eight] and [Juror Number Nine]: It was great meeting you and working with you these past few days. If I was so fortunate as to have finished the jury assignment, I would have found [Defendant] guilty on all 4 counts based on the facts as I heard them. There was a lot of speculation and innuendo, but that is the case as I saw it. How wonderful it would have been to see how others saw it. Please fill me in as you can.... I feel like I was robbed. After four days, I should have been able to contribute in

some way.... I want to wish you and the rest of the jurors very clear thinking and the will to

Page 445

do the right thing. Respectfully, [Juror Number One].

Trial Chambers Conference Tr. 14:18-15:24, June 8, 2011.

Juror Number Eight responded " Thank you for sharing your thoughts. I am of the same mind and have great doubt that the defense can produce anything new today that will change my thinking. It disturbs me greatly to know that people lie .... Anyway I will share your message with the gang." *Id.* at 16:2-11. [2] The Court conducted voir dire of Juror Number Eight. Upon Defendant's motion and without objection from the Government, the Court dismissed Juror Number Eight from the jury and she was replaced by the second alternate. Trial Tr. 14:18-15:24, June 8, 2011.

The Court also engaged in voir dire of Juror Number Nine. She stated that she had not seen an e-mail from Juror Number One.

Trial Chambers Conference Tr. 24:18-25:1, June 8, 2011. Upon agreement of the parties, Juror Number Nine remained on the jury. During deliberations, the Court ordered her cell phone to be held in the Court's custody until the end of trial on June 9, 2011.[3] Trial Tr. 24:6-8, June 9, 2011.

On June 30, 2011, this Court referred the matter of prosecuting Juror Number One for contempt to the United States Attorney for the Eastern District of Pennsylvania for violation of 18 U.S.C. § 401. ECF No. 90. In relevant part, section 401 states: " A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as ... (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The Government subsequently filed a motion for an Order to Show Cause why Juror Number One should not be held in contempt of this Court for failing to obey its orders of June 2, 2011, and June 7, 2011. Gov't's Mot. for Order to Show Cause, ECF No. 103.

III. WHETHER JUROR NUMBER ONE'S ACTIONS EVINCE JUROR MISCONDUCT

Generally, contempt means disregard for, or disobedience of, the orders or commands of a public authority either legislative or judicial. A federal court has the power to punish contemnors by fine or imprisonment " at its discretion." 18 U.S.C. § 401; *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65, 45 S.Ct. 18, 69 L.Ed. 162 (1924) (" That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law."). This authority extends over jurors who disobey a court's orders. *See, e.g.,United States v. Hand*, 863 F.2d 1100, 1101 (3d Cir.1988) (affirming district court's judgment that a juror guilty of impermissible contact with a defendant was required to pay restitution to the government for the cost of prosecuting the trial). Based on Juror Number One's conduct, the Court found that contempt proceedings were appropriate to evaluate whether Juror Number

Page 446

One had violated the Court's orders. The Government's petition and the Court's order to show cause provided Juror Number One with the essential facts underlying its request for contempt sanctions.[4] *See* Gov't's Mot. for Order to Show Cause, ECF No. 103; Order, Sept. 23, 2011, ECF No. 105.

A. *Criminal Versus Civil Contempt*

The appropriateness of either of two types of contempt, civil or criminal, depends upon the court's reason for initiating contempt proceedings. *Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 896-97 (3d Cir.1992) (citing *Shillitani v. United States*, 384 U.S. 364, 371, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966)). " The dichotomy between criminal and civil contempt lies in the function of the order." *McDonald's Corp. v. Victory Inves.*, 727 F.2d 82, 86 (3d Cir.1984). Civil contempt sanctions are remedial in nature and are designed to coerce compliance with a court order or to compensate the injured party. *SeeRoe v. Operation Rescue*, 919 F.2d 857, 868-69 (3d Cir.1990); *Latrobe Steel Co. v. United Steelworkers of Am.*, 545 F.2d 1336, 1343 (3d Cir.1976). As a result, a civil contemnor can purge the contempt if he performs the affirmative act required by the court's order. By contrast, criminal contempt is a punitive sanction, designed to vindicate the court's authority by punishing past acts of disobedience and therefore cannot be cured by the contemnor. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631-32, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988).

The two types of contempt also have different burdens of proof and relations to the underlying proceeding. Civil contempt must be proved by " clear and convincing" evidence, while criminal contempt must be proved beyond a reasonable doubt. *United States v. Pozsgai*, 999 F.2d 719, 735 (3d Cir.1993); *see alsoHicks*, 485 U.S. at 632, 108 S.Ct. 1423; *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 974 (3d Cir.1982). Although civil contempt proceedings are ordinarily a part of the underlying action, criminal contempt proceedings are " separate from the actions which spawned

them." *Latrobe Steel Co.*, 545 F.2d at 1343.

It is a criminal non-summary contempt proceeding that is most appropriate here, as the Court is not compelling compliance but instead is punishing for past behaviors, and the judge neither saw nor heard the contemptuous conduct. *See* Fed.R.Crim.P. 42(a) (" [T]he court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies."); *Taberer*, 954 F.2d at 896-97 (finding that the [Supreme] Court's admonition in *Shillitani* that courts must first resort to civil contempt sanctions " was intended to apply only when a judge initiates contempt proceedings for the purpose of coercing compliance with a court order, and not when the court's purpose is to punish past violations of its orders"). As the sanctions would be criminal in nature, Juror Number One is entitled to all constitutional rights provided to criminal defendants. *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (holding that constitutional protections for criminal defendants other than the double

Page 447

jeopardy provision apply in non-summary criminal contempt prosecutions just as they do in other criminal prosecutions) (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444, 31 S.Ct. 492, 55 L.Ed. 797 (1911) (listing presumption of innocence, proof beyond a reasonable doubt, and guarantee against self-incrimination)); *Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925) (listing notice of charges, assistance of counsel, and right to present a defense); *In re Oliver*, 333 U.S. 257, 278, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (listing the right to a public trial as a protection that must be provided in criminal contempt proceedings); *see alsoHicks*, 485 U.S. at 632, 108 S.Ct. 1423 (" [C]riminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings."). All of the constitutional protections required with respect to this criminal contempt proceeding have been duly afforded to Juror Number One in this case.

B. *Criminal Contempt Process*

Federal Rule of Criminal Procedure 42 governs criminal contempt proceedings. Rule 42(a) requires that notice and a hearing be given in every case where the contempt may not be summarily punished. Specifically it provides that " [a]ny person who commits criminal contempt may be punished for that contempt after prosecution on notice." Fed.R.Crim.P. 42(a). That notice must be provided by the court in open court, in an order to show cause, or in an arrest order. *Id.* The notice must also " state the time and place of the trial; allow the defendant a reasonable time to prepare a defense; and state the essential facts constituting the charged criminal contempt and describe it as such." [5] *Id.*

Congress has determined that under certain circumstances criminal contempt constitutes a federal crime. *See* 18 U.S.C. § 401. Section 401 reads in relevant part: " A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as ... (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." While Section 401 limits the Court's power to punish contempt summarily, it is not an exhaustive definition of the conduct that courts may punish as contempt. *Taberer*, 954 F.2d at 900. The Third Circuit has reasoned that:

Page 448

The power to define what does and does not constitute contempt is an attribute that inheres in the contempt power. If Congress can exhaustively define the conduct that courts may punish as contempt, then the court's ability to vindicate its authority is completely dependent upon Congress, in violation of the principle that the contempt power " is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Young* [*v. United States ex. rel. Vuitton et Fils S.A.*], 481 U.S. [787], 796, 107 S.Ct. [2124, 95 L.Ed.2d 740 (1987)].

Id. Nonetheless, the imposition of all criminal contempt sanctions is restricted to " those instances where the court must vindicate its authority." *Waste Conversion, Inc. v. Rollins Envtl. Servs.*, 893 F.2d 605, 612 (3d Cir.1990).

In construing section 401(3), the Supreme Court stated that, " [W]e find no case suggesting that subdivision (3) of § 401, before us here, is open to any but its obvious meaning." *Green v. United States*, 356 U.S. 165, 172, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958). Thus, to sustain a conviction under subsection (3), the government must prove that the alleged contemnor willfully disobeyed an order by the court beyond a reasonable doubt. The mere failure to comply with a court's order, without more, is not sufficient to sustain a conviction for contempt because " the crime of criminal contempt requires a specific intent to consciously disregard an order of the court." *Waste Conversion*, 893 F.2d at 610. The willfulness element of the offense requires proof of " a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States v. Greyhound Corp.*, 508 F.2d 529, 531-32 (7th Cir.1974). Moreover, the Third Circuit has adopted the following defense against the element of willfulness from

the Seventh and D.C. Circuits:

Willfulness for the purpose of criminal contempt does not exist where there is a " [g]ood faith pursuit of a plausible though mistaken alternative." To provide a defense to criminal contempt, the mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible.

Greyhound Corp., 508 F.2d at 532 (quoting *In re Brown*, 454 F.2d 999, 1007 (D.C.Cir.1971)).

In this case, Juror Number One's misconduct is based on her failure to obey two separate court orders directing her not to discuss the case with anyone else until the case was complete. *See* Trial Tr. 5:23-7:12, June 2, 2011; Trial Tr. 270:7-16, June 7, 2011. On June 2, 2011, the Court specifically mentioned the use of cellular telephones, the Internet, and electronic messaging as avenues to be avoided in communicating about the case to anyone else. On June 7, 2011, after dismissing Juror Number One, the Court again admonished her that the case was not completed, that she should not discuss the case with anyone else until it was completed, and that she would be notified when the case was completed. Despite these orders, Juror Number One reached out via e-mail to two jurors who were still on the panel and even began a dialogue with one of them concerning the case. The e-mails specifically discussed Juror Number One's emotional disquietude about being dismissed at such a late stage of the proceedings and contained her opinion that the Defendant was guilty of all of the charges. The clear language of both orders prohibiting any type of discussion via any medium until the conclusion of the case does not

Page 449

permit much leeway for plausible though mistaken understandings of the orders.

Under these circumstances, the Court finds beyond a reasonable doubt that Juror Number One did willfully disobey the Court's orders and did not in good faith pursue a " plausible, though mistaken alternative." Due to the early detection of Juror Number One's misconduct, the integrity of the trial was preserved; however, her actions could have damaged the trial process, prejudiced the defendant, and/or resulted in a mistrial, all of which would have inflicted additional costs and burdens on the parties and the judicial system generally. Accordingly, the Court finds that under the current facts, there is sufficient evidence that Juror Number One is guilty beyond reasonable doubt of criminal contempt pursuant to subsection (3) of 18 U.S.C. § 401.

C. *Sentencing*

The Court has the inherent power and discretion to impose a penalty for contempt reasonably commensurate with the gravity of the offense. Section 401(3) provides that a federal court " shall have power to punish by fine *or* imprisonment,[6] at its discretion," a contempt arising from the disobedience of a lawful order of the court. As the statutory language is in the disjunctive, the district court has discretion to impose a fine or imprisonment, but not both. *SeeUnited States v. Versaglio*, 85 F.3d 943, 947 (2d Cir.1996) (holding that section 401's prohibition against both a fine and imprisonment has not been superseded by the Sentencing Reform Act of 1984); *United States v. Hawkins*, 76 F.3d 545, 550 (4th Cir.1996) (same); *United States v. Holloway*, 991 F.2d 370, 373 (7th Cir.1993) (same); *United States v. White*, 980 F.2d 1400, 1401 (11th Cir.1993) (same). [7] In the present case, as the Court found Juror Number One guilty of criminal contempt, the Court can either fine Juror Number One, or sentence her to a term of imprisonment not to exceed six months.[8]

The maximum sentence that can be imposed is that provided for by Congress in

Page 450

the United States Code. *United States v. Booker*, 543 U.S. 220, 259, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Title 18 U.S.C. § 401 specifies neither a minimum nor maximum penalty for its violation, nor does it assign a felony or misdemeanor designation or grade.[9] As the offense in the case occurred after the Sentencing Guidelines were promulgated pursuant to the SRA, the Court ordinarily takes into account the advice of the Sentencing Guidelines and bases Juror Number One's sentence on the factors set forth in 18 U.S.C. § 3553.

While courts have struggled with the appropriate method to discern whether criminal contempt appropriately falls within either the felony or misdemeanor classification pursuant to the Sentencing Guidelines,[10] since the imprisonment penalty in

Page 451

this case is capped at six months, this Court needs not determine this issue. Moreover, as the highest sentence the Court can impose for this offense would be a Class B or C misdemeanor or infraction, [11] the Sentencing Guidelines do not apply to the offense at hand. *See* U.S. Sentencing Guidelines Manual § 1B1.9.

Since the Guidelines do not provide any specific guidance under the circumstances, in imposing the appropriate sentence, the Court will take into account the factors in § 3553(a) and impose a sentence " sufficient, but not greater than necessary," to comply with the elements in § 3553(a)(2). The factors under § 3553(a) relevant to this case

and brought to this Court's attention include, the nature and circumstances of the offense and the history and characteristics of the defendant,[12] and the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, and to afford general adequate deterrence to criminal conduct of the kind at issue.[13]

As the Third Circuit Court of Appeals has recognized, the widespread availability of the Internet and the extensive use of social networking sites, such as Twitter and Facebook, have exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors. *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir.2011). Jurors are not supposed to discuss with anyone the cases they hear before deliberation or outside the jury deliberation room so as to avoid improper influences and to ensure that a jury's verdict will be just and fair. While jurors improperly commenting on cases perhaps are not unprecedented occurrences, the Internet and social networking sites, and in this case e-mail, " have simply made it quicker and easier to engage more privately in juror misconduct, compromise the secrecy of their deliberations, and abase the sanctity of the decision-making process." *Id.* at 332 (Nygaard, J., concurring in part, dissenting in part).[14]

Page 452

Courts must continually adapt to the potential effects of emerging technologies on the integrity of the trial and must be vigilant in anticipating and deterring jurors' continued use of these mediums during their service to the judicial system.[15] A necessary consequence of this adaptation is the enforcement of a Court's admonitions against commenting— even obliquely— about a trial on social networking websites and through other internet mediums. Unless curtailed, this inappropriate conduct can have an enormous impact on the justice system.[16] Holding jurors in contempt due to Internet misconduct vindicates the court's authority by punishing past acts of disobedience and conveys " a public message that the judicial system cannot tolerate such behavior." *Id.*

In addition, the Court acknowledges that Juror Number One has lived an exemplary life, both personally and professionally, and has devoted twenty-six years to public service, rising in the ranks of a respected government agency.

The Court has also considered alternative sentences of imprisonment or probation with community service, which it has found not to be appropriate under the circumstances of this case.

In consideration of all of these factors, the Court imposes a sentence of a fine of $1,000, which serves to vindicate the authority of the Court and to punish Juror

Page 453

Number One for her improper conduct. The Court believes that the sentence imposed is sufficient, but not greater than necessary to reflect the serious nature of the offense, to afford adequate general deterrence, and to provide just punishment for the offense.

IV. CONCLUSION

Based on the aforementioned, the Court finds that Juror Number One is guilty beyond a reasonable doubt of criminal contempt for juror misconduct and sentences her to a $1,000 fine. An appropriate order shall follow.

Notes:

[1] The facts of this case have been stipulated to by the parties and in this Memorandum they constitute the Court's findings of fact and conclusions of law.

[2] The existence of this communication was disclosed by Juror Number Eight during the course of individual voir dire of jurors on a completely unrelated matter to the present matter. But for this coincidence, Juror Number One's communication may never have been discovered.

[3] The jury went on to complete the trial, engage in deliberations, and reach a verdict. The results of the trial are not at issue in this case.

[4] The order to show cause provides Juror Number One with notice of the time and place of the hearing, and the Court scheduled a hearing a month after the order, which is a reasonable time to prepare a defense. *SeeUnited States v. United Mine Workers of Am.*, 330 U.S. 258, 296, 67 S.Ct. 677, 91 L.Ed. 884 (1947) (stating that an order to show cause can serve notice function of Rule 42(b)).

[5] The order to show cause in this case did not specify that the hearing was for criminal contempt. Order, Sept. 23, 2011, ECF No. 105. The Supreme Court has held a district court's failure to label a contempt proceeding as criminal in the hearing notice is grounds for reversal only when the failure causes " substantial prejudice" to the defendant resulting from his lack of awareness that the proceeding is criminal. *United Mine Workers of Am.*, 330 U.S. at 297-98, 67 S.Ct. 677. Here, the Government's petition alleged a willful violation of the Court's orders with respect to Juror Number One's conduct, and both the petition and the rule to show cause inquired as to why Juror Number One should not be held in " contempt of this Court for refusing to obey

its Orders." The omission of the words " criminal contempt" in this case is not prejudicial error. First, the Court in compliance with Rule 42(a) requested that the contempt be prosecuted by an attorney for the Government and in that order explained that a criminal contempt charge was being pursued. ECF No. 90. Second, the Court stated on the record during a hearing on September 8, 2011, that the only proper contempt proceedings for this case were criminal in nature. Lastly, the Government's petition explains that the contempt proceedings are governed by Rule 42(a), which only governs criminal contempt proceedings. The purpose of Rule 42(a), namely to ensure that contemnors realize that a prosecution for criminal contempt is contemplated, was sufficiently fulfilled here. *SeeUnited Mine Workers of Am.*, 330 U.S. at 297-98, 67 S.Ct. 677.

[6] The sentence can also consist of probation with a discretionary condition of community service. 18 U.S.C. §§ 3561, 3563(b)(12) (2006).

[7] The Third Circuit has not ruled on this issue since the Sentencing Reform Act of 1984 (" SRA") was passed. Before the SRA was passed, it was clear that a defendant convicted of criminal contempt could not be sentenced to both a fine and imprisonment under section 401. *United States v. Restor*, 679 F.2d 338, 339-40 (3d Cir.1982).

[8] The Supreme Court has held that where no legislative penalty is specified and the sentence is left to the discretion of the judge, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense. *Frank v. United States*, 395 U.S. 147, 149, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969). A defendant has a Sixth Amendment right to a jury trial before being sentenced to a prison term of more than six months for criminal contempt. *Codispoti v. Pennsylvania*, 418 U.S. 506, 512, 516-17, 94 S.Ct. 2707, 41 L.Ed.2d 912 (1974); *see alsoBloom v. Illinois*, 391 U.S. 194, 198-200, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968) (holding that defendant has the right to trial by jury before conviction of contempt punishable by severe punishment); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 662 & n. 4 (2d Cir.1989) (noting in dicta that a defendant has the right to a jury trial whenever the penalty imposed is greater than six months); *United States v. Gedraitis*, 690 F.2d 351, 354-355 (3d Cir.1982) (finding that when an actual sentence is no more than six months in prison plus normal periods of probation, contempt is treated as a petty offense). Thus, a criminal contempt charge carrying a sentence of more than six months is a serious crime entitling a defendant to a jury trial, and one carrying a sentence of six months or less is a petty offense. As the hearing for the order to show cause was not heard by a jury, the Court can only impose a term of imprisonment of six months or less if it chooses to impose a penalty of imprisonment instead of a fine.

[9] For violations of 18 U.S.C. § 401, the statutory table refers the court to U.S. Sentencing Guidelines Manual § 2J1.1, but that section simply directs the court to " Apply § 2X5.1 (Other Offenses)." U.S. Sentencing Guidelines Manual § 2X5.1 provides little additional guidance:

If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

Application Note 1 to U.S. Sentencing Guidelines Manual § 2J1.1 explains why the Sentencing Commission felt it necessary to allow sentencing judges complete discretion in finding an applicable guideline:

Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to § 2J1.2 (Obstruction of Justice) for that guideline to apply.

[10] Absent from the text of § 401 is a maximum sentence for punishing a contemnor. *SeeFrank v. United States*, 395 U.S. 147, 149, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969) (noting Congress placed no statutory maximum that might limit a court's ability to mete out an appropriate punishment for contempt). Title 18 U.S.C. § 3559, which classifies offenses according to letter grades, states that " [a]n offense that is not specifically classified by a letter grade in the section defining it, is classified ... [according to] the maximum term of imprisonment authorized."

Courts have reasoned that because a maximum penalty is not specified in § 401, a violation of the statute is punishable by life imprisonment, which statutorily classifies all contumacious crimes as Class A felonies. *SeeUnited States v. Mallory*, 525 F.Supp.2d 1316, 1320 (S.D.Fla.2007), *rev'd sub nom.United States v. Cohn*, 586 F.3d 844 (11th Cir.2009) (rejecting a literal reading of the classification statute requiring all criminal contempts to be classified as Class A felonies); *United States v. Carpenter*, 91 F.3d 1282, 1284 (9th Cir.1996) (rejecting district court's contention that all criminal contempts should be treated as Class A felonies because criminal contempts include " a broad range of conduct, from trivial to severe").

The only two Circuits to have addressed the appropriate

classification of criminal contempts have both rejected such a literal reading of the classification statute. The Ninth Circuit in *United States v. Carpenter* explained that " [i]t would be unreasonable to conclude that by authorizing an open-ended range of punishments to enable courts to address even the most egregious contempts appropriately, Congress meant to brand all contempts as serious and all contemnors as felons." 91 F.3d 1282, 1284 (9th Cir.1996). Therefore, " criminal contempt should be classified for sentencing purposes according to the applicable Guidelines range for the most nearly analogous offense." *Id.* at 1285. The Ninth Circuit amended this method in *United States v. Broussard*, in holding that while the severity of contempt violations for purposes of 18 U.S.C. § 3559(a) continues to turn on the most analogous underlying offense, judges are no longer limited to the maximum guidelines sentence for that offense, but instead " upper limit of the district judge's discretion" is the statutory maximum for that offense. 611 F.3d 1069, 1072 (9th Cir.2010).

The Eleventh Circuit in *United States v. Cohn* declined to adopt the Ninth Circuit's method of classification because it did not address how to classify criminal contempt if a sufficiently analogous guideline is absent. 586 F.3d 844, 847 n. 7 (2009). Specifically, the Court held that " criminal contempt is an offense *sui generis* that cannot be classified pursuant to § 3559." *Id.* at 849.

The Third Circuit has not addressed this issue and this Court does not have a reason to address the issue as the term of imprisonment allowed pursuant to the Sixth Amendment could only appropriately fall under the classifications for misdemeanors. *See* 18 U.S.C. § 3559 (2006).

[11] A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days or for which no imprisonment is authorized. *See* 18 U.S.C. § 3559 (2006).

[12] 18 U.S.C. § 3553(a)(1) (2006).

[13] 18 U.S.C. § 3553(a)(2)(A), (B) (2006).

[14] While the majority opinion in *Fumo* did recognize the perils of these new technologies, the concern was expounded upon further by Judge Nygaard. He noted that in a large number of both criminal and civil cases, jurors have used social mediums to improperly discuss their service or conduct independent research. His examples included the following:

In an Arkansas state court, a defendant attempted to overturn a $12.6 million verdict because a juror used Twitter to send updates during the trial. One post stated " Oh, and nobody buy Stoam. It's bad mojo and they'll probably cease to exist now that their wallet is 12m lighter." *See* Renee Loth, *Mistrial by Google*, Boston Globe, Nov. 6, 2009, at A15, *available at* http:// www. boston. com/ bostonglobe/ editorial_ opinion/ oped/ articles /2009/11/06/mistrial_by_google (last visited Aug. 1, 2011).

In Maryland, Baltimore Mayor Sheila Dixon sought a mistrial in her embezzlement trial because, while the trial was going on, five of the jurors became " Facebook friends" and chatted on the social networking site, despite the Judge's instructions not to communicate with each other outside of the jury room. Dixon's attorneys argued that these " Facebook friends" became a clique that altered the jury dynamic. Brendan Kearny, *Despite Judge's Warning, Dixon Jurors Went on Facebook*, The Daily Record, Dec. 2, 2009, http:// mddailyrecord. com/ 2009/ 12/ 02/ despitejudge' s- warning- dixon- jurors- went- on- facebook (last visited August 1, 2011).

In the United Kingdom, a case was thrown out because a juror sitting on a criminal matter wrote on her Facebook page that she was uncertain of the defendant's guilt or innocence and created a poll for her friends to vote. Urmee Khan, *Juror Dismissed From a Trial After Using Facebook to Help Make a Decision*, Telegraph.co.uk, Nov. 24, 2008, http:// www. telegraph. co. uk/ news/ newstopics/ lawreports/ 3510926/ Juror- dismissed- from- a- trial- after-using- Facebook- to- help- make- a- decision. html (last visited August 1, 2011). *Fumo*, 655 F.3d at 332. These cases are not unique and there is reason to surmise that these violations are occurring more frequently than courts are able to detect.

[15] An example of anticipatory measures against juror misconduct occurred in a federal case against a former Soviet military officer facing arms charges. Specifically, Judge Shira Scheindlin required jurors to sign a pledge not to research the case on the Internet. *See N.Y. Judge: No Web for Jurors at Soviet Arms Trial*, CBS News (Oct. 5, 2011 11:01 PM), http:// www. cbsnews. com/ stories/ 2011/ 10/ 05/ ap/ business/ main 20116412. shtml.

[16] The Arkansas Supreme Court recently reversed an Appellant's conviction and death sentence due to juror misconduct which occurred during the course of a trial and the failure of the trial judge to declare a mistrial or replace the juror with an alternate. *Dimas-Martinez v. Arkansas*, ___ S.W.3d ___, ___, ___, No. CR 2007-94-2-A, 2011 WL 6091330, at *11-15 (Ark. Dec. 8, 2011). During the course of the trial, the juror tweeted about the proceedings and

even after the juror was questioned, admitted to the misconduct, and was again admonished not to discuss the case in Internet forums, he continued to tweet, specifically during jury deliberations. *Id.* at ___, ___, at *14-15.

Citing References :

755 F.3d 125 (2nd Cir. 2014), 12-240-cr, United States v. Ganias

_____

United States Court of Appeals, Second Circuit06/17/2014 755 F.3d 125

69 F.Supp.3d 374 (S.D.N.Y. 2014), 12-CR-934 (RA), United States v. Liu

_____

United States District Court, S.D. New York11/14/2014 69 F.Supp.3d 374

866 F.Supp.2d 437 (E.D.Pa. 2011), C. A. 10-4853, Great American E & S Ins. Co. v. John P. Cawley, Ltd.

_____

United States District Court, E.D. Pennsylvania06/03/2011 866 F.Supp.2d 437

196 F.Supp.3d 530 (E.D.Pa. 2016), 11-7316, United States v. Baker Funeral Home, Ltd.

_____

United States District Court, E.D. Pennsylvania07/13/2016 196 F.Supp.3d 530

No negative treatment in subsequent cases