Ethics: Can a Party Ethically Influence the Internet in Anticipation of Juror Misconduct

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I. INTRODUCTION

So you're heading to trial in a big, high-profile case. There has been lots of media attention and the Internet is replete with information (and misinformation) about the case. You know that the judge will give the usual admonition to the jury not to do any online research or case-specific social media searches. You also know that, in this day and age, the instruction is likely to go unheeded.

Are there steps you can and should take to anticipate juror misconduct? Is it ethical to influence what a juror may find if they "Google" the plaintiff's name, your client's name, etc.? Where does an attorney cross the line from effectively advocating your client's position to juror tampering? What ethical rules are implicated?

In the "Google" era, there are steps every attorney must take to fully protect their client's interests at trial.

II. THE PROBLEM

Every trial attorney has heard the judge instruct the jury to limit their decision to the facts that they hear in the courtroom, and not to engage in outside research. Most trial attorneys have also experienced jurors' failure to heed that instruction, whether they know it or not.

There is much press on "the Google mistrial." See "As Jurors Turn to Web, Mistrials Are Popping Up," The New York Times, March 17, 2009, http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all. Courts in multiple jurisdictions have declared mistrials after it was discovered that jurors were conducting Internet research during trial. See "Courts in Colorado, Maryland, New Jersey, Florida Declare Mistrials After Juror Internet Research," http://www.citmedialaw.org/blog/2010/courts-colorado-maryland-new-jersey-florida-declare-mistrials-after-juror-internet-researc. The misconduct has ranged from jurors researching medications online, see People v. Wadle, 77 P.3d 764 (Color. App. 2003, aff'd 97 P.3d 932 (2004), to researching definitions (legal and others), see Wardlaw v. State, No. 1478/07, 185 Md. App. 440 (Md. Ct. Special App. May 8, 2009), to researching articles about the case, see State of New Jersey v. Scott, 2009 N.J. Super. Unpub. Lexis 1901 (N.J. Div. July 20, 2009), cert. den. 2009 N.J. Lexis 1370 (N.J. Nov. 9, 2009).

As courts have sought to curb the use of internet research by jurors through specifically-tailored jury instructions, it should come as no surprise

to trial attorneys that jury members have frequently ignored these instructions. See Drew Singer, *Juror Misconduct Strikes Again at Jenkens Ally's Trial*, LAW360.com (Oct. 24, 2013), http://www.law360.com/articles/483305/juror-misconduct-strikes-again-at-jenkens-atty-s-trial (juror was relieved from duties and escorted from courthouse after directly breaching judge's instructions by researching the credentials of a witness); Michelle Bowman, *States Punish Web-Cruising Jurors*, Lawyers.com (June 18, 2013), http://blogs.lawyers.com/2013/06/states-cpunish-web-cruising-jurors/ (juror held in criminal contempt for ignoring judge's instructions by reading online article about case and posting on newspaper's online comment board); *State v. Smith*, No. M2010-0101384, 2013 WL 4804845 (Tenn. Sept. 10, 2013) (juror ignored judge's instructions and sought out and initiated Facebook message conversation with expert witness).

It is critical that attorneys understand that, while there are steps they can and should take to prevent juror misconduct, it is virtually impossible to control. Consequently, attorneys owe it to their clients to prepare as much as possible for the inevitable juror misconduct.

III. STEP 1 – ENGAGE EARLY

When you are first hired in a high profile case, where you anticipate heavy publicity, try to work with your client to include potential trial themes in press statements from the beginning. Educating your client that today's press statement may be what jurors are ultimately finding on the Internet during trial may encourage them to move away from "no comment" and embrace the concept of educating the public on their defenses.

Assuming a juror may conduct their own research, you must follow the press with an eye toward what they will find. If the only articles are very biased toward one side, that's what the eventual jurors will have available to find. At a minimum, clients may wish to correct misstatements. Ideally, however, a client will put forth its own version of the facts and make clear it has a compelling story to tell.

IV. STEP 2 – KNOW WHAT'S OUT THERE

Once you have been engaged as counsel, and throughout your representation of the client, it is crucial that you know what is available to any future juror armed with a smartphone. Spend some time on the Internet and make sure you're aware of what a juror may find. This needs to take place throughout the time the case is worked up for trial, and is particularly important immediately before and during trial.

A. Social Media

Much has been written about the usefulness of social media in litigation, and that is not the focus of this paper. It is, however, important to know what is available from social media sites, not just for working up the case, but also to know what a juror may find when he "Googles" the parties involved in the litigation. For any key witness, be it the plaintiff or someone else, you should check the certain sites, including:

- Facebook
- My Space
- Twitter
- Instagram
- E Blogger
- Caring Bridge

It isn't just plaintiffs who have Facebook pages. Most major companies now have pages themselves. It is thus important to check on your client's page, if they have one, to determine whether there is anything damaging or contrary to your case on that site.

Before you can determine what steps, if any, to take in response to those sites, you have to know what's there. Presumably jurors will primarily come across information that is publicly available. So remember not to engage with plaintiffs or key witnesses by "friending" them, posting on their walls or otherwise messaging or chatting with them.

B. Press

Read any press about the incident involved in the litigation. Particularly in a high profile case, there may be extensive press coverage. Depending on the case, it may even garner national attention. To the extent it has had any televised coverage, make sure to know what video is available.

In addition to press directly related to the incident involved in the litigation, make sure you know what else is out there about your client. Has your client received any adverse verdicts in cases involving similar claims? Is there some unrelated bad press (i.e. your client has recently closed a plant in the jurisdiction, causing some negative publicity)? If so, you'll want to be aware of it going into trial so you can determine how best to address it.

C. Company Website

It is also important to carefully comb your client's website to ensure that it does not contain material that is at odds with assertions you will make at

trial. Does the website contain warnings, link to product documents, etc? You have to know what is there.

In addition to the company website, if your client has a customer service line or other similar (800) service number, you should call it and ask the kinds of questions apt to be asked by a juror. For instance, if your case involves an allegation that your client made a false representation in order to sell the product, call the company and ask whether the product has X quality. If the answer you receive from the customer service line is contrary to what you plan to say in court, you need to know that.

D. CPSC Database

In March 2011, the Consumer Product Safety Commission launched a Congressionally-mandated database that permits consumers to submit reports of harm or risks of harm and to search for information about a variety of products. See www.SaferProducts.gov. If you're litigating a product liability suit, you should enter that product name into the database to see if any complaints pop up. This is an exercise you'll want to repeat, particularly close to and during trial.

E. Wikipedia

Wikipedia is a site commonly used, and may be one target by jurors looking for information in a particular case. They may look up your client, key witnesses, products or certain illnesses, injuries or terms.

F. You Tube

It is amazing what can be found on You Tube, including videos regarding complaints about products and common misuses of products. It is worth searching for not just the product involved in your lawsuit, but similar products. It is also important to search for any videos of or uploaded by the plaintiff. You should also search for your (and opposing) expert witnesses. There are a surprising number of clips from expert depositions and trials on the site.

G. E-bay

Particularly if your case involves a product that is no longer on the market, look to see whether that product is for sale on E-bay. If it is, do not be surprised if jurors try to get their hands on it.

H. Google Earth

If your case involves an accident scene or building, you should enter the address/location into Google Earth to see what images are available. You

may want to make sure that your demonstratives and descriptions in court will match what a juror finds. To the extent there are differences, you should consider explaining them.

I. Check on Yourself

One of the first things jurors may investigate online is you. Thus, it is important to find out what they'll see. You should check your firm website to see if there is anything that might be damaging to the image you'll be portraying in court. You should also be aware of any article you have authored, particularly if you have previously promoted a position or opinion contrary to what you may present in court.

J. Check on Your Experts

You should run a similar check on your expert witnesses. It is important to know whether there is any press coverage regarding those experts that is negative or whether they've taken contrary opinions that are publicly available online.

V. STEP 3 – TAKE ACTION

Now that you know what is on the Internet and otherwise publicly available, the next question is what to do about it. Are you stuck with what's out there, or can you take steps to try to change what a juror will find if, or when, they violate the court's admonition not to do independent research. From an ethical standpoint, when do you run the risk of being accused of jury tampering?

There are a couple of rules that could apply to these situations.

A. Relevant Ethical Rules

<u>ABA Model Rule of Professional Conduct 3.5. Impartiality and Decorum of the Tribunal.</u>

> 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; or

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

Comment to Rule 3.5: "A lawyer is required to avoid contributing to a violation of such provisions." In other words, you cannot ask somebody else to do what you are explicitly barred from doing.

ABA Model Rule of Professional Conduct 3.6. Trial Publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

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(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment to Rule 3.6:

"[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a

> party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy."

So given those rules, what steps can lawyers take, not just to learn about what information is available, but to change it?

B. Seek a Gag Order on the Other Side

If you are involved in a very high profile case that has garnered press interest, you may want to seek a gag order early on during the litigation. While the bar may be high to get such an order, laying the ground work with the judge and highlighting the pre-trial publicity may help you with the next suggestion, which is seeking stronger admonitions come the time of trial.

C. Ask for Strong Admonitions at the Beginning

As more courts are discovering juror misconduct, a number of jurisdictions are adopting stronger and more explicit warnings. In crafting a hopefully more effective jury warning, consider the need to explain to jury why it is so important they not engage in outside research. They should also be told that each of them is responsible to make sure that other jurors are abiding by rules and that they should report jurors who are doing independent research. Finally, the court should be explicit about what will happen if a juror is caught violating the rules, and that such conduct may result in fines and even jail time. For instance, California recently passed legislation that provided that jurors who violate a judge's instructions not to use social media or conduct research about the case may be punished with contempt of court, a misdemeanor. Section 1122 of the California Penal Code states "(a)...The [jury] instructions shall include, among other things, all of the following admonitions...(1)...The court shall clearly explain, as part of the admonishment, that the prohibition on conversation, research, and dissemination of information applies to all forms of electronic and wireless communication."

The problem has become so pressing that the Committee on Court Administration and Case Management of the Judicial Conference of the United States, in January 2010, endorsed "a set of suggested jury instruction that district judges should consider using to help deter jurors from using electronic technologies to research or communicate about cases on which they serve." See http://www.wired.com/images_blogs/threatlevel/2010/02/juryinstructions.pdf.

These instructions were updated in 2012 in an attempt to further deter the use of social media and internet research by jurors, and specifically added a provision instructing jurors to notify the judge if they become aware that a fellow juror has broken the rules. See http://news.uscourts.gov/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial.

The model jury instructions include instructions to be given prior to and at the close of trial, and specify, in part:

> You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

The instructions also provide that:

> You may not communicate with anyone about the case on your cellphone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or Youtube. You may not use any similar technology or social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions..

The Missouri Approved Jury Instructions were also recently revised in an attempt to prevent "Google mistrials." Missouri jurors are now instructed, "you must not conduct your own research or investigation into any issues in this case.... You must not conduct any independent research or obtain any information of any type by ... the use of the Internet.... You are not permitted to communicate, use a cell phone, record, photograph, video, e-mail, blog, tweet, test, or post anything about this trial or your thoughts or opinions about any issue in this case to any other person or to the

Internet, 'facebook,' 'myspace,' 'twitter,' or any other personal or public web site during the course of this trial or at any time before the formal acceptance of your verdict by [the court] at the end of this case." *See* http://kansascity.injuryboard.com/wrongful-death/illinois-court-of-appeals-refuses-google-mistrial-for-blogging-juror.aspx?googleid=295468.

Some judges, including a federal judge in the Southern District of New York, have required jurors to sign a pledge promising, under penalty of perjury, not to perform internet research. *See* http://verdict.justia.com/2011/09/27/should-jurors-take-a-no-internet-pledge. Lawyers in California have similarly sought, and obtained, the use of juror declaration. In a case involving the death of a participant in a radio station contest, "Hold Your Wee for a Wii," jurors were going to be required to swear that they did not use any communication technologies to do research that "in any way directly or indirectly" dealt with the incident and the lawsuit — or even with the attorneys and judge. They would also have to swear that they did not watch or read any media coverage during the trial. *See* http://www.utsandiego.com/news/2009/sep/13/revised-jury-instructions-do-not-use-internet/?&zindex=165049. If a juror is unwilling to sign such a declaration, or otherwise acknowledges they could not abide by the instruction not to do independent research, they should be a "for cause" strike. *See* http://www.bizjournals.com/twincities/stories/2009/05/11/focus3.html?B=1242014400%255E1825130.

Consider also the timing of the instruction. Usually, such instructions are not giving until the jury is empaneled. But in a case where the potential jurors may fill out a questionnaire in advance of jury selection, or jury selection lasts more than one day, the admonition may come too late. Once jurors know any details at all about a case, their curiosity may be peaked and they may start trolling the Internet for information.

D. Ask the Judge to Require Plaintiff to Take Down Certain Sites

Frequently, plaintiffs do themselves more harm than good with their posts to social media sites. Commonly it may be the defense seeking to admit that information. What do you do, however, when met with a site that is compelling and supportive of the plaintiff's story at trial? Do such sites provide a way for plaintiffs to back door cringe-worth photos, or heart breaking stories about their injuries or treatment that would be otherwise inadmissible in court?

As a corollary to requesting any kind of gag order on the attorneys or parties, consider asking that the judge require the plaintiff to either (a) remove the page or (b) adjust the privacy settings to prevent jurors from seeing the content.

There are several instances where trial courts have granted such requests. See Steiner v. Superior Court, 164 Cal. Rptr. 3d 155 (Cal. Ct. App. 2013) (trial court granted defendants' request that plaintiff's attorney remove portions of firm website touting successful verdicts in similar asbestos-exposure cases); Marceaux v. Lafayette City-Parish Consolidated Gov't, 731 F.3d 488 (5th Cir. 2013) (trial court ordered that certain website operated by plaintiffs "be taken down" in its entirety). Unfortunately, in both of these reported cases, the trial courts' rulings were reversed on appellate review.

E. Hire a Search Engine Optimizer

While the Internet may be replete with negative publicity about a particular case, the negative stories need not be the first to come up when a potential juror researches the case. According to Wikipedia, search engine optimization is the process of improving the visibility of a website or a web page in search engines via the "natural" or un-paid ("organic" or "algorithmic") search results. Essentially, the first story to pop up following a search using Google or another search engine will get read more frequently than stories that appear further down in the search results.

Consequently, if there are many articles about your case, is it ethical to hire a consultant to carry out an optimization on behalf of your client to push negative stories down further in the search results and to make stories more favorable to your side appear higher up in the search results? Arguably, you would not be doing anything to affect the content; you are just affecting the order in which the content appears. A strong argument supports the conclusion that such conduct violates no ethical rules.

F. Press

Apart from changing the order in which articles might appear online by using a search engine optimizer, can attorneys affirmatively put out articles favorable to their case, or have others do so on their behalf?

If a gag order is in place, clearly not. But if there is no gag order, what is ethical? Can an attorney make publications aware of the case and let them do the reporting for him or her? For instance, in Madison County, IL, there is a weekly newspaper called "The Madison-St. Clair Record, A Legal Journal Serving Madison and St. Clair Counties." The weekly is put out by the local Chamber of Commerce, which tends to put a pro-defense spin on stories. The weekly is distributed for free in a box right outside the courthouse. What if any obligations do counsel have to refrain from speaking to such publications? Or, on the contrary, are attorneys free to encourage such articles that embrace and explain the defense theories of the case?

If there are articles detailing any adverse verdicts your client has received in similar cases, it is important that your client's side of the story is told, or risk a juror in a subsequent case discovering the articles and being tainted against your client. If it at all possible, clients should refrain providing "no comment" responses, and instead work to educate the public about their facts and defenses, even when they have lost cases. Jurors could wrongfully infer that one adverse verdict against your client means they should find similarly in a subsequent case. For example, in one products liability trial in Louisville, Kentucky, the judge dismissed an entire jury after one juror Googled the defendant, learned it had received a significant verdict against it in a similar case, and shared this fact with the rest of the jurors. Compounding the problem was that the juror even misread (or misrepresented) the amount of the verdict, telling the other jurors the verdict was for $10 million, not $1 million, the actual amount. *See http://www.claimsjournal.com/news/southeast/2013/04/15/226937.htm*

In addition to the articles themselves, check the comment sections. Many jurors will read those and if there are some particularly damning comments, you may wish to contact the site to see if they can be removed. Many sites have moderators and terms of use under which removal requests may be made. If there is not a gag order in place, you may wish to consider placing comments that tell your client's side of the story.

What about other types of PR? Several years ago, in 2006, jury selection was scheduled to begin in the civil trial against British Petroleum stemming from the 2005 explosion at BP's Texas City, Texas, oil refinery, which had resulted in 15 deaths. The pool of potential jurors had already been selected and advised to appear, when BP sent out a mailer to 900 members of the Texas City Chamber of Commerce, touting BP's actions in improving safety since the explosion. The Texas state court judge called the move a "publicity stunt" and threatened to fine BP for each potential juror that had seen the letter. The judge added a question to the juror questionnaire to inquire if any had received the letter. She stated that, if too many members of the pool of over 200 potential jurors had seen the mailer, she would fine BP for the costs of restarting the trial. The case settled prior to trial. *See* http://www.independent.co.uk/news/business/news/bp-denies-jurytampering-in-texas-blast-trial-423434.html;

http://houston.injuryboard.com/wrongful-death/bp-caught-jury-tampering.aspx?googleid=208146; http://articles.cnn.com/2006-11-09/justice/refinery.suit_1_bp-spokesman-oil-plant-eva-rowe?_s=PM:LAW

G. Company Website

What happens if, in examining your client's website, you find assertions or information that is contrary to what your position and the evidence you intend to present at trial? It is ethical to change what appears on the website?

Certainly, a company should be able to present correct, factual information on its website. It may also, however, have an obligation to preserve prior versions of its website or risk being found to have spoliated evidence. *See Katiroll Co. v. Kati Roll & Platters, Inc.*, 2011 U.S. Dist. LEXIS 85212 (D.N.J. Aug. 3, 2011) (finding that a party had engaged in unintentional spoliation by changing his profile figure on Facebook during the pendency of litigation); see also *Piper Jaffray Cos., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 967 F. Supp. 1148, 1152 n.3 (D. Minn. 1997) ("The Court understands that Piper's website has changed in response to this litigation; the Court fully expects Piper to cause all relevant previous "editions" to be preserved for discovery.")

This responsibility to maintain prior versions likely applies not just to the company's own website, but to any pages it might maintain on other sites, such as Facebook. Attorneys have faced staggering sanctions for directing their clients to remove photos from Facebook and otherwise failing to produce relevant, responsive information from social media sites during discovery. *See* "*Facebook Spoliation Costs Lawyer $522,000; Ends His Legal Career*," http://blog.x1discovery.com/2011/11/15/facebook-spoliation-costs-lawyer-522000-ends-his-legal-career/.

H. CPSC Database

Consider the litigation when responding to CPSC complaints. While you may not be able to get the complaints removed from the website, you may be able to convince your client to consider your defense themes when posting responses to similar complaints.

A very common company response appears to be along the lines of, "Dear consumer, we are sorry you are dissatisfied with our product. Please contact us to provide more information about the incident." While such a response may be fine in the usual course, if you know there are reports involving the product at issue in your litigation, you may wish to consider whether a more substantive response will better serve the client's needs.

Additionally, the website permits anyone, including a manufacturer, to submit a claim that a report about a product contains "materially inaccurate information." *See* http://www.saferproducts.gov/faq-business.aspx#accuracy. This may provide an avenue to remove inaccurate reports.

I. Wikipedia

Wikipedia permits its content to be edited by the public. Is it ethical for an attorney (or his or her client) to edit articles on the website?

At a minimum, if you know that information harmful to your case appears on Wikipedia, is there any way to ask for an instruction, as part of the court's general admonitions, that specifically calls out the unreliability of information from that website? While you may not want to call attention specifically to Wikipedia, you may wish to ask that the court inform jurors that, in general, information on the Internet may be rife with errors and incorrect facts.

In Harris v. Barefoot, 704 S.E.2d 282 (N.C. Ct. App. 2010), the plaintiff attempted to rely on information from Wikipedia to oppose a summary judgment motion. The court, citing Campbell ex. rel. Campbell v. Sec'y of Health and Human Serv., 69 Fed. Cl. 775, 781 (2006), noted that:

> "Wikipedia.com [is] a website that allows virtually anyone to upload an article into what is essentially a free, online encyclopedia. A review of the Wikipedia website reveals a pervasive and, for our purposes, disturbing series of disclaimers, among them, that: (i) any given Wikipedia article 'may be, at any given moment, in a bad state: for example it could be in the middle of a large edit or it could have been recently vandalized;' (ii) Wikipedia articles are 'also subject to remarkable oversights and omissions;' (iii) 'Wikipedia articles (or series of related articles) are liable to be incomplete in ways that would be less usual in a more tightly controlled reference work;' (iv) '[a]nother problem with a lot of content on Wikipedia is that many contributors do not cite their sources, something that makes it hard for the reader to judge the credibility of what is written;' and (v) 'many articles commence their lives as partisan drafts' and may be 'caught up in a heavily unbalanced viewpoint.'"

Harris, 704 S.E.2d at 284 f.2. Language from the case could certainly be used to craft an instruction on the perils of internet research.

J. YouTube

If there are videos on You Tube that are damaging, you may want to seek to have them removed. You Tube has a "privacy complaint process" (see http://www.youtube.com/t/privacy_at_youtube and http://support.google.com/youtube/bin/answer.py?hl=en&answer=142443). They also have a copyright policy, which allows material to be removed that violates copyright law (see http://www.youtube.com/t/copyright_owners).

In at least one instance, a party claimed that the other side was trying to influence jurors in a medical malpractice case by posting deposition testimony on YouTube. *See* http://www.jdsupra.com/documents/60c18d09-7f61-477a-902b-5ae405f5dcd9.pdf.

For a thorough and thoughtful summary of the law on this issue, *see* "*Is That Me on YouTube? Ground Rules for Access, Use and Sharing of Digital Depositions*," http://img.en25.com/Web/MerrillCorporation/DIGIDEP001_PDF.pdf.

K. E-bay

Particularly if your case involves a product that is no longer on the market, look to see whether that product is for sale on E-bay. If it is, do not be surprised if jurors try to get their hands on it.

We were involved with a case where the precise model of a product, a foot spa, that had allegedly burned the plaintiff, was no longer sold. We discovered after the trial, which had resulted in a defense verdict, that jurors had been finding the older model foot spa was available for sale on e-bay. This led some to conclude that, because you could still buy it on e-bay, it could not have been defective.

L. Google Maps/Earth

If your case involves any accident scene, building, home, or other real property, be sure you know what images are available when a juror enters the address/location into Google Maps or Google Earth. Assume jurors will perform this research, and confirm that any demonstratives and descriptions used in court will match what a juror finds. If the images are misleading or harmful to your case, consider taking action. For example, Google's privacy policy permits users to make requests for blurring of certain aspects of Google Streetview images for privacy concerns. *See* http://www.google.com/maps/about/behind-the-scenes/streetview/privacy/ At the very least, any discrepancies between your case theory and the images available should be anticipated and adequately explained.

L. Check on Yourself

When you search your name on the Internet, what comes up? If a particular attorney has published papers, given interviews or otherwise has an Internet presence at odds with a particular position at trial, you must consider how that may impact the attorney's ability to effectively advocate for their client.

Perhaps the issue is a narrow one, such that a simple fix, like having a different attorney handle certain witnesses or take responsibility for making certain arguments at trial, may suffice. If articles contrary to your position are posted on your bio on your firm's website, you may wish to take those down during trial. At a minimum, you must know what a juror is apt to find so you can plan accordingly.

M. Check on Your Experts

This is a step you should probably take prior to hiring expert witnesses. Depending on what you find, it may influence your decision as to whether to hire a particular expert for a particular case. If you do use the expert, in spite of damaging Internet information, you may wish to take the sting out of it during trial. We are all used to doing that for experts who may have published papers that have contrary positions, where their thinking has evolved or changed over time. If you know that there is information on the Internet that will contradict positions your expert will take at trial, you might elicit a simple statement that science has changed over time, and the expert's thinking has evolved. Such a statement may at least cause a juror to question whether what they find on the Internet is still the expert's opinion.

N. Other Considerations

There is no way to possible imagine every source that a juror may encounter on the Internet. However, there are a few other issues you may want to consider. Does your client have a significant presence in internet advertising? Do those advertisements give an unwanted message or presence given your trial. If so, can they be pulled during the trial? What is the cost-benefit analysis of such a decision? Certainly, companies have been known to pull television advertising from markets during a high profile trial. Does the same thinking apply to internet advertising?

CONCLUSION

In this era of easy information, jurors may not be able to follow the court's admonitions against doing their own research. To fully advocate your client's position, attorneys must recognize this new reality and take steps to combat it. Knowledge is power, so at a minimum, you must educate yourself and your client about what information is accessible to a tech-savvy juror. Only then can you decide how best to handle it.