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**Voir Dire:
Ethically Investigating Potential Jurors**

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This past Fall, I was involved in a multi-party civil trial in Multnomah County Circuit Court. The trial was expected to take two to three weeks, and, as a result, a pool of over 50 jurors was summoned for voir dire. Time constraints at the outset of the trial precluded use of a background questionnaire. Instead, the lawyers had to rely on each potential juror reciting answers to relatively standard questions before launching into individual voir dire. The questions weren't exactly "name, rank and serial number," but they weren't the most illuminating either for a case involving several million dollars in claimed damages.

The defendants used a jury consultant and huddled over the lunch break to review the results. In surprisingly short order, the consultant's firm had unearthed an impressive trove of information on each potential juror that helped frame the questioning that followed in the afternoon. Virtually all of the information was the result of web-based searches of public data. It included property ownership records, political party registration and similar demographic data. More revealing were business web sites for some of the jurors and public social media pages for others.

The jury consultant's quick and efficient work underscored both the scope and volume of public information available today on all of us—including a wealth

of data that we ourselves post. It also illustrated the interplay between the court rules and the professional rules in gathering information about potential jurors from electronic sources. In this column, we'll look at both.

The Court Rules

UTCRC 3.120(1) and its Oregon federal district court counterpart, LR 48-2, provide the context for permissible jury research under the RPCs. Both are very clear that lawyers (and those working for them) cannot “initiate contact” with any potential juror. The prohibition under both rules attaches at the point jurors are initially sworn prior to voir dire and continues (absent a court order) after they have rendered a verdict.

The Professional Rules

RPC 3.5(b), in turn, reflects the interplay between the court rules and the RPCs by prohibiting ex parte communication with a juror “during the proceeding” (again, absent a court order). RPC 3.5(c) then extends the prohibition (again, absent a court order) post-verdict if such contact is otherwise prohibited by the accompanying court rule. Oregon’s professional rule mirrors the corresponding ABA Model Rule and OSB Formal Ethics Opinion 2005-143 discusses the post-verdict period in detail.

With on-line research of prospective jurors, the key phrase in the Oregon court rules is “initiate contact.” OSB Formal Ethics Opinion 2013-189 addresses investigations through electronic social media generally and draws a distinction

between simply viewing public information about potential jurors available on the Internet and contacting potential jurors to obtain access to on-line material.

Formal Ethics Opinion 2013-189 concludes that lawyers and those working with them (either at their firms or outside consultants) are free to gather public information that is available on-line about potential jurors. In doing so, Formal Ethics Opinion 2013-189 applies to social media the same reasoning that the Oregon State Bar used with a party opponent's web site in Formal Ethics Opinion 2005-164: such electronic information is no different conceptually than reading similarly public information in paper form such as a book or a magazine. Formal Ethics Opinion 2013-189 also echoes the ABA's conclusion on this point in Formal Ethics Opinion 466 (2014).

At the same time, Formal Ethics Opinion 2013-189 notes that communication with jurors is generally prohibited by the court rules and corresponding professional rule discussed earlier. Focusing on the phrase "initiate contact," the Oregon State Bar concluded (at 578 n.2) that "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." The wording in Formal Ethics Opinion 2013-189 is sufficiently broad to include auto-generated permission requests.

Summing Up

Oregon's court rules draw a bright line prohibiting lawyers and those assisting them from initiating contact with prospective jurors. That unequivocal prohibition carries over to RPC 3.5(b), which is explicitly linked to the corresponding court rules. Nonetheless, as Formal Ethics Opinion 2013-189 explains, information about prospective jurors that is available on public web sites and social media pages may be used as long as the lawyers and those working with them do not "initiate contact" with the prospective jurors to gain access. Formal Ethics Opinion 2013-189 reflects a practical approach that in most cases will fully arm lawyers with a broad spectrum of public information to effectively and ethically select jurors.

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