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RPC 3.5:
Jury Research Before and After the Verdict

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Lawyers usually focus on jury research at two distinct points in a trial. The first is at the outset to assist with *voir dire* and jury selection. The second is after the verdict to understand the factors that led to the jury's decision. The former often involves web and related social media research of prospective jurors. The latter more frequently involves direct contact with jurors following their service. In this column, we'll look at both through the prism of RPC 3.5 that governs communication with jurors.

Before we do, three qualifiers are in order.

First, although we will focus on lawyers, lawyers in these contexts often work with consultants, investigators and other nonlawyer staff.[1] It is important to remember that under RPCs 5.3 and 8.4(a), lawyers are generally responsible for the conduct of nonlawyers they supervise or direct. Careful lawyers, therefore, will make sure that the nonlawyers with whom they are working understand the constraints that apply to contacts with jurors.

Second, this is an area that is also heavily regulated by court rules. In fact, RPC 3.5(b), which addresses communications with jurors during a proceeding, and RPC 3.5(c), which does the same for communications after jurors have been discharged, are both expressly predicated on other "law or

court order." Accordingly, lawyers should also closely examine any applicable statutes, court rules or orders governing the case concerned.

Third, once a jury is seated and a trial is underway, lawyers may be present with jurors in a variety of circumstances outside the courtroom such as on an elevator during a lunch break. Judges will often instruct jurors that the lawyers are not being rude in these situations by not conversing but instead are simply following the court's rules.[2] Even if a judge has not given a cautionary instruction, prudent lawyers will generally nod politely and say little beyond a common pleasantry to avoid the implication that they engaged in a prohibited communication that might trigger a mistrial, sanctions, regulatory discipline or some combination.[3]

Jury Selection

Internet research on prospective jurors is not new.[4] As more information about people's lives has entered the public domain, however, lawyers have used increasingly sophisticated searches of public data to obtain both more information generally about prospective jurors and information that jurors may not have shared in jury questionnaires or *voir dire*.[5] Strategies for using this information vary. Occasionally, trial counsel may incorporate the information into *voir dire*. More often, however, trial counsel do not wish to risk offending

prospective jurors by appearing to "snoop."[6] Instead, the information is used to make better decisions during jury selection and in shaping arguments during trial.[7] While perhaps not yet within the realm of the standard of care, internet jury research at this point is a common practice.[8]

Some information about jurors may be available from third party sources such as an interview posted on a local media outlet's web site. Other information, however, may be on a platform controlled primarily by the juror such as a social media site. In that latter instance, the critical question under RPC 3.5(b) is whether access to the site involves a "communication" with a prospective (or selected) juror:

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

ABA Formal Opinion 466 (2014) both analyzes this issue and compiles authorities nationally on this point.[9] The opinion is available on the ABA web site.[10]

Assuming the court has not entered an order prohibiting internet research for the case involved,[11] ABA Formal Opinion 466 finds that simply viewing

publicly available information that a prospective juror has posted on a web or social media site does not constitute a "communication" under ABA Model Rule 3.5(b):

> Passive review of a juror's website or . . . [social media] . . ., 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).[12]

By contrast, ABA Formal Opinion 466 concludes that contacting a prospective juror with an access request is a prohibited communication:

> 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). 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.[13]

Post-Trial Interviews

After a jury has rendered its verdict, lawyers may have a variety of reasons to contact jurors once they are discharged. In some instances, lawyers

may wish to investigate suspected juror misconduct that impacted the outcome of the trial.[14] In others, they are interested in learning "what worked" and "what didn't" to incorporate into future trial planning—especially with repetitive litigation such as employment or product liability cases.[15]

RPC 3.5(c) addresses post-trial communication with jurors:

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

Washington's state and federal courts take different approaches to contacting jurors post-trial.

Subject to RPC 3.5(c), post-trial communications with jurors are generally permitted in state court.[16] In fact, Washington Pattern Civil Jury Instruction 6.20 specifically advises jurors that they may be contacted by the attorneys involved once discharged: "Having completed your service on this trial, you may now

discuss this case and your jury service with others, including the attorneys involved in this case." At the same time, state trial courts have the discretion to limit post-trial contact if the circumstances warrant.[17]

Both Washington federal districts, by contrast, have local rules prohibiting counsel from contacting or interviewing jurors post-trial without the specific permission of the court in the case concerned.[18] As noted above, although RPC 3.5(c) generally accommodates post-trial contact, communication is not allowed when prohibited "by law or court order[.]"

Summing Up

In today's electronic environment, internet research can provide a uniquely revealing window on prospective jurors. While not typically as digital, interviewing jurors after a trial can be equally revealing. With both, however, lawyers need to pay careful attention to the constraints imposed by RPC 3.5 and any associated court rules or orders.

ABOUT THE AUTHOR

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[1] *See generally* David C. Kent and Gary R. Giewat, *Effective Use of Jury Consultants*, 28, No. 2 Trial Evidence 8 (Fall 2020) (surveying use of jury consultants before, during and after trial).

[2] *See, e.g.*, WPI 6.02 ("Before Recesses"); *see also* RCW 4.44.280 ("Admonitions to jurors").

[3] *See, e.g., State v. Dechant*, 2016 WL 1032365 at *6 (Wn. App. Mar. 14, 2016) (unpublished) (reviewing contention on appeal that there had been impermissible contact between witnesses and jurors in a hallway outside the courtroom during a lunch break); *see also* WSBA Advisory Op. 1303 (1989) (counseling against casual conversation between lawyers and prospective jurors).

[4] *See generally* J. Brad Reich, *Inexorable Intertwinement: The Internet and the American Jury System*, 51 Idaho L. Rev. 389 (2019) (tracing the parallel expansion of the internet and associated jury research).

[5] *See generally* John G. Browning, *Should Voir Dire Become Voir Google? Ethical Implications of Researching Jurors on Social Media*, 17 SMU Sci. & Tech. L. Rev. 603 (2014) (discussing use of internet and related electronic jury research).

[6] *Id*. at 604-05.

[7] *Id*. at 605-610. *See also* Anthony M. LaPinta, *Ethical Considerations for Attorneys Researching Jurors on the Internet*, 9 J. Race, Gender, and Ethnicity 7, 10-11 (2020) (surveying practical benefits for jury selection by comparing juror answers in *voir dire* with internet research on the same prospective juror).

[8] *See generally* Robert B. Gibson and Jesse D. Capell, *Researching Jurors on the Internet—Ethical Implications*, 84, No. 9 NYSBA Journal 10 (Nov./Dec. 2012) (discussing the evolution of internet jury research).

[9] For another very accessible and comprehensive survey of this issue, *see generally* Jan L. Jacobowitz and John G. Browning, *Legal Ethics and Social Media: A Practitioner's Handbook*, ch. 6 (2d ed. 2022) ("Juror, Juror on the (Social Media) Wall, Who's the Fairest of Them All?").

[10] ABA Formal Opinion 466 also addresses situations where a lawyer through internet jury research discovers juror misconduct during trial. The opinion finds that if the information discovered involves criminal or fraudulent misconduct by the juror regarding the proceeding, the lawyer has a duty under ABA Model Rule 3.3(b) to take "reasonable remedial measures" that may include notifying the judge. *Id*. at 6-9.

[11] Neither Washington state nor federal rules prohibit internet jury research outright. Occasionally, however, courts enter case-specific orders in this regard. *See, e.g., United States v. Kilpatrick*, 2012 WL 3237147 (E.D. Mich. Aug. 7, 2012) (unpublished) (prohibiting internet research of prospective jurors in criminal case involving local public official and intense media coverage).

[12] ABA Formal Op. 466 (2014) at 4.

[13] *Id*. On a related point, ABA Formal Opinion 466 concludes (at 5) that an auto-generated notice to a prospective juror that someone who shares the same platform has viewed the juror's content does not constitute a "communication" under ABA Model Rule 3.5(b). The opinion notes, however, that authorities around the country have taken different positions on this issue and that, in any event, such notices may present a practical disincentive.

[14] *See, e.g., State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2019) (noting post-verdict contact of jurors to investigate claim of juror misconduct during deliberations); *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 137 S. Ct. 855, 197 L. Ed.2d 107 (2017) (same). *See also* Robert H. Aronson and Maureen A. Howard, *The Law of Evidence in Washington* at 7-16 to 7-24 (rev. 5th ed. 2021) (discussing the juror "anti-impeachment" rule under the Federal Rule of Evidence 606 and Washington common law).

[15] David C. Kent and Gary R. Giewat, *Effective Use of Jury Consultants*, *supra*, 28, No. 2 Trial Evidence at 11.

[16] *See generally* CR 59 (discussing motions for new trials in civil cases); CrR 7.5 (same in criminal cases); *see, e.g., State v. Orozco*, 2021 WL 1035319 at *6 (Wn. App. Mar. 18, 2021) (unpublished) ("[A]s long as it complied with RPC 3.5(c), the defense could task its investigator with talking to jurors after the trial[.]").

[17] *See State v. Finch*, 137 Wn.2d 792, 866-67, 975 P.2d 967 (1999) (affirming limitation in aggravated murder case).

[18] *See* Western District LCR 47(d); Eastern District LCivR 48(d).