CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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THE POTENTIAL IMPACT OF THE PUBLIC'S PERCEPTION OF TRUCKS AND PUBLIC TRANSPORTATION ON JURY SELECTION IN LITIGATION

The Influence of Headlines and the Media's Coverage of Catastrophic Accidents Involving Large Trucks and Various Forms of Public Transportation on Your Jurors, and the Plaintiff Bar's Use of the "Reptile Theory" to Take Advantage of their Bias and Fear

The rate of fatalities and injuries involving large trucks and buses steadily increased from 2010 – 2012.[1] In 2012, over 3700 people were killed in accidents involving large trucks or buses.[2] These crashes amounted to over $40 billion in damages in 2012.[3] The stakes in personal injury cases are high, and care must be given from start to finish when trying these cases. The beginning of such care should first be implemented during *voir dire*.

While jury selection procedures vary from state to state and from county to parish, one thing is true: *voir dire* is one of the most important parts of your trial. When undervalued or conducted without the requisite care, you may have lost your case before you have even begun to try it.

Today's local and national news is filled with tragic accidents. Many involve catastrophic injuries and death. Some even involve celebrities. What is true about each is that someone is watching and that someone might just be in your next jury panel. Will you know what they really think about you and your client before they take a seat to decide your fate?

On March 20, 2013, a New Mexico jury returned a $58.5 million verdict, including $47 million in punitive damages, to the plaintiff in a wrongful death lawsuit against three trucking and transportation defendants, as well as the driver involved in a semi-truck accident. Not only is the verdict believed to be the largest in New Mexico history, but it is noteworthy for the trucking industry, because the jury sought permission from the trial judge after rendering the verdict to release a statement, which read in part, **"Our hope is**

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[1] *Pocket Guide to Large Truck and Bus Statistics*, U.S. Dept. of Transp., Federal Motor Carrier Safety Admin. Office of Analysis, Research, and Technology (Oct. 2014) http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/FMCSA%20Pocket%20Guide%20to%20Large%20Truck%20and%20Bus%20Statistics%20-%20October%202014%20Update%20%282%29.pdf.

[2] *Id.*

[3] *Id.*

that our judgment will clearly communicate that we expect a much higher standard of safety and training in the trucking industry." Plaintiffs' lawyers have celebrated the verdict as a victory against the trucking industry and are sure to cite it as an example of holding companies responsible for not following proper "safety rules" to protect the commuting public. Indeed, an increasing number of plaintiffs' attorneys are utilizing a new trial strategy to frame cases so it appears that each defendant consciously violated certain "safety rules" in order to maximize damages awards, like this recent case.

Don Keenan and Dr. David Ball introduced a concept known as the "Reptile Theory" that is used by plaintiff attorneys to gain favorable verdicts with high damage awards.[4] The theory focuses on the reptilian part of the human brain, which controls survival instincts.[5] "According to Ball and Keenan, 'when the Reptile sees a survival danger, even a small one, she protects her genes,' which, to the authors, can be correspondingly applied to jurors who may see danger and must 'protect [her]self and the community,' by awarding damages that punish or deter defendants."[6] "By framing arguments in terms of our most biologically basic need for security, plaintiff [attorneys] are able to successfully tap into jurors' primitive or 'reptile' mind."[7]

Ball and Keenan encourage plaintiff attorneys to emphasize "'the immediate danger of the kind of thing the defendant did, and how fair compensation can diminish that danger within the community.' In order to generate this sense of immediate danger within jurors, they 'urge plaintiff lawyers to frame a case so it appears that every defendant chose to violate a safety rule.'"[8] By proposing that defendants violated a safety rule, the Reptile Theory then suggests that the courtroom is the place to enforce such safety rules by awarding damages and decreasing any dangers posed by the defendant.[9] "According to Ball and Keenan, jurors serve as the guardians of community safety and the author's formula 'Safety Rule + Danger = Reptile' theorizes that the reptile brain 'awakens' once jurors perceive that a safety rule has been broken by the defendant, resulting in jurors awarding damages to the plaintiff to protect themselves and society."[10]

Tactics for the Reptile Theory are implemented very early during litigation, including voir dire.[11] "To debunk any theory, one must show that the theory's core principals and formulas are flawed."[12] Several blemishes exist in the Reptile Theory. One flaw is that a

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[4] Ryan A. Malphurs, Ph.D. and Bill Kanasky Jr., Ph.D., *Confronting the Plaintiff's Reptile Revolution Defusing Reptile Tactics with Advanced Witness Training,* Courtroom Sciences Inc., http://www.courtroomsciences.com/News/Articles-Archive/047b6e5c-2517-42a3-ad42-3b5184ffca05.

[5] *Id.*

[6] *Id.*

[7] Broda-Bahm, Ken, Ph.D., *Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution,* The Jury Expert (Nov. 5, 2013), http://www.thejuryexpert.com/2013/11/taming-the-reptile-a-defendants-response-to-the-plaintiffs-revolution/.

[8] *Confronting the Plaintiff's Reptile Revolution Defusing Reptile Tactics with Advanced Witness Training.*

[9] *Id.*

[10] *Id.*

[11] Kanasky, Bill Ph.D., *Debunking and Redefining the Plaintiff Reptile Theory*, Courtroom Sciences Inc., http://www.iadcmeetings.mobi/assets/1/7/6.1-_Kanasky-_Debunking_Reptile_Theory.pdf.

[12] *Id.*

plaintiff's attorney can only "suggest" a danger to jurors as opposed to actually causing a danger that would initiate these survival instincts.[13] "In other words, the core foundation of the Reptile [T]heory is that danger triggers survival responses, but in reality, jurors are never exposed to any direct danger. Therefore, without an immediate threat, awakening the reptile brain in the manner in which Ball and Keenan describe is physiologically impossible."[14]

Next, the reptile portion of the brain isn't the only region of the human brain that is responsible for triggering survival instincts.[15] This portion actually plays a much more limited role in comparison with other portions of the brain.[16] "While the reptile brain…plays a key role in detecting danger, the limbic system actually processes the dangerous information and can activate the sympathetic nervous system to trigger the fight or flight survival response. As such, Ball and Keenan's theory is invalid because true protective survival responses are not even triggered by the human reptile brain…, but rather by the more advanced limbic system."[17]

During voir dire, plaintiff attorneys use a technique called "'priming' [to establish] terms, language and definitions."[18] "Priming is…used to influence (i.e. control) attention and memory, and it can have significant impacts on decision-making."[19] Priming is an inherent memory effect where "exposure to a stimulus influences a response to a later stimulus."[20] Attorneys use priming so that these impetuses are processed early on by a jury during *voir dire*, which causes these impetuses to be processed more quickly by the brain during the course of trial.[21] If "careless" is used frequently to describe a characteristic, then that description is likely to be "automatically attributed to someone's behavior."[22] Priming can "essentially blind jurors from processing new information."[23]

Defense attorneys usually choose to ask questions that will identify "pro-plaintiff" jurors, and while this is important, it is necessary that they take the time to "strip and re-prime" jurors with "defense terms, language and definitions."[24] "Defense counsel can defuse plaintiff attorney priming efforts by indoctrinating jurors in *voir dire* with a cognitive 'plan' that can spoil plaintiff counsel's priming efforts."[25] Usually, defendants will try to counter plaintiff remarks by asking the jury to focus on the law and facts that are present in the matter at hand.[26] However, it is much more effective for a defendant to "re-prime"

[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

the jurors.[27] For instance, a defense attorney should ask jurors "who here feels that a physician's real priority needs to be to treat every patient as a unique individual" in response to a plaintiff attorney's line of questioning that revolves around physicians placing safety as a top priority, and if this duty of safety is owed to the community.[28]

In addition to priming the jurors, it is necessary for defense attorneys to "weed out with [the] idea that elimination of the risk is never possible."[29] Questions such as the following may be considered to get potentially problematic jurors talking:

1) Some people feel it's a good thing for the result of trials to have an effect on the community. Others are uncomfortable about it. Which folks are you closer to?

2) Trials can have far reaching effects. We all know about the McDonald's coffee case. And we all know about the Ford Pinto gas tanks that exploded and the jury held them accountable. Some folks are hesitant in being a juror whose decision might have far-reaching effects. Others are okay with it. Which are you closer to?

3) Someone once said the jury is the guardian of the community. Some folks are uncomfortable being asked to be a guardian. Others are okay with it. Which are you closer to?

It is necessary to remind the jurors that there is always an inherent risk associated with activity when a plaintiff lawyer tries to prime them with a "safety" theme.[30] Efforts to "deny a safety rule . . . can be part of your message at trial."[31] Plaintiff attorneys often rely on the following six elements to prime their witnesses with a safety theme:

(1) The safety rule must prevent danger;
(2) The safety rule must protect people in a wide variety of situations, not just someone in the plaintiff's position;
(3) The safety rule must be in clear English;
(4) The safety rule must explicitly state what a person must or must not do;
(5) The safety rule must be practical and easy for someone in the defendant's position to have followed; and
(6) The safety rule must be one that the defendant will either agree with or reveal him or himself as stupid, careless, or dishonest in disagreement.[32]

Consider reminding your jury that nothing can "literally and fully 'prevent' danger."[33] The defendant in your case does not bear the responsibility of fully preventing harms, but

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[27] *Id.*
[28] *Id.*
[29] Richard C. Thomas and Corinne Ivanca, *Snake Handling: Recognizing and Responding to Reptilian Trial Tactics* (Jul. 28, 2014), http://c.ymcdn.com/sites/www.mdla.org/resource/resmgr/Files/14-Thomas-Ivanca-Snake-Handl.pdf.
[30] *Id.*
[31] *Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution*.
[32] *Id.*
[33] *Id.*

he or she is obligated to mitigate or control risks.[34] For instance, seatbelts reduce the impact an individual may feel when they are involved in an automobile collision, but they do not protect against every single injury that could occur. Next, remember that the Reptile Theory encourages jurors to think in abstract and broad terms.[35] If you remind jurors that there isn't a simple "cut-and-paste set of rules" that apply to various situations, it will be easier to deter them from using their "survival instincts" throughout the course of the litigation, especially during voir dire.[36]

It is also necessary that this "safety rule" is in plain English, even if it is complex.[37] "A dumbed-down principle can be a less accurate principle. Complexity for its own sake is the defendant's enemy, and can be rightly seen as obfuscation. But *realistic* complexity — factors and distinctions that are critical…and can be patiently and accurately taught to the jury — [are] the defendant's friend."[38] Also, remember that the "[t]here is no room in a Reptile perspective for 'typically,' 'probably,' or 'in most cases;' [i]t has to be an imperative."[39] Defense lawyers can assist jury members with grasping this concept by "explaining and supporting all of the factors" that must be taken into account.[40]

Likewise, urge the jury to not think in terms of hindsight, but rather, what was appropriate at the time given the knowledge in place.[41] Lastly, "[t]his final rule really sums up the mindset: You either agree with a simplistic rule, or you are stupid, careless or dishonest. To fight back, you need to mount an educational offensive that frames the choice as something other than that. For example, craft your own safety rule that is simple, yet honest: a principle that jurors can understand... If the true rule is a little more complicated than the plaintiff's proffered rule, then make jurors proud of the extra effort it takes for them to get it: They aren't taking the easy route[;] they're taking the accurate route."[42]

Because of the numerous regulations governing commercial motor carriers, commercial truck accident litigation is fertile ground for plaintiffs' lawyers to implement the "Reptile" strategy to inflame juries into record-breaking verdicts. Indeed, it is low hanging fruit to equate Federal Motor Carrier Safety Association (FMCSA) regulations to "safety rules" and argue that all violations, no matter if causative to the issues in dispute, "needlessly endanger the community" and create automatic liability resulting from potential harms. The general public is seemingly biased against truck drivers to begin with and expects higher safety standards from the trucking industry. Accordingly, defense attorneys should recognize the "Reptile" strategy, prepare for it in discovery, educate defense witnesses and the judge, seek to exclude it from trial, and be prepared for its use in *voir dire*.

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

Voir Dire **in Context of Large Trucks/Buses and Public Transportation Litigation**[43]

"In trucking cases, jurors' prior experiences, beliefs and values are highly predictive of their verdicts."[44] Throughout the course of trial, jurors will process all the information presented to them using these outlooks and prior dispositions that they possess.[45] Accordingly, this means that the jurors use these attitudes and beliefs in conjunction with the facts of the case when reaching a verdict.[46]

"The key objective of voir dire is to identify and de-select biased jurors. De-selection questioning allows us to expose jurors' prior experiences, values, beliefs and attitudes that run contrary to the themes in our case. The following methodology should be employed to assure de-selection[:]"

- Open-ended questions;
- Reinforce;
- Survey;
- Confirm; and
- Eliminate.[47]

In the context of large trucks/buses and public transportation litigation, the following topics should be addressed: (1) prior experience with automobile accidents; (2) media coverage involving truck accidents; (3) bias against truck drivers; (4) significant personal loss; (5) bias against the defendant; and (6) familiarity with plaintiff's type of injuries.[48]

Jury research may be conducted to identify the most persuasive and compelling trial themes and strategies that reinforce positive case reactions while countering an adversary's arguments and evidence.[49] This research consists of a representative sample of mock jurors from the trial venue observing presentations given on behalf of the plaintiff and defendant(s) in the dispute.[50] These presentations may be adversarial, thematic, and provide the strongest arguments and evidence for each side.[51] Following the presentations, the mock jurors are given the jury instructions and deliberate to

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[43] *See* separate attachments made a part of this Handout – *Key Topics to Cover in Voir Dire in Transportation Cases* and *Utilizing "Big Data" Modeling for Evaluating Potential Jurors*, by Dr. Rudich, et al.
[44] Rudich, Eric, Ph.D., *Key Topics in Voir Dire in Transportation Cases*, Magna Legal Services.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Hecht, P. & Rudich, E., Ph.D., *Online versus In-Person Jury Research*, Magna Legal Services.
[50] *Id.*
[51] *Id.*

verdict.[52] The mock jury deliberations provide valuable feedback on the case strengths and weaknesses and the key case aspects that determine jurors' decision-making.[53]

Today, such research may be conducted using online methodologies or in-person groups.[54] Both methodologies provide critical feedback for determining strengths and weaknesses and for assessing jurors' overall evaluation of the case.[55] Determining whether an in-person or online jury research is more appropriate may depend on the complexity of the case, budget, and stage in the litigation lifecycle.[56] Importantly, jury research will inform which topics are most important for making jury selection decisions.[57]

How Do Attorneys Make All This Work?

Presumption of Innocence/Presumption of Guilt – application of government standards and the implication of liability at trial

The Federal Motor Carrier Safety Regulations (FMCSR) "generally [applies] to any employee, employer, and commercial motor vehicle that transports property or passengers in interstate commerce."[58]

"A number of cases across the country have held that violations of [the] FMCSR can form the basis of negligence *per se* claims[59]."[60] However, some jurisdictions do not allow violations of the FMCSR to constitute as negligence *per se*.[61] Also, "[s]everal cases illustrate violations of state statutory laws that courts have found to constitute negligence per se."[62] Thus, it is necessary to determine if your relevant jurisdiction affirms or denies that a violation of the FMCSR and/or state law equivalent

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[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Federal Motor Carrier Safety Regulations*, http://www.truckinginjuryfirm.com/federal-motor-carrier-safety-regulations-fmcsr/.
[59] The doctrine of negligence per se uses a statutory or regulatory provision to determine a duty and a breach of said duty in a negligence action. Numerous jurisdictions require several elements to be satisfied for negligence per se to apply. These elements typically include the following: (1) the defendant violated a statute or regulation; (2) the plaintiff is a member of the class that the statute or regulation intended to protect; (3) the plaintiff's injury was one that the statute or regulation was designed to protect against; and (4) violating the statute or regulation proximately caused plaintiff's injury (J. Richard Caldwell, Jr. and Kurt Rozelsky, *Negligence Per Se*, FDCC Annual Meeting (Jul. 28, 2014), http://www.thefederation.org/documents/08.Negligence%20Per%20Se).
[60] J. Richard Caldwell, Jr. and Kurt Rozelsky, *Negligence Per Se*, FDCC Annual Meeting (Jul. 28, 2014), http://www.thefederation.org/documents/08.Negligence%20Per%20Se.pdf.
[61] Capps, Bryan, *Effective Use of Federal Motor Carrier Safety Regulations*, http://www.sidgilreath.com/docs/Federal_Motor_Carrier_Safety_Regulations.pdf.
[62] Biggs, Robert, *A Framework for Reference Know Statutes and Regulations to Defend Trucking Cases Successfully*, 55 No. 12 DRO For Def. 80 (Dec. 2013).

constitutes as negligence *per se* in order to determine if "minimum standards" have been met.[63]

Lessons learned from *voir dire* and the ethics of juror research

An important lesson lawyers learn after participating in the *voir dire* process is the proper use of jury questionnaires. Notwithstanding the extent to which juror questionnaires have gained support in the legal community, it remains true that attorneys do not have a specific right to use questionnaires in most jurisdictions.[64] Therefore, it is necessary to determine if a particular jurisdiction allows the use of such questionnaires and the extent to which they may be used.

In addition to determining if jury questionnaires may or may not be used, strategic concerns dictate whether counsel should prefer to conduct *voir dire* amongst a group of jurors or instead, examine them one by one, with each juror questioned outside the hearing of others.[65] The dynamics of the case, pretrial publicity, potential juror biases, and other factors must be considered before a jury questionnaire is implemented.[66]

Researching jurors and potential jurors by using the Internet and Electronic Social Media (ESM) platforms may prove to be beneficial. The American Bar Association's Standing Committee on Ethics and Professional Responsibility released a Formal Opinion on April 24, 2014 titled "Lawyer Reviewing Jurors' Internet Presence."[67] The conclusion of the Opinion sets forth that:

> "[u]nless 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)[68].

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[63] *See* the attached chart which briefly summarizes various jurisdictions' application of negligence per se to the FMCSR, other federal regulations governing motor vehicles, and state regulatory provisions concerning same.

[64] Jury Selection Strategy and Science § 17:2 (3d ed.).

[65] *Id.*

[66] *Id.*

[67] American Bar Association, *Lawyer Reviewing Jurors' Internet Presence*, April 24, 2014, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

[68] This rule sets forth that:

> A lawyer shall not:

> 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.[69]

The Opinion continues by commenting that "some information posted on ESM websites 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 EMS service, or in some cases, only to those whom the subscriber has granted access."[70] The opinion addressed three "levels" of potential lawyer review of a juror's or potential juror's internet presence, to wit:

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.[71]

As to scenario one, the Opinion concludes passive review that is available without making an access request (read: "friending" on Facebook" for example), does not violate the Model Rules, noting that "the mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b)."[72] The Opinion compares this circumstance with "driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information."[73]

As to scenario two, the Opinion concludes that such active review is prohibited and is "akin to driving down the juror's street, stopping the car, getting out, and asking the juror

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(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 . . .

[69] *See*, *supra*, n.1., at p. 1.
[70] *Id*. at p. 2.
[71] *Id*.
[72] *Id*. at p. 4.
[73] *Id*.

for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."[74]

As to scenario three, the Opinion concludes that a passive lawyer is not "communicating" with the juror, rather, the ESM service is communicating with the juror based on a technical feature unique to that ESM.[75] The Opinion correlates this situation with a lawyer's "car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."[76]

Interestingly, the Opinion "strongly encouraged judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet" and suggested the same be reflected in either a court order, a scheduling order, or even in the form of a local court rule.[77]

Finally, the Opinion made two further suggestions to lawyers that plan to review juror information.[78] First, lawyers should be aware of an ESM's terms and conditions regarding privacy, especially in an ever changing landscape.[79] Second, lawyers who review juror social media should ensure their purpose is not to embarrass, delay, or burden the juror or the proceeding.[80]

An Affirmative Duty to Research the Jury?

One Court has actually held that an attorney has an *affirmative* duty to conduct the type of social media research during *voir dire*. The Missouri Supreme Court case of *Johnson v. McCullough, M.D.,*[81] involved a medical malpractice lawsuit where plaintiffs' counsel, during *voir dire*, asked about prior involvement in litigation by any venire member. After the close of a six-day jury trial and a defense verdict, plaintiffs' counsel investigated one particular juror using Missouri's automated case record service, Case.net, and "discovered that [the juror] previously had been a defendant in multiple debt collection cases and in a personal injury case.[82] At least three of the lawsuits against [the juror] were recent, as they were filed within the previous two years."[83] Plaintiff filed a motion for new trial alleging that the juror intentionally failed to disclose her prior litigation experience.[84] The trial court granted the motion, and defendants appealed.[85] The Court held the following:

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[74] *Id*.
[75] *Id*. at 6.
[76] *Id*.
[77] *Id*. at p. 3.
[78] *Id*. at 5-6.
[79] *Id*.
[80] *Id*.
[81] 306 S.W. 35 551, 554 (Mo. Banc 2010).
[82] *Id*. at 554-55.
[83] *Id*.
[84] *Id*. at 555.
[85] *Id*.

> [I]n 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. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled. Litigants should endeavor to prevent retrials by completing an early investigation. Until a Supreme Court rule can be promulgated to provide specific direction, to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial. To facilitate this search, the trial courts are directed to ensure the parties have an opportunity to make a timely search prior to the jury being empanelled and shall provide the means to do so, if counsel indicates that such means are not reasonably otherwise available.[86]

Though the Court ultimately affirmed the judgment of the trial court, it paved the way for Missouri Supreme Court Rule 69.025[87], which became effective January 1, 2011.[88]

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[86] *Id.* at 558-59.

[87] **(a) Proposed Questions.** A party seeking to inquire as to the litigation history of potential jurors shall make a record of the proposed initial questions before voir dire. Failure to follow this procedure shall result in waiver of the right to inquire as to litigation history.
(b) Reasonable Investigation. For purposes of this Rule 69.025, a "reasonable investigation" means review of Case.net before the jury is sworn.
(c) Opportunity to Investigate. The court shall give all parties an opportunity to conduct a reasonable investigation as to whether a prospective juror has been a party to litigation.
(d) Procedure When Nondisclosure is Suspected. A party who has reasonable grounds to believe that a prospective juror has failed to disclose that he or she has been a party to litigation must so inform the court before the jury is sworn. The court shall then question the prospective juror or jurors outside the presence of the other prospective jurors.
(e) Waiver. A party waives the right to seek relief based on juror nondisclosure if the party fails to do either of the following before the jury is sworn:
(1) Conduct a reasonable investigation; or
(2) If the party has reasonable grounds to believe a prospective juror has failed to disclose that he or she has been a party to litigation, inform the court of the basis for the reasonable grounds.
(f) Post-Trial Proceedings. A party seeking post-trail relief based on juror nondisclosure has the burden of demonstrating compliance with Rule 69.025(d) and Rule 69.025(e) and may satisfy that burden by affidavit. The court shall then conduct an evidentiary hearing to determine if relief should be granted.

[88] *See also As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn*, May 31, 2013, John G. Browning, Lewis Brisbois Bisgaard & Smith, http://www.thejuryexpert.com/2013/05/as-voir-dire-becomes-voir-google/.

The *Johnson* case and Rule 69.025 were recently at issue in *Khoury v. Conagra Foods*, where, the day prior to *voir dire*, the trial court and parties' counsel agreed that counsel would "investigate overnight the venire panel members' litigation history using Missouri's automated case record service, Case.net, and then determine the next morning whether any of the eighty panel members may have failed to answer questions regarding prior litigation experience."[89] After *voir dire* was finished and the parties exercised their peremptory strikes and strikes for cause, "counsel for ConAgra informed the trial court that counsel had found, separate and apart from litigation history information, that Juror Piedimonte had a Facebook page and was a 'prolific poster for anti-corporation, organic foods.'"[90] This juror was ultimately stricken on ConAgra's motion.[91] The issue on appeal was whether ConAgra's request to strike the juror was timely.[92] The plaintiff relied on *Johnson*, arguing that it applies to researching jurors for *any* alleged material nondisclosure.[93] The appellate court noted that *Johnson*, and subsequent Rule 69.025, only required an attorney to timely search a juror's *litigation history*.[94] As to other juror challenges, the court relied on its prior decision in *McBurney v. Cameron* where it "encouraged counsel to make [challenges to a juror's alleged intentional nondisclosure of material information in voir dire] before submission of the case whenever practicable."[95] The court ultimately held the following:

> Neither *Johnson* nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that *any and all* research—Internet based or otherwise— into a juror's alleged material nondisclosure must be performed and brought to the attention of the trial court *before* the jury is empanelled or the complaining party waives the right to seek relief from the trial court. While the day may come that technological advances may compel our Supreme Court to re-think the scope of required "reasonable investigation" into the background of jurors that may impact challenges to the veracity of responses given in voir dire *before* the jury is empanelled—that day has not arrived as of yet . . . Here, ConAgra lodged its objection to Juror Piedimonte not just *before* the case was *submitted*, but actually *before any evidence whatsoever had been introduced at trial.* ConAgra's motion to strike Juror Piedimonte was neither untimely nor prejudicial to the Khourys.[96]

The Supreme Court of Kentucky in *Sluss v. Commonwealth*, although not discussing any affirmative duty to conduct online juror research, did note that "a lawyer may undertake a pretrial search of a prospective juror's social-networking website provided that there is no contact or communication with the prospective juror and the lawyer does not seek to

[89] 368 S.W. 3d 189, 193 (Mo. App. S.D., 2012).
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*. at 202.
[94] *Id*.
[95] 248 S.W. 3d 36, 41 (Mo. App. W.D., 2008).
[96] *Khoury*, *supra*, at 203.

'friend' jurors, subscribe to their microblogging-website accounts, send jurors microblogs, or otherwise contact them."[97]

Ethics and Juror Research

Ethics committees in some states have issued opinions on the ethics of monitoring jurors online in a world of increasing social media use. The New York County Lawyers' Association Committee on Professional Ethics held that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page" was allowed as long as the lawyers did not have direct or indirect contact with the jurors during trial.[98]

The New York City Bar Committee on Professional Ethics also issued Formal Opinion 2012-2: Jury Research and Social Media, holding as follows:

> [A]ttorneys 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.[99]

The Court in *Sluss* noted the above opinions and commented as follows:

> In 2011, the New York County Lawyers Association's Committee on Professional Ethics examined whether, under New York's professional conduct rule governing communications between a lawyer and a juror or member of the jury venire, N.Y. R. Profl Conduct 3.5, a lawyer is permitted, "[a]fter voir dire is completed and the trial commences, ... [to] routinely conduct ongoing research on a juror on Twitter, Facebook and other social networking sites." N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (May 18, 2011). The Committee's ethics opinion, mirroring the ethics rule, differentiates between conduct that is permissible during the pretrial phase and conduct that is permissible during the evidentiary and deliberation phases. The committee concluded: It is proper

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[97] *See Sluss v. Commonwealth*, 381 S.W. 3d 215 (Ky. 2012).

[98] New York County Lawyers' Association Committee on Professional Ethics, Forma Opinion 743 (May 18, 2011).

[99] *Formal Opinion 2012-2: Jury Research and Social Media*, The Association of the Bar of the City of New York on Professional Ethics http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

> and ethical under [Rule of Professional Conduct] 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that 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 to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any representations or engage in deceit, directly or indirectly, in reviewing juror social networking sites . . . The New York ethics opinion provides reasonable guidance for counsel by weighing the party's right to have an impartial jury against the lawyer's ethical duty not to interfere with jurors. This Court therefore adopts this model for the type of investigation an attorney may conduct before and during trial into a juror's social media account. Importantly, SCR 3.130(3.5)(c)[13] also clearly governs the circumstances when an attorney may communicate with a juror after the jury has been discharged. The same principles that apply to communications made before and during trial apply to post-trial communications as well.[100]

The Oregon State Bar issued Formal Opinion No. 2013-189 discussing the ethics of juror research.[101] One article addressed the holding as "lawyers may always access the publicly available social networking information about parties or jurors and that neither a lawyer nor her agent may send a request to a juror to access non-public personal information on a social networking site."[102] An article reviewing this Opinion noted the following:

> The Oregon ethics committee went beyond its New York counterparts, however, by further advising that Rule 8.4(a)(3), which prohibits deceitful conduct, will not automatically preclude a lawyer from enlisting an agent to deceptively seek access to another person's social networking profile. It holds that while a lawyer "may not engage in subterfuge designed to shield [her] identity from the person" whose profile she's seeking to access, Oregon Rule 8.4(b) (which has no counterpart in the ABA Model Rules) creates one exception permitting lawyers "to advise clients and others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance "with other ethical provisions." Under such "limited instances," the Committee concluded, a lawyer "may advise or supervise another's deception to access a person's non-public information on social networking websites" as part of an investigation into unlawful activity. Could this language be used to justify

[100] *Sluss, supra*, at 227-28.
[101] *See* https://www.osbar.org/_docs/ethics/2013-189.pdf.
[102] *See As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn, supra.*

> having a trial consultant pose as someone or otherwise be deceptive in order to gain access to a juror's privacy-restricted profile if there is a "suspicion of juror misconduct?" While the language is vague (referring only to "persons"), the better course of action would be to adhere to the opinion's earlier mandate: "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."[103]

The degree to which a lawyer investigates a juror or potential juror's ESM along with the rules of a particular jurisdiction should be given careful consideration. Additionally, a lawyer should research the rules of a particular jurisdiction to see if he or she possesses an affirmative duty to conduct social media research during *voir dire*. Taking these factors into account, attorneys should be mindful of the Rules of Professional Conduct and local tribunal rules before engaging in ESM searches of jurors and potential jurisdiction.

[103] *Id*.