Massachusetts Lawyers Weekly **http://masslawyersweekly.com**

Too much information?

by Brandon Gee

Published: September 19th, 2013

At a time when government surveillance of online communications is a sensitive subject, lawyers are divided on where to draw the line when it comes to their own secretive research into jurors' Internet activities.

While mining the web for as much background information as possible about jurors has become a widely accepted practice among trial lawyers — particularly in Massachusetts, which doesn't allow attorney-conducted voir dire — some are less comfortable with moving beyond research to the real-time monitoring of jurors' Internet activities once a trial is underway.

"There are services today who will contact trial lawyers when a trial starts, and they are capable of, once a jury is selected, actually monitoring their [social media] traffic," says William F. Lee of WilmerHale in Boston.

As the high-profile "smartphone war" trial between Apple and Samsung was drawing near in a federal court in California, Lee, lead trial counsel for Apple, was contacted by one such service. He declined the offer.

"We were asked about it, but we did not do it, and I would not consider doing it," Lee says. "I actually think there are ethical problems with this."

Other attorneys don't draw such a distinction and believe anything posted publicly online is fair game as long as there is no communication between attorneys and jurors and no way for jurors to discover they're being snooped on.

"In my mind, as long as the juror is not aware of the surveillance and the surveillance is gathering publicly available … information, I don't see a difference between the two," says Andrew M. Perlman, a professor and director of the Institute on Law Practice Technology and Innovation at Suffolk University Law School.

Still other attorneys, regardless of whether they have strong feelings on whether juror surveillance is ethical, believe it is a waste of time and more trouble than it's worth.

"There's something sort of exciting about knowing what they're up to, but it's usually a colossal waste of time," says Michelle R. Peirce, a litigator at Donoghue, Barrett & Singal in Boston. "You can do it, but don't let the tail wag the dog. There's so much out there, it can overwhelm. Keep in mind your goal. You shouldn't just do it for the sake of doing it."

Little guidance

Official guidance on the issue is sparse. According to Perlman and Peirce, there have been no ethical opinions on the subject issued in Massachusetts, leaving lawyers to apply existing rules and guidance to what Peirce calls a "dynamic and fast-moving situation."

According to Perlman, the underlying ethical principle is that attorneys are not supposed to have contact with jurors.

Lawyers interviewed for this story, and formal ethics opinions published in other jurisdictions such as New York, unanimously agree that attorneys are limited to viewing what jurors post to the public at large and that sending jurors invitations to connect and share information on a social network (for example, "friend" requests on Facebook and "follow" requests on Twitter), or otherwise causing a juror to be notified of the monitoring, qualifies as communication and is not allowed.

That's problematic because it is possible to inadvertently alert a juror to surveillance. For example, users of the professional social networking site LinkedIn who pay for an upgraded "premium" membership are able to see the names of people who have viewed their profiles.

"You have to be really careful that the looking doesn't cross over into contact," Peirce says. "It's the same old rules, but there's some nuance in how you apply them."

Intrusion?

Even when it's possible to monitor a juror's social media activity without running afoul of the rules, some lawyers, like Lee, just don't feel right about it.

"Any kind of surveillance, whether it's actual physical surveillance or not, would obviously be socially inappropriate, if not legally inappropriate," says Jeffrey N. Catalano, a personal injury lawyer at Todd & Weld in Boston who calls the practice "a little smarmy."

While Catalano admits there's "some limited value" at the beginning of a case, he warns that one then has to be careful "of that not-so-clear line between investigation and intrusion."

Again, guidance is sparse, but Catalano's thinking appears similar to the U.S. Supreme Court's in the 1929 case Sinclair v. United States, in which the court held that the physical surveillance of jurors by private detectives constituted criminal contempt even though "it did not appear that any operative actually approached or communicated with a juror, or attempted to do so, or that any juror was conscious of the observation."

More recently, during the federal trial of former Detroit Mayor Kwame Kilpatrick, U.S. District Court Judge Nancy Edmunds empaneled a jury, disclosed the jurors' names and hometowns privately to the lawyers in the case, but barred counsel from investigating their backgrounds or monitoring their use of social media during the trial.

Edmunds ruled that there was "no recognized right to monitor jurors' use of social media," that jurors "are entitled to safety, privacy and protection against harassment," and that monitoring them "would unnecessarily chill the willingness of jurors summoned from our community to serve as participants in our democratic system of justice."

Legal commentators, such as the influential 7th U.S. Circuit Court of Appeals Judge Richard A. Posner, have fretted that privacy concerns are one reason people dread jury duty and fear that the specter of online investigations and monitoring will make service even less appealing and reduce jury summons reply rates.

Boston personal injury and medical-malpractice lawyer Marc L. Breakstone believes the squeamishness is unwarranted. Monitoring public Internet posts is more like listening to someone speaking from a soapbox on a street corner than secretly shadowing his every move like the private detectives discussed in Sinclair, Breakstone says.

"I see no ethical issue. It's in the public domain," says Breakstone, who personally monitors jurors' social media accounts. "The public domain is the public domain. There's certainly nothing wrong with checking the Internet. There would be a lot wrong with interacting with jurors or doing anything on the Internet to influence jurors with respect to the case."

'Starving' for info

Depending on what jurors post publicly, they could reveal information that an attorney might use to tailor arguments and questioning. A sports metaphor, for example, might be thrown in for the benefit of a bored-looking juror who posted several tweets about the Red Sox the night before.

"If somebody makes a political statement [online], and you know somebody is an arch conservative, that's something to factor into your argument, into your case theme," Breakstone says.

"Trial lawyers are starving for information about jurors. The Internet is a potential treasure trove of information. Why wouldn't a diligent trial lawyer inquire of that source? I would rather have voir dire, but without voir dire, this is all I can do."

Lee and Catalano agree that the information can be useful, but believe that kind of research needs to be done on the front-end and shelved once a trial is actually underway.

"Once the jurors have been picked, I think trying to gather social media information is sufficiently problematic that I would avoid it," Lee says.

Catalano concurs, saying once a trial begins, lawyers should be more focused on putting the case together than trolling the Internet for information on jurors that will be of limited value, if not misleading.

Meanwhile, Weston lawyer Kimberly E. Winter has one of the associates at her firm monitor jurors' social media accounts during trial. To date, the monitoring hasn't revealed anything more interesting than one juror's complaint about the lunch options during trial. Winter continues the surveillance anyway, in part to make sure jurors don't break the rules by discussing or researching the case online.

There have indeed been several examples of jurors held in contempt and mistrials declared over inappropriate online activities. But Peirce questions whether lawyers really want to put themselves in the position of policing that type of behavior.

While some lawyers in some cases might salivate at the idea of getting a hostile-looking juror removed from the case or a mistrial declared, discovering juror misconduct could prove a double-edged sword if a lawyer likes the juror and the way things are going.

"If you find things that are troublesome, you then have to evaluate your obligation to bring it to the court's attention," Peirce says. "You need to be prepared to think through what the implications are."

Complete URL: **http://masslawyersweekly.com/2013/09/19/too-much-information/**