



Program Title 12 Angry Tweeters – A Reboot of “12 Angry Men”  
 Date Presented April 12, 2017 Inn Year 2016-2017  
 Presenting Inn Joseph B. Campbell Inn of Court Inn Number 30165  
 Inn City San Bernardino Inn State California  
 Contact Person Susan Grabarsky Phone (909) 390-3770  
 E-mail Address sgrabarsky@darraslaw.com

Please consider this program for the Program Awards: X Yes No This program is being submitted for Achieving Excellence: X Yes No  
 (Submit within 60 days of presentation.)

### Program Summary:

Be concise and detailed in summarizing the content, structure, and legal focus of your program. Please attach additional sheets if necessary.  
 See attached.

### Program Materials:

The following materials checklist is intended to insure that all the materials that are required to restage the program are included in the materials submitted to the Foundation office. **Please check all that apply and include a copy of any of the existing materials with your program submission:**

X Script X Articles X Citations of Law Legal Documents Fact Pattern List of Questions X Handouts  
 X PowerPoint Presentation CD DVD Other Media (Please specify) Movie trailer, pictures

### Specific Information Regarding the Program:

Number of participants required for the program 5 or more Has this program been approved for CLE? X Yes No  
 Which state's CLE? California How many hours? 1.0 Pending X Approved

### Recommended Physical Setup and Special Equipment:

i.e., DVD and TV, black board with chalk, easel for diagrams, etc.

AV set-up with projector, screen, laptop for PowerPoint and video clips, microphones for panel and audience participation.

We also provided the audience with auction paddles printed with the words "Ethical" and "Unethical" on each side.

### Comments:

Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on Inn members' response regarding the demonstration.  
 See attached.

## Program Submission Form

### Roles:

List the exact roles used in the demonstration and indicate their membership category; *i.e.*, Pupil, Associate, Barrister or Master of the Bench.

Role	Membership Category
See attached.	

### Agenda of Program:

List the segments and scenes of the demonstration and the approximate time each item took; *i.e.*, "Introduction by judge (10 minutes)."

Item	Time
See attached.	

**Program Awards:** *Please complete this section **only** if the program is being submitted for consideration in the Program Awards.*

**Describe how your program fits the Program Awards Criteria:**

**Relevance:** How did the program promote or incorporate elements of our mission? *(To Foster Excellence in Professionalism, Ethics, Civility, and Legal Skills)*

See attached.

**Entertaining:** How was the program captivating or fun? \_\_\_\_\_

See attached.

**Creative and Innovative:** How did the program present legal issues in a unique way? \_\_\_\_\_

See attached.

**Educational:** How was the program interesting and challenging to all members? \_\_\_\_\_

See attached.

**Easily Replicated:** Can the program be replicated easily by another Inn?    ☒ Yes    ☐ No    This program is:    ☒ Original    ☐ Replicated

### Questions:

Please contact program library staff at (703) 684-3590 or by e-mail at [programlibrary@innsofcourt.org](mailto:programlibrary@innsofcourt.org).

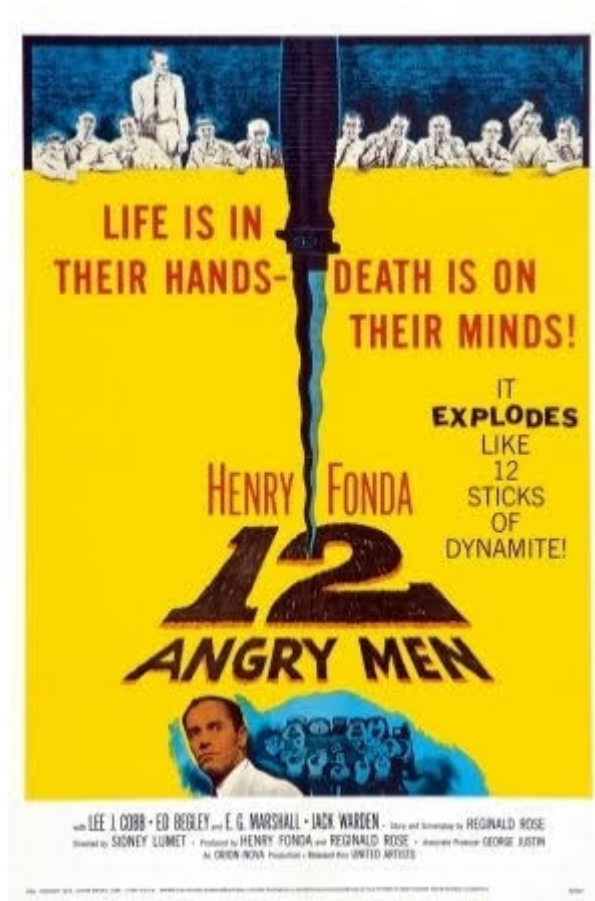
**Please include ALL program materials. The committee will not evaluate incomplete program submissions.**

**Attachment to Program Submission Form  
Hon. Joseph B. Campbell American Inn of Court  
San Bernardino, California  
April 12, 2017**

Title of Program: 12 Angry Tweeters – A Reboot of “12 Angry Men”

Date of Program: April 12, 2017

Presenting Inn: Hon. Joseph B. Campbell American Inn of Court,  
San Bernardino County, California



**Table of Contents:**

1. Attachment to Program Submission Form with links to movie trailer on YouTube, plot summary, and most of the Program Materials.
2. PowerPoint presentation.
3. Handouts: cases, statutes, ethical rules, and MCLE articles not linked in the Program Summary.
4. Pictures of Audience Participation.

## **Program Summary:**

**Purpose:** This year, our Inn is presenting a series of programs titled “Rebooting Classic Lawyer Movies.” Our aim is to continue American Inns of Court’s goal of advancing the legal profession through ethics, civility, and excellence, by taking a fresh look at popular movies about lawyers.

Through the lens of advancements in technology, evolution of the law, and increased cultural diversity, we are discussing classics like the 1957 film, “12 Angry Men.” In this movie, some of the jurors have personal issues and biases that affect their ability to be fair and impartial. How much of this could have been gleaned from their social media posts and other online research if the trial was held in 2017?

The presenting team led a lively discussion regarding the use of modern jury selection consultants and internet research, especially social media research, to unearth potential juror bias. Every member of the audience was provided with an auction paddle printed with the words “Ethical” and “Unethical” on each side. While discussing hypothetical situations, the audience was invited to vote with their auction paddles. This proved to be the most animated part of the program.

In addition, the Inn had a special guest speaker on this topic, jury consultant David E. Cannon, Ph.D. of Trial Innovations. He discussed online juror surveys, voir dire and jury selection consultation, and post-trial juror interviews.

## **MCLE Credit: Recognition and Elimination of Bias in the Legal Profession**

### **Program Materials:**

- Movie trailer: <https://www.youtube.com/watch?v=fSG38tk6TpI>
- Plot Summary: <http://www.imdb.com/title/tt0050083/plotsummary>
- Recent Case Law:
  - *Oracle America Inc. v. Google Inc.* No. C 10-03561 WHA (N.D. Cal. Mar. 25, 2016)
- Articles about searching jurors’ social media:
  - Respecting The Rules For Searching Jurors' Social Media  
<https://www.law360.com/articles/830240/respecting-the-rules-for-searching-jurors-social-media>
  - Litigation Insights: Is it Ethical to Research Jurors Online During Jury Selection? <http://litigationinsights.com/jury-selection-process/ethical-research-jurors-online/>
  - Leveraging Social Media Analytics in Jury Selection
  - <http://www.thenationaltriallawyers.org/2016/04/leveraging-social-media-analytics-in-jury-selection/>



- Social Media and Jury Selection  
<http://www.lexology.com/library/detail.aspx?g=eff05461-18a3-4168-8a0e-13197b211f35>
- MCLE articles:
  - Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection  
[http://www.americanbar.org/publications/the\\_brief/2016\\_17/winter/voir\\_dir\\_e\\_becomes\\_voir\\_google\\_ethical\\_concerns\\_of\\_21st\\_century\\_jury\\_selection.html](http://www.americanbar.org/publications/the_brief/2016_17/winter/voir_dir_e_becomes_voir_google_ethical_concerns_of_21st_century_jury_selection.html)

**Specific Information Regarding the Program:**

Number of participants required for the program: 5 or more on the panel, including the moderator, with one participant operating the AV equipment.

Has this program been approved for CLE: Yes, 1 hour of California MCLE credit in Recognition and Elimination of Bias in the Legal Profession.

**Recommended Physical Setup and Special Equipment:**

- Audio-visual set-up with projector and screen for the PowerPoint with movie clips;
- Internet connection for YouTube clips of the movie or copies of the movie clips downloaded and saved to a laptop;
- Microphones for the panel and for audience; and
- Auction paddles printed with the words “Ethical” and “Unethical” on each side.
- Optional: extra projector and Live Tweet App set-up (<https://www.livetweetapp.com/en>) allowing members to tweet their comments from their smartphones during the presentation.

**Comments:** *Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on Inn members’ response regarding the demonstration.*

The team had several meetings prior to the presentation. The first order of business was to make sure everyone had seen the movie. The Inn sent an email reminder to all members so that they could re-watch the film before the program. Then we discussed which scenes to show as part of the PowerPoint presentation. We chose to show the movie trailer with inserted video animations, such as the Twitter symbol and tweet sound effects.

We recommend reviewing current legal authority, as this is a rapidly evolving field. It is also a good idea to formulate the hypotheticals based on the latest social media trends. If none of the team members are comfortable discussing the technical aspects of social media research, we recommend they invite a guest speaker with expertise on this subject, as we did during this program.

The team also considered using a second projection screen so that members could “Live Tweet” their opinions and answers to the hypotheticals. Depending on the demographics of the Inn, this could work. For our Inn, however, given the number of members who are not active on social media, we decided to use auction paddles instead. The members enjoyed voting by physically holding up the sides printed with the words “Ethical” or “Unethical.”

### **Inn Members’ Responses:**

The members of our Inn responded very favorably to the series of hypotheticals. The ability to vote with auction paddles generated substantial audience participation. Some people were so emphatic in their opinions that they stood up to raise their paddles higher. A few people indicated equivocal opinions by flipping the paddles back and forth between “Ethical” and “Unethical.”

### **Roles:**

Moderator:

Linda Lindsey, Barrister

Panel Members:

Greg Brittain, Master

Zachary Hagenbuch, Associate

Masood Khan, Master

Steve Bell, Legal Professional

Guest Speaker:

David E. Cannon, Ph.D. of Trial Innovations, Jury Consultant

### **Agenda of Program:**

1. Introduction (3 minutes)
2. Movie Trailer and brief discussion of the movie plot (5-10 minutes)
3. Overview of Current Legal Authority (5-10 slides, 10-15 minutes)
4. Discussion of Modern Jury Selection (15-20 slides, 15-20 minutes)
5. Hypothetical Ethical Dilemmas and Q&A Session (remaining time)

### **Program Awards:**

**Relevance:** *How did the program promote or incorporate elements of our mission? (To Foster Excellence in Professionalism, Ethics, Civility, and Legal Skills)*

This program emphasized fostering excellence in legal skills, ethics, and professionalism – particularly how to investigate potential jurors in the age of social media. We accomplished this by comparing and contrasting how lawyers evaluated potential jurors in the 1950s with how they do so in 2017. We discussed how the ethical

guidelines apply to the rapidly evolving technology of social media. We also provided a copy of a recent legal opinion in our jurisdiction that examines these issues, *Oracle America Inc. v. Google Inc.* No. C 10-03561 WHA (N.D. Cal. Mar. 25, 2016).

**Entertaining:** *How was the program captivating or fun?*

Nearly every member of our Inn had seen the film before, as it is a classic. We updated the movie trailer with Twitter sound effects and other social media symbols, which made most people laugh.

One of the funniest parts of the program was the translation of tweets from 140-character limited acronyms to plain English.

The audience also enjoyed voting on the hypotheticals with their auction paddles.

**Creative and Innovative:** *How did the program present legal issues in a unique way?*

Using this classic legal film as a backdrop, we compared how lawyers evaluated potential jurors in the 1950s versus how they do so in 2017. We speculated on how some of the jurors in the film would have behaved on social media. Would they have revealed their biases if given the opportunity to post their opinions on Facebook, Twitter, or other types of social media? We then discussed how the ethical guidelines apply to the rapidly evolving technology of social media.

**Educational:** *How was the program interesting and challenging to all members?*

Many of our members, including most of the judicial officers, are not active on social media. Indeed, some are averse to it. To these members, the program was confirmation of their worst fears, yet it was also eye-opening. The general consensus was that lawyers have a duty to familiarize themselves with social media, given its pervasiveness in modern society.

Even those members who are technologically adept were impressed by the amount of information jury consultants, like our guest speaker, are able to obtain via the internet and other sources.

The program provided a thorough review of the ethical rules and current legal authority regarding evaluation of potential jurors.

**Easily Replicated:** *Can the program be replicated easily by another Inn?*

This program can be easily replicated by Inns in other states who want to focus on jury selection techniques. They should update the case law with current legal authority in that jurisdiction. They should also update the social media references, to reflect the most current trends.

## CURRENT RULES CA

### *Rules of Professional Conduct*

#### Rule 5-320 Contact With Jurors

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- (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.
  - (B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.
  - (C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.
  - (D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
  - (E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.
  - (F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
  - (G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.
  - (H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
  - (I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror.
- (Amended by order of Supreme Court, operative September 14, 1992.)



## Legal Ethics, Social Media, and the Jury

As you look at the panel of prospective jurors in the courtroom, you certainly would like to know more about them in order to ascertain how they might view your client and your case. You are curious about the potential biases prospective jurors might hold, and concerned about whether your *voir dire* opportunities will uncover significant areas of prejudice. Mindful of your ethical obligations, you steer clear of direct contact with the jurors. During jury selection, you conduct your *voir dire* on behalf of your client. Asking whether anyone in the venire knows your adversary or her family, the panel remains silent. When you ask the jurors whether any of them has a Facebook account, one juror in particular answers no. Another juror acknowledges having a Facebook account, but shares little further information. You may think, "Nothing remarkable there."

Fast forward. After an adverse verdict against your client, you learn that not one, but two, of the jurors are Facebook friends with the adverse party. Both jurors more or less concealed that information during the *voir dire*. Now you are talking about a new trial, and the judge is considering whether you should have investigated the jurors' Facebook accounts during jury selection. Next time, to learn more about your jurors earlier, can you, or must you, in order to fully address your client's interests, investigate your prospective jurors' social media?

### **Ethical Duties Toward Jurors**

Several core ethical concerns bear on this scenario, including the duty of competence, the duty of honesty, and prohibitions on communication with jurors. These intersect with the power (and mystery) of technology. Lawyers' professional responsibilities include a duty to perform work competently, that is, with diligence, learning, and skill. Cal. R. Prof. Conduct 3-110. Recent revision to the American Bar Association rule on competence requires lawyers to both understand the basic features of technology and to be informed regarding the risks and benefits associated with the use of relevant technology. Model Rules of Prof'l Conduct R. 1.1 cmt 6 (2012). Under the California rules, the duty of competence includes acquiring sufficient learning and skill before performance is required. Cal. R. Prof. Conduct 3-110. The duty of competence may require lawyers to conduct an online investigation of jurors, including looking at social media. To do that, lawyers must understand how to utilize social media without violating prohibitions on contacting jurors.

Ethical restrictions on lawyer contact with jurors preclude communicating, directly or indirectly, with anyone the lawyer knows to be a member of the jury venire, and with any juror during trial. Cal. R. Prof. Conduct 5-320. California's ethics rules also prohibit lawyers from directly or indirectly conducting an out-of-court investigation of a juror or venire member in a manner likely to influence the person's state of mind in connection with jury service. *Id.* In addition, lawyers have a duty to report to the court any improper conduct by a member of the venire or a juror. *Id.* While post-trial communication with jury members after the discharge of the jury generally is permissible under California's rules, lawyers may not make comments to members that are intended to harass or embarrass jurors or to influence a juror's actions in future jury service. *Id.*

The third major relevant area of ethics for our purposes is the duty of honesty. California law makes attorney deceit a misdemeanor. Cal. Bus. & Prof. Code § 6128(A). In addition, impersonating another actual person by electronic means can be a misdemeanor. Cal. Penal Code § 528.5. California law prohibits lawyers from engaging in acts involving dishonesty, whether as an attorney or otherwise, and requires that lawyers employ such "means only as are consistent with truth." Cal. Bus. & Prof. Code § 6106; Cal. Bus. &

Prof. Code § 6068(d). Finally, lawyers directing a third party's investigatory efforts have an ethical duty to supervise non-lawyers working under their direction to assure that such subordinates operate in an ethical manner. *See* Cal. R. Prof. Conduct 3-110, *Discussion*.

### Vetting the Venire

As a competent lawyer, do you have a duty to conduct online research regarding potential jurors? Courts have begun to endorse online investigation regarding jurors during the jury selection process, but some judges have expressed reservations. One court held that the trial judge should have permitted a lawyer to use his computer to conduct research on the venire panel. *Carino v. Muenzen*, A-5491-08T1, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010). In another case where a juror concealed information about her litigation history during questioning in the *voir dire* phase of the trial, the court indicated that a party must use reasonable efforts to investigate jurors' litigation backgrounds during jury selection, or prior to the jury's being empanelled, and report relevant information to the court. *Johnson v. McCullough*, 306 S.W.2d 551, 558-59 (Mo. 2010) (juror concealed information concerning her litigation history during *voir dire*, but information was readily available through automated case record service). However, the practice of scrutinizing jurors' social media, while becoming more commonplace, may not yet have risen to the level of an affirmative duty. *See Sluss v. Com.*, 381 S.W.3d 215 (Ky. 2012) (two jurors may have been Facebook friends with the mother of the victim during trial, and made misrepresentations during *voir dire*, from which the factual scenario described above is loosely derived).

Two ethics opinions from New York address the lawyer's duty of competence in connection with this issue, and are not so equivocal as the cases just referenced. Both agree that the duty of competence requires that lawyers research social media of jurors and potential jurors, but only so long as no prohibited "communication" occurs. N.Y. County Formal Opn. 743 (2011); N.Y. City Bar Formal Opn. 2012-2 (2012). This guidance indicates that lawyers may read public postings on jurors' social media pages before and during trial, with several important provisos discussed below. In addition, a lawyer has a duty to research and understand the mechanics of any social media service or website that that lawyer uses to conduct such research, in order to avoid inadvertent prohibited communication with jurors. *Id.*

Bearing in mind that lawyers are prohibited from communicating with jurors, both New York opinions indicate that a lawyer may not "friend" jurors on Facebook, or otherwise connect with jurors or potential jurors through social media. The term "communication" is construed in the broadest possible sense, including any messaging a juror may receive as a result of a lawyer's viewing of the juror's social media pages, and including automated communication generated by the technology following contact with the site, without regard for the lawyer's intent to communicate. This is consistent with the San Diego County Bar's ethics opinion indicating that a "friend" request is at least an indirect, and therefore prohibited, communication. San Diego County Bar Legal Ethics Opn. 2011-2 (2011) (discussing prohibited contact with adverse parties). Just viewing a person's social media site can leave a record of the visit. For example, a juror may receive notice that particular persons have visited the juror's LinkedIn page, or receive a communication from the social media service that, for an extra fee, the juror can see everyone who has visited the person's site for a certain period of time. Broadly construed, this would violate the prohibition on communication.

In addition, lawyers may not subscribe to jurors' Twitter accounts, nor send Tweets to jurors, since following a juror on Twitter would result in a notification to the juror, resulting in improper communication. Chats and messaging with jurors or potential jurors via social media are also off limits for lawyers. The key issue here is gaining an understanding of the social media site you are visiting to determine what actions of the lawyer or her proxy will result in a juror learning of the contact. Such contact runs the risk of improperly influencing or intimidating a juror.



Both New York ethics opinions also caution lawyers not to use deceitful contact in viewing a juror's social networking sites, and advise lawyers not to have proxies contact jurors using deception or misrepresentation when conducting jury research. Despite this common-sense application of the rules against deceit, some lawyers have adopted false personas online and other lawyers have directed third parties (such as their paralegals) to do so. John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 St. Mary's Journal of Legal Malpractice & Ethics 204, 225, 228-29 (2013) (discussing prosecutors' posting under pseudonyms online and attorneys' delegating online investigation to paralegal). The use of deception through "over-zealous efforts to effectuate a legal strategy" reflects a disregard of ethical duties that can constitute moral turpitude. See *In re Maloney*, 4 Cal. State Bar Ct. Rptr. 774 (2005); Cal. Bus. & Prof. Code § 6106.

Juror tweeting and blogging during trial is difficult to detect, and yet, can lead to mistrials. N.Y. City Bar Formal Opn. 2012-2. Courts have adopted a range of practices to prevent use of social media by jurors, including use of jury instructions and admonitions, frequent reminders, use of posters, confiscation of devices, warnings about penalties (fines and contempt), distribution of copies of warnings, and asking jurors to sign formal statements of compliance. Meghan Dunn, *Juror's Use of Social Media During Trials and Deliberations—A Report to the Judicial Conference Committee on Court Administration and Case Management*, 8-9 (2011) available at [http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf). While detected conduct is relatively rare, should a lawyer become aware via social media that a juror is Tweeting, posting, or blogging about a case, or otherwise discussing the case via social media, the attorney's ethical obligation is to advise the court regarding such activity.

Gone are the days when lawyers tried to discern juror predilections based on mere observations of their tee-shirt slogans and the type of reading materials jurors brought with them into the courtroom. In today's digital environment, analysis of social media in investigation of potential jurors can yield important information relevant to possible bias and prejudice of jurors. Monitoring social media of jurors during trial may reveal misconduct by empanelled jurors. Navigating the social media maze proves challenging as the functionality of technology changes. Competent lawyers will utilize this resource appropriately and inform themselves regarding the extent to which the investigation of jurors through social media would generate a "communication" with jurors, as construed in the broadest sense, to avoid ethical violations.

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*Carole Buckner is the principal of Buckner Law Corp. in Irvine, and she serves as co-chair of the OCBA's Professionalism and Ethics Committee. She is Dean of the School of Law at Abraham Lincoln University, and Chair of the Los Angeles County Bar Association's Professionalism and Ethics Committee. She can be reached at [cbuckner@bucknerlaw.net](mailto:cbuckner@bucknerlaw.net). The views set forth here are her own.*

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

## Formal Opinion 466 Lawyer Reviewing Jurors' Internet Presence

April 24, 2014

*Unless 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).*

*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.*

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'<sup>1</sup> presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

### **Juror Internet Presence**

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

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1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.



another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites 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 ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.<sup>2</sup>

This opinion addresses three levels of lawyer review of juror Internet presence:

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;

### **Trial Management and Jury Instructions**

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached *ex parte* by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.<sup>3</sup> In today's Internet-saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.<sup>4</sup> If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

### Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

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 . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g., In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

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4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his “jury selection team” phone venire member’s home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer “cannot avoid the proscription of the rule by using agents to communicate improperly” with prospective jurors).

Passive review of a juror’s website or ESM, 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).<sup>5</sup>

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).<sup>6</sup> 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.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror’s ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

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5. Or. State Bar Ass’n, Formal Op. 2013-189 (“Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website”); N.Y. Cnty. Lawyers Ass’n, Formal Op. 743 (2011) (lawyer may search juror’s “publicly available” webpages and ESM); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass’n, Op. E-434 (2012) (“If the site is ‘public,’ and accessible to all, then there does not appear to be any ethics issue.”). *See also* N.Y. State Bar Ass’n, Advisory Op. 843 (2010) (“A lawyer representing a client in pending litigation may access the public pages of another party’s social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation”); Or. State Bar Ass’n, Formal Op. 2005-164 (“Accessing an adversary’s public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary”); N.H. Bar Ass’n, *supra* note 3 (viewing a Facebook user’s page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party’s public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass’n, *supra* note 5, fn. 2, (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”); N.Y. Cnty. Lawyers Ass’n, *supra* note 5 (“Significant ethical concerns would be raised by sending a ‘friend request,’ attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror’s blog, or ‘following’ a juror’s Twitter account”); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, *supra* note 3 (lawyer may not chat, message or send a “friend request” to a juror); Conn. Bar Ass’n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass’n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass’n, *supra* note 3 (lawyer may request access to witness’s private ESM, but request must “correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer’s involvement” in the matter); Phila. Bar Ass’n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness’s private ESM, but may ask the witness “forthrightly” for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2<sup>7</sup>, concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9<sup>th</sup> ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."<sup>8</sup>

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

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7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.

8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions “that have no substantial purpose other than to embarrass, delay, or burden a third person . . .” Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

### Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.<sup>9</sup>

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.<sup>10</sup> The recommended instruction states in part:

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror’s violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that “jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media.”<sup>11</sup> As a result, the authors recommend jury instruction on social media “early and often” and daily in lengthy trials.<sup>12</sup>

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9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr>.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), <http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf>.

11. *Id.* at 66.

12. *Id.* at 87.



Analyzing the approximately 8% of the jurors who admitted to being “tempted” to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission’s proposal, to expand on a lawyer’s previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer’s client to also include such conduct by any person.<sup>13</sup>

Model Rule 3.3(b) reads:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000’s stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

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13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule3.3.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule3.3.html) (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) (“A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal”) and DR 7-108(G) (“A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson’s or juror’s family, of which the lawyer has knowledge”). *Reporter’s Explanation of Changes, Model Rule 3.3.*<sup>14</sup>

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code’s DR 7-108(G), a lawyer knowing of “improper conduct” by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer’s obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal*.<sup>15</sup> While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror’s conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee’s authority, applicable law might treat such juror activity as conduct that triggers a lawyer’s duty to take remedial action including, if necessary, reporting the juror’s conduct to the court under current Model Rule 3.3(b).<sup>16</sup>

14. Ethics 2000 Commission, *Model Rule 3.3 Reporter’s Explanation of Changes*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule33rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html) (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF’L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF’L CONDUCT, R. 3.5(d) (2013) (“a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror....”).

16. See, e.g., *U.S. v. Juror Number One*, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. *U.S. v. Rowe*, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

### Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

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#### AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CHAIR: Paula J. Frederick, Atlanta, GA ■ T. Maxfield Bahner, Chattanooga, TN ■ Barbara S. Gillers, New York, NY ■ Amanda Jones, Chicago, IL ■ Donald R. Lundberg, Indianapolis, IN ■ Myles V. Lynk, Tempe, AZ ■ J. Charles Mokriski, Boston, MA ■ Ellen A. Pansky, South Pasadena, CA ■ Jennifer A. Paradise, New York, NY ■ Richard H. Underwood, Lexington, KY

CENTER FOR PROFESSIONAL RESPONSIBILITY: Dennis A. Rendleman, Ethics Counsel, Mary McDermott, Associate Ethics Counsel

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# “12 ANGRY TWEETS”

A Reboot of the 1957 Classic  
“12 ANGRY MEN”



# “12 ANGRY TWEETS”

## Team:

- Linda Lindsey, Team Leader
- Steve Bell
- Greg Brittain
- Zachary Hagenbuch
- Masood Khan

## Special Guest:

- Dr. David Cannon

# “12 ANGRY TWEETS”

## Presentation Outline:

- Movie Trailer
- Overview of Current Legal Authority
- Social Media & Jury Selection
- Audience Participation



**HENRY  
FONDA**

*A Man's life  
in their hands ...*

YRUL  
MOOR



# **12 ANGRY MEN**

with **LEE J. COBB** **ED BEGLEY**  
and **E. G. MARSHALL** **JACK WARDEN**

Story and Screenplay by **REGINALD ROSE** Directed by **SIDNEY LUMET**  
Produced by **HENRY FONDA & REGINALD ROSE**

Associate Producer **GEORGE JUSTIN**  
AN ORION-NOVA PRODUCTION



# “12 ANGRY TWEETS”

## ABA Formal Opinion #466 (4/24/2014)

- ▣ Under Model Rule 3.5(b):
  - “Passive” review of a juror’s website/social media is permissible
  - “Active” online activities (e.g., a Facebook “friend” request) is impermissible juror communication
  - Automated notifications to a juror of a passive online review is NOT a “communication” under Rule 3.5(b), *but . . .*  
    . . . IS an impermissible “communication” according to O.C.B.A.
- ▣ California Rules of Professional Conduct Rule 5-320
  - Prohibits direct & indirect communication with the venire





# “12 ANGRY TWEETS”



## ABA Formal Opinion #466 (8/24/2014)

□ CBA Model Rule

■ “Pas

■ “A

■ Auto

... IS an im... according to C.B.A.

□ California Rules of Professional Conduct Rule 5-320

■ Prohibits direct & indirect communication with the venire

The California State Bar  
has not yet issued an  
opinion on this subject!

(est) is

review is NOT

# “12 ANGRY TWEETS”

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

- ▣ Motion for New Trial: Juror Misconduct
  - Two jurors were Facebook “friends” with the victim’s mother
  - During *voir dire* neither juror replied that they knew the victim or his family & one juror stated that she was not on Facebook at all
- ▣ “[A] juror who is a ‘Facebook friend’ with a family member of a victim, standing alone, is arguably not enough evidence to presume juror bias sufficient to require a new trial.”
- ▣ Open question: was the jurors’ “friends” status sufficient when combined with their untruthful answers in *voir dire*?

# “12 ANGRY TWEETS”

*Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010)

- ▣ Motion for New Trial: Juror Misconduct
  - Juror remained silent when asked if involved in prior lawsuits
  - Post-verdict online research revealed substantial litigation history
- ▣ “[A]dvances in technology allowing greater access to information that can inform a trial court about the [misconduct] of venire members . . . place a greater burden on the parties to bring such matters to the court's attention . . .” (*emphasis added*)
- ▣ Lawyers do not yet have an affirmative duty to research a prospective juror's online presence



# “12 ANGRY TWEETS”

*Oracle v. Google*, C10-03561, N.D.Cal. (2016)

- ▣ Order Re Internet & Social Media Searches of Jurors (3/25/16)
  - Allowing lawyers to research jurors online after jurors were admonished not to research lawsuit, parties, & lawyers would have “a corrosive effect on fidelity to the no-research admonition.”
  - Researching jurors’ preferences on social media & using this information might “facilitate improper personal appeals to particular jurors via jury arguments and witness examinations.”
  - Invading jurors’ privacy is allowable “only as necessary to reveal bias or a reluctance to follow the Court’s instructions.”

# “12 ANGRY TWEETS”

*Pena-Rodriguez v. Colorado*, 580 U.S. \_\_\_\_ (15-606, Mar. 6, 2017)

- ▣ Juror (ex-police officer) asserted during deliberations that:
  - Defendant was guilty because he was “Mexican”
  - Alibi witness was not credible because juror believed he was “illegal”
- ▣ In criminal cases, when there is clear evidence after a jury verdict of racial bias during deliberations, the no-impeachment rule must yield to the 6<sup>th</sup> Amendment’s guarantee of a fair jury
- ▣ Open questions:
  - Additional protected classes other than race?
  - Extension to state civil trials?

# JURY SELECTION AND ETHICAL CONSIDERATIONS

Social Media and The Internet

David Cannon, Ph.D.

[David@Trialinnovations.com](mailto:David@Trialinnovations.com)

310-927-5879



# SOCIAL MEDIA AND THE INTERNET



- 👍 **Social Networks**– Facebook, Twitter, LinkedIn
- 👍 **Open Web** – Google, Bing, Yahoo!
- 👍 **Deep Web** – Public Records
- 👍 **Archived Web** – Cached Google Search

# EFFECTIVE RESEARCH SKILLS

- 👍 No Footprints
- 👍 Timing and Red Herrings
- 👍 Effective Search Tools
- 👍 Identifying Useful Results
- 👍 Insufficient Information
- 👍 Avoid Liability
- 👍 Compliance



# POPULAR PLATFORMS

- 👍 68% Facebook
- 👍 28% Instagram (IG)
- 👍 26% Pinterest
- 👍 25% LinkedIn
- 👍 21% Twitter


























































































# Demographics of Social Networking Platform Users

based on a survey of 1,520 US adults aged 18+

font colors indicate adoption increase/decrease from 2015 survey (black = flat) | bolded figures show change of at least 3% points

## November 2016

Among adult internet users, the % who use:	Facebook	Instagram	Pinterest	LinkedIn	Twitter
Total	 <b>79%</b>	 <b>32%</b>	 31%	 <b>29%</b>	 24%
Men	 <b>75%</b>	 26%	 17%	 <b>31%</b>	 <b>24%</b>
Women	 <b>83%</b>	 <b>38%</b>	 45%	 27%	 <b>25%</b>
18-29	 <b>88%</b>	 <b>59%</b>	 <b>36%</b>	 <b>34%</b>	 <b>36%</b>
30-49	 <b>84%</b>	 <b>33%</b>	 <b>34%</b>	 33%	 <b>23%</b>
50-64	 <b>72%</b>	 <b>18%</b>	 <b>28%</b>	 <b>24%</b>	 <b>21%</b>
65+	 <b>62%</b>	 <b>8%</b>	 16%	 <b>20%</b>	 <b>10%</b>
High school grad or less	 <b>77%</b>	 27%	 <b>24%</b>	 <b>12%</b>	 20%
Some college	 <b>82%</b>	 <b>37%</b>	 <b>34%</b>	 27%	 25%
College+	 <b>79%</b>	 <b>33%</b>	 <b>34%</b>	 <b>50%</b>	 29%
Less than \$30k/year	 <b>84%</b>	 <b>38%</b>	 <b>30%</b>	 <b>21%</b>	 23%
\$30-50k	 <b>80%</b>	 <b>32%</b>	 <b>32%</b>	 <b>13%</b>	 <b>18%</b>
\$50-75k	 <b>75%</b>	 32%	 <b>31%</b>	 32%	 <b>28%</b>
\$75k+	 <b>77%</b>	 <b>31%</b>	 <b>35%</b>	 <b>45%</b>	 <b>30%</b>
Urban	 <b>81%</b>	 <b>39%</b>	 <b>30%</b>	 <b>34%</b>	 <b>26%</b>
Suburban	 <b>77%</b>	 28%	 34%	 <b>30%</b>	 <b>24%</b>
Rural	 <b>81%</b>	 <b>31%</b>	 <b>25%</b>	 <b>18%</b>	 <b>24%</b>



**USING RELEVANT  
PLATFORMS**



# FACEBOOK

👍 Private v. Public

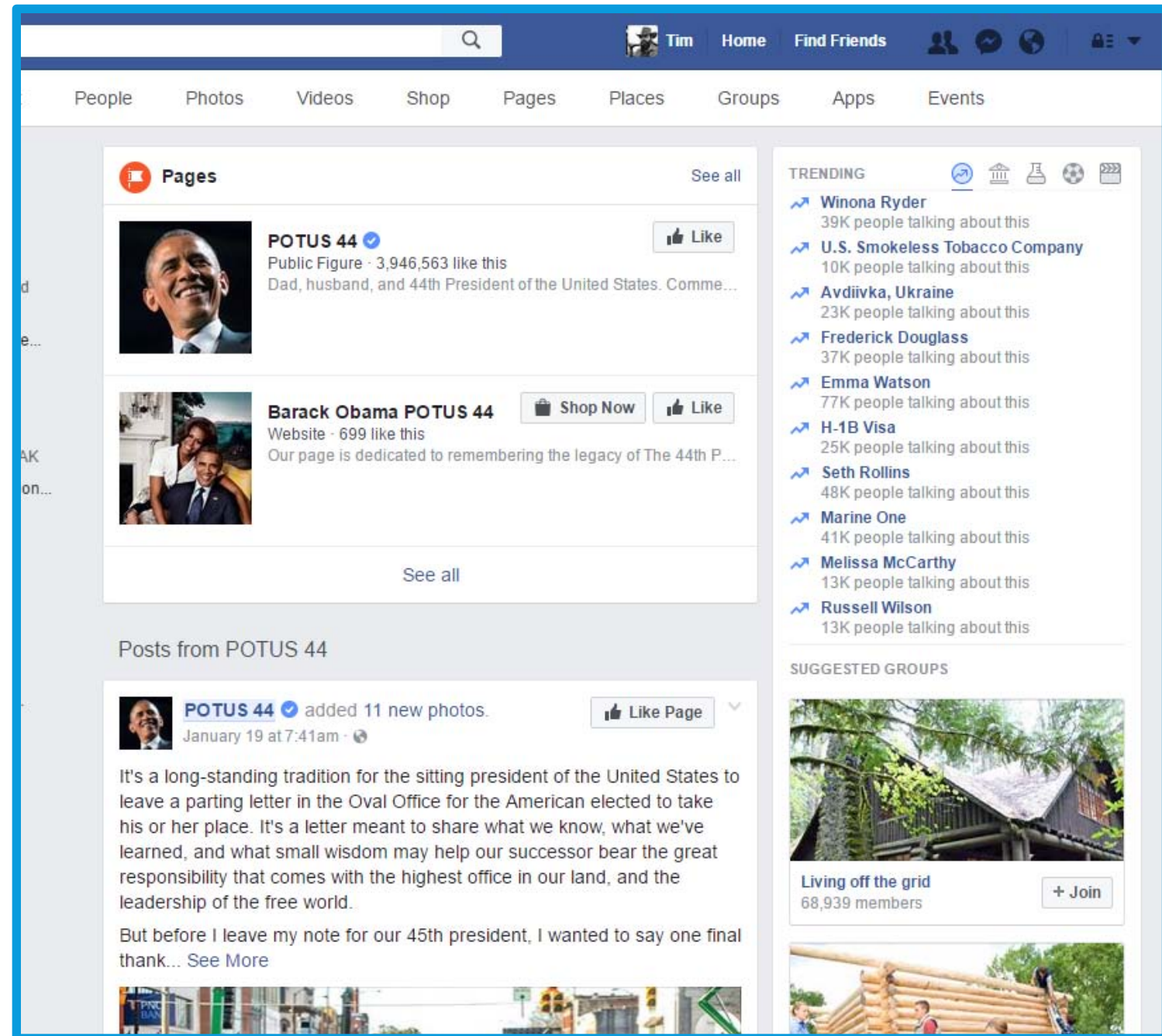
👍 Likes

👍 Groups

👍 Friends

👍 Pictures

👍 Posts

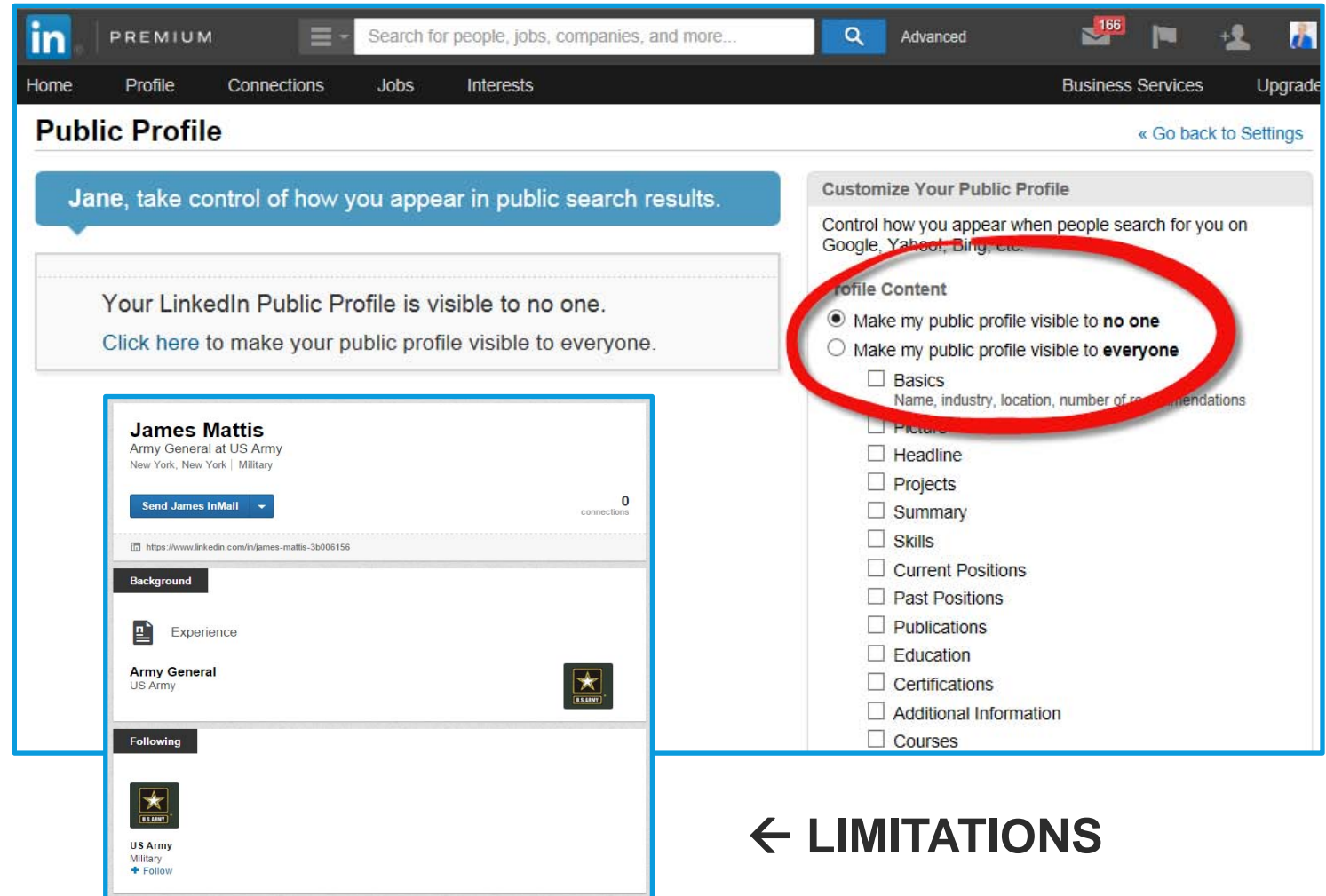


# LINKEDIN

- 👍 Adjust Settings
- 👍 Input Location
- 👍 Connections
- 👍 Similar Concepts
  - 👍 Likes
  - 👍 Groups
- 👍 Employment
- 👍 Endorse
- 👍 Premium Profiles



## SEARCH FOOTPRINT



The screenshot shows the LinkedIn 'Public Profile' settings page. At the top, a blue banner reads 'Jane, take control of how you appear in public search results.' Below this, a message states 'Your LinkedIn Public Profile is visible to no one. Click here to make your public profile visible to everyone.' The main section is titled 'Customize Your Public Profile' and includes a warning: 'Control how you appear when people search for you on Google, Yahoo!, Bing, etc.' The 'Profile Content' section has two radio buttons: 'Make my public profile visible to no one' (selected) and 'Make my public profile visible to everyone'. Below this are checkboxes for 'Basics', 'Picture', 'Headline', 'Projects', 'Summary', 'Skills', 'Current Positions', 'Past Positions', 'Publications', 'Education', 'Certifications', 'Additional Information', and 'Courses'. A blue box on the left shows a preview of a profile for 'James Mattis', an Army General at US Army, with 0 connections. The bottom of the page features a blue arrow pointing left towards the text 'LIMITATIONS'.

Public Profile

Jane, take control of how you appear in public search results.

Your LinkedIn Public Profile is visible to no one.  
[Click here](#) to make your public profile visible to everyone.

Customize Your Public Profile

Control how you appear when people search for you on Google, Yahoo!, Bing, etc.

Profile Content

- ☒ Make my public profile visible to **no one**
- ☐ Make my public profile visible to **everyone**

- ☐ Basics  
Name, industry, location, number of recommendations
- ☐ Picture
- ☐ Headline
- ☐ Projects
- ☐ Summary
- ☐ Skills
- ☐ Current Positions
- ☐ Past Positions
- ☐ Publications
- ☐ Education
- ☐ Certifications
- ☐ Additional Information
- ☐ Courses

James Mattis  
Army General at US Army  
New York, New York | Military

Send James InMail

0 connections

<https://www.linkedin.com/in/james-mattis-3b006156>

Background

Experience

Army General  
US Army

Following

US Army  
Military  
Follow

← LIMITATIONS

# TWITTER

- 👍 Limited Visible Tweets
- 👍 Public Profiles
- 👍 Hashtags
- 👍 Private Users
- 👍 “Follow” Button



## FINDING HISTORIC TWEETS

The screenshot illustrates the Twitter search interface with four numbered annotations:

- 1** Points to the main search bar and filter tabs (EVERYTHING, LINKS, TWEETS, PHOTOS, VIDEOS, INFLUENCERS). Below the search bar are buttons for "ALL TWEETS" and "SINCE 2016".
- 2** Points to the "Advanced Search" modal window. The "Within a Twitter user:" field is highlighted with a red rectangle.
- 3** Points to the "Latest Results" sidebar, which includes filters for time ranges (Past 1 Hour, Past 1 Day, Past 7 Days, Past 18 Days, Past 30 Days, All Time, Specific Range) and sorting options (Oldest, Newest).
- 4** Points to a specific tweet by Tom Hanks (@tomhanks) dated 11 Nov 2016. The tweet text is: "11th hour on the 11th day of the 11th month. The moment of Armistice. Now it's Veterans Day. Peace and Freedom comes at a cost. Hanx." The tweet has 278 replies, 2.8K retweets, and 20K likes.



# USING SEARCH ENGINES





# GOOGLE

- 👍 #1 Search Engine
- 👍 Quotations
- 👍 Keywords
- 👍 Connecting Terms
- 👍 Results
  - 👍 Images
  - 👍 Maps
- 👍 Google Earth
- 👍 Use Chrome



# PUTTING IT ALL TOGETHER

**Juror One: General Mad Dog Mattis (Secretary of Defense, 2017-2020)**

**Facebook:** <https://www.facebook.com/MadDogMattisMemes/>



**LinkedIn:** <https://www.linkedin.com/in/james-mattis-3b006156>

- Army General, United States (from New York, NY)
- No picture

**Google:** (this is where you'd include relevant website results, such as newspaper articles/published writing/anything public that speaks to the person's character/creepy websites that list the person's address/phone/home value/emails/lolololol)

**Analysis:** James N. Mattis (born September 8, 1950) is a retired United States Marine Corps general who last served as the 11th Commander of United States Central Command from August 11, 2010 to March 22, 2013. Mattis is known for implementing the COIN strategy. Before President Obama appointed him to replace General Petraeus on August 11, 2010, he previously commanded United States Joint Forces Command from November 9, 2007 to August 2010 and served concurrently as NATO's Supreme Allied Commander Transformation from November 9, 2007 to September 8, 2009. Prior to that, he commanded I Marine Expeditionary Force, United States Marine Forces Central Command, and 1st Marine Division during the Iraq War. **His political identification is "Independent," but appears to be conservative leaning.**

On December 1, 2016, **President-elect Donald Trump** announced that Mattis would be nominated to serve as United States Secretary of Defense in the coming administration.

**Background:** This juror is repeatedly quoted saying, "The first time you blow someone away is not an insignificant event. That said, there are some a\*\*h\*\*\*s in the world that just need to be shot." (include a screenshot or two if available and reduce the size). Results produced no criminal records and no BKs. Mad Dog Mattis is very wealthy (state income if known) and owns a home(s) (list location(s) and value(s)). He married Jane Doe (DOB) on (date), who is highly involved in (social/political issues if available).

- 👍 **Credible Resources**
- 👍 **Recognize Patterns**
- 👍 **Tracking Time**
- 👍 **Critical Thinking**
- 👍 **Fact-Driven**
- 👍 **Concise Summaries**





# ILLUSTRATIONS

# PREVENTING PROLONGED TRIALS

Florida civil juries consist of six (6) jurors, with only three (3) strikes permitted per party, and a limited number of available alternates. This was a premises liability case. Plaintiff alleged injuries and losses due to the negligence of the Defendant (our client). We were looking for potential jurors with prior lawsuit histories, criminal records, and prior affiliations with the Defendants. Local demographics favored the Plaintiff. Googling a final name in quotations yielded a criminal record of “check-kiting,” resulting in removal for cause.



# FBI: FACEBOOK INVESTIGATION



If an individual does not want to be found, then even with a wealth of facts known about an individual can be irrelevant. After a week of exhausting resources, the subject's address was found through an extensive Facebook investigation. This was accomplished by tracking common friends, family, and fans. Identifying characteristics were visible outside the subject's home via Google Earth, resulting in a response from the subject after a period of ignored responses.

# QUESTIONS?

Social Media and The Internet

David Cannon, Ph.D.

[David@Trialinnovations.com](mailto:David@Trialinnovations.com)

310-927-5879



# “12 ANGRY TWEETS”

## Audience Participation

- ▣ Display a series of post, tweets, & other situations
- ▣ For each situation, vote with your paddles



# “12 ANGRY TWEETS”

## Audience Participation

- ▣ Display a series of post, tweets, & other situations
- ▣ For each situation, vote with your paddles









# "12 ANGRY TWEETS"






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**Number 5**   
[@BuildThatWall13](#)  
Joined January 2012  
[Tweet to Number 5](#)  
1,257 Photos and videos



Tweets **Tweets & replies** Media

**Breitbart News**  [@BreitbartNews](#) · 10m






**'Far-Left Militia' Attacks Le Pen Rally in Corsica**  
'Far-Left Militia' Attacks Le Pen Rally in Corsica  
[breitbart.com](#)

 8  26  28

**Fox News**  [@FoxNews](#) · 9m

**Will @DonaldJTrumpJr run for NY Governor?**

 11K  16K  84K

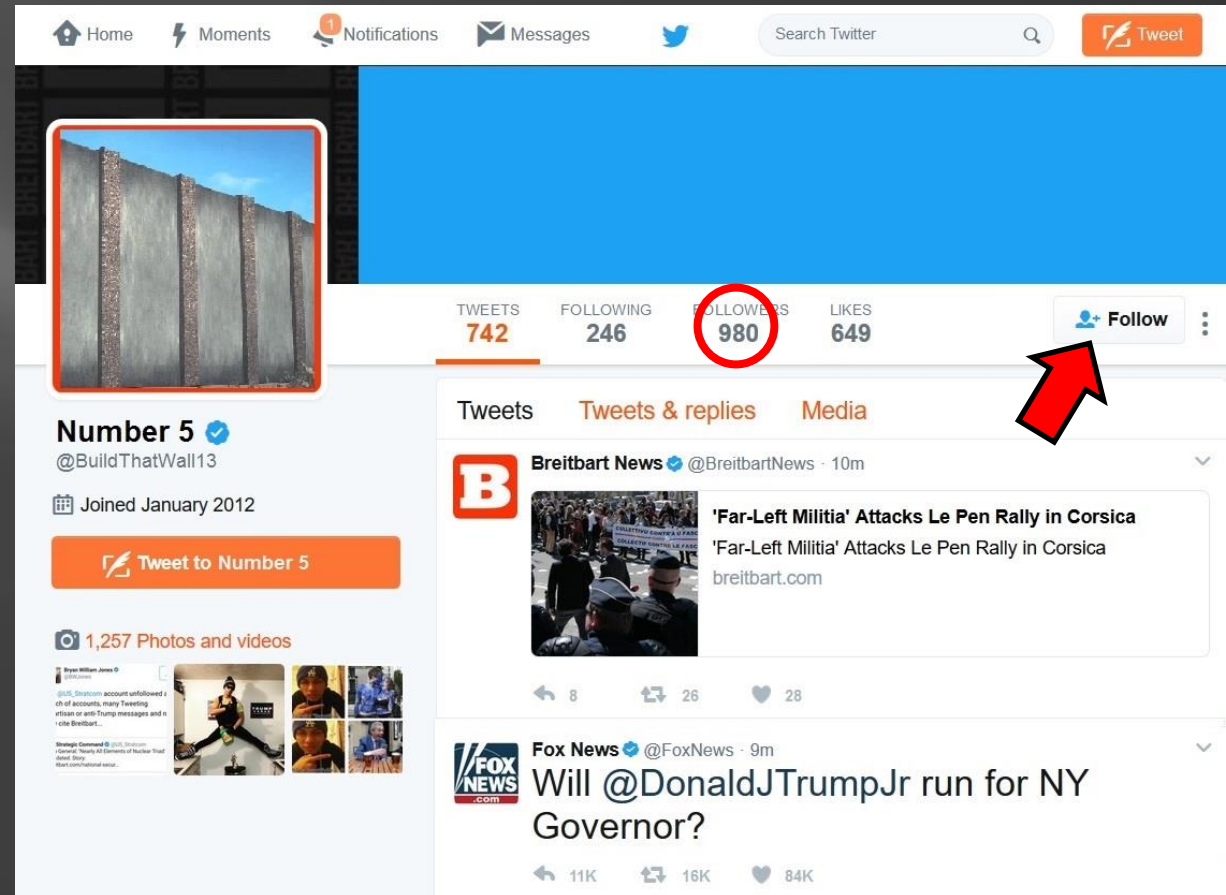
# “12 ANGRY TWEETS”

Prior to *voir dire*, you scroll through Number 5's tweets.

ETHICAL / UNETHICAL ?

Then you click the “Follow” button to see future tweets as posted.

ETHICAL / UNETHICAL ?





# “12 ANGRY TWEETS”



**Number 6**

@AmericaForAmericansNow



jury duty wtf?! u can c these jew  
lawyers just want \$\$\$\$! hang em  
all!

10:08 AM - 1 Apr 2017





# “12 ANGRY TWEETS”



**Number 6**

@AmericaForAmericansNow



Jury duty? What the heck! You can see that these Jew lawyers just want money! Hang them all!

10:08 AM - 1 Apr 2017



# “12 ANGRY TWEETS”

During *voir dire*, when you saw this tweet from a prospective juror you...

1. Requested Removal for Cause

**ETHICAL / UNETHICAL ?**

2. Asked #6 Targeted Questions to Expose Bias

**ETHICAL / UNETHICAL ?**

3. Did Nothing

**ETHICAL / UNETHICAL ?**



**Number 6**

@AmericaForAmericansNow



jury duty wtf?! u can c these jew lawyers just want \$\$\$\$! hang em all!

10:08 AM - 1 Apr 2017







# “12 ANGRY TWEETS”



Your case is ready for trial.  
The venire has completed &  
submitted jury questionnaires.

Prior to *voir dire* you request a  
two-day continuance. You  
intend to use this delay to  
search social media & gather  
additional personal information  
about the venire.

**ETHICAL / UNETHICAL ?**

Three-Digit Juror Number: \_\_\_\_\_

7. Are you currently a student? ☐ Yes ☐ No

7a. If Yes, do you attend classes: ☐ Part-time ☐ Full-time  
Where do you attend school and what field are you studying?  
\_\_\_\_\_

8. What is your current marital status?  
☐ Single, never married  
☐ Married ☐ Years current marriage  
☐ Divorced ☐ Years divorced  
☐ Separated ☐ Years separated  
☐ Widowed ☐ Years widowed

9. Do you own your residence, rent your residence, or live with friends or relatives?  
☐ Own ☐ Rent ☐ Live with friends or relatives

10. What is your current employment status? [CHECK ONE ONLY]  
☐ Currently working full-time for an employer (30 or more hours/week)  
☐ Working part-time for an employer (less than 30 hours/week)  
☐ Self-employed and working full-time  
☐ Self-employed and working part-time  
☐ On temporary leave/lay-off/disability  
☐ On strike or other labor stoppage  
☐ Unemployed and looking for work  
☐ Unemployed and not looking for work  
☐ Retired  
☐ Disabled/Worker's Compensation  
☐ Student  
☐ Full-time Homemaker  
☐ Other (please describe) \_\_\_\_\_

11. Please provide the following information about your job (if you are currently employed),  
or your most recent job (if you are not currently employed):

11a. Occupation: \_\_\_\_\_

11b. Employer: \_\_\_\_\_  
\_\_\_\_\_

11c. Type of business: \_\_\_\_\_

11d. Years employed in present job: \_\_\_\_\_

11e. Do you supervise others? ☐ Yes ☐ No



# “12 ANGRY TWEETS”

During *voir dire*, when you saw this tweet from a prospective juror you...

1. Requested Removal for Cause

**ETHICAL / UNETHICAL ?**

2. Asked #3 Targeted Questions to Expose Bias

**ETHICAL / UNETHICAL ?**

3. Did Nothing – You Represent Plaintiff

**ETHICAL / UNETHICAL ?**



**Number 3**

@MyDogIsMyBestFriend77



idk-should i tell sum1? had wreck like this 1 last year & ins refused my \$. don't want trouble. want 2 be juror to help vic collect def \$.


10:52 AM - 1 Apr 2017










# “12 ANGRY TWEETS”










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Law Office of  
I. M. Remarkable

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- Photos
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- Posts**





   

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**Law Office of I.M. Remarkable**  
12 April at 18:30

Picking a jury in another auto collision case against an Uber driver. Where do they find these guys? The facts here are IDENTICAL to my last case: Uber driver rushing passenger to the airport, using his horn instead of obeying traffic signals, ramming my client who had the right of way. Last jury awarded my client a bundle on the same facts. Hope this jury pays attention to my eyewitness. Expert witness is unassailable! Looking forward to opening statements!

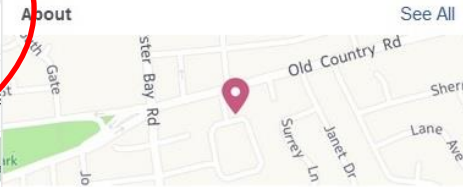
  

 15 [Top comments](#)

Law firm in California  
4.7 ★★★★★ · [Open now](#)

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[imremarkablelaw.com](#)

# “12 ANGRY TWEETS”

You're plaintiff's counsel.  
Just before *voir dire*, you  
post this on your  
Facebook page.

ETHICAL / UNETHICAL ?



**Law Office of I.M. Remarkable**

12 April at 18:30

Picking a jury in another auto collision case against an Uber driver. Where do they find these guys? The facts here are IDENTICAL to my last case: Uber driver rushing passenger to the airport, using his horn instead of obeying traffic signals, ramming my client who had the right of way. Last jury awarded my client a bundle on the same facts. Hope this jury pays attention to my eyewitness. Expert witness is unassailable! Looking forward to opening statements!



Like



Comment



Share



# “12 ANGRY TWEETS”

You're a trial judge.  
During *voir dire*, defense counsel objects to plaintiff counsel's Facebook post because it might be seen by jurors.

You order counsel to remove the post.

**PROPER / IMPROPER ?**



*Steiner v. Superior Court*, 220 Cal. App. 4th 1479 (2013)

# “12 ANGRY TWEETS”

During trial, when you saw this tweet from a juror you...

1. Informed the Court & Opposing Counsel

**ETHICAL / UNETHICAL ?**

2. Did Nothing – You Represent Plaintiff

**ETHICAL / UNETHICAL ?**



**Number 6**

@AmericaForAmericansNow



just saw on breitbart news that def belongs to isis. remember bowling green! no mercy. eod.

1:28 PM - 1 Apr 2017



# 🐦 “12 ANGRY TWEETS” 🐦

During trial, you & your staff use social media to monitor jurors' activities.

ETHICAL / UNETHICAL ?





# “12 ANGRY TWEETS”

You’re a plaintiff’s attorney. A “friend” posts a question on your Facebook page & you answer...

**ETHICAL** / **UNETHICAL** ?



**John Doe**

12 April at 13:35

I was riding my motorcycle solo when a truck ran a red light & hit me. I was in the hospital for a week. I want to sue that driver. How long do I have to file this in court?



Like



Comment



Share



**Law Office of I.M. Remarkable**

12 April at 18:30

Hi, John Doe: Since there were injuries, you must get your lawsuit filed within two years of the date of the accident.

# “12 ANGRY TWEETS”

You’re representing the defendant in a criminal trial. When you saw this tweet from a juror you...

1. Informed the Court & Opposing Counsel

**ETHICAL / UNETHICAL ?**

2. Did Nothing

**ETHICAL / UNETHICAL ?**



**Number 5**

@BuildThatWall13



y dont the defendut talk 2 us? r his lawyers otl? must b gulty 2 hide bhind lawyers! looks like a immigut 2 me!

3:47 PM - 1 Apr 2017



# 🐦 “12 ANGRY TWEETS” 🐦

In closing argument, you pattern some content & analogies (although used generally) around jurors' personal preferences based on information (likes & dislikes) found through social media research.

ETHICAL / UNETHICAL ?





# 🐦 “12 ANGRY TWEETS” 🐦

In closing argument, you pattern some content & analogies (although used generally) around jurors' personal preferences based on information (likes & dislikes) found through social media research.

ETHICAL / UNETHICAL ?



# “12 ANGRY TWEETS”

During jury deliberations, when you saw this tweet from a juror you...

1. Informed the Court & Opposing Counsel

**ETHICAL / UNETHICAL ?**

2. Waited for the Verdict Before Deciding What to Do

**ETHICAL / UNETHICAL ?**

3. Did Nothing

**ETHICAL / UNETHICAL ?**



**Number 8**

@PeaceLoveGoddessForever



#6 keeps hittin' on me. ugh! otoh he's got a point about how the wreck went down. even has a youtube they didn't show us.

2:36 PM - 2 Apr 2017





# “12 ANGRY TWEETS”

During jury deliberations, when you saw this tweet from a juror you...

1. Informed the Court & Opposing Counsel

**ETHICAL** / **UNETHICAL** ?

2. Waited for the Verdict Before Deciding What to Do

**ETHICAL** / **UNETHICAL** ?

3. Did Nothing

**ETHICAL** / **UNETHICAL** ?



**Number 7**

@SportsNut2017



b3! got tickets 2 game 2nte! whos rite whos wrong? idk/idc! i'll vote either way just 2 get out of here & make it 4 the tip-off!

3:22 PM - 2 Apr 2017



# “12 ANGRY TWEETS”

During jury deliberations, when you saw this tweet from a juror you...

1. Informed the Court & Opposing Counsel

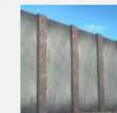
**ETHICAL / UNETHICAL ?**

2. Waited for the Verdict Before Deciding What to Do

**ETHICAL / UNETHICAL ?**

3. Did Nothing

**ETHICAL / UNETHICAL ?**



**Number 5**

@BuildThatWall13



#6 b excop & thinkin strait bout this case! knows about immigut crimes. knows this guy guilty b/c immigut. lawyers immiguts 2!

3:40 PM - 2 Apr 2017





# “12 ANGRY TWEETS”



**Twelve Angry Tweets**

@HonJBCampellInnofCourt



**Thanks for your participation.  
Any questions?**

6:00 PM - 12 Apr 2017



**Attachment to Program Submission Form  
Hon. Joseph B. Campbell American Inn of Court  
San Bernardino, California  
April 12, 2017**

Inn members emphatically waving auction paddles – “Ethical” and “Unethical.”









