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A Status Update for Texas Voir Dire: Advocating for Pre-Trial Internet Investigation of Prospective Jurors

Luke A. Harle

St. Mary's University School of Law

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COMMENT

A STATUS UPDATE FOR TEXAS VOIR DIRE: ADVOCATING FOR PRE-TRIAL INTERNET INVESTIGATION OF PROSPECTIVE JURORS

LUKE ALAN HARLE*

I.	Introduction.....	666
II.	Background of Texas Law	669
	A. Texas Jury Qualifications.....	669
	B. The Purpose and Scope of Texas Voir Dire.....	671
	C. Texas Disciplinary Rules of Professional Conduct.....	675
	D. Texas Voir Dire Laws as Applied to Internet Research	676
III.	Non-Texas Perspectives Regarding Internet Research of Jurors ...	678
	A. Judicial Attitudes of Federal District Courts	679
	B. Judicial Attitudes of State Courts	681
	C. Ethics Opinions from Outside of Texas.....	685
IV.	Recognizing and Responding to Concerns	689
	A. Emboldening Jurors to Research	689
	B. Selecting a Biased Jury.....	691
	C. Personal Appeals.....	691
	D. Infringing Juror Privacy	692
V.	Updating Texas Voir Dire	694
VI.	Conclusion	697

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I. INTRODUCTION

*"Don't judge of men's wealth or piety, by their Sunday appearances."*¹

In the age of the Internet, trial attorneys no longer have to be prisoners to appearances when evaluating prospective jurors. Any attorney with a laptop and Wi-Fi has an ocean of data, and with a few clicks of a mouse, can discover the person behind the jury number. People may reveal their personality on the Internet more candidly than they do in the "real-world."² As a result, searching online is likely the most efficient way to learn about the quirks, strengths, and flaws of a person.³ By simply perusing a Facebook profile, attorneys can discover everything from one's political sensibilities to their nightlife tendencies. Armed with this information, attorneys could design made-to-order cases, including

1. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK 137 (The Century Co. 1898) (1751).

2. Some behavioral scientists view the world as now existing on two separate planes—one composed of atoms, the other composed of zeroes and ones. See Lisa Nakamura, *Cyberace*, 123 PUBLICATION MOD. LANGUAGE ASS'N AM. 1673, 1676 (2008) (viewing the Internet as a "second life" that allows users to connect and separate simultaneously); Amber Case, *We Are All Cyborgs Now*, TED (Dec. 2010), https://www.ted.com/talks/amber_case_we_are_all_cyborgs_now?language=en [<https://perma.cc/M2NY-6PKR>] (analogizing human interactions within the digital world as an entirely secondary existence). Internet users may think of the online world as a sanctuary where they can present their true personality. See Katrina Fong & Raymond A. Mar, *What Does My Avatar Say About Me? Inferring Personality from Avatars*, 41 PERSONALITY & SOC. PSYCHOL. BULL. 237, 238 (2015) (considering the Internet as a refuge for users to express their true personalities); Mitja D. Back et al., *Facebook Profiles Reflect Actual Personality, Not Self-Idealization*, 21 PSYCHOL. SCI. 372, 372–73 (2010) (concluding, after empirical study, that Facebook profiles accurately reflect the personality of its users); Tomas Chamorro-Premuzic, *How Different Are Your Online and Offline Personalities?*, GUARDIAN (Sept. 24, 2015, 5:38 PM), <https://www.theguardian.com/media-network/2015/sep/24/online-offline-personality-digital-identity> [<https://perma.cc/6E9F-PWJL>] ("Although our digital identity may be fragmented, it seems clear that our various online personas are all digital breadcrumbs of the same persona . . ."). But see Nathan Jurgenson, *When Atoms Meet Bits: Social Media, the Mobile Web and Augmented Revolution*, 4 FUTURE INTERNET 83, 84–86 (2012) (contending the duality of personalities in the real and virtual world does not exist, opting for an enhanced reality instead—one in which the virtual world serves as an extension of the real world). See generally SHERRY TURKLE, LIFE ON THE SCREEN 10 (1995) (portraying humans as dwelling "on the threshold between the real and virtual" and anticipating "fundamental shifts" in the way humans create identity).

3. Where resumes, applications, and interviews were previously sufficient when making hiring decisions, it is now often necessary to review the online social networks of prospective employees. See Yuki Noguchi, *Can't Ask That? Some Job Interviewers Go to Social Media Instead*, NPR (Apr. 11, 2014, 4:06 PM), <http://www.npr.org/sections/alltechconsidered/2014/04/11/301791749/cant-ask-that-some-job-interviewers-go-to-social-media-instead> [<https://perma.cc/YV69-K8AL>] (reporting the frequency at which employers review a prospective hire's online social network to gather information otherwise unobtainable in an interview).

sections perfectly crafted to appeal to the specific interests of each juror.⁴ While using private juror information to those extents may toe the line between resourceful and exploitative, the potential for online information to reveal biases, relationships, or misconduct is unquestionably valuable.⁵ A quick Google search of a venireperson could give the court information that, if undiscovered, might be grounds for a mistrial or new trial.⁶

Despite these advantages, lawyers have proceeded with caution,⁷ although bar associations have slowly begun to permit passive review of a juror's public Internet presence.⁸ Reasonable concerns over invasions of privacy, jury intimidation, and potential chilling effects on jury service have led one court to condemn Internet research of the venire during voir dire.⁹ Texas courts, however, have not yet issued any opinion on the specific

4. See *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1103 (N.D. Cal. 2016) (recognizing the potential for tailor-made jury panels by saying, "The jury is not a fantasy team").

5. See *Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010) (en banc) (per curiam) (suggesting parties to a case must actively brief themselves on the selected jurors backgrounds on Case.net to shed any light on questionable findings, preserving the trial's integrity); see also John G. Browning, *Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection*, BRIEF, Winter 2016, at 41, 42–43 [hereinafter Browning, *Ethical Concerns*] (outlining dangers of not researching jurors through the Internet); Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 636–37 (2013) (posing the question of whether failure to conduct online research of the venire is malpractice).

6. See TEX. R. CIV. P. 327 (providing for a new trial in instances of jury misconduct); *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 192–93 (Mo. Ct. App. 2012) (affirming a lower court's decision to replace a juror with an active bias in the case, demonstrated through information found by counsel on his Facebook profile); *State v. Dellinger*, 696 S.E.2d 38, 40–43 (W. Va. 2010) (per curiam) (remanding a case for a new trial where one juror's "lack of candor during voir dire regarding" a pre-existing relationship with the defendant was later revealed upon discovering the two were MySpace "friends"); see also Kathryn Kinnison Van Namen, Comment, *Facebook Facts and Twitter Tips—Prosecutors and Social Media: An Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function*, 81 MISS. L.J. 549, 556–57 (2012) (reciting the highly publicized Casey Anthony murder trial in which a juror was struck due to comments posted online saying, "Cops in Florida are idiots and completely useless"). But see *Shaw v. State*, 139 So. 3d 79, 88–89 (Miss. Ct. App. 2013) (en banc) (approving a trial judge's refusal to declare a mistrial where a juror "made a comment on his Facebook page regarding his jury duty, stating: 'I guess all I need to know is GUILTY. lol'").

7. See *Sluss v. Commonwealth*, 381 S.W.3d 215, 227 (Ky. 2012) (discussing the practice of investigating prospective jurors on social media, while suspecting "a reasonable attorney without guidance may not think this investigatory tactic appropriate").

8. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466, at 4 (2014) [hereinafter ABA Formal Op. 466] (emphasizing the right to privacy, allowing the inspection of a juror's visible online information, but denying any "access request" to be made).

9. See *Oracle*, 172 F. Supp. 3d at 1104 (requiring attorneys to provide the court with an exact record of every online search and all the information viewed).

issue.¹⁰ The legislative and executive branches of Texas, at this time, also remain silent on the question.¹¹

The goal of this Comment is to use existing Texas law and ethics guidelines to advocate for a policy that will allow attorneys to conduct reasonable online research of public, self-published prospective juror information during voir dire. This Comment aspires to be equally persuasive in both civil and criminal contexts. Although there are differences between the two, they are guided by similar principles.¹²

Part II of this Comment will present a brief background of existing Texas law likely to shape future development of rules regarding Internet researching of jurors during voir dire—namely, juror qualifications, existing laws guiding voir dire, and the Texas Disciplinary Rules of Professional Conduct. Part III will review non-Texas perspectives,

10. While many Texas courts have issued several opinions regarding the scope of voir dire, none have yet addressed the issue of Internet research of prospective jurors by attorneys. *See, e.g., Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006) (wanting for direction from the Texas Supreme Court on how lawyers should use the Internet during voir dire). Furthermore, the Texas Rules of Civil Procedure, promulgated by the Supreme of Court of Texas, do not specifically address the issue. *See* TEX. R. CIV. P. 226a (prohibiting the jury from posting about the case online, but not prohibiting attorneys to investigate jurors); *id.* R. 228 (permitting “other evidence . . . for or against” a challenge for cause made to a prospective juror to be heard during examination, though not addressing the scope of permissible “other evidence” or whether it encompasses Internet research during voir dire). Similarly, the Texas Committee on Professional Ethics, appointed by the Supreme Court of Texas, has yet to rule on this specific issue. *See generally Opinions*, TEX. COMM. ON PROF'L ETHICS, <https://www.legaethicstexas.com/Ethics-Resources/Opinions.aspx> [<https://perma.cc/TM6X-C8C5>] (lacking a conclusive answer as to the permissibility of researching a jury member during the trial process).

11. *See generally* TEX. GOV'T CODE ANN. §§ 21.001–158.003 (West Supp. 2017) (lacking direction on how lawyers should use the Internet during voir dire); TEX. CODE CRIM. PRO. ANN. (failing to condone or condemn the use of the Internet to research jurors during voir dire); *see also Index to Opinions*, ATTY GEN. TEX., <https://texasattorneygeneral.gov/opinion/index-to-opinions> [<https://perma.cc/H7CX-PY8J>] (listing all opinions of the Attorney General of Texas, none of which address Internet research of prospective jurors during voir dire).

12. Civil and criminal cases in Texas are both guided by principles of broad latitude in questioning prospective jurors, subject to the trial judge's reasonable restrictions. *See Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989) (recognizing the importance of granting a wide margin for online juror-research to properly “discover any bias or prejudice” during the voir dire process); *Whitaker v. State*, 653 S.W.2d 781, 785 (Tex. Crim. App. 1983) (finding a judge's discretion over jury selection to be limited by the attorney's right to procure an impartial jury). However, criminal cases must consider constitutional rights to effective counsel, as well as additional requirements for capital proceedings, for which there is no civil equivalent. *See* CRIM. PRO. arts. 1.051(a), 37.071 (West Supp. 2017) (addressing the right to representation by counsel and the procedure followed in capital cases). Both criminal and civil rules provide grounds for juror disqualification. *See* GOV'T § 62.105 (West 2013) (establishing circumstances that disqualify an individual from serving as a juror).

including judicial and ethics opinions, concerning pre-trial Internet investigation of prospective jurors. Part IV will recognize the issues created by such Internet investigations and respond to those concerns. Part V will use both Texas law and other opinions to suggest specific ways Texas may update its voir dire structure, hopefully in a way that is beneficial to attorneys while limiting unnecessary probing of jurors' personal lives.

II. BACKGROUND OF TEXAS LAW

A. *Texas Jury Qualifications*

Texas, like other state and federal courts, requires jurors to meet minimum qualifications.¹³ Texas also has a list of exemptions, which if met, will allow a juror to be excused from service.¹⁴ Most information regarding qualifications and exemptions is usually acquired through a standard jury questionnaire.¹⁵ However, judges also maintain the ability to test jury qualifications.¹⁶ Jurors who meet the minimum qualifications, and who are not exempt or excused, will then proceed to the assigned courtroom for the voir dire examination.¹⁷ Once in the courtroom, the presiding judge administers an oath instructing the jurors to truthfully answer all questions related to their qualifications to be a juror.¹⁸ The

13. See GOV'T § 62.102 (West Supp. 2017) (defining the qualifications for jurors in a Texas civil case); CRIM. PRO. art. 35.19 (West 2006) (considering past conviction of a misdemeanor or felony offense, a pending indictment for misdemeanor theft or felony, or insanity as absolute disqualifications); see also 705 ILL. COMP. STAT. ANN. 305/2 (2018) (requiring jurors to be "[i]nhabitants of the county[,]"; "[o]f the age of 18 years or upwards[,]"; "of fair character," and "[c]itizens of the United States of America"); 28 U.S.C. § 1865 (2012) (listing the minimum qualifications for jurors in federal court, including ability to read and speak English).

14. See GOV'T § 62.106 (providing a list of criteria that may exempt a potential juror from service, including being over the age of 70, serving active duty in the military and deployed, and having children under the age of 12).

15. See *id.* § 62.0132(c) (specifying the questions to be included on the basic jury questionnaire).

16. See CRIM. PRO. arts. 35.10, 35.12 (granting the court the ability to test the qualifications of the jurors if no challenges have been made by asking questions of the jurors' past criminal history); see also 8 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 120.01[4][a1] (2017) (explaining the latitude given to judges in civil cases to determine whether one is "qualified for jury service").

17. See 8 DORSANEO III, *supra* note 16, § 120.02[1] (detailing the preliminary procedures before voir dire examination).

18. See TEX. R. CIV. P. 226 ("[T]he jurors shall be sworn by the court or under its direction, as follows: 'You, and each of you, do solemnly swear that you will true answers give to all questions

court then reads instructions prescribed by the Texas Supreme Court that preview the procedures of the trial and mandate certain behaviors of the jury.¹⁹

Attorneys sculpt the initial venire into the final jury panel through challenges for cause and peremptory challenges.²⁰ Peremptory challenges eliminate undesirable jurors from the jury without assigning any reason,²¹ while challenges for cause are objections made alleging the juror is unfit to serve on the jury.²² Jurors are unfit for, and thus disqualified from, jury service if they display any potential to judge a case on more than the information being presented in court.²³ Attorneys may learn of evidence to support a challenge for cause based on responses to voir dire questions.

propounded to you concerning your qualifications as a juror, so help you God.”); CRIM. PRO. art. 35.02 (administering the same oath).

19. See TEX. R. CIV. P. 226a (instructing, among other things, that the jurors turn off their electronic devices and “not communicate with anyone through any electronic device”).

20. See *id.* R. 227 (providing the availability of peremptory challenges and challenges for cause in a civil setting); CRIM. PRO. arts. 35.14, 35.16 (announcing the availability of peremptory challenges and challenges for cause in a criminal setting).

21. See TEX. R. CIV. P. 232 (“A peremptory challenge is made to a juror without assigning any reason therefor.”); CRIM. PRO. art. 35.14 (describing how a peremptory challenge is asserted without giving any reason for its making). In civil cases, a party is allowed six peremptory strikes in district court and three in county courts. See TEX. R. CIV. P. 233 (allocating for six peremptory strikes, but also allowing trial judges to “equalize” peremptory strikes in multiple party cases). The number of peremptory strikes varies in criminal courts depending on the severity of the crime. See CRIM. PRO. art. 35.15 (permitting fifteen peremptory strikes for capital cases and as few as three for misdemeanors tried in county courts). While attorneys do not need to assign a reason for using a peremptory strike, peremptory strikes are not to be used to stack the jury for the selection of a favorable jury. See *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 750 (Tex. 2006) (“Peremptory strikes are not intended, however, to permit a party to ‘select’ a favorable jury.”).

22. TEX. R. CIV. P. 228; CRIM. PRO. art. 35.16.

23. See TEX. GOV'T CODE ANN. § 62.105 (West 2013) (disqualifying jurors who have an interest “in the subject matter of the case[,]” who are biased or prejudiced in favor of one party, or who have previously served in a trial “involving the same questions of fact”); CRIM. PRO. art. 35.16 (listing disqualifying characteristics of a juror in criminal contexts, including bias or prejudice towards a party of the case). Lying, or failing to respond truthfully to an attorney’s questions during voir dire, may be sufficient to set aside a judgment. See TEX. R. CIV. P. 327(a) (maintaining an improper response by a venire person on voir dire, if material, would be grounds for a new trial). The Texas Supreme Court has found that “a juror’s failure to disclose information that establishes that the juror is legally disqualified from serving on the jury is *per se* material.” *In re Whataburger Rests. L.P.*, 429 S.W.3d 597, 599 n.1 (Tex. 2014) (*per curiam*) (emphasis added) (citing *Burton v. R.E. Hable Co.*, 852 S.W.2d 745, 747 (Tex. App.—Tyler 1993, no pet.)). However, a party moving for a new trial based on juror misconduct during voir dire must also show the misconduct probably caused injury to the movant. See *id.* at 598–600 (finding non-disclosure by jurors who were defendants in a prior case to be material but probably not causing injury to the movant).

However, attorneys may also rely on evidence beyond the given answer of a juror to remove a juror with a challenge for cause.²⁴

B. *The Purpose and Scope of Texas Voir Dire*

The purpose of voir dire is deceptively simple: to empanel a fair and impartial jury.²⁵ To achieve this goal, attorneys may inquire about jurors' specific experiences, perspectives, or relationships that would create a predisposition favoring one party over the other.²⁶ By asking the venire personal questions, attorneys establish a basis for a challenge for cause and facilitate the intelligent use of peremptory strikes.²⁷ The difficulty arises from strict tests from the United States and Texas Supreme Courts

24. See TEX. R. CIV. P. 228 (“Upon such challenge the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge.”); CRIM. PRO. art. 35.18 (“Upon a challenge for cause, the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge.”). To win on an appeal for the failure to exclude a disqualified juror, a party must inform the court that it exhausted its peremptory challenges and thus lacked the ability to strike other objectionable jurors. See *Hallet v. Hous. Nw. Med. Ctr.*, 689 S.W.2d 888, 890 (Tex. 1985) (“It is at this point that any harmful error occurs, i.e., when the court is made aware that objectionable jurors will be chosen.”).

25. See *In re Commitment of Hill*, 334 S.W.3d 226, 228 (Tex. 2011) (per curiam) (proclaiming that a jury must be, “to the greatest extent possible, [] free from bias”); *Sanchez v. State*, 165 S.W.3d 707, 710–11 (Tex. Crim. App. 2005) (describing the function of voir dire as “further[ing] the defendant’s constitutional right to . . . an ‘impartial’ jury” (citing *Morgan v. Illinois*, 504 U.S. 719, 727 (1992))); see also Richard J. Crawford & Daniel W. Patterson, *Exploring and Expanding Voir Dire Boundaries: A Note to Judges and Trial Lawyers*, 20 AM. J. TRIAL ADVOC. 645, 646 (1997) (“[V]oir dire exists for one straightforward and simple reason: to provide a screening step[,] . . . which will reduce the possibility of disputes being resolved by citizens whose backgrounds, attitudes or predispositions may interfere with a fair and impartial resolution of those disputes.”); *Voir Dire*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *voir dire* as “[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury”).

26. See *Hyundai*, 189 S.W.3d at 749 (encouraging lawyers to examine jurors for improper biases that would substantially impair their ability to perform their duty according to the oath or instructions). Prior to the voir dire examination, the court reads admonitory instructions prescribed by the Texas Supreme Court that preview the procedures of the trial and mandate certain behaviors of the jury. See TEX. R. CIV. P. 226a (instructing jurors to provide truthful answers if questioned by attorneys about their backgrounds, experiences, and attitudes).

27. See *Hill*, 334 S.W.3d at 229 (finding attorneys have a right to question potential jurors to discover biases and facilitate intelligent use of peremptory challenges); *Sanchez*, 165 S.W.3d at 710–11 (perceiving the first purpose of voir dire as eliciting information which would cause a potential juror to be legally disqualified or establish a bias or prejudice of the juror that would create “a basis for a challenge for cause” and the second purpose as “facilitat[ing] the intelligent use of peremptory challenges”). Cf. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding the Equal Protection Clause of the Fourteenth Amendment forbids peremptory challenges made solely based on the race of the juror); *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 526 (Tex. 2008) (applying *Batson* and determining the peremptory strikes were used according to the prospective jurors’ race).

regarding what constitutes “impartiality”²⁸ and “bias”²⁹ combined with the inherent biases all humans carry.³⁰ Regardless of the difficulty, a jury panel free from bias or prejudice is guaranteed by the federal³¹ and state³² constitutions, and is foundational to the Texas adversarial system of justice.³³

28. See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“[A] juror who has formed an opinion cannot be impartial.” (quoting *Reynolds v. United States*, 98 U.S. 145, 155 (1878))); *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) (establishing impartiality requires jurors to be free from bias towards the defendant as well as without any prejudice against the prosecution).

29. In *Compton v. Henrie*, the Texas Supreme Court distinguished bias and prejudice. 364 S.W.2d 179, 181–82 (Tex. 1963). The court defined bias as “an *inclination* toward one side of an issue rather than to the other[.]” *Id.* at 182. Prejudice, on the other hand, was defined simply as “‘prejudgment,’ and consequently embraces bias[.]” *Id.* To be disqualified on the basis of bias, it must be apparent that the juror “will not . . . act with impartiality.” *Id.* at 181–82.

30. Social sciences recognize implicit bias as the involuntary habit of a person to associate certain groups of people with characteristics that do not align with reality. See Cheryl Staats et al., *State of Science: Implicit Bias Review*, KIRWAN INST., 2016, at 14 (describing the unconscious association humans make between certain identity groups and certain characteristics). All people are susceptible to implicit biases. See *id.* at 14–15 (defining “implicit bias” as “attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner”); Félíce van Nunspeet et al., *Reducing Implicit Bias: How Moral Motivation Helps People Refrain from Making “Automatic” Prejudiced Associations*, 1 TRANSLATIONAL ISSUES IN PSYCHOL. SCI. 382, 382–83 (2015) (observing the “widespread presence” of implicit biases and proposing a method to help combat it). The United States Supreme Court has recognized the phenomenon. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2511–12 (2015) (commending the Fair Housing Act’s role in permitting plaintiffs to defend against “unconscious prejudices”). Cf. *Compton*, 364 S.W.2d at 181–82 (“To a greater or lesser extent, bias and prejudice form a trait common in all men; however, to fall within the disqualifying provision . . . certain degrees thereof must exist.”).

31. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”); see also *Patterson v. Colorado ex rel. Att’y Gen. Colo.*, 205 U.S. 454, 462 (1907) (recognizing jury prejudice threatens the American system of trials in which decisions are to be founded according to evidence and argument made in court).

32. See TEX. CONST. art. I, § 10 (“In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.”); *id.* art. I, § 15 (“The right of trial by jury shall remain inviolate.”); *id.* art. V, § 10 (“In the trial of all causes in the District Courts, the plaintiff or defendant shall . . . have the right of trial by jury”).

33. The Texas Declaration of Independence listed Mexico’s failure to guarantee a trial by jury as a grievance when Texas declared independence on March 2, 1836. See THE DECLARATION OF INDEPENDENCE (Repub. Tex. 1836), reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1063, 1065 (Gammel Book Co. 1898) (listing Mexico’s failure “to secure, on a firm basis, the right of trial by jury”); see also R. Brent Cooper & Diana L. Faust, *Procedural and Judicial Limitations on Voir Dire—Constitutional Implications and Preservation of Error in Civil Cases*, 40 ST. MARY’S L.J. 751, 760–62 (2009) (providing a detailed history of Texas’ preservation of the right to trial by jury).

Texas protects this right by affording attorneys—not judges—broad latitude in questioning jurors during voir dire examinations.³⁴ However, the definition of “broad” is largely at the discretion of the trial judge.³⁵ Judges must allow questions that seek to discover grounds for challenges for cause or facilitate the intelligent use of peremptory challenges.³⁶ Texas has not promulgated guidance on the scope of general voir dire questioning,³⁷ although Texas courts have indicated “commitment questions”—questions which attempt to preview the votes of jurors—are improper.³⁸ Judges additionally have discretion over the time in which voir dire must be completed.³⁹ However, appellate review to determine whether a trial court abused its discretion in this regard is primarily

34. Compare FED. R. CIV. P. 47(a) (granting attorneys and the court power to examine prospective jurors), with TEX. R. CIV. P. 226a (assigning attorneys in state courts the right to question prospective jurors), *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2011) (per curiam) (confering a right on attorneys to question potential jurors to discover biases), and *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989) (supplying attorneys “broad latitude” during voir dire to discover any juror bias or prejudice). But see TEX. CODE CRIM. PRO. ANN. arts. 35.10, 35.12 (West 2006) (furnishing the court with the power to “try the qualifications of those” who appear for jury duty); see also 8 DORSANEO III, *supra* note 16, § 120.01[4][a1] (pointing out the latitude judges enjoy in determining a juror’s qualifications).

35. See *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 753 (Tex. 2006) (announcing judicial discretion as a “primary rule” of voir dire and vesting trial judges with the authority to determine whether voir dire questions probe into prejudices or potential verdicts). Cf. *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793, 801–02 (Tex. App.—Texarkana 2001, no pet.) (upholding a trial judge’s determination, which limited voir dire to 30 minutes for each party).

36. See *Babcock*, 767 S.W.2d at 709 (holding judges’ decisions during voir dire examination to an abuse of discretion standard).

37. See *Hyundai*, 189 S.W.3d at 750 (acknowledging the subjective nature of “voir dire does not lend itself to formulaic management”); see also 8 DORSANEO III, *supra* note 16, § 120.02[1] (“The Texas Rules of Civil Procedure provide virtually no guidance on the subject of the voir dire examination of jury panels by counsel.”); William V. Dorsaneo III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 822 n.702 (2013) (recognizing Texas Rule of Civil Procedure 230 as the only rule guiding the conduct of voir dire).

38. See *Standefer v. State*, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001) (“[A] question is a commitment question if one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question.”); see also *Hyundai*, 189 S.W.3d at 753 (concluding that questions asked to preview juror votes are improper).

39. See *Mathis v. State*, 576 S.W.2d 835, 839 (Tex. Crim. App. 1979) (Douglas, J., dissenting) (“Inherent in the trial court’s discretion over the scope and course of voir dire is his ability to (1) place reasonable time limits on the examination” (citing *Abron v. State*, 523 S.W.2d 405, 408 (Tex. Crim. App. 1975))); *McCoy*, 59 S.W.3d at 797 (announcing the court’s discretion over voir dire proceedings and continuing with an analysis over whether a court abused its discretion in limiting voir dire).

concerned with voir dire being excessively limited rather than excessively lengthy.⁴⁰

Rather than precisely insisting on a pre-determined method, order, and length of voir dire examination, Texas affords attorneys freedom to conduct voir dire how they best see fit, subject to reasonable judicial limitations.⁴¹ As such, attorneys practicing in Texas courts traditionally have more opportunity to control the composition of the jury than their federal court counterparts. However, despite the apparent amorphous nature of Texas voir dire conventions, judge-made law provides some semblance of structure, usually to prohibit questions crafted to improperly influence jurors prior to trial.⁴² For example, counsel cannot bring inadmissible information to the jury's attention,⁴³ attempt to create a bias against a party,⁴⁴ or comment on the personal lives of the parties or their attorneys.⁴⁵ Reasonable voir dire restrictions, such as these, protect juror privacy and the sanctity of the trial while also allowing maximum room for counsel to rid biases from the final jury panel.

40. The Texas Court of Criminal Appeals developed a three-prong test to determine if a court abused its discretion in imposing time limitations on voir dire. *See Ratliff v. State*, 690 S.W.2d 597, 599–600 (Tex. Crim. App. 1985) (reviewing the test the Texas Court of Criminal Appeals historically applied to determine whether “the trial court abused its discretion in the time limitation which it imposed” and applying a three-factor test). The three factors to be considered are: “(1) whether the defendant’s voir dire examination reveals an attempt to prolong the voir dire;” (2) whether the questions that were disallowed were proper questions; and (3) whether the party was not permitted to individually examine prospective jurors who actually served on the jury. *Id.* The *Ratliff* factors were first used in a civil proceeding in *McCoy v. Wal-Mart Stores, Inc.* Cooper & Faust, *supra* note 33, at 776.

41. *See* 4 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 21:19 (2d ed. 2001) (recognizing “[t]he importance of allowing reasonable latitude in the questioning” during voir dire). *Compare* N.Y. COMP. CODES R. & REGS. tit. 22 § 202.33 (2016) (prescribing, with detail, the methods to be used during voir dire examination), *and* CAL. STDS. JUD. ADMIN. § 3.25 (2018) (providing lists of questions to ask prospective jurors in accordance with different areas of the law), *with* TEX. R. CIV. P. 216–36 (lacking any rule prescribing how voir dire should be conducted, with the exception of TEX. R. CIV. P. 230, which forbids any questions regarding jurors’ prior criminal convictions), *and* TEX. CODE CRIM. PRO. ANN. art. 35.17 (West 2006) (requiring voir dire to be conducted “in the presence of the entire [jury] panel”).

42. *See* 8 DORSANEO III, *supra* note 16, § 120.02[2A][b] (presenting a list of Texas cases in which the court restricted voir dire examination that, when read together, create a theme of avoiding premature influence of the jury). The Texas cases are addressed in further detail below.

43. *See* A.J. Miller Trucking Co. v. Wood, 474 S.W.2d 763, 766 (Tex. Civ. App.—Tyler 1971, writ *re*fd n.r.e.) (referencing the defendant’s liability insurance may be reversible error).

44. *See, e.g.,* Tex. & N.O.R. Co. v. Lide, 117 S.W.2d 479, 480 (Tex. Civ. App.—Waco 1938, no writ) (finding questions to the jury regarding the wealth of the defendant highly improper).

45. *See* Gulf States Utilities Co. v. Reed, 659 S.W.2d 849, 855–56 (Tex. App.—Houston [14th Dist.] 1983, writ *re*fd n.r.e.) (upholding the trial court’s decision to prohibit questions pertaining to the jury’s knowledge of the plaintiff’s multiple former married names).

C. *Texas Disciplinary Rules of Professional Conduct*

The intentionally vague rules guiding voir dire examinations in Texas allow trial attorneys flexibility in securing an impartial jury; however, the methods involved may go only as far as Rule 3.06 of the Texas Disciplinary Rules of Professional Conduct allow.⁴⁶ The primary goal of this rule is to protect jurors from all extraneous influences, including influences resulting from attorney conduct.⁴⁷ Thus, this rule prohibits certain prejudicial contact between lawyers, jurors, and prospective jurors.⁴⁸

First, the Texas Disciplinary Rules of Professional Conduct prevent attorneys from inflicting needless harm onto third persons while representing their client.⁴⁹ The rules proscribe any “vexatious or harassing investigation of a venireman or juror[.]”⁵⁰ The official comments caution any attorney conducting an investigation of a juror to do so with “circumspection and restraint.”⁵¹ Furthermore, attorneys, and any other representative, are prohibited from communicating with a juror or jurors’ family members during the course of trial.⁵² Unauthorized, extrajudicial communication between a juror and a party, counsel, or witness creates a rebuttable presumption of harm to the accused.⁵³

In addition to preventing attorneys from improperly influencing prospective jurors, Rule 3.06 requires counsel to report to the court any venireman misconduct or misconduct by another toward a venireman.⁵⁴

46. See TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 7, reprinted in TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9) (providing the “minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action”); see also *id.* R. 3.06 (outlining proper conduct for Texas attorneys and their relationships with prospective jurors).

47. See *id.* R. 3.06 cmt. 1 (“To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences.”).

48. See *id.* (“There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial or on behalf of a lawyer connected with the case.”).

49. See *id.* R. 4.04 (mandating lawyers should always avoid embarrassing, delaying, or burdening a third person).

50. *Id.* R. 3.06(a)(1).

51. *Id.* R. 3.06 cmt. 2.

52. See *id.* R. 3.06(e) (applying the restrictions to the family members of the veniremen or jurors).

53. See *Mayo v. State*, 708 S.W.2d 854, 856 (Tex. Crim. App. 1986) (discussing a case in which “the foreman of the jury[] made a telephone call to . . . a witness who testified on behalf of the defense in the punishment phase” of a capital murder trial).

54. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.06(f).

Attorneys are obligated to report this information to the court immediately upon discovery.⁵⁵ In *Mize v. State*,⁵⁶ an appellate judge scolded a prosecutor who had knowledge of harassing phone calls made to a juror, yet failed to inform the court.⁵⁷ Although the error was not found to be reversible error,⁵⁸ the judge still chided the attorney, saying he “usurp[ed] the judicial function of the trial court” by “substitut[ing] his judgment for that of the trial court[.]”⁵⁹ This incident occurred during the punishment phase of a trial rather than voir dire; however, the underlying principle remains the same: lawyers should remain alert to discover extrajudicial factors that might taint the impartiality of the final jury panel, and report any such influences to the court as soon as feasible.⁶⁰

D. *Texas Voir Dire Laws as Applied to Internet Research*

Texas law alone suggests that attorneys should have the latitude to use the Internet to research prospective jurors during voir dire. Attorneys are granted broad latitude to ask questions that will facilitate intelligent use of peremptory challenges or discover grounds for challenges for cause, subject to the trial court’s discretion. That same approach, were it extended to the Internet, would further enable the court to empanel a fair and impartial jury. Courts would still be able to use their discretion to limit the depth of searches and the time available for Internet research.

Furthermore, should Texas affirmatively allow the use of the Internet to research the venire during voir dire, Texas Disciplinary Rules of Professional Conduct would continue to apply. Vexatious and harassing investigations by an attorney to a prospective juror or a juror’s family

55. *See id.* (requiring lawyers who learn of improper jury conduct to “promptly” report such conduct to the court).

56. *Mize v. State*, 754 S.W.2d 732 (Tex. App.—Corpus Christi 1988, pet. ref’d).

57. *See id.* at 737–38 (recounting the facts leading to the appeal).

58. *See id.* at 740 (“While no reversible error occurred in the present case, prosecutors are strongly advised to conform their conduct to the Code of Professional Responsibility.”).

59. *Id.*

60. *See* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.06 cmt. 4 (implores that all lawyers who learn of “any actions that threaten the integrity of the jury system” promptly report such information to the court); *see also* Barbara Hanson Nellermeoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY’S L.J. 443, 474 (1997) (concluding, after a review of Texas Disciplinary Rule 3.06, that attorneys should not only behave in compliance with the rule, but should also remain observant “of what is going on in the proceedings”).

member would be prohibited as it is now.⁶¹ Additionally, and perhaps more importantly, attorneys would still be prohibited from communicating with jurors.⁶²

Notably, however, Rule 3.06(c) of the Texas Disciplinary Rules of Professional Conduct, which prohibits attorney communication with prospective jurors, does not define *communication*.⁶³ The manner in which Texas courts choose to define and apply the word *communication* to Internet research of jurors during voir dire will determine what is and is not a Rule 3.06 violation.⁶⁴ The failure to provide a precise definition has left social media interactions in a newfound gray-area within the common definition of the word.⁶⁵ But, whether an attorney communicates with a juror by affirmatively “friending” them on Facebook or “following” them on Twitter or Instagram may be deduced by a review of bar association ethics opinions nationwide.⁶⁶ Nevertheless, Texas certainly has not provided a clear answer to this point.⁶⁷ Similarly, the extent to which “passive viewing”⁶⁸ of jurors’ online information left available to the public constitutes a Rule 3.06 violation is also unknown at this point in time.⁶⁹

61. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.06(a)(1) (prohibiting vexatious or harassing investigations of jurors or their family members).

62. See *id.* R. 3.06(c) (forbidding attorneys from communicating with jurors).

63. See *id.* (failing to provide a definition for *communication*).

64. See *id.* R. 3.06(a)(1) (“A lawyer shall not: (1) conduct or cause another . . . to conduct a vexatious or harassing investigation of a venireman or juror . . .”).

65. Compare *Communication*, BLACK’S LAW DICTIONARY (6th ed. 1990) (“Information given; the sharing of knowledge by one with another; conference; consultation or bargaining preparatory to making a contract. Intercourse; connection.”), with *Communication*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *communication* as “[t]he interchange of messages or ideas by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception”).

66. See, e.g., ABA Formal Op. 466, *supra* note 8, at 4 n.6 (providing a list of state bar association ethics opinions, nearly all of which prohibit attorney’s from “friending” jurors).

67. Texas law has only gone as far as allowing attorneys to obtain a list of jury panel members and restricting the applicability of jurors’ privacy protections to the final jury panel. Compare Tex. Att’y Gen. Op. No. JC-0405 (2001) [hereinafter Tex. Op. JC-0405] (declining to extend the privacy protections provided to the final jury panel to prospective jurors), with Tex. Att’y Gen. Op. No. C-239 (1964) [hereinafter Tex. Op. C-239] (permitting both prosecution and defense counsel to obtain a list of jury panel members at the judge’s discretion).

68. The ABA Standing Committee on Ethics and Professional Responsibility defined *passive viewing* of an online profile as a “review of a juror’s website or [electronic social media] that is available without making an access request where the juror is unaware that a website or ESM has been reviewed[.]” ABA Formal Op. 466, *supra* note 8, at 2.

69. Under existing Texas law, an attorney may ask a judge to provide a list of jury panel members, and presumptively research them on the Internet, without violating the privacy protections to the final jury panel. Compare Tex. Op. JC-0405, *supra* note 67 (allowing the provision of the jury

III. NON-TEXAS PERSPECTIVES REGARDING INTERNET RESEARCH OF JURORS

While Texas courts have been silent on the issue of whether attorneys may use the Internet to evaluate the venire during voir dire, several federal district courts have shared their views on the issue.⁷⁰ State courts from Missouri, New Jersey, and Kentucky have also written on the issue, generally encouraging lawyers to use the Internet as a tool to evaluate prospective jurors.⁷¹ Additionally, the American Bar Association, as well as several state and local bar associations, have crafted ethics opinions that recognize dangers that come hand-in-hand with increasing the presence of the Internet in a courtroom.⁷² However, those opinions also acknowledge the ubiquitous reality of the Internet in the twenty-first century, as well as the potential benefits. The perspectives from these opinions will reveal the strengths, and perhaps the deficiencies, of existing Texas law and guide the development of a new rule.

panel's personal information "to counsel for the purpose of voir dire"), *with* Tex. Op. C-239, *supra* note 67 ("[I]f the judge wishes to follow the custom of making the jury panel list available prior to the time of trial, he may do so.").

70. *See* United States v. Norwood, No. 12-CR-20287, 2014 WL 1796644, at *4 (E.D. Mich. May 6, 2014) (fearing monitoring the jurors' Internet use would discourage jurors from wanting to serve); Burden v. CSX Transp., Inc., No. 08-cv-04-DRH, 2011 WL 3793664, at *9 (S.D. Ill. Aug. 24, 2011) (considering Internet research as part of an attorney's reasonable diligence to investigate). *See generally* Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100 (N.D. Cal. 2016) (criticizing the practice of using the Internet to gather information regarding jurors' prior litigation history).

71. *See* Johnson v. McCullough, 306 S.W.3d 551, 559 (Mo. 2010) (en banc) (per curiam) (charging an affirmative duty on attorneys to use a specific Internet resource to research jurors); Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189, 201-03 (Mo. Ct. App. 2012) (upholding a trial court's decision to remove a juror after Facebook investigation revealed posts protesting against commercial foods); Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at *10 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (per curiam) (reversing a trial judge who denied a lawyer's ability to research jurors over the Internet); Sluss v. Commonwealth, 381 S.W.3d 215, 227-28 (Ky. 2012) (permitting pre-trial research of prospective jurors).

72. *Compare* ABA Formal Op. 466, *supra* note 8, at 4 (allowing an attorney to review jurors' online presence but prohibiting an attorney's attempt to access private portions of a juror's social media), *and* Or. State Bar, Formal Op. No. 2013-189, at 2 (2013), http://www.osbar.org/_docs/ethics/2013-189.pdf [<https://perma.cc/BNJ9-5QDB>] [hereinafter Or. Formal Op. 2013-189] (permitting review of public information, but forbidding lawyers to "friend" jurors), *with* N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 2012-2, at 1 (2012), <https://www2.nycbar.org/pdf/report/uploads/20072303-FormalOpinion2012-02JuryResearchandSocialMedia.pdf> [<http://perma.cc/UHK8-JFAF>] [hereinafter N.Y.C. Formal Op. 2012-2] (approving of attorney's use of the Internet for juror research).

A. *Judicial Attitudes of Federal District Courts*

In March 2016, Judge William H. Alsup of the U.S. District Court for the Northern District of California delivered the most stinging criticism of the practice of researching and evaluating prospective jurors over the Internet to date. The case, *Oracle v. Google*,⁷³ was at that point nearly six years in the making,⁷⁴ and the attorneys for both sides requested the jurors to complete a two-page questionnaire for the parties to review for multiple days before voir dire began.⁷⁵ Upon being asked, the attorneys admitted the extra time was going to be spent “scrubbing” the Internet presence of each juror.⁷⁶

With this, Judge Alsup delivered an order outlining three potential fears if either Oracle or Google were allowed to spend time using the Internet to research jurors.⁷⁷ First, he feared attorney research of jurors would set a poor example for the jurors, and as a result, the jurors would be more likely to conduct research of their own.⁷⁸ Additionally, the judge worried the information discovered from online social media websites would be used for more than merely establishing challenges for cause or facilitating use of peremptory strikes.⁷⁹ Rather, if permitted to use the Internet to research jurors, attorneys might exploit a juror’s personal preferences during trial.⁸⁰ Finally, Judge Alsup sought to protect the jurors’ privacy.⁸¹ The parties, in the judge’s opinion, were treating the jury panels like “fantasy team[s],” rather than sacrificial, civically responsible citizens.⁸²

73. *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100 (N.D. Cal. 2016).

74. *See id.* at 1102 (stating the case began in 2010).

75. *See id.* at 1101 (reciting the parties’ requests for extra time to review the juror questionnaires).

76. *See id.* (recounting the judge’s discovery of the parties’ plans to research the jurors over the Internet).

77. *Id.* at 1102–04.

78. *See id.* at 1102 (anticipating jurors would consider the judge’s “no-research” admonition one-sided and would consequently use the Internet to research the parties and the case).

79. *See id.* at 1102–03 (fearing, if permitted to use the Internet, attorneys would exploit jurors’ personal preferences for books or movies by crafting arguments including allusions to those books or movies).

80. *See id.* at 1103 (providing *To Kill A Mockingbird* as a potential favorite book of a juror, the knowledge of which might be exploited by an attorney).

81. *See id.* (compelling the parties to respect the privacy of jurors).

82. *See id.* (defending juror privacy by proclaiming their sacrificial nature and willingness to serve).

Considering those fears, Judge Alsup contemplated imposing an outright ban on Internet-usage to evaluate the venire.⁸³ However, he recognized doing so would result in attorneys lacking information potentially obtainable by the media or general public.⁸⁴ Therefore, rather than banning all Internet research, Judge Alsup reluctantly allowed the parties to use the Internet, subject to several conditions.⁸⁵ Notable amongst those conditions was a requirement that jurors must be informed of the impending searches and be given an opportunity to adjust their social media privacy settings.⁸⁶ Furthermore, the litigating parties were required to maintain “an exact record of every search and all information viewed.”⁸⁷ Finally, the order prohibited parties from using personal appeals based on juror information discovered from online searches.⁸⁸

No other federal court order or opinion has addressed the issue as directly as *Oracle v. Google*. However, two other federal judges have presented previews of how they might rule should the question come before their court.

In 2014, Judge Mark A. Goldsmith of the Eastern District of Michigan issued an order empaneling an anonymous jury⁸⁹ for trial over the

83. *See id.* at 1103–05 (advocating for an “outright ban” on juror evaluation with the Internet, but reluctantly allowing the parties to decide for themselves).

84. *See id.* at 1103 (“[W]ith an outright ban, everyone in the gallery could have more information about the venire persons and the empaneled jurors than the lawyers themselves.”).

85. *See id.* at 1103–04 (listing the requirements parties must meet if they insist on using the Internet to evaluate prospective jurors).

86. *Id.*

87. *Id.* at 1104.

88. *Id.*

89. Where an anonymous jury is empaneled in a criminal case, identifying information of the jurors—including names—may not be disclosed. *See* William D. Brenner, Annotation, *Propriety of Using Anonymous Juries in State Criminal Cases*, 60 A.L.R.5th 39, 45 (1998) (introducing the concept of anonymous juries). The rules surrounding the empaneling of an anonymous jury vary by jurisdiction. *See id.* (“Jurisdictions have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject.”). Some jurisdictions prohibit disclosure to just the public, while others prohibit disclosure to the attorneys as well as the public. *See id.* (distinguishing between varieties of anonymous juries for the purpose of the annotation). The decision generally rests upon consideration of several factors, primarily involving risk of danger or harassment to the jurors. *See, e.g.,* *United States v. Lawson*, 535 F.3d 434, 439 (6th Cir. 2008) (listing three factors to be considered before empaneling an anonymous jury). The Texas provision for anonymous juries is found in article 35.29 of the Code of Criminal Procedure and prohibits disclosure to the parties, public, and media. *See* TEX. CODE CRIM. PRO. ANN. art. 35.29 (West Supp. 2017) (prohibiting disclosure of jurors’ personal information except by an application showing good cause). Significantly, however, the Attorney General has specifically removed the anonymous jury provision from the purview of voir dire. *See* Tex. Op. JC-0405, *supra* note 67 (confining the purpose and scope of article 35.29 to the

defense's request for juror identity information.⁹⁰ The defense sought the jurors' information, among other reasons, to monitor their social media use over the course of the trial.⁹¹ The court overruled the defense's motion, concluding that monitoring the jurors "would 'unnecessarily chill the willingness of jurors summoned from our community to serve as participants in our democratic system of justice.'"⁹²

To the contrary, former Chief Judge David Richard Herndon from the Southern District of Illinois implicitly imposed an affirmative duty to use the Internet to research jurors.⁹³ When a defense attorney filed a motion for new trial alleging juror dishonesty, the court considered those objections untimely.⁹⁴ In the judge's opinion, the information about the jurors was available through the Internet and should have been discovered during voir dire.⁹⁵ As opposed to finding Internet research a danger, the judge considered it an element of an attorney's reasonable diligence.⁹⁶

B. *Judicial Attitudes of State Courts*

State court cases addressing the issue are scarce, but the majority tend to permit research of jurors using the Internet during voir dire.⁹⁷ Most notably, in *Johnson v. McCullough*,⁹⁸ the Supreme Court of Missouri

final jury panel rather than the venire, therefore, allowing personal information of the jurors to be used by attorneys during voir dire).

90. *United States v. Norwood*, No. 12-CR-20287, 2014 WL 1796644, at *1 (E.D. Mich. May 6, 2014).

91. *See id.* at *3–4 (reviewing defense's requests for juror information to facilitate bias discovery in voir dire and to monitor social media conduct).

92. *Id.* (quoting *United States v. Kilpatrick*, No. 10-20403, 2012 WL 3237147, at *3 (E.D. Mich. Aug. 7, 2012)).

93. *See Burden v. CSX Transp., Inc.*, No. 08-cv-04-DRH, 2011 WL 3793664, at *9 (S.D. Ill. Aug. 24, 2011) (implying that diligent attorneys should use the Internet to research jurors and raise objections during voir dire).

94. *See id.* (overruling defendant's motion for new trial, in part, because the defendant's objections to the empanelling of specific jurors were considered waived when not raised during voir dire).

95. *Id.*

96. *See id.* (deeming Internet research to be a necessary element of attorney's reasonable diligence in identifying a juror's potential biases).

97. *See* John G. Browning, *As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn?*, 25 JURY EXPERT, May/June 2013, at 1, 1 (discussing "the revolution in communication that social networking represents [which] has provided attorneys and trial consultants with a vast digital treasure trove of information about prospective jurors" and how the Missouri Supreme Court, the New Jersey Superior Court, and the Eastern District of Michigan Court has addressed the plethora of issues on using the Internet during the voir dire process).

98. *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam).

imposed an affirmative duty on attorneys to research jurors using “Case.net,” a Missouri online database,⁹⁹ to determine whether prospective jurors had previously served as a juror.¹⁰⁰ Despite only addressing this narrow, state-specific database, the court hinted at the increasing role of the Internet within voir dire in the future by declaring:

[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. . . . [A] party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not [empaneled] and present to the trial court any relevant information *prior* to trial.¹⁰¹

The attitude of this opinion was later promulgated as Missouri Supreme Court Rule 69.025, which requires an online pretrial review of a juror's litigation history and objection to a prospective juror, if at all, before the jury is sworn.¹⁰²

Not even four months after *Johnson* was decided, attorneys in *Khoury v. ConAgra Foods, Inc.*,¹⁰³ followed the instruction of the Missouri Supreme Court and agreed to review prospective juror litigation history on Case.net prior to voir dire examinations.¹⁰⁴ The morning of trial, but before opening statements, defense counsel, who was representing a manufacturer of microwaved popcorn, informed the court that one prospective juror had previously revealed a bias against corporate, commercial food manufacturers.¹⁰⁵ The trial court subsequently

99. Missouri describes Case.net as providing “access to the Missouri state courts automated case management system,” where users can view “case records, including docket entries, parties, judgments and charges in public court.” CASE.NET, <https://www.courts.mo.gov/casenet/base/welcome.do> [<https://perma.cc/CUV8-RLJH>].

100. See *Johnson*, 306 S.W.3d at 558–59 (discussing advances in technology and access to information that enable attorneys to inform the court about a juror's prior litigation history at an earlier stage in voir dire).

101. *Id.* (emphasis added).

102. See MO. SUP. CT. R. 69.025(d) (2017) (“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.”).

103. *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189 (Mo. Ct. App. 2012).

104. *Id.* at 193.

105. See *id.* (stating the defense counsel considered the juror “a prolific poster for anti-corporation, organic foods”).

questioned the juror and sustained a motion to strike.¹⁰⁶ The Missouri Court of Appeals considered the removal of the juror within the discretion of the trial court.¹⁰⁷ Significantly, however, the court of appeals refused to extend the timing restriction of *Johnson* and Rule 69.025 to Internet research other than litigation history.¹⁰⁸ By making such a delineation, the court implicitly declared that Internet research of jurors, when done in a manner unrelated to prior litigation history, is without restriction.¹⁰⁹

In New Jersey, an appellate court held a trial court's preclusion of Internet research of jurors to be an abuse of discretion.¹¹⁰ The trial court deemed the research an unfair advantage to the researching party, and subsequently prohibited it, considering the other party was not given advance notice.¹¹¹ The appellate court recognized that—like Texas—trial court judges are afforded broad discretion to control jury selection.¹¹² Nevertheless, the appellate court found prohibiting online research an unfair punishment to a party who had the foresight to bring a laptop to the courtroom, so as to take advantage of the Wi-Fi access.¹¹³

The Supreme Court of Kentucky heard a case in 2012 involving two jurors who were found to be Facebook “friends” with the mother of the victim.¹¹⁴ When the initial jury panel was asked during voir dire whether

106. *Id.* Later, the trial judge referred to the decision as a “very close call.” *Id.* at 201.

107. *See id.* at 201–02 (describing the trial judge's unique ability to judge the bias of the prospective juror, and in this case, the judge's decision to exclude the juror out of an “abundance of caution”).

108. *See id.* (limiting the scope of *Johnson* and Rule 69.025 to Internet searches of litigation history only).

109. *See id.* at 202–03 (speculating that a “day may come” in which the Missouri Supreme Court may need to reconsider the scope of pretrial research of prospective jurors; however, noting “that day has not arrived as of yet”).

110. *See Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071, at *10 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (per curiam) (finding the trial court judge acted unreasonably by requiring trial counsel to notify an adversary and the court prior to using the Internet during voir dire, without citing any basis for such a decision).

111. *See id.* at *4 (highlighting an exchange between the trial judge and the plaintiff's counsel in which the judge required notice before accessing the Internet).

112. *See id.* at *9 (“In the absence of a statute or court rule to the contrary, as long as the selection procedure results in a fair and impartial jury, the manner in which a jury is to be selected is properly within the trial court's sound discretion.” (quoting *State v. Howard*, 471 A.2d 796, 799 (N.J. Super. Ct. App. Div. 1983))).

113. *See id.* at *10 (regarding the use of the Internet to vet potential jurors as fair when both parties were given equal access to the Internet, “even if only one [party] chose to utilize it”).

114. *See Sluss v. Commonwealth*, 381 S.W.3d 215, 221 (Ky. 2012) (determining whether the court erred in denying a motion for new trial, where, among other things, jurors were discovered to have been untruthful during voir dire).

they knew the victim or the victim's family, neither of the two jurors responded.¹¹⁵ One juror denied having a Facebook account at all.¹¹⁶ After an insightful discussion on the nature of online relationships,¹¹⁷ the Kentucky Supreme Court remanded the case for a hearing to determine whether the two jurors' relationship with the victim's mother was sufficient to constitute a strike for cause.¹¹⁸

While making this ruling, the Supreme Court of Kentucky also took the opportunity to review the ethics of the increasingly "commonplace" practice of Internet vetting of potential jurors.¹¹⁹ Recognizing the information posted on social media websites as "likely public," the court allowed for pretrial searches of prospective jurors' networking sites by adopting the guidance of the New York County Lawyers Association's Committee of Professional Ethics.¹²⁰ Following these guidelines, "it is proper and ethical" for Kentucky lawyers to conduct Internet searches of

115. *Id.*

116. *See id.* at 222 (reciting a juror denying having knowledge of the case and "unequivocally" denying having a Facebook).

117. The Kentucky Supreme Court considered the varying weight of Facebook "friendships," rather than the existence of an online relationship, to determine whether a new trial should have been granted. *See id.* at 222–23 (acknowledging that, although becoming "friends" on Facebook requires an affirmative request and/or approval, the term "friend" fails to sufficiently connote the nuance and variance within those relationships). One person may be stating the truth when denying knowledge of another person, while also maintaining a relationship as Facebook friends. *See id.* at 222 ("[A] person can become 'friends' with people to whom the person has no actual connection . . ."). Thus, the existence of a Facebook relationship between a juror and family member of a victim, standing alone, is insufficient to require a new trial. *See id.* (stating that Facebook relationships do not provide enough evidence to presume juror bias sufficient to require a new trial).

118. *See id.* at 229 (directing the trial court to consider the extent of the relationship between the two dishonest jurors and the mother's victim when determining whether to grant a new trial). *But see* *Sluss v. Commonwealth*, 450 S.W.3d 279, 286–87 (Ky. 2014) (approving, after the hearing on remand, of the trial court's decision to deny a motion for new trial).

119. *See Sluss*, 381 S.W.3d at 227 (recognizing that, while perhaps more commonplace, many lawyers are still "skittish" given that "court rules on the subject are murky or nonexistent in most jurisdictions" (quoting Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS (Feb. 17, 2011, 2:49 PM), <http://www.reuters.com/article/us-courts-voirdire-idUSTRE71G4VW20110217>)).

120. *See id.* at 228 (approving of the New York County Lawyer Association's guidelines, considering them similar to Kentucky's Rules of Professional Conduct). *Compare* KY. SUP. CT. R. 3.130 (3.5) (West 2018) (prohibiting communication between a lawyer and juror, and distinguishing between communication during trial and communication post-trial), *with* N.Y. Cty. Lawyers' Ass'n Comm. on Prof. Ethics, Formal Op. 743, at 1 (May 18, 2011), http://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf [<https://perma.cc/SZZ8-NVNE>] [hereinafter N.Y. Cty. Formal Op. 743] (adding a distinction regarding pretrial online vetting and approving of such vetting so long as the juror is not contacted).

prospective jurors “provided that there is no contact or communication with the prospective juror,” including through Facebook or Twitter.¹²¹

C. *Ethics Opinions from Outside of Texas*

The State Bar of Texas Committee on Professional Ethics currently has no formal ethics opinion addressing the use of Internet during voir dire.¹²² Additionally, the local bar associations of Texas’s major metropolitan areas also lack formal opinions on the topic.¹²³ However, the American Bar Association, as well as several state and local bar associations from outside of Texas, have published formal ethics opinions on the precise issue.

The non-Texas ethics opinions provide a clear answer to the question of using Internet resources to evaluate prospective jurors: yes, it is permitted, subject to certain qualifications.¹²⁴ The major qualifications that follow

121. *Sluss*, 381 S.W.3d at 221 (quoting N.Y. Cty. Formal Op. 743, *supra* note 120).

122. *See generally* TEX. COMM. ON PROF’L ETHICS, *supra* note 10 (showing no formal ethics opinions regarding the use of Internet during voir dire at the completion of research for this Comment). The most relevant authority on lawyer social media use in Texas comes from the Texas Young Lawyers Association, and even that lacks guidance on research of prospective jurors, jurors, or other third-parties. *See* TEX. YOUNG LAWYERS ASS’N, TYLA POCKET GUIDE: SOCIAL MEDIA 101 (2013), https://www.texasbar.com/AM/Template.cfm?Section=Lawyers_Home&Template=/CM/ContentDisplay.cfm&ContentID=25527 [<https://perma.cc/RC54-7UA4>] (providing basic guidance on social media use as it relates to the legal profession).

123. Upon review, most local bar associations of Texas do not publish their own formal ethics opinions on any topic. *See generally* *Local Bar Association Roster*, STATE BAR OF TEXAS, https://www.texasbar.com/AM/Template.cfm?Section=Local_Bar_Websites [<https://perma.cc/V58E-FFTJ>] (showing the shortage of published formal ethics opinions by most local bar associations in Texas at the time this Comment was written). However, the Dallas Bar Association has published articles on social media ethics in its monthly publication. *See* Nicole Knox, *Ethics Column: Three Ethical Rules in a Facebook Nation*, DALLAS BAR ASSOCIATION HEADNOTES, May 2015, at 13 (advising attorneys to follow ABA Formal Op. 466); John G. Browning, *Legal Ethics and Social Media: It’s Complicated*, DALLAS BAR ASSOCIATION HEADNOTES, December 2013, at 9 (cautioning attorneys researching third-parties online to treat social media as normal communication, subject to traditional ethical rules).

124. *See* ABA Formal Op. 466, *supra* note 8, at 1 (“[A] lawyer may review a juror’s or potential juror’s Internet presence”); Colo. Bar Ass’n Ethics Comm., Formal Ethics Op. 127, at 1 (2015), http://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_127.pdf [<https://perma.cc/9K28-PK5T>] [hereinafter Colo. Formal Ethics Op. 127] (“A lawyer may always view the public portion of a person’s social media profile and any public posts made by a person through social media.”); D.C. Bar Ass’n, Ethics Op. 371, at 4 (2016), <https://www.dccbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref28> [<https://perma.cc/ES38-TYEX>] [hereinafter D.C. Ethics Op. 371] (“Accessing public social media sites of jurors or potential jurors is not prohibited by Rule 3.5 as long as there is no communication by the lawyer with the juror in violation of Rule 3.5(b)”); N.Y.C. Formal Op. 2012-2, *supra* note 72, at 7 (“The Committee

that endorsement are unanimous—the approval applies only to the information available to the public.¹²⁵ Lawyers may not request to see information the juror designates as private, as such requests would constitute prohibited communications.¹²⁶ Furthermore, lawyers may not use deception to circumvent the communication prohibition.¹²⁷ Therefore, a lawyer cannot create a profile with a fake name and profile picture to request access to a private account or ask another to make a request on their behalf.¹²⁸

Despite the near universal agreement on those major points, there is one minor point of divergence. Bar association committees disagree on whether “network-generated notifications” constitute prohibited communications.¹²⁹ These notifications are sent automatically to an account owner when another user views their account, regardless of the

concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur.”); N.Y. Cty. Formal Op. 743, *supra* note 120, at 1 (“It is proper and ethical under RPC 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”); Or. Formal Op. 2013-189, *supra* note 72, at 2 (“Lawyer may access publicly available information on a social networking website.”); Pa. Bar Ass’n, Formal Op. 2014-300, at 2 (2014), <https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf> [<https://perma.cc/26BF-LNRS>] [hereinafter Pa. Formal Op. 2014-300] (“Attorneys may review a juror’s Internet presence.”); W. Va. Office of Disciplinary Counsel, Legal Ethics Op. 2015-02, at 18 (2015), <http://www.wvdc.org/pdf/LEO%202015%20-%2002.pdf> [<https://perma.cc/LG77-QCZJ>] (“Although attorneys may review the public sections of a juror’s social networking websites, attorneys are prohibited from attempting to access the private portions of a juror’s social media page”).

125. *See, e.g.*, Pa. Formal Op. 2014-300, *supra* note 124, at 16 (“[A]n attorney may access the public portion of a juror’s social networking website but may not attempt or request to access the private portions of the website.”).

126. *See, e.g.*, ABA Formal Op. 466, *supra* note 8, at 1 (“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).”).

127. *See, e.g.*, Colo. Formal Ethics Op. 127, *supra* note 124, at 4 (“No exception in the Rules permits a lawyer to employ deception or subterfuge to gain access to restricted information through social media.”).

128. *See, e.g.*, N.Y.C. Formal Op. 2012-2, *supra* note 72, at 2 (“In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable.”).

129. *Compare* ABA Formal Op. 466, *supra* note 8 (considering network-generated notifications as non-communication, and therefore acceptable), *with* N.Y. Cty. Formal Op. 743, *supra* note 120, at 3 (fearing that even inadvertent notice might influence a juror’s decision-making), *and* N.Y.C. Formal Op. 2012-2, *supra* note 72, at 5–6 (analyzing the definition of “communication” and determining inadvertent notifications may be prohibited communication).

viewer's intentions.¹³⁰ LinkedIn is a common example.¹³¹ Additionally, the relatively new Instagram "stories" feature likely qualifies.¹³² The American Bar Association's Formal Opinion 466 stands for the majority view, which does not consider such notifications to be a communication by the lawyer to the juror.¹³³ In their view, the lawyer is not communicating in those circumstances—rather, the social media network is communicating.¹³⁴ Consequently, following the ABA's opinion, a lawyer may view a juror's public LinkedIn account without fear of ethical violations.¹³⁵

The New York City Bar Association and New York County Bar Association, together, constitute the minority view.¹³⁶ The New York County Bar Association's opinion held that network-generated notifications, though sometimes inadvertent, may influence a juror's decision-making.¹³⁷ One year later, the New York City Bar Association

130. See ABA Formal Op. 466, *supra* note 8, at 4–5 (“[T]he key feature . . . is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer.”).

131. See *Who's Viewed Your Profile - Privacy Settings*, LINKEDIN (Mar. 2016), <https://www.linkedin.com/help/linkedin/answer/47992> [<https://perma.cc/3CQZ-QPBQ>] (informing users that they will see the name, location, industry, and other information of accounts who visit their profile, unless the viewing user has a Premium account).

132. See *How Can I Tell Who's Seen My Instagram Story?*, INSTAGRAM, <https://help.instagram.com/202055156863605> [<https://perma.cc/6BKU-MPCY>] (instructing users that they will be able to see the names of people who view their “stories”).

133. See ABA Formal Op. 466, *supra* note 8, at 5 (“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.”). This interpretation is also followed by the bar associations of Colorado, Washington, D.C., and Pennsylvania. See Colo. Formal Ethics Op. 127, *supra* note 124, at 3 (“[T]he social media service is communicating with the juror based on a technical feature of the particular social media, consistent with agreements between the provider and the subscriber.”); D.C. Ethics Op. 371, *supra* note 124, at 4 (“In the Committee’s view, such [automatically-provided] notification does not constitute a communication between the lawyer and the juror or prospective juror.”); Pa. Formal Op. 2014-300, *supra* note 124, at 16 (“There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed.”). Oregon and West Virginia, whose state bar associations address using the Internet to evaluate prospective jurors, are silent to this narrow issue.

134. See ABA Formal Op. 466, *supra* note 8, at 5 (“The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM.”).

135. See *id.* (implying that, as network-generated notification from passive lawyer review is not communication, it is permissible to review LinkedIn accounts, so long as other ethical rules are not violated in the process).

136. N.Y. Cty. Formal Op. 743, *supra* note 120; N.Y.C. Formal Op. 2012-2, *supra* note 72.

137. See N.Y. Cty. Formal Op. 743, *supra* note 120, at 3 (“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

crafted a similar opinion, but added depth with an analysis of Black's Law Dictionary's definition of "communication."¹³⁸ Their analysis concluded that communication contains no *mens rea* element.¹³⁹ Therefore, communication occurs when knowledge or information is received, regardless of the intention of the one communicating, and notifications impart knowledge of being searched.¹⁴⁰ However, the New York City Bar Association could only say it was surely prohibited where the lawyer was aware that such review would result in the juror being notified—*inadvertent notifications "might constitute a prohibited communication[.]"*¹⁴¹

Several other state and local bar associations have crafted ethics opinions on lawyer review of third party Internet profiles, while not necessarily distilling the differences between jurors, witnesses, or other natural parties.¹⁴² Still, the primary ideas of those opinions remain largely consistent with the opinions already mentioned: public portions of online

impermissible communication, as it might tend to influence the juror's conduct with respect to the trial.").

138. See N.Y.C. Formal Op. 2012-2, *supra* note 72, at 6 (highlighting that Black's Law Dictionary definition of "communication" focuses on the effect on the receiver of information).

139. See *id.* at 5 ("The Rule does not contain a *mens rea* requirement; by its literal terms, it prohibits *all* communication, even if inadvertent.").

140. See *id.* at 6 ("A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney . . .").

141. See *id.* at 2 ("We further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended.").

142. Ky. Bar Ass'n, Ethics Op. KBA E-434 (2012), [http://c.yecd.com/sites/www.kybar.org/resource/resmgr/Ethics_Opinions_\(Part_2\)/kba_e-434.pdf](http://c.yecd.com/sites/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)/kba_e-434.pdf) [<https://perma.cc/HTZ8-NF7G>] [hereinafter Ky. Ethics Op. KBA E-434]; N.H. Bar Ass'n Ethics Comm., Advisory Op. #2012-13/05 (2013), https://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp#6 [<https://perma.cc/4CPJ-BZGB>] [hereinafter N.H. Advisory Op. #2012-13/05]; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 843 (2010), <http://www.nysba.org/CustomTemplates/Content.aspx?id=5162> [<https://perma.cc/NU2A-5GH4>]; Mass. Bar Ass'n, Ethics Op. 2014-5 (2014), <http://www.massbar.org/publications/ethics-opinions/2010-2019/2014/opinion-2014-5> [<https://perma.cc/E67N-FFE2>]; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009), http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf [<https://perma.cc/MDC8-X7T4>]; see also San Diego Cty. Bar Ass'n Legal Ethics Comm., SDCBA Legal Ethics Op. 2011-2 (2011), <https://www.sdcbba.org/?pg=LEC2011-2> [<https://perma.cc/NS66-7SSF>] (presenting a model approach that allows for passive review of jurors' social media but prohibits contact).

profiles are always reviewable,¹⁴³ but an attorney may never use deception to obtain access to a third party's private information.¹⁴⁴

IV. RECOGNIZING AND RESPONDING TO CONCERNS

Oracle v. Google stands out as being the only judicial opinion to directly, and aggressively, oppose the practice of investigating prospective jurors' Internet presence.¹⁴⁵ However, Judge Alsup is not the only commentator to fear the potential negative implications that could come with increased attorney access to juror Internet profiles during voir dire.¹⁴⁶ While virtually all the professors and practitioners who have written on the subject approve of the practice—even if begrudgingly so—their approval did not blind them to the potential problems involved.¹⁴⁷ However, most of their reservations can be soothed with a well-crafted rule.

A. *Emboldening Jurors to Research*

Commentators fear that increased freedom for lawyers to use the Internet to research jurors will embolden jurors to do the same to lawyers, parties, or witnesses.¹⁴⁸ However, for this fear to ever become reality, the

143. See, e.g., Ky. Ethics Op. KBA E-434, *supra* note 142, at 2 (“If the site is ‘public,’ and accessible to all, then there does not appear to be any ethical issue.”).

144. See, e.g., N.H. Advisory Op. #2012-13/05, *supra* note 142 (“Deceit is improper, whether it is accomplished by providing information or by deliberately withholding it.”).

145. See generally *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100 (N.D. Cal. 2016) (dreading the idea that trial lawyers may dissect a juror's personal information through online investigations).

146. See, e.g., Caren Myers Morrison, *Investigating Jurors on Social Media*, 35 PACE L. REV. 285, 285–91 (2014) (criticizing the practice of researching jurors' Internet presence and imploring courts to, at minimum, give jurors advance notice of the impending searches).

147. See Michael Begovich, *Voir Dire in a Digital World: A Model for Ethical Internet Investigation of the Venire*, 36 T. JEFFERSON L. REV. 227, 249 (2014) (presenting “conservative” guidelines for ethical investigation of the venire through the Internet); Browning, *Ethical Concerns*, *supra* note 5, at 49 (recognizing Internet research as a threat to juror privacy but contending the Internet to be a valuable tool to research jurors); Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 647–48 (2011) (proposing discovery-like rules to be applied to Internet research of jurors to “help curb some of the criticism aimed at the investigation of jurors”); Robinson, *supra* note 5, at 618–38 (identifying several concerns but ultimately suggesting it is now “impossible to stop attorneys from using resources available online to investigate and monitor jurors”).

148. See *Oracle*, 172 F. Supp. 3d at 1102 (suggesting that once a juror becomes aware of attorney investigation into their social media there exists a very significant risk of unfairness in the trial); see also Morrison, *supra* note 146, at 303 (warning that lawyers looking for misconduct “may want to consider what kind of behavior they are modeling” or else “jurors may feel entitled to do a bit of research of their own”).

jurors would first need to learn of attorneys conducting research of their Internet profiles. The jurors could receive notice in two ways. First, jurors could learn from the court itself. Articles, opinions, and judges have suggested giving jurors advance notice of impending online research as a matter of fairness and respect for the juror.¹⁴⁹ But any such advance notification may actually produce, rather than pacify, any anxiety that would cause a juror to conduct his or her own research. A prospective juror's decision to privatize portions of a social media account implies awareness that unknown people may review the portions left public for unknown reasons.¹⁵⁰ In other words, prospective jurors who have left their social media accounts public should already know strangers will look at those accounts; they just don't know who the stranger is, or why that stranger is looking. Here, where the stranger is a lawyer researching the prospective juror's social media to discover any potential bias, ignorance may be bliss. Advance notice would aggravate anxieties the prospective juror has already chosen to dismiss.

Second, a juror could also learn of impending or occurring research through either a request for increased access or through a network-generated notification. However, each bar association opinion on the issue specifically rejects the notion that attorneys can send any requests to gain access to a juror's private information.¹⁵¹ Network-generated notifications may inadvertently provide a juror notice of lawyer review, especially in jurisdictions that do not consider network-generated notifications to be prohibited communication.¹⁵² But, a rule that considers such notifications prohibited communication further decreases

149. See *Oracle*, 172 F. Supp. 3d at 1103–04 (mandating that both parties “inform the venire of the specific extent to which it . . . will use Internet searches to investigate and to monitor jurors”); see also ABA Formal Op. 466, *supra* note 8, at 3 (2014) (“[J]udges should consider advising jurors during the orientation process that their backgrounds will be of interest”); Morrison, *supra* note 146, at 301–02 (suggesting trial judges should be able to inform jurors their social media profiles will be searched); Robinson, *supra* note 5, at 628 (suggesting pre-investigation notice as a way to preserve juror privacy).

150. See *Can I Tell Who's Looking at My Profile?*, FACEBOOK, <https://www.facebook.com/help/210896588933875> [<https://perma.cc/8SYX-AW5E>] (explaining that Facebook does not allow users to track who has viewed their profile).

151. See, e.g., Or. Formal Op. 2013-189, *supra* note 72 (permitting review of public information about third parties by glancing through their social networking websites).

152. Compare N.Y.C. Formal Op. 2012-2, *supra* note 72, at 5–6 (prohibiting attorneys from reviewing profiles on social networks known to notify users upon review, such as LinkedIn), with ABA Formal Op. 466, *supra* note 8 (holding network-generated notifications to not be barred communication).

the chance of jurors becoming aware of a review of their online profile. Additionally, regardless what the attorneys do, jurors in Texas are still instructed not to use electronics or social media, and further, not to conduct their own research.¹⁵³

B. *Selecting a Biased Jury*

Judges and commentators are also afraid that increased Internet access to research jurors, rather than being used to fetter out biases, would be used to discover traits of bias favorable to a particular argument.¹⁵⁴ For example, prosecutors may seek jurors who are sympathetic to police officers, while defense attorneys may want jurors with negative past experiences with police. However, jury selection has never been one of selecting favorable jurors—it is a process of striking jurors who might be unfavorable.¹⁵⁵ An attorney cannot choose a favorable juror, they can only hope that juror is not struck.¹⁵⁶ It is the job of opposing counsel to recognize the potential bias in a prospective juror and strike that juror or challenge for cause.¹⁵⁷ The net result of both parties recognizing and striking potentially prejudicial jurors hopefully results in an impartial panel.¹⁵⁸

C. *Personal Appeals*

Judges and writers also worry that attorneys might exploit information gathered from Internet investigations to make personal appeals to the

153. See TEX. R. CIV. P. 226a (instructing, among other things, that jurors turn off their electronic devices, refrain from using social media, not communicate with anyone, or conduct their own research); see also Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 86 (2014) (considering carefully-crafted instructions prohibiting juror use of social media “the best way to ensure an impartial jury [panel] in the age of social media”).

154. See Morrison, *supra* note 146, at 288 (vying that most Internet searches are simply ways attorneys increase their jury appeal); Robinson, *supra* note 5, at 630–31 (examining the issues created when attorneys select biased jurors).

155. See *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2011) (per curiam) (finding attorneys have a right to question potential jurors to discover biases and strike the jurors accordingly); *Sanchez v. State*, 165 S.W.3d 707, 710–11 (Tex. Crim. App. 2005) (providing the reasoning behind the voir dire requirement).

156. See Hoffmeister, *supra* note 147, at 614 n.23 (proposing that jury selection be re-named “jury de-selection” as “neither party has an affirmative right to empanel certain jurors”).

157. *Supra* Part IIB.

158. See Robinson, *supra* note 5, at 630 (“In the end, however, the net result of this use of research on jurors to select a biased jury may be the creation of a balanced panel.”).

jury.¹⁵⁹ For example, by reviewing a prospective juror's Facebook profile, an attorney may learn that juror's favorite book is *To Kill a Mockingbird*.¹⁶⁰ Such knowledge might prove particularly useful for a defense attorney, who could analogize the situation of the defendant to that of Tom Robinson.¹⁶¹ If attorneys are given the ability to research prospective jurors, there may not be a satisfactory scheme to ensure that personal appeals are not made based on the information collected on that review.

However, such a preventative scheme might not be necessary, as the judicial and academic fear over attorneys' utilization of juror information during trial is likely overstated. Simply, for many attorneys, such efforts would be a waste of time.¹⁶² While discovering and removing biases is an issue of constitutional concern and attention, time and resources spent mining for a perfect quote to use during closing arguments could be better spent strengthening a case elsewhere. The use of personal appeals gleaned from review of online public information is a strategic decision best left with attorneys.

D. *Infringing Juror Privacy*

All these listed concerns relate back to an overriding desire to protect the privacy of the prospective jurors. Judge Alsup correctly asserted that jurors are not tools to be manipulated by attorneys; rather, they are citizens performing a sacrosanct civic duty, sacrificing time and peace of mind.¹⁶³

159. See *Oracle Am., Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1102–03 (N.D. Cal. 2016) (fearing that attorneys might begin using a prospective juror's favorite quote during trial); Morrison, *supra* note 146, at 299 (viewing attorney's exploitation of juror's personal information "distasteful"). But see Hoffmeister, *supra* note 147, at 633 (finding "well-placed metaphors" as methods by which attorneys may "bond with jurors").

160. See *Oracle*, 172 F. Supp. 3d at 1103 (mentioning *To Kill A Mockingbird* as an example of how an attorney might exploit juror information); Morrison, *supra* note 146, at 288–90 (viewing an attorney's investigation of a juror's social media as unfair and exploitative).

161. Tom Robinson is a character in the novel who is falsely accused of rape. See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (1960) (articulating the racial injustice which leads a man to be convicted of a crime he obviously did not commit).

162. See Morrison, *supra* note 146, at 302 ("[An] investigated jury, vetted by leading trial consultants[,] . . . is not likely to perform substantially differently from a jury picked at random.").

163. See *Oracle*, 172 F. Supp. 3d at 1103 ("The jury is not a fantasy team composed by consultants, but good citizens commuting from all over our district, willing to serve our country, and willing to bear the burden of deciding a commercial dispute the parties themselves cannot resolve."); Morrison, *supra* note 146, at 289–91 (warning a lack of transparency regarding the use of online investigation in the jury selection process may negatively impact citizens' willingness to partake in jury duty when they discover "that jury duty entails . . . wholesale intrusion into their online lives").

Increasing attorney access to the private lives of jurors may have a chilling effect on jurors' willingness to participate.¹⁶⁴

However, while valuing a prospective juror's privacy interest, the Supreme Court of the United States has not granted prospective jurors a privacy right.¹⁶⁵ Given this difference, commentators considered the constitutional rights to an impartial jury at trial to override the prospective jurors' privacy interest.¹⁶⁶ Existing ethics opinions protect that privacy interest; under those opinions, attorneys are only entitled to review what is made available to the public by the juror.¹⁶⁷ Thus, ethics opinions seek to protect the privacy of prospective jurors as much as jurors themselves protect it.¹⁶⁸

Furthermore, a lawyer's online investigations of prospective jurors may actually enhance juror privacy rather than erode it.¹⁶⁹ In typical *voir dire*

164. See *United States v. Norwood*, No. 12-CR-20287, 2014 WL 1796644, at *4 (E.D. Mich. May 6, 2014) (fearing the attorneys' attempts to monitor the juror's social media use "would 'unnecessarily chill the willingness of jurors . . . to serve as participants in our democratic system of justice'" (quoting *United States v. Kilpatrick*, No. 10-20403, 2012 WL 3237147 at *3 (E.D. Mich. Aug. 7, 2012))); *United States v. Blagojevich*, 614 F.3d 287, 293 (7th Cir. 2010) (Posner, J., dissenting) ("Most people dread jury duty—partly because of privacy concerns.").

165. See *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 514–15 (Blackmun, J., concurring) ("Certainly, a juror has a valid interest in not being required to disclose to all the world highly personal or embarrassing information simply because he is called to do his public duty. . . . I am concerned that recognition of a juror's privacy 'right' would unnecessarily complicate the lives of trial judges attempting to conduct a *voir dire* proceeding.").

166. See Robinson, *supra* note 5, at 624 (concluding the Supreme Court of the United States "has refused to give prospective jurors a similar reassurance regarding a constitutional right either to refuse to answer questions or to avoid public disclosure of their answers" (quoting Karen Monsen, *Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights from Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 REV. LITIG. 285, 288–89 (2002))).

167. See, e.g., ABA Formal Op. 466, *supra* note 8 (permitting passive review of jurors' public online presence while forbidding attorney attempts to access private portions of a juror's social media). The Supreme Court of the United States has also held that information exposed to the public to view carries "no reasonable expectation of privacy[.]" See *California v. Greenwood*, 486 U.S. 35, 41 (1988) (asserting "police cannot be reasonably expected to avert their eyes from" information left out to be viewed by the public).

168. Additionally, Internet-using jurors may have lower privacy expectations regarding what they post online. See Hoffmeister, *supra* note 147, at 638 ("Courts have consistently recognized . . . [Internet users] have a lower expectation of privacy in information that they themselves make available on the Internet."); see also Robinson, *supra* note 5, at 628 ("The active, voluntarily sharing of information in social media may reflect different conceptions of privacy among users of these websites and services."). This is particularly true for younger generations who grew up with the Internet. See Hoffmeister, *supra* note 147, at 637 (discussing differences in privacy expectations between "Digital Natives" and "Digital Immigrants").

169. See Morrison, *supra* note 146, at 293 ("[O]nline jury investigation might arguably be less offensive to jurors because it avoids putting them on the spot.").

scenarios, prospective jurors may be required to divulge private information, out loud, in front of several dozen strangers.¹⁷⁰ An attorney, by reviewing an online social media profile, may be able to obtain the desired information before the question is asked.¹⁷¹ Online investigations may also be less intrusive than former “traditional” investigations, in which attorneys would hire private investigators to survey homes of jurors.¹⁷²

V. UPDATING TEXAS VOIR DIRE

The primary goal of voir dire in Texas is to seat an impartial jury.¹⁷³ Texas's current structure for achieving that goal is flexible, lacking clear guidelines, and designed to maximize attorneys' abilities to fetter out biased or prejudiced jurors.¹⁷⁴ Updating the current voir dire structure to include pretrial Internet searches of the venire furthers this goal. Allowing attorneys to conduct online investigations of prospective jurors increases the likelihood that an attorney will discover relationships, predispositions, or untruthful responses sufficient to constitute grounds for a challenge for cause, or other information that may facilitate intelligent use of a peremptory strike.¹⁷⁵ An overwhelming weight of authority permits, and

170. See TEX. R. CIV. P. 226 (requiring prospective jurors to swear to answer all questions truthfully).

171. See Morrison, *supra* note 146, at 293 (articulating the value of online investigating in enabling attorneys to uncover relevant juror information while saving jurors the offense or discomfort of disclosing the information in open court).

172. See Hoffmeister, *supra* note 147, at 638 (considering online investigations better than the alternative of intrusive, “traditional” investigations); see also Morrison, *supra* note 146, at 291–92 (describing the evolution of juror investigation from “the grizzled gumshoe in a cheap raincoat driving slowly past prospective jurors' houses to nattily attired paralegals sitting in the back of courtrooms frantically surfing social media sites”).

173. See *In re Commitment of Hill*, 334 S.W.3d 226, 228 (Tex. 2011) (per curiam) (reversing the lower courts' decision to stop a party from utilizing acceptable modes of juror questioning, thereby depriving the party of the ability to select an unbiased jury).

174. See *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 750 (Tex. 2006) (identifying the boundary of peremptory challenges in permitting “parties to reject jurors they perceive to be unsympathetic to their position” but not “to ‘select’ a favorable jury”); see also 4 MCDONALD & CARLSON, *supra* note 41, § 21:19 (“[T]he scope of the voir dire examination . . . [cannot] be bounded by inflexible rules of thumb, for of all the delicate psychological factors inherent in a jury trial perhaps none is more essentially subjective and hence less submissive to dogmatic limitations.”).

175. See *Hill*, 334 S.W.3d at 228 (“Litigants have the right to question potential jurors to discover biases and to properly use peremptory challenges.” (citing *Hyundai*, 189 S.W.3d at 749–50)); *Sanchez v. State*, 165 S.W.3d 707, 710–11 (Tex. Crim. App. 2005) (summarizing the role of voir dire in revealing information that would establish juror bias sufficient to raise a challenge for cause and in advancing the right to assert peremptory challenges).

occasionally encourages, such searches, presenting Texas with a clear picture of how to fashion its own rules.¹⁷⁶

Should Texas choose to formally permit online pretrial investigations of prospective jurors, the following provisions should be included, considering both Texas law, the judicial and bar association formal opinions, and academic commentary:

First, any online investigation of prospective jurors must be limited to only what is made available to the public by the prospective juror. Every bar association to share its opinion has strictly forbidden “friend” requests of any kind, and Texas should follow suit.¹⁷⁷ The weight of authority from other states suggests such affirmative conduct constitutes a prohibited communication barred by Rule 3.06(b) of the Texas Disciplinary Rules of Professional Conduct.¹⁷⁸ Furthermore, citizens need not volunteer all private aspects of their lives upon being called to potentially serve as a juror. However, what they choose to leave available to the public should be available for the public, including attorneys, to review.¹⁷⁹

Second, Internet investigations resulting in network-generated notifications should be barred. As explained by the New York City Bar Association, such notifications constitute impermissible communications between the reviewing attorney and the prospective juror.¹⁸⁰ According to that opinion, a communication occurs when the juror receives

176. See *Johnson v. McCullough*, 306 S.W.3d 551, 558–59 (Mo. 2010) (en banc) (per curiam) (hinting at an affirmative duty for attorneys to use the Internet to gather information regarding jurors’ prior litigation history); see also, e.g., D.C. Ethics Op. 371, *supra* note 124, at 4 (presenting, to this point, the most recently crafted opinion on pretrial Internet investigations of prospective jurors).

177. See Pa. Formal Op. 2014-300, *supra* note 124, at 16 (excluding the private components of a juror’s social media website from the purview of what an attorney may access in investigating jurors online).

178. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.06(b) (prohibiting contact or communication with members of the venire).

179. See *California v. Greenwood*, 486 U.S. 35, 41 (1988) (reiterating the absence of Fourth Amendment protection for information voluntarily made accessible for the public’s review (citing *Katz v. United States*, 389 U.S. 347, 351 (1967))).

180. See N.Y.C. Formal Op. 2012-2, *supra* note 72, at 5–6 (focusing the analysis of whether a “communication” has occurred “on the effect on the receiver,” which may lead to a finding that an inadvertent, automated message constitutes a prohibited “communication”).

information that a litigating attorney reviewed their profile,¹⁸¹ and such information has the potential to influence a juror's decision-making.¹⁸²

Furthermore, LinkedIn, the social media website most often associated with these "network-generated" notifications, is the most popular social media website for lawyers.¹⁸³ New rules should be written with an expectation of Internet competence, and in fact, the American Bar Association's Model Rules of Professional Conduct require such.¹⁸⁴ Lawyers must now "keep abreast of . . . the benefits and risks associated with relevant technology."¹⁸⁵ Banning investigation that results in network-generated notifications may slightly restrict *voir dire*; however, such a ban prevents improper communications and encourages attorney Internet literacy.

Third, judges must not notify prospective jurors of the impending or ongoing Internet investigations;¹⁸⁶ however, judges should give general notice that the attorneys may investigate the jurors' backgrounds. Currently, Rule 226a of the Texas Rules of Civil Procedure requires judges to inform jurors that attorneys "have the right to ask you questions about your background, experiences, and attitudes."¹⁸⁷ Simply changing the language to instead say that attorneys "have the right to investigate jurors' backgrounds" would be sufficient to notify the jurors of the impending Internet investigations.

Specifically notifying the venire of potential Internet investigations may cause more problems than it prevents. While jurors may have a moment to update their privacy settings, such notice may cause an unnecessary anxiety amongst the jurors, or it may even embolden jurors to conduct

181. *See id.* at 6 (explaining how any transmission of information constitutes communication, regardless of whether the transmission was intentional).

182. *See* N.Y. Cty. Formal Op. 743, *supra* note 120, at 3 (stating that jurors' conduct may be influenced if they discover attorneys reviewed their social media accounts).

183. *See* The Editors, *Survey Results: Truths About Lawyers and Social Media*, ATTORNEY AT WORK, (Mar. 4, 2016), <https://www.attorneyatwork.com/survey-results-truths-lawyer-social-media/> [<https://perma.cc/79HL-S6RG>] (reporting LinkedIn as the most widely used social website by lawyers, followed by Facebook and Twitter).

184. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 1983) (requiring technological competence as part of lawyers' overall duty "[t]o maintain the requisite knowledge and skill").

185. *Id.*

186. *See* Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1103–04 (N.D. Cal. 2016) (compelling parties to inform the venire of the extent to which they plan to use the Internet to investigate and monitor jurors).

187. TEX. R. CIV. P. 226a.

research of their own.¹⁸⁸ However, if jurors were not given such notification, the jurors would be blissfully unaware of an attorney's review of the same public information made available by the jurors to the rest of the world.¹⁸⁹

Fourth, the time in which the online investigations were to be conducted must not needlessly extend the time the prospective jurors are required to be present at the courthouse. Currently, trial judges have broad discretion to control voir dire, including the time spent on voir dire.¹⁹⁰ Out of respect for the juror, judges should not afford attorneys additional time to conduct Internet investigations. Any such investigation must take place either concurrently with oral voir dire examination or in the days prior to voir dire, if the jury list is available in advance.¹⁹¹

These four suggestions foster an appropriate respect for the jurors' personal lives while also increasing the ability of the court to empanel an impartial jury.

VI. CONCLUSION

The trail for Texas to follow has been blazed. Existing Texas law, together with decisions from other state courts, as well as formal ethics opinions from several bar associations, have worn ruts that can guide Texas to an ethical and practical solution for voir dire in the twenty-first century. Jurors are sacrificial citizens who perform a crucial role in the

188. See *Oracle*, 172 F. Supp. 3d at 1102 (contending the “one-sidedness” of lawyers’ Internet research “will be hard [for jurors] to accept”); see also Morrison, *supra* note 146, at 303 (warning the lawyers looking for misconduct “to consider what kind of behavior they are modeling” or else “jurors may feel entitled to do a bit of research of their own”).

189. See *California v. Greenwood*, 486 U.S. 35, 39–40 (1988) (rejecting the defendants’ claim that police breached the Fourth Amendment by retrieving inculpatory evidence from defendants’ trash bags because, regardless of whether defendants “did not expect that the contents of their garbage bags would become known to the police[.]” application of objective standards shows defendants “exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection”).

190. See *Mathis v. State*, 576 S.W.2d 835, 839 (Tex. Crim. App. 1979) (Douglas, J., dissenting) (finding a court’s ability to establish reasonable time limits on examination “inherent”); *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793, 797 (Tex. App.—Texarkana 2001, no pet.) (“Generally speaking, the scope of voir dire examination is a matter which rests largely in the sound discretion of the trial court.”).

191. The availability of the juror list is subject to the discretion of the District Clerk. However, the District Clerk can only make the list available to attorneys after the list has first been sent to the sheriff to summon the jurors. See *Tex. Op. JC-0405*, *supra* note 67 (explaining no right exists for attorneys to review the juror list in advance, but noting it is customary for the list to be made available to a requesting attorney on the Friday before the Monday of trial).

judicial process, and their privacy should be respected. However, an impartial jury panel is constitutionally required. The Internet, and social media websites in particular, provide additional tools to discover damning biases, in the occasional instance a juror chooses to not reveal it on their own. Texas attorneys know this, and many are likely using the Internet to research jurors without any specific guidance on what is and isn't appropriate. To sharpen the ethical boundaries of online Internet investigations, and further ensure impartial jury panels, Texas needs to update its voir dire structure to formally permit pretrial Internet investigations of public information.