



Online CLE

Juror Number 6 Tweeted What?! The Ethical Highs and Lows of Social Media

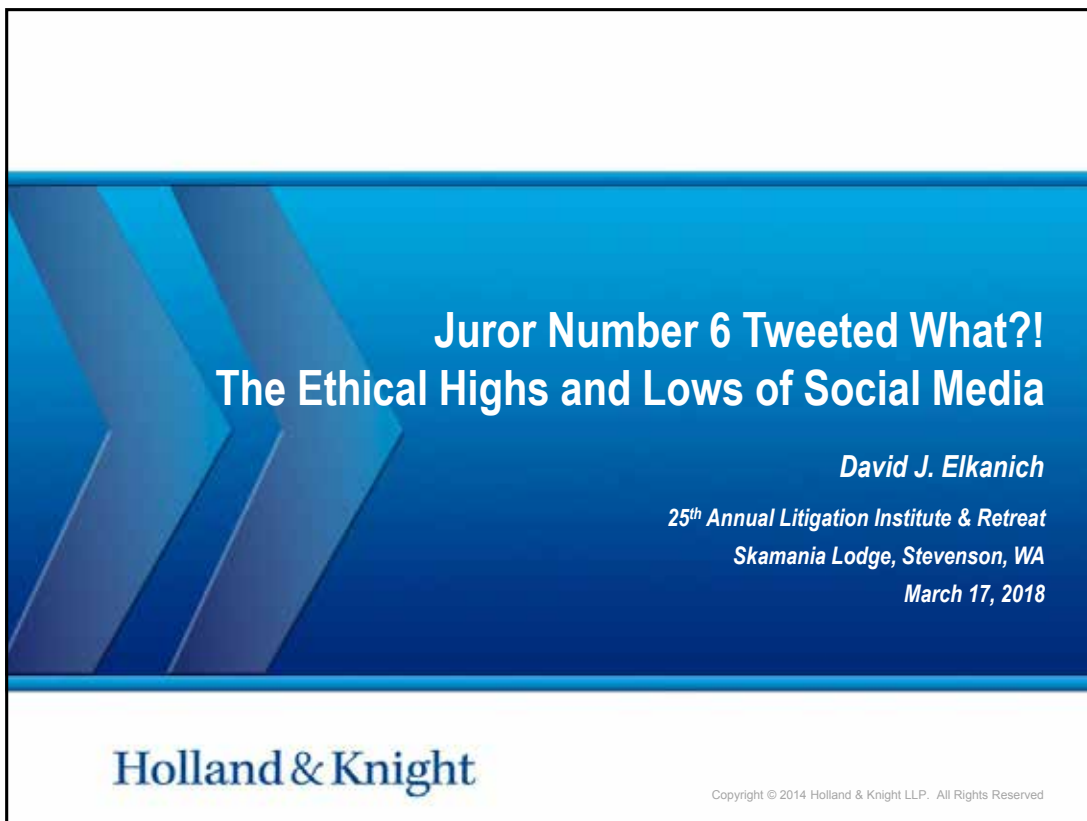
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**From the Oregon State Bar CLE seminar *25th Annual Litigation
Institute and Retreat*, presented on March 16 and 17, 2018**

Chapter 6

Juror Number 6 Tweeted What?! The Ethical Highs and Lows of Social Media—Presentation Slides

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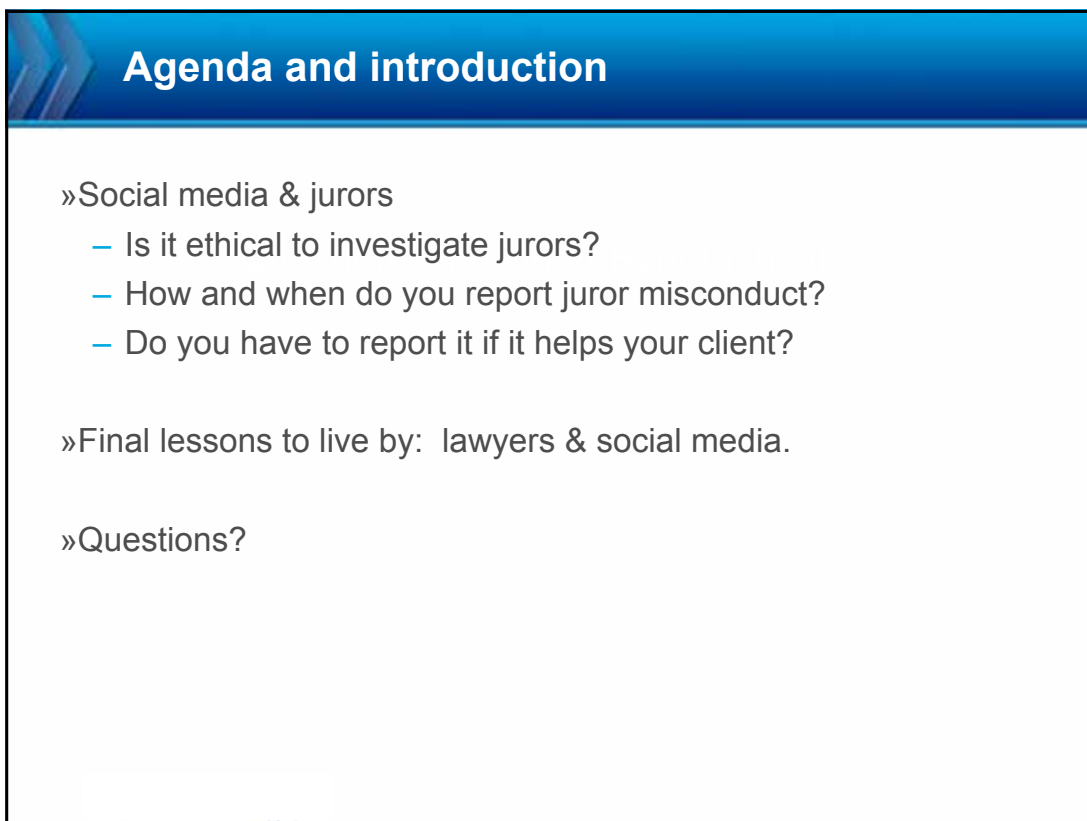


**Juror Number 6 Tweeted What?!
The Ethical Highs and Lows of Social Media**

David J. Elkanich
25th Annual Litigation Institute & Retreat
Skamania Lodge, Stevenson, WA
March 17, 2018

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Agenda and introduction

- »Social media & jurors
 - Is it ethical to investigate jurors?
 - How and when do you report juror misconduct?
 - Do you have to report it if it helps your client?

- »Final lessons to live by: lawyers & social media.

- »Questions?

Why do we care about social media?

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The world communicates through social media

TECH CHART OF THE DAY

FACEBOOK DOMINATES THE SOCIAL MEDIA LANDSCAPE

Monthly active users of selected social networks and messaging services*

Service	Monthly Active Users (M)
Facebook	2,006M
WhatsApp	1,300M
Messenger	1,200M
WeChat	938M
Instagram	700M
Qzone	632M
Weibo	340M
Twitter	328M
Pinterest	175M
Snapchat	166M**
Vkontakte	95M

SOURCE: Company data *Latest data (Dec '16-Jul '17) **Daily active users statista BUSINESS INSIDER

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The internet and privacy



A HELPFUL VENN DIAGRAM

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It is not a question of whether you are aware of social media, but rather what you do with it and how well you do it.

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#socialmedia
#investigatingjurors

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- » RPC 3.5(b): A lawyer shall not “communicate ex parte with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order”.
- » UTCR 3.120(1): Except as necessary during trial, * * * parties, witnesses or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.
- » LR 48-2 No Communications with Jurors—before, during, and after Trial Except as authorized by the Court, attorneys, parties, witnesses, or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

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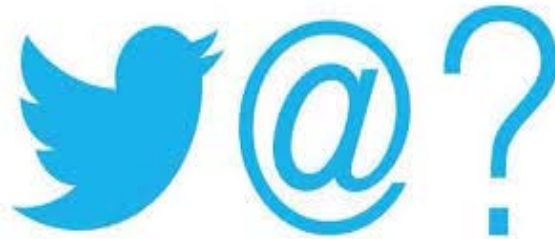
- » RPC 1.1: duty of competence requires you to be thorough and prepared for trial
- » Cmt [8]: requires us to keep abreast of the “benefits and risks of relevant technology” to be competent.
- » What does this mean?
 - What technology do you need?
 - Understand and mitigate risks of technology?
 - How do you obtain and maintain competence?



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» Do you ask jurors whether they have a handle?



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Carino v. Muenzen, 2010 WL 3448071 (NJ 2010):

» THE COURT: Are you Googling these [potential jurors]?

» [PLAINTIFF'S COUNSEL]: I'm getting information on jurors-we've done it all the time, everyone does it. It's not unusual. It's not. There's no rule, no case or any suggestion in any case that says-

» THE COURT: No, no, here is the rule. The rule is it's my courtroom and I control it.

» THE COURT: I believe in a fair and even playing field. I believe that everyone should have an equal opportunity. Now, with that said there was no advance indication that you would be using it. The only reason you're doing that is because we happen to have a [Wi-Fi] connection in this courtroom at this point which allows you to have wireless internet access.

» THE COURT: And that is fine provided there was a notice. There is no notice. Therefore, you have an inherent advantage regarding the jury selection process, which I don't particularly feel is appropriate. So, therefore, my ruling is close the laptop for the jury selection process. You want to-I can't control what goes on outside of this courtroom, but I can control what goes on inside the courtroom.

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Oracle Am., Inc. v. Google, Inc., No. 3:10-cv-03561-WHA (2016)

- » “Trial judges have such respect for juries — reverential respect would not be too strong to say — that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.”
- » The Court called upon the parties to voluntarily consent to a ban against all Internet research on the venire or our jury until the trial is over.
- » If don’t agree, each side shall inform the venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to monitor jurors * * * and the extent to which they will perform ongoing searches while the trial is underway.
- » Venire will be given opportunity to adjust privacy settings.

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Johnson v. McCullough, 306 S.W. 3d 551, 559 (Mo. 2010)

- » “[A] party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial”.
- » “Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors’ prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.”
- » “An attorney’s duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client.”

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ABA Formal Ethics Op 4767

1. Viewing a juror's information that is available without making an access request so that the juror is unaware that the information has been viewed. For example, viewing a juror's Facebook page that is open to the public.
Answer: Generally "yes"
2. Viewing a juror's information by requesting access to the juror's social media. For example, sending a "friend" request to a juror so that you can view the juror's Facebook page if the juror has placed privacy restrictions at the "Friends" level.
Answer: Generally "no"
3. Viewing a juror's information where the juror will or may learn the identity of the viewer. For example, viewing a juror's LinkedIn profile, if the juror has a premium LinkedIn account.
Answer: Generally, "yes, qualified."

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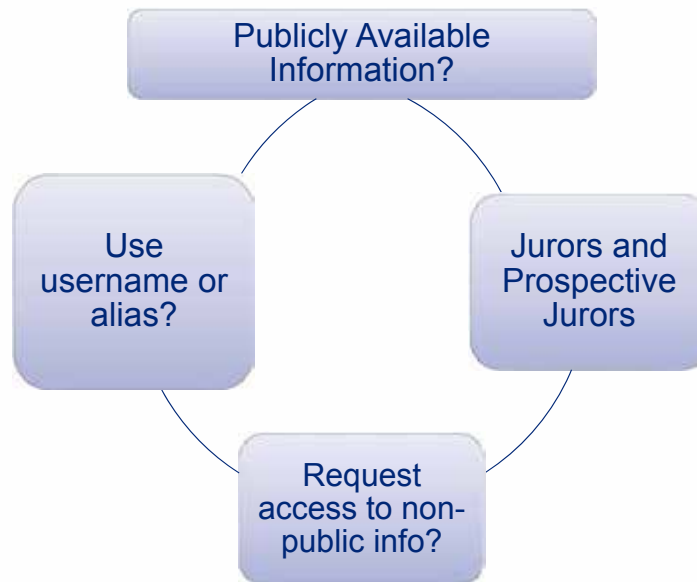
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- » The question of whether a notification that is automatically triggered by a visit to the juror's social media constitutes a communication with the juror is an unsettled question.
- » See, e.g., U.S. District Court for the District of Idaho Rule 47.2, subpart (a)(4) :
- » (a) Attorneys may use websites available to the public, including social media websites, for juror or prospective juror research, so long as:
- » ... (4) Social media research is done anonymously. For example, a search on a social media site must not disclose to the juror who is making the inquiry, and it must only seek information available and accessible to the public and not the result of an attorney's account on said social media site;
- ...

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The perils of being friends: Opinion No. 2013-189



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Continuing obligations to investigate jurors?

»Practical limits?

- No timely jury list
- Not enough information
- Not enough time
- Not enough recourses
- No jury questionnaires

»Consider the following:

- How long and complex is the case?
- Can you learn information about the jurors that could assist in presentation of the case?
- Should you be monitoring jurors' online activities?

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Jury/trial consultants: supervise nonlawyer assistance

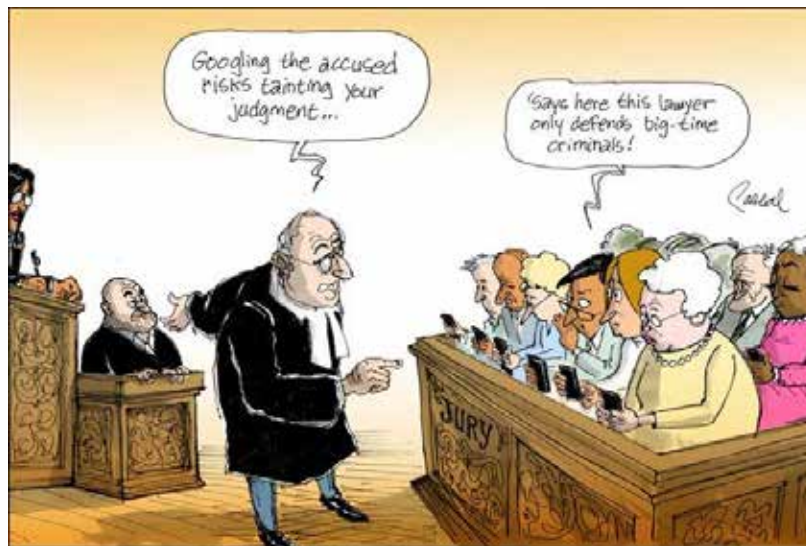
»RPC 5.3: With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

»(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

»(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- » (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- » (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

#socialmedia
#jurymisconduct



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It does happen, but we don't really know how much

- » In 2011, Arkansas threw out a death row inmate's murder conviction in part because a juror tweeted out the verdict before it was read;
- » A juror in Georgia was fined \$500 and incarcerated for 5 days after the judge learned that she had been online during trial. The California legislature considered a bill in 2016 that would imposed a \$1500 fine on jurors who are caught using the internet or on social media during trial
- » In Michigan, a juror posted "[i]t's gonna be fun to tell the defendant they're GUILTY. : P." The juror was dismissed before deliberations, fined \$250, and tasked with writing a five page essay on the Sixth Amendment.
- » In U.S. v. Zimny, First Circuit held that defense counsel had made "colorable claim of juror misconduct" and ordered trial judge to conduct an investigation. Juror postings on blog suggested jury deliberated before they were supposed to do so.

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Primary issues

Lack of disclosure	Misrepresentation
Early deliberation	Other misconduct

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- » Are the questions clear and understandable?
- » Is the information sought personal?
- » Could the juror have forgotten the question?
- » Could the jury could have forgotten the answer?
- » Could the juror be a “stealth” juror?
- » Clear and repeated instructions given?

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Struggling with appropriate social media during trial

- » “Inappropriate” comments v. complaints about jury duty

- » Examples:
 - Foreperson complaining no open bar at court
 - Jurors tweeting they are on jury duty
 - Jurors who tweet about the courthouse, lawyers, or the parties
 - Jurors who tweet the verdict too early
 - Jurors who tweet about and/or to witnesses

- » Case examples.

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Ethics rules discuss contact and disclosure to court

- » RPC 3.5(c): A lawyer shall not communicate with a juror or prospective juror after discharge of the jury if:
 - » (1) the communication is prohibited by law or court order;
 - » (2) the juror has made known to the lawyer a desire not to communicate; or
 - » (3) the communication involves misrepresentation, coercion, duress or harassment.

- » RPC 3.5(e): A lawyer shall not fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

- » See OSB Formal Ethics Op. 2005-143: generally may not contact jurors after verdict rendered and jury discharged even if to see what worked or didn't work, or to see if juror conduct could lead to another argument on appeal.

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Ethics rules discuss contact and disclosure to court

- » UTCR 3.120(2):
- » After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:
 - » (a) There is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict; or
 - » (b) There is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment.

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Not an easy standard

- » Whether to report?
- » NYCBA Juror Research and Social Media, 2012:
 - Requiring attorneys to use their best judgment as to what constitutes improper conduct by a juror, “without factoring in how it benefits them or their case.”
- » When to report?
 - Promptly
 - Without regard to affect on client case?
 - See U.S. v. Parse, 2015 U.S. App. LEXIS 9492 (2d Cir. 2015) – question whether defendant waived right to a fair trial after trial counsel failed to disclose juror misconduct.

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U.S. v. Daguerdas, 2012 WL 2149238 (S.D.N.Y. June 4, 2012)

Jury Statements	Real Life
Bachelor's Degree	J.D.
Stay-at-home wife	Practicing lawyer until suspended
Owned house	Rented apartment
Westchester County	Bronx
Never trial witness before	Yes trial witness before
No real criminal history	Lots of criminal history

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U.S. v. Daguerdas (continued)

- » Test: “a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.”
- » Court: the jurors “lies are breathtaking” and would have been excused for cause
- » Court: “a defendant waives his right to an impartial jury if defense counsel were aware of the evidence giving rise to the motion for a new trial or failed to exercise reasonable diligence in discovering that evidence. To be sure, actual knowledge of facts disqualifying a juror is an absolute bar to any challenge to that juror after a verdict.
* * * But a defendant cannot consciously avoid learning the truth in the hope the jury verdict will be in his favor.”

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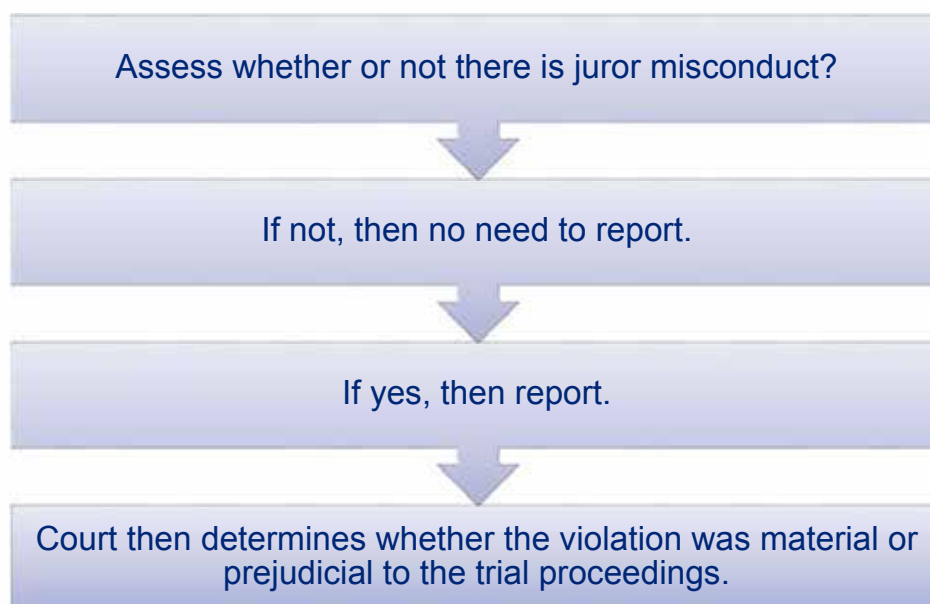
U.S. v. Bolinger, 837 F.2d 436 (11th Cir.)

- » On a weekend break in the middle of jury deliberations, an attorney for the defense learned from a relative of a juror's neighbor that the juror had purportedly formed a view of the defendant's guilt prior to the close of evidence. The jury did not return a verdict until three days later. Rather than inform the court of what he had learned, defense counsel filed a post-verdict motion for a new trial based on the juror's bias and purported misconduct.
- » The Court: “our cases teach that ‘a defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct.’ “

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How to respond ethically?



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#socialmedia
#lawyerconduct
#lessonstoliveby
#2finalpoints

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No 1: no anonymity online

»In re Quitschau

»In re Carpenter



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No 2: talk to clients about their conduct – RPC 1.4

- » Lawyers can advise clients:
 - What they should and should not post on social media
 - Implications of social media posts that may be used against them
 - To change privacy settings
- » But:
 - May not delete content unless properly preserved
 - Must make reasonable efforts to obtain content if you know it exists and not produced by client

- » See Philadelphia Bar Ass’n Op. 2014-5 (2014); New York Ethics Op. 745 (2013); Allied Concrete Co. Lester, 736 S.E.2d 699 (Va. 2013).

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Coda: how some (“creative”) lawyers use social media



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Thank you!

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David is an adjunct professor at Lewis & Clark Law School, where he has taught the required ethics course (Regulation and Legal Ethics) since 2012.

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