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PRACTICE TIP

Protecting Your Verdict

Part Two of a Two-Part Article

By Christiana Jacxsens and Daniel I.A. Smulian

Part One of this article, which appeared in this newsletter's February Issue, identified some of the most common juror-related pitfalls, and provided strategies for countering the allegations and tactics that could give rise to a new trial. Part Two herein focuses on some of the challenges presented by the rise of technology and social media, and describes some measures for avoiding the most prevalent forms of juror misconduct.

Jury Misconduct in the Time of Facebook

Exacerbating Factors: Technology and Social Media

Although there are myriad variations, actual juror misconduct typically occurs in the following ways: 1) improper contact between a juror and third parties; 2) exposure to extra-judicial materials and information; 3) improper experiments and reenactments; 4) untruthful statements during *voir dire*; 5) bias and prejudgment; 6) physical and mental incompetence; 7) pre-deliberation discussions; and 8) failure to apply the law pursuant to the court's instructions, *i.e.*, nullification. *See generally*

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Journey Across the Pond

The Tension Between Broad U.S. Discovery Procedures and Strict EU Privacy and Data Protection Laws

By Christopher P. DePhillips and Heather B. Siegelheim

In a time of ever-increasing globalization, the likelihood that a multi-national corporation will be named as a party in a lawsuit overseas is greater than ever. An increase in product liability litigation — or any litigation, for that matter — in the U.S. involving foreign corporations has consequently resulted in an increased need for U.S. litigants to conduct discovery and collect evidence located outside the U.S. *See* ABA Section of Antitrust Law: Obtaining Discovery Abroad (2d ed.), at p. 1 (2005). However, antithetical notions of the appropriate scope of discovery in the EU and U.S. may lead to conflict when European companies are named as parties in U.S. lawsuits, or vice versa, or when a U.S. corporation needs to gather information and discovery in Europe for litigation pending in the U.S. Accordingly, it is crucial that product manufacturers, sellers, and distributors whose products are sold and used overseas recognize and understand these differences and appreciate the potential for conflict between broad U.S. discovery procedures and stringent E.U. privacy and data protection laws.

The Source of the Tension

The source of this tension stems primarily from the differing views between U.S. and EU countries with regard to the appropriate scope of discovery. Most U.S. jurisdictions employ a very broad definition of discovery. The Federal Rules of Civil Procedure and most state procedural rules provide that non-privileged information is discoverable if it is relevant to any claim or defense of any party, and is reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1). For this reason, U.S. discovery rules are often perceived as fostering "fishing expeditions." *Id.* at p. 3.

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By contrast, most European courts employ a much more narrow scope of discovery. Most EU countries generally prohibit discovery beyond what is absolutely necessary to support a party's case at trial, and do not impose affirmative disclosure obligations. *See* David Cohen, E-discovery: The Need for a Transnational Approach to Cross-Border Discovery Disputes, *InsideCounsel*, July 24, 2012; *see also* Karin Retzer and Michael Miller, Mind the Gap: U.S. Discovery Demands versus E.U. Data Protection, Bureau of National Affairs, Inc., *Privacy & Security Law Report* (2011). It is no wonder, then, that the broad scope of U.S. discovery, which is in contravention of some of Europe's discovery practices and laws, has led to conflict in cases involving overseas discovery.

This article focuses on the conflict between U.S. and EU discovery procedures, and offers some useful and practical advice for U.S. litigants who may face uncertain territory when seeking discovery abroad.

The Scope of EU Discovery

The European Union member countries at the present time are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. An examination of discovery practices in some of these countries demonstrates how limited the scope of discovery is in the EU as compared with the U.S.

The Federal Rules of Civil Procedure allow parties virtually unfettered discretion to seek the production of documents, witnesses, and other information from parties and subpoenaed non-parties, as long as the requested evidence is not privileged, is relevant to any claim or defense of any party, and is reasonably calculated to lead to the discovery of admissible evidence. On the contrary, in many EU jurisdictions, it is very difficult to require a party to produce broad categories of documents and evidence, and even more difficult to require non-parties to disclose any information. *See* Retzer and Miller, Mind the Gap, at p. 2.

In Belgium, for example, there is no formal discovery system. Rather, each party produces only the documents that are necessary to sustain its own allegations, and parties may choose not to produce certain documents. 1 *Belgium Law Digest* 5.02 (2010). A court may order the production of certain documents if there is a strong basis for believing it will prove a fact relevant to the case, or the opposing party demands an injunction against a party for refusing to produce a relevant document. *Id*. Moreover, American-style pre-trial depositions do not exist under Belgian law, but a judge can decide to hear pre-trial witnesses. *Id*.

The UK, on the other hand, does not allow for pre-trial depositions at all. Consequently, parties rely almost exclusively on a tailored exchange of written discovery to work up a case for trial. In 1999, new court rules in the UK renamed the concept of discovery as "disclosure," and significantly narrowed the scope of discoverable information. Gavin Foggo, Brett Harrison, Victor Jose Rodriguez-Barrera, Comparing E-Discovery in the United States, Canada, the UK, and Mexico, *Committee on Commercial & Business Law Litigation, Section of Litigation, American Bar Association* (newsletter, vol. 8, no. 4, Summer 2007), p. 5. Since these rule changes, litigants are no longer required to produce documents that do not affect issues in the case, even if they may lead to a "train of enquiry" to potentially relevant documents. A party is only required to produce non-privileged documents: "1) on which it intends

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Navigating the Rule 26 Expert Disclosure Rules

By Ricardo Woods and Taylor Barr

While expert testimony is key in many types of cases, in no area of the law is this more true than in product liability cases, which often turn on highly technical concepts such as product design "defect" and the availability of a reasonable alternative design. As a result, most product liability practitioners are at least generally familiar with *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, and *Kumbo Tire Co. Limited v. Carmichael*, the substantive law that, along with Rule 702 of the Federal Rules of Evidence, determines whether an expert's opinion gets to the jury. When we think of *Daubert* challenges, we think of the flashy science-driven arguments that get law clerks giddy about exercising their academic prowess by sifting through medical testimony and scientific journals. However, even a qualified expert with an opinion based on reliable methodology may never reach the jury if counsel fails to be mindful of the highly technical expert disclosure requirements that the federal rules require and courts enforce with little empathy. This article highlights some of the basic requirements and common mistakes that plague practitioners in this area.

Making a Proper Rule 26 Expert Disclosure

Federal and state courts alike have repeatedly shown that the guidelines for experts set out in Rule 26 are not flexible, and failure to comply with these requirements can have devastating consequences, including the exclusion of an expert and even the possibility of a suit for malpractice. *See, e.g., Byrd v. Bowie*, 992 So.2d 1202, 1203 (Miss. Ct. App. 2008), which upholds a $2 million award in a legal malpractice claim that resulted from an attorney's failure to timely disclose the expert, resulting in summary judgment in a medical malpractice action. Thus familiarity with these rules — especially with the changes to the Federal Rules in 2010 that are now fully in effect — is essential.

When Do I Have to Disclose My Expert?

This rule is the first and most basic procedural question to answer with regard to experts. While most federal courts will issue a scheduling order that determines the time for filing expert reports, some courts will not, and in lieu of such order, the Federal Rules provide a default:

> (C) Time to Disclose Expert Testimony. *A party must make these disclosures at the times and in the sequence that the court orders.* Absent a stipulation or a court order, the disclosures must be made:
>
> (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
>
> (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.
>
> Fed. R. Civ. P. 26(a)(2)(D).

What Do I Have to Disclose?

The answer to this question depends on the type of expert being disclosed. Experts come in three basic varieties: 1) a retained testifying expert or an employee who testifies on a regular basis as part of his/her employment (*i.e.*, a "professional employee expert"); 2) a retained consulting expert; and 3) employees rendering expert opinions who are not "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony."

1. Retained Testifying Experts/ Professional Employee Expert

The Federal Rules require that retained experts file a written report along with their disclosure, and provide specific guidelines for what should be contained in a written expert report. Complying with these requirements and properly supplementing the report are absolutely crucial. The Rules require the report to contain the following:

> (B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure *must be accompanied by a written report* — prepared and signed by the witness … and must contain:
>
> (i) *a complete statement of all opinions* the witness will express and the basis and reasons for them;
>
> (ii) the *facts or data* considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.
>
> Fed. R. Civ. P. 26(a)(2)(B).

2. Consulting Experts

Consulting experts are often utilized in product liability cases to perform analysis on a product and/or accident; educate an attorney on the subject matter; and assist in issue-spotting, among other things. These types of litigation consultant experts do not fall within the Rule 26 disclosure rules and are specifically protected from discovery obligations — unlike testifying experts. *See* Fed. R. Civ. P. 26(b)(4)(D), which states, "Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held

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by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial."

Prior to the amendment of the Federal Rules of Civil Procedure, the majority of courts followed a bright-line rule as to testifying expert discovery, mandating disclosure of all documents considered by an expert in coming to his opinions, including work product. S*ee Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 716-17 (6th Cir. 2006); *In re Pioneer Hi-Bred Int'l, Inc.,* 238 F.3d 1370, 1375 (Fed. Cir. 2001); *Elm Grove Coal Co. v. Dir., O.W.C.P.,* 480 F.3d 278, 301-02 (4th Cir. 2007).

The pre-2010 mandatory disclosure rule resulted in counsel often choosing to hire both consulting and testifying experts to preserve privilege. However, the 2010 changes to the Federal Rules of Civil Procedure — at least on its face — substantially limit the discovery that can be sought from testifying experts, banning discovery of draft expert reports and only allowing discovery of attorney-expert communications that: 1) relate to compensation for the expert's study or testimony; 2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or 3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. Fed. R. Civ. P. 26(b)(4)(B)-(C).

However, courts which have interpreted the new amendments have resisted complete abrogation of the "bright-line rule" and interpreted the communications privilege narrowly. *See Republic of Ecuador v. Bjorkman*, 2012 WL 12755 (D. Colo. Jan. 4, 2012).

Thus, keeping communications with your testifying expert minimal and having a separate consulting expert can still be beneficial. Of course, counsel must be mindful that the disclosure rules will apply to a consulting expert as soon as s/he is transitioned to a testifying expert, and some courts have found that this obligation includes producing "facts and data" relied on by that expert when s/he was in that earlier consulting role. *See Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 419-20 (N.D. Ill. 2011), which discusses how courts approach the disclosure rules for experts who wear "two hats."

3. Employees Rendering 'Expert' Opinions

Employee experts not "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony" are not required to provide a written report but must disclose:

> (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.

Fed. R. Civ. P. 26(a)(2)(C); *see also* 2010 Adv. Comm. Notes FRCP 26.

The trap when it comes to employee experts is failure to recognize testimony that amounts to "expert" testimony. While an employee witness is allowed to testify about the facts of a case where he or she has personal knowledge, he or she cannot give an opinion on a subject with "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. For example, a company employee such as a product engineer or a quality control manager involved in the design phase or the manufacturing phase of a product may have knowledge necessary to inform the jury properly about the product. If this person is not disclosed as an expert, any such opinions will be struck. *See Kaplan v. Kaplan*, 2012 WL 1660605 (M.D. Fla. May 11, 2012).

Employee experts are also subject to the same *Daubert* challenges as retained experts, and may be deposed as an expert. However, employees with expert knowledge are not protected under the attorney communications privilege, which applies to retained experts. *See* 2010 Adv. Comm. Notes FRCP 26.

Do I Have to Supplement My Opinions?

Often, an expert's opinion may change or need to be updated during the duration of litigation while discovery is still open. Federal Rule of Civil Procedure 26(e)(2) provides that: "[f]or an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due." This is one of the most common errors that can lead to exclusion of an expert opinion.

The Harsh Reality of Non-Compliance with the Expert Disclosure Rules

The sanctions for failure to disclose your expert's opinion properly can be undeniably harsh. A deficient written report or an untimely report can result in the exclusion of the expert's testimony in its entirety on a motion, at a hearing or at trial. *See Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 641 (7th Cir. 2008). Federal Rule of Civil Procedure 37 provides that "if a party fails to provide information or identify a witness as required by Rule 26(a) … , the party is not allowed to use that information or witness to supply evidence … " unless the error is harmless or a party shows substantial justification. Trial courts do not take this provision lightly, and trial courts have substantial discretion to impose the limits set out by the disclosure rules. *See Amarel v. Connell*, 102 F.3d 1494, 1514 (9th Cir. 1996).

For example, in *Walter Intern. Productions, Inc. v. Salinias*, 650 F.3d 1402 (11th Cir. 2011), the Eleventh Circuit upheld the trial court's decision to strike six of the plaintiff's

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proposed experts based on failure to comply with the court's scheduling order for disclosure of expert testimony, despite repeated extensions, and failure "to provide a report of the type envisioned by Rule 26(a)(2)(B)." *Id.*, 1409-10.

Even where the expert's written report is substantially in compliance but omits opinions in the report or omits data/literature that an expert relied on, the court may strike those specific opinions that are not specifically disclosed in the report. *See, e.g., Olson v. Montana Rail Link, Inc.*, 227 F.R.D. 550 (D. Mont. 2005) (holding that failure of defendant to provide data underlying expert report by the expert disclosure deadline warranted sanction of excluding expert from in any way relying upon data or conclusions specifically not included and spelled out in his timely disclosure). While courts allow experts to "elaborate" on opinions stated in their reports and certainly do expect a certain amount of deviation, new opinions that have not been properly disclosed either through the original report or supplementation are inadmissible. *See Beller ex rel. Beller v. United States*, 221 F.R.D. 696, 700-01 (D.N.M. 2003).

Justification for the rule, and a good rule of thumb to consider, is whether or not the report puts opposing counsel on notice of the opinion such that they would be prepared to question the expert about the data/ and or opinion at a deposition or at least would not be ambushed by the opinion at trial. *Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st Cir. 1992) ("In the arena of expert discovery … Rule 26 increases the quality of trials by better preparing attorneys for cross-examination, minimizing surprise, and supplying a helpful focus for the court's supervision of the judicial process."). If opposing counsel does not reasonably have the opportunity to question the expert about the basis of his opinion, the trial court will likely find that the error is "harmful" as contemplated by Rule 37(c), and will strike the opinion as was the case in *Salinias*.

Conclusion

In order to avoid the all too common pitfalls associated with the improper disclosure of experts and their corresponding written reports, counsel in a product liability case should identify the disclosure deadline, format, and content required by the court as early as possible. Counsel should also take care to read and re-read the Federal Rules of Civil Procedure, local rules and scheduling orders at the outset of the case. The consequences for failing to do so are dire and costly. This is especially true in a product liability context, where the case often turns on the quality of the expert witnesses and scientific evidence. Being fully prepared to face this challenge may just be the deciding factor in a product liability matter.

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to rely, 2) which adversely affect its case or another party's case, or support another party's case, and 3) those required by a relevant practice direction." *Id*.

One of the key factors in determining what is discoverable in the UK is the concept of proportionality. While either party can apply to the court for an order compelling disclosure of certain information, courts typically require such orders to be proportionate to the likely importance of the documents, the financial positions of the parties and the amount in dispute, and ease and cost of producing the requested materials. *Id*. This disclosure process is far more limited in scope than the discovery process in the U.S., where a party must produce non-privileged documents that appear "reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1).

The Hague Evidence Convention

Most EU countries are parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 1970 T.I.A.S. No. 7444, codified at 28 U.S.C. Section 1781 ("Hague Evidence Convention"), which means their discovery processes are governed by its prescribed procedures. Generally, voluntary witnesses from party countries may be deposed in their respective countries, or in the U.S. under certain conditions. In Denmark, parties are permitted to conduct "voluntary depositions" without court intervention, but the witness cannot be sworn in or take an oath. 1 *Denmark Law Digest* 5.02 (2010). Moreover, sworn out-of-court statements are inadmissible as evidence if an objection is made. *Id*. at 10.02. In the Czech Republic, parties who wish to depose witnesses or seek documents outside of the Czech Republic are permitted to issue a letter rogatory to a foreign state requesting such documents or examinations. If a Czech court receives a letter rogatory from a foreign court, it can execute the order according to foreign laws of procedure (*e.g.*, an American-style deposition taken under oath), as long as it is not contrary to Czech law. 1 *Czech Republic Law Digest* 5.02 (2010).

The tension between broad U.S. discovery procedures and strict disclosure procedures in foreign countries pursuant to the Hague Evidence Convention was evident in *In re Global Power Equipment Group, Inc.*, 418 B.R. 833 (Bankr. D. Del. 2009). In *Global Power*, a Dutch company refused to produce certain documents or make certain witnesses available for deposition in the United States unless the parties seeking this information complied with the Hague Evidence Convention. The Dutch company argued that the documents and witnesses were controlled by a French company and to

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produce them outside of the procedure required by the Hague Evidence Convention would violate the French Blocking Statute. (The latter prescribes sanctions for French nationals who disclose information in foreign discovery without honoring Hague Evidence Convention procedures. *See* French Penal Code Law No. 80-538.) The U.S. Bankruptcy Court for the District of Delaware found that the witnesses and documents were under the Dutch company's control, and the Dutch company failed to produce evidence showing that it or its French affiliate faced a significant risk of prosecution pursuant to French Penal Code Law if it complied with the discovery requests. *Id*.

Thus, the court held that a comity analysis weighed in favor of requiring discovery in compliance with the Federal Rules of Civil Procedure, rather than the procedures set forth in the Hague Evidence Convention, despite possible criminal penalties under the French Blocking Statute. *Id*. Although the court held that the depositions of witnesses who reside in France were to proceed under the Federal Rules of Civil Procedure, it did not require those depositions to take place in the United States, due to the time constraints and financial hardship it would likely impose upon the witnesses. Rather, the court held the depositions could take place in France or another agreed-upon location. *Id*. at 851.

EU Privacy and Data Protection Laws

Another factor in the potential conflict between U.S. and EU cross-border discovery procedures is the tension between these systems with regard to privacy and data protection laws. The EU and the U.S. employ very different notions of "personal data," which results in different protections afforded to such data. Retzer and Miller, Mind the Gap, at p. 2. The EU jurisdictions generally embrace a broad view of "personal data," covering all types of personal information relating to an identifiable individual, including work-related e-mails and memoranda. Conversely, the U.S. focuses on protecting only particularly sensitive information which, if disclosed, could cause individuals harm, such as Social Security numbers and personal medical information. *Id*. These differing notions have the potential to confound U.S. courts that may not have an understanding of these differences, and thereby result in overbroad discovery orders that conflict with EU privacy and data protection laws. Despite these differences, U.S. federal courts routinely compel discovery against foreign litigants under the Federal Rules of Civil Procedure, despite foreign privacy and protection laws to the contrary. *See, e.g., In re: Auto Refinishing Paint Antitrust Litig.*, 358 F.3d 288 (3d Cir. 2004); *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 542 (1987) (stating that the Hague Evidence Convention does not prevent an American court from upholding application of U.S. discovery rules to collection of evidence from foreign parties).

ABA Resolution

Perhaps recognizing the potential for such conflicts, the American Bar Association (ABA) House of Delegates recently approved a resolution and recommendation for foreign data protection in U.S. litigation. The recommendation, which was approved in February 2012, urges U.S. courts, "where possible, to consider and respect the data protection and privacy laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws, with regard to data sought in discovery in civil litigation." *See* Delegates Adopt Range of Policies at Association's 2012 Midyear Meeting, American Bar Association website, February 2012, available at www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2012/february/midyearmeeting.html (last visited Jan. 29, 2013). The resolution, while not binding on U.S. courts, certainly reflects the current global marketplace and its impact on cross-border litigation, and may cause U.S. courts to think twice before favoring broad discovery over foreign privacy rights and data protection laws.

Conclusion

Corporations faced with overseas litigation, or the potential for cross-border discovery disputes, should consider the following measures so they can be in a position to seek the discovery they need, while avoiding conflicts resulting from the EU's narrow discovery procedures and privacy laws:

- Know the parties and potential fact witnesses. If the opposing party is a foreign corporation or if documents, witnesses, or other evidence necessary to support your case are controlled by a foreign country, make sure you understand that country's discovery procedures. Is it a party to the Hague Evidence Convention? Does it have a "blocking statute," intended to block broad U.S. discovery, like France does? Will the party be able to seek pre-trial depositions, or will it have to rely entirely on written discovery? The more you know about the country's laws and discovery procedures, the more prepared you will be for potential discovery conflicts that may arise.
- If the country is a party to the Hague Evidence Convention, proceed under its prescribed procedures when seeking documents or information from non-party witnesses. Otherwise, consider using a letter rogatory to request the information you seek from a foreign country. Think before you seek! Narrowly tailor discovery requests as much as possible. The narrower the request, the more likely it is to be granted.

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Bennett L. Gershman, Contaminating the Verdict: The Problem of Juror Misconduct, 50 *S.D. L. Rev.* 322 (2005). The prevalence of portable technology and the rise of social media are rapidly increasing the opportunity for — and actual instances of — true juror misconduct. Examples of such misconduct abound in the popular press. *See, e.g.*, Murder Case Mistrial over Juror's Facebook Comments, CBS News, July 18, 2012, available at www.cbc.ca/news/canada/new-brunswick/story/2012/07/18/nb-prosser-trial-929.html. This issue is also becoming the subject of significant legal scholarship. *See, e.g.*, Thaddeus Hoffmeister, Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age, 83 *U. Colo. L. Rev.* 409 (2012); Hon. Amy J. St. Eve & Michael A. Zuckerman, Ensuring an Impartial Jury in the Age of Social Media, 11 *Duke L. & Tech. Rev.* 1 (2012).

Consequences

There is no doubt that even seemingly innocent lapses can have significant consequences. In *Tapanes v. State*, for example, the jury foreperson used his iPhone to look up the definition of "prudent" during a lunch break; he then shared the definition — as he recollected it — with the rest of the jury. 43 So. 3d 159, 162 (Fla. 4th Dist. Ct. App. 2010). After the defendant was convicted of manslaughter, one of the jurors brought the incident to the attention of the defendant's attorney. *Id*. Following an evidentiary hearing, the trial court denied the defendant's motion for a new trial, finding that the juror misconduct was harmless. *Id*. The appellate court disagreed:

> In the present case, looking up the definition of 'prudent' could hardly be considered harmless … The concept of 'prudence' is one that could be key to the jury's deliberation. At the very least, we cannot say that there is no reasonable possibility that the juror's misconduct, by utilizing a smartphone to retrieve the definition of 'prudence,' did not affect the verdict in this case.

Id. at 163.

Not every instance of juror misconduct is fatal to the jury's verdict. In *People v. Rios*, for example, a juror attempted to contact one of the prosecution's witnesses via Facebook. Index No. 1200/06, 2010 WL 625221 (N.Y. Sup. Ct. Bronx Co. Feb. 23, 2010), aff'd, 87 A.D.3d 916 (1st Dep't 2011). The prosecution learned of the attempted Facebook contact after the jury had rendered a guilty verdict and brought it to the court's and defense counsel's attention. *Id*. at *3. Following a hearing during which both the juror and witness were questioned, the court denied the defendant's request to set aside the verdict. The court agreed that the juror's conduct "was unquestionably a serious breach of her obligations as a juror and a clear violation of the court's instructions." *Id*. at *4. Nevertheless, the court noted that "[b]efore a court can set aside a verdict based on a juror's violation of a rule … the misconduct must have prejudiced a substantial right of the defendants." *Id*. The court found no such prejudice in the facts of the case.

Strategies for Avoiding and Defeating Claims of Jury Misconduct

The prevalence of stories about jury misconduct in the digital age seems to indicate that there is no easy fix for this problem. Smart phones are here to stay, social media is omnipresent, and jury service may not be convenient or engaging for some, if not most, jurors. Nevertheless, there are at least two practical devices the practitioner can employ to minimize the likelihood of jury misconduct. Those devices are addressed below. Finally, in the event you are faced with actual juror misconduct, Section 2 addresses the standard that will apply to claims for a new trial.

Ideas for Avoiding Jury Misconduct

Jury instructions that specifically address technology and social media seem to be the most prevalent response to the risks posed by these intrusions. *See St. Eve & Zuckerman, supra*; *see also* Meghan Dunn, Jurors' Use Of Social Media During Trial and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management, Federal Judicial Center (Nov. 22, 2011), www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf. Many of the judges who give such instructions use the model instructions from the United States Judicial Conference Committee on Court Administration and Case Management (CACM). Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (June 2012), www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf (last visited on March 8, 2013). The CACM models propose a similar instruction to be provided at the close of evidence.

The American College of Trial Lawyers also offers model instructions, including a recommended juror pledge. *See* American College of Trial Lawyers, Jury Instructions Cautioning Against Use of the Internet and Social Networking, www.actl.com/AM/Template.cfm?%20Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213 (last visited on March 8, 2013).

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A second possible way to minimize risk of technological jury misconduct is to utilize *voir dire* to identify — and hopefully avoid — the jurors who may be most prone to abuse technology. This could be particularly important if your judge does not intend to give specific instructions about social media and technology. Jurors could be asked whether, and how often, they use social media and smartphones. Those who use them often could be asked whether they will be able to curtail their use during the pendency of the trial.

Strategies for Defeating Claims of Jury Misconduct: It's All About Prejudice

If you are facing a claim of actual juror misconduct, the standard of proof is of paramount importance. In most states, a litigant is not entitled to a new trial merely because he or she can demonstrate the existence of juror misconduct. Rather, in those states, the party seeking a new trial must typically establish that it suffered or likely suffered substantial prejudice as a result of that misconduct. *See, e.g., Altman v. Bobcat Co.*, 349 Fed. Appx. 758, 760-63 (3d Cir. 2009). Accordingly, "a new trial is not required if the jury can remain impartial and unprejudiced and can confine its deliberations to the record evidence." *Id.*

Some states, however, reverse the burden of proof. In Florida, for example,"[o]nce juror misconduct is established by juror interviews, the moving party is entitled to a new trial *unless* the opposing party can demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict." *Tapanes*, 43 So. 3d at 162-63 (internal punctuation, quotation marks and citation omitted; emphasis in the original).

In cases where juror misconduct actually exists, the general lesson is quite simple: A new trial is not warranted in the absence of actual prejudice. Thus, if a party claims that misconduct occurred because the jury considered extraneous evidence, that party must establish such evidence actually reached and prejudiced the jury. In *Porchia v. Design Equip. Co.*, for example, the plaintiff sought a new trial due to alleged juror misconduct. 113 F.3d 877, 883 (8th Cir. 1997). The plaintiff alleged that a juror's relative had approached the plaintiff's relative to inquire why another entity had not been named as a defendant; the juror's relative indicated that numerous jurors had asked this same question. *Id.* at 883. The trial judge denied plaintiff's request for a new trial, and the plaintiff appealed. Affirming the trial court's decision, the Eighth Circuit explained that the plaintiff "did not assert that any extraneous information actually reached a jury member," and therefore "offered nothing to suggest that he was prejudiced by the jury's exposure to any extraneous information." *Id.* Consequently, the "District Court acted well within its discretion in determining that these speculative allegations did not merit further investigation and in denying [plaintiff's] motion for a new trial." *Id.*

The decision in *In re MTBE Prod. Liab. Litig.*, 739 F. Supp. 2d 576, 591-93, 609-612 (S.D.N.Y. 2010) demonstrates a similar requirement for proof of actual prejudice. During deliberations, the court learned that one of the jurors had conducted limited research on the Internet, which he then passed on to the some of the other jurors. *Id.* at 591-92. One juror learned that there was going to be a fourth phase of the trial. *Id.* at 592. Another juror learned that other defendants had been sued but had settled. *Id.* The court initially noted the dangers posed by technology. Nevertheless, with respect to the information discussed in this case, the court was not persuaded that a new trial was required. As the court explained, none of the information considered by the jury was prejudicial. As to the damages phase, the court determined "[m]ere knowledge of a possible penalty phase is insufficient to create prejudice." *Id.*

Conclusion

Trials are becoming both less common and more expensive. This reality creates an unfortunate divergence: as familiarity with post-verdict strategies wanes for some litigators and their clients, the prejudice resulting from a new trial rises dramatically. At the same time, the prevalence of technology and social media render jury verdicts increasingly unstable and/or subject to attack. For all of these reasons, the trial practitioner must be alert to the potential juror issues — polling, post-trial contact, juror affidavits — that have the potential to upset an otherwise optimal outcome. Knowing how to address these issues — and how to avoid or minimize juror misconduct in the digital age — is a critical part in preserving a favorable verdict.

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