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CLIFFORD'S NOTES

Bull. It's the name of a new popular hit television series that deals with a trial consultant who somehow is the key to "cracking the case."

Bull is Dr. Jason Bull, who tells his clients that he knows jurors through their online conduct — "what they click on, likes, keywords, avoidances" — he refers to it as "predictive efficiency." On the show, he proudly proclaims about jurors that "we'll know how they'll vote even before they do."

Bull's team scours jurors' social media accounts from the moment they are selected to sit as jurors.

Some legal experts and the American Bar Association in a formal opinion have stated that when a case goes to trial, lawyers would, in fact, not be doing their duty if they didn't follow jurors' social media accounts. In order to ensure that their client is receiving a fair trial, lawyers must know if jurors are making any public statements about the case and make the court aware if inappropriate comments are being made outside of the courtroom.

At least one judge makes it part of each juror's oath that in addition to following the court's instructions, "you will not communicate with any others about this case, including not talking about it in person or by phone, not writing, blogging or tweeting about it and not using any social networking sites (examples of which are Facebook, MySpace, LinkedIn and Twitter) to discuss any aspect of the case or your work as a juror."

But a federal judge in a copyright case in the U.S. District Court for the Northern District of California took the opposite approach and ruled that lawyers may not research social media posts of prospective jurors or else they must disclose the extent of their online research. Both sides agreed in that case to accept the court's ban. *Oracle America Inc. v. Google Inc.*, 2016 U.S. Dist. LEXIS 39675 (N.D. Calif. 2016); No. C 10-03561 WHA, 2012 WL 1964523 (N.D. Cal. May 31, 2012).

Even if a lawyer doesn't use jury consultants, attorneys must be aware of their own clients' use of social media platforms in order to fulfill one's obligations under Rule 1.1 of the Model Rules of Professional Conduct. Comment (8) to that rule explains that, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of change in the law and its practice, including the benefits and risks associated with relevant technology ..." It also means that an attorney can reasonably expect that opposing counsel will monitor a client's social media activity and advise



TV'S 'BULL' IS JUST THAT

Social media research is fun TV, but a tricky area of law

by BOB CLIFFORD

her clients accordingly.

And social media posts may even affect the case after it is over if the terms of a settlement are confidential. In a Miami case, a man received an \$80,000 confidential settlement for an age discrimination case against his former employer, but when his daughter posted on Facebook, "Mama and Papa Snay won the case against Gulliver ... Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT," the plaintiff had to forfeit the entire amount for violating the terms of the confidentiality agreement. *Gulliver Schools Inc. v. Snay*, 137 So. 3d 1045 (3d Dist. Fla. 2014).

The court there noted that, "Central to this agreement was a detailed confidentiality provision, which provided that the existence and terms of the agreement between Snay and the school were to be kept strictly confidential."

These issues and others dealing with social media questions involving clients and the courts will be examined in further detail during a free two-hour ethics webinar sponsored by Clifford Law Offices. The webinar will be presented at 2:30 to 4:30 p.m. Feb. 16.

Registration for "The Ethics of Social Media

Inside and Out of the Courtroom" is at cliffordlaw.com. I'll be moderating, and panelists will be Cook County Circuit Judge Lynn Egan; Mark Palmer, professionalism counsel for the Illinois Supreme Court Professionalism Committee; and John Barkett, a Miami lawyer who has written extensively on this subject. It's an area of law that is just now developing in the courts as cases make their way to the appellate level.

As for Bull, he's neither a medical doctor nor a lawyer. Anything he says to the client isn't necessarily protected by any privilege. Fodder perhaps for a future day. [CL](mailto:clifford@cliffordlaw.com)

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