NORTH EAST JOURNAL OF LEGAL STUDIES

Volume Thirty Three **Spring 2015**

NORTH EAST JOURNAL OF LEGAL STUDIES

An official publication of the North East Academy of Legal Studies in Business, Inc. © 2015
ISSN: 1545-0597

INFORMATION FOR CONTRIBUTORS

The North East Journal of Legal Studies is a double blind refereed journal, published once a year. Its purpose is to encourage scholarly research in legal studies and pedagogy related thereto.

Articles may be submitted simultaneously to this journal and others with the understanding that the author(s) will notify this journal if the article is to be published elsewhere. We will not publish an article that will be published in another journal.

Papers should relate to the field of Business Law (including recognized topics within Business Law and the Legal Environment of Business) or to Legal Studies Education.

The Journal will consider submission of articles from those papers presented at the North East Academy of Legal Studies in Business Annual Conference. The paper designated the recipient of the Hoehlein Award for Distinguished Paper at the NEALSB Conference will serve as the lead article of the journal. Up to four articles from resources other than those presented at the NEALSB Conference may be published in the journal.

Articles offered for inclusion in the next issue of the journal shall be submitted to the editor by September 1.

PROCEDURE FOR SUBMITTING PAPERS

Articles submitted for publication should be three clean, camera ready originals (no photocopies) accompanied by a diskette version of Microsoft Word for Windows prepared as set forth below and sent to:

Professor Sharlene A. McEvoy
Charles F. Dolan School of Business
Fairfield University
North Benson Road
Fairfield, CT 06824-5195

Submission must include a check for $50.00 payable to North East Academy of Legal Studies in Business. If the article is not published, $25.00 will be returned.

FORMAT

1. Papers should be no more than 20 single-spaced pages, including footnotes. Use font 12 pitch, Times New Roman. Skip lines between paragraphs and between section titles and paragraphs. Indent paragraphs 5 spaces. Right-hand justification is desirable, but not necessary.
2. Margins: left and right hand margins should be set at 1 ¼ inches, top margin at 1 ½ inches and bottom margin at 1 ¾ inches.
3. Page Setup: Custom size your paper to have 6 ¾ inch width and a height of 10 inches. Your hard copy should be printed on a standard 8 ½" x 11" paper size. This will allow for the proper binding and trimming for printing purposes.
4. Upon acceptance, the first page must have the following format: the title should be centered, in CAPITAL LETTERS. Two lines down center the word "by" and the author's name, followed by an asterisk (*). Begin text three lines under the author's name. Two inches from the bottom of the page, type a solid line 18 inches in length, beginning from the left margin. On the second line below, type the asterisk and the author's position of title and affiliation.
5. "Headings"
   FIRST LEVEL (caps flush with left margin)
   Second Level (center, italics)
   Third Level (flush with left margin, italics, followed by a colon [:])
   Fourth Level (flush with left margin, italics, followed a colon [:], with text immediately following).
6. Endnotes should conform to *Uniform System of Citation*, current edition (2010), and should begin 3 lines after the end of the text.

7. A flash drive with the final version of your paper, in Microsoft Word, must accompany your paper.
8. Email a copy of your paper to the following email address: samcevoy@mail.fairfield.edu.

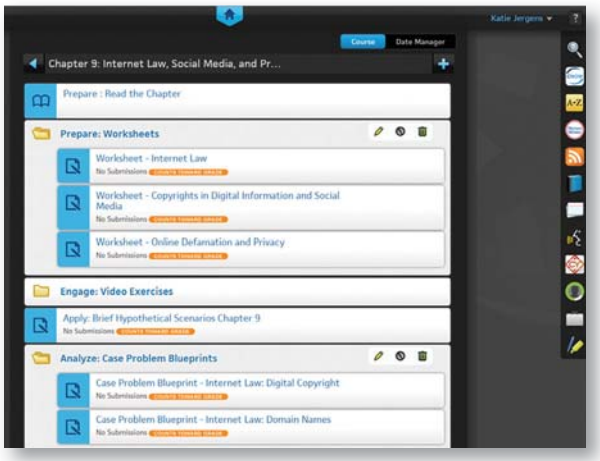
Individual copies of the journal are available to non-members and libraries at $25.00 per copy. General correspondence, applications for membership in NEALSB or change of address notice should be addressed to the name above at the address therein stated.

TURN THE LIGHT ON WITH MINDTAP FOR BUSINESS LAW!

MindTap for business law holds students accountable to be prepared and engaged in the content. The robust learning experience offers interactive, customizable content that promotes engagement and comprehension. The pre-built learning path in MindTap guides students through consistent learning activities to:

MindTap

(1) prepare, (2) engage, (3) apply and (4) analyze business law content.



Video Activities
Real-world video exercises make Business Law ENGAGING & RELEVANT.

Find out more at www.cengage.com/blaw

NORTH EAST JOURNAL OF LEGAL STUDIES

VOLUME 33 **SPRING 2015**

ARTICLES

* Co-winner Best Paper Award 2014

WORKPLACE CYBERHARASSMENT: EMPLOYER AND WEBSITE OPERATOR LIABILITY FOR ONLINE MISCONDUCT

by

John Paul*

I. INTRODUCTION

Harassment is a serious problem in the United States (U.S.) workplace. One widespread definition of workplace harassment is "repeated and persistent attempts by one person to torment, wear down, frustrate or get a reaction from another. It is treatment which persistently provokes, pressures, frightens, intimidates or otherwise discomforts another person."[1] While workplace harassment may be immoral and unprofessional, it is not universally illegal in the U.S. workplace for employers to insult, humiliate, ignore or mock employees; furthermore, it is not illegal to gossip, spread rumors or take credit for someone else's work. Unfortunately, these types of workplace harassment take place with distressing frequency.[2]

Several recent studies confirm the seriousness of workplace harassment in the U.S. A March 2007 survey of 1,000 U.S. employees conducted by the Employment Law Alliance revealed that 45 percent of respondents reported working for abusive bosses. A September 2007 poll sponsored by the Workplace Bullying Institute (consisting of 7,740 online

* Clinical Assistant Professor of Accounting/Legal Studies and Taxation, Lubin School of Business, Pace University, New York, NY

interviews) estimated that 37 percent of U.S. workers (about 54 million people), would report being bullied in the workplace. In a 2008 study conducted by the Society for Human Resource Management and the Ethics Resource Center, 57 percent of the 513 participants reported that they had witnessed "abusive or intimidating behavior toward employees," excluding sexual harassment (Daniel 2009).[3]

Workplace bullies can be identified by a number of characteristics: (1) frequent misuse of authority; (2) focus on personal self-interest, as opposed to the good of the organization; (3) inconsistency and unfairness in the treatment of employees; and (4) prone to emotional outbursts. Bullies engage in actions that are perceived as being overwhelmingly negative. These negative actions include: (A) a need for control, exploitation, intimidation, humiliation and embarrassment; (B) a failure to communicate, manipulation and engaging in a pattern of obstructive behavior over time; (C) ostracizing and ignoring employees; and (D) gossiping or spreading rumors about their targets.[4]

The effects of workplace harassment include: (i) depression; (ii) post-traumatic stress disorder; (iii) prolonged-duress stress disorder; (iv) alcohol abuse; and (v) suicide. Workplace bullying is a risk factor for maintaining mental health. The effects of workplace harassment may lead to adverse interpersonal and familial consequences; moreover, the effects are not just limited to the targets of harassment but also impact witnesses to bullying who experience mental stress.[5] The demoralization harassment victims suffer can create toxic working environments and impair organizational productivity.[6]

Traditionally, workplace harassment has occurred through face-to-face verbal and physical acts in the workplace environment.[7] The traditional notion of the workplace

environment continues to expand with changing technology, which allows employees to stay connected to the workplace environment at locations outside the four walls of the office.[8] These technological advances have also expanded the media through which individuals may harass others.[9] With the rise in the popularity of social media,[10] harassment has moved beyond the physical boundaries of the workplace to the virtual workplace.[11]

The rise of workplace harassment in cyberspace is one of the most recent examples of the increasing complexity of this phenomenon. Workplace harassment law has not kept up with this evolution. It has not been adequately updated to address the new and amplified practices of workplace discrimination. The two principal limitations of the current law are: (1) treats only workplace harassment that occurs in certain protected settings, such as the physical workplace or school setting, as actionable; and (2) assumes that both the act and resulting harm of workplace harassment occur in the same protected setting. These two limitations make the current workplace harassment law unable to address harassment that occurs completely or partially outside of the traditionally protected settings.[12]

In *Faragher v. City of Boca Raton*[13]*and Burlington Industries, Inc. v. Ellerth,*[14] the U.S. Supreme Court recognized that employers are liable under Title VII of the 1964 Civil Rights Act for harassment that is sufficiently severe or pervasive to alter the employee's workplace environment. The rise in digital media, however, has created a new medium through which harassment occurs and the courts are just beginning to deal with the issue of whether to consider digital media harassment as part of the totality of the circumstances of a hostile workplace claim.[15]

This article argues for a multiple-setting approach to dealing with cyberharassment with liability extending to website operators. Furthermore, this article argues that the courts should examine whether the employer has derived a substantial benefit from the digital media forum in order to consider whether this digital media forum is an extension of the employee's workplace environment. These frameworks: (1) are consistent with the traditional workplace harassment analysis under Title VII; (2) recognize the evolving technology in the modern workplace; and (3) provide employers with guidance on how to maintain an affirmative defense to workplace harassment allegations in the digital media age.[16]

II. THE MULTIPLE-SETTING APPROACH TO WORKPLACE HARASSMENT

Workplace cyberharassment causes much harm: victims have committed suicide, lost jobs, dropped out of school and decreased their participation in employment, educational and recreational activities.[17]

While cyberharassment creates harm that is equal to or even more severe than harassment that occurs in traditionally protected spaces, there is no clear legal concept of or remedy for cyberharassment. Certain settings are protected under traditional harassment law: workplaces under Title VII, schools in Title IX and to a lesser extent homes via the Fair Housing Act and prisons via the Eighth Amendment. Current law requires that the harassment and the effects of that harassment occur in the same protected setting. While courts have sometimes expanded the concept of protected settings by recognizing that the workplace is not limited to physical location but the relationships that constitute the employment setting, even the most expansive legal view of protected

settings leaves cyberharassment outside the purview of harassment law.[18]

The fact that workplace harassment doctrine has developed around a list of single, protected settings means that it does not provide a remedy for harassment that occurs in one setting and produces consequences in another. Thus, if an employee is harassed at her/his workplace by a co-worker, manager or even a visitor in a way that significantly interferes with her/his ability to function there, s/he has a claim; if s/he is harassed by an anonymous stranger on an Internet message board with the same effects, s/he does not. The single concept of workplace harassment is ill-suited for the realities of the Internet age, where harassment occurring in virtual settings can have severe effects in traditionally protected employment and educational spaces.[19]

Recently, the courts have begun to adopt a more expansive concept of workplace and school harassment that includes cyberharassment.[20]

In *Blakely v. Continental Airlines, Inc.*, the New Jersey Supreme Court held that an airline could be liable for the harassment that occurred on an electronic bulletin board used by the pilots of that airline.[21] The court held that just because the electronic bulletin board was located outside of the workplace doesn't mean that the employer may not have a duty to correct off-site harassment by co-workers as conduct that takes place outside of the workplace tends to permeate the workplace.[22]

In *J.S. ex rel. H.S. v. Bethlehem Area School District*,[23] students created a website where they posted comments about their teacher such as "F—k you, Mrs. Fulmer. You are a Bitch. You are a Stupid Bitch," and "Why Should She Die."[24] On

another website, there was a sketch of Mrs. Fulmer with her head cut off and blood dripping from her neck.[25] When Mrs. Fulmer saw these websites, she was unable to complete the school year and took a medical leave of absence for the following year. She testified that she suffers physically and emotionally as a result of what the students wrote about her on those websites. The Supreme Court of Pennsylvania held that this type of substantial disruptive effect justifies control of student speech and that the student's website containing the threatening comments about the teacher has a sufficient nexus to the school to be considered on-campus.[26]

One possible interpretation of these cases is that the courts recognize that workplaces and schools, especially in an increasingly virtual world, are not just physical locations. Workplaces and schools tend to be "sets of social relations of power and privilege, which may or may not have a distinct geographical nexus."[27] This developing approach provides a reasonably sound way of dealing with harassment cases in which the harassment occurs "off-site" but produces effects in a protected workplace or school setting and is committed by individuals with some relationship to the protected setting.[28]

Of course, this multiple-setting approach could be seen as being unfair to employers in numerous cases. Should employers be held liable for all off-site harassment cases just because they may produce effects in the workplace and are perpetrated by individuals with a connection the employer? If a group of employees form their own blog to discuss work and decide to make disparaging comments about a certain employee, should the employer be liable if those comments produce effects in the traditional workplace? There is a possible affirmative defense that an employer in this situation could raise.

III. THE EMPLOYER'S AFFIRMATIVE DEFENSE: SUBSTANTIAL BENEFIT FROM THE DIGITAL MEDIA FORUM

Currently, there is confusion and a scarcity of case law regarding what role evidence of social media harassment should have in a workplace harassment claim. The lack of clear legal boundaries regarding online media encourages harassers to engage in conduct they would have refrained from within the physical walls of the workplace.[29] Meanwhile, the increased integration of social media within our personal and professional lives makes it likely that the courts will be confronting social media issues with increased frequency.[30]

To determine whether harassment over a social media site may serve as evidence of a hostile work environment, the courts should examine whether the employer derived a substantial benefit from this social media site, thereby categorizing the site as a digital extension of the employee's workplace environment.[31] In these claims, social media harassment should be examined under the totality of the circumstances of a Title VII hostile work environment claim for the purpose of determining employer liability.[32]

Although the court in *Blakely* did not clearly define what constitutes a "substantial benefit," it provided several examples of how social media may provide a benefit to an employer.[33] First, employees' access to company information via social media is a benefit because it improves efficiency.[34] Second, communication between employees via social media promotes collaboration, spurs innovation and streamlines operations, thereby providing a benefit by reducing costs.[35] Third, the greater the number of current employees using social media, the more likely it is that the employer is receiving a

benefit.[36] All of these benefits reduce internal transaction costs.[37]

Based on the substantial benefits test, an employer could be held liable for postings on a corporate Facebook page since the employer benefits from increasing employee communications, encouraging product innovation or streamlining operations.[38] As the court in *Blakely* reasoned, when the employer receives a substantial benefit from a social media forum, such as a corporate Facebook page, the forum is sufficiently integrated into the workplace so that it can be characterized as an extension of the employer's workplace environment.[39]

On the other hand, an employer would not be held liable for postings on an employee's personal Facebook page. In this case, the employer is probably not receiving any type of economic or personal benefit from the employee's personal Facebook page; therefore the employer is not deriving a substantial benefit.[40] The employee's personal Facebook page cannot be properly characterized as an extension of the workplace environment.

The substantial benefits analysis is consistent with agency principles, which served as the basis of the U.S. Supreme Court's traditional analysis in hostile workplace claims.[41] In both the *Faragher* and *Ellerth* cases, the U.S. Supreme Court held employers liable for harassment by supervisors and non-supervisors under the aided-in-agency theory.[42] Under this theory, the employer is liable because the agency relationship between the employer and the employee enables the employee's harassment of others in the workplace. Without the agency relationship, the harassment could not have been committed.[43]

The substantial benefit argument could serve as an affirmative defense for an employer who is being sued for workplace harassment on the basis of postings on a social media forum. The employer would raise the defense that s/he does not derive a substantial benefit from the social media forum and therefore the postings on the social media are not an extension of the workplace; therefore, the employer would not be liable. In situations like this, if the employer is not liable for these postings, which could adversely affect the workplace environment, who would be? It could be the website operator of the social media on which the harassing postings were displayed.

IV. THE WEBSITE OPERATOR'S LIABILITY FOR CYBERHARASSMENT

The anonymity of the Internet appears to bring out the tendencies of certain users to mock and malign others in ways they wouldn't dream of implementing in a "real" or "offline" environment.[44] Some might say that the best strategy of dealing with the insulting behavior that occurs on the Internet is to just ignore it. However, when the users attack individuals by name with graphic, vicious insults that could interfere with the victims' livelihood or education, ignoring the problem is not a viable solution. This type of cyberharassment could be categorized as a form of workplace harassment since it could adversely affect the way others view and treat the victim in the workplace.[45]

One of the more famous cases of cyberharassment involved AutoAdmit.com, which was a largely unmoderated message board where individuals could share information about law schools, law school admissions, firms, and how to succeed in law school.[46] In March 2005, Professor Brian Leiter

wrote about AutoAdmit on his blog, Leiter Reports, noting the rampant racism and sexism of AutoAdmit posters.[47] In March, 2007, the *Washington Post* highlighted the numerous racist, sexist and obscene posts on AutoAdmit.[48] There were posts that included entire message threads devoted to ranking female students' bodies as well as discussing their alleged sexual activities.[49]

In numerous cases, the personal information of these students, such as their names, email addresses and instant messenger screen names were disclosed. Furthermore, the email addresses of their professors and former employers were disclosed and site members were encouraged to email their insults to these professors and former employers directly.[50] A number of women knew nothing about these threads until they were informed of them by friends or through Google searches.[51] Some women contacted the AutoAdmit administrators and requested that the offensive threads be removed.[52] An AutoAdmit administrator responded in an AutoAdmit post by telling them "Do not contact me … to delete a thread." He warned that if he kept receiving such requests, he would post them on the message board for everyone to see.[53] In response to criticism, the AutoAdmit administrators cited First Amendment arguments and claimed that the women invited the attention by posting photographs on social media sites such as Facebook and MySpace. In some cases, the AutoAdmit administrators posted the women's complaints on the site, leading to threads calling the women "bitches" and threats to punish them with rape, stalking and other abuse.[54]

Sites that thrive on gossip and personal insults, such as AutoAdmit are numerous.[55] The comments sections of many online newspapers and blogs are loaded with obscene abuse.[56] Social networking sites such as Facebook have become highly

effective media outlets for vengeful individuals to attack ex-lovers and there are numerous sites devoted to "revenge porn," which is defined generally as homemade porn uploaded by an ex-lover after a particularly nasty breakup as a means of humiliating that ex-lover.[57]

Revenge porn victims are starting to come forward to describe the harms they have suffered, including psychological damage, stalking and a loss of professional and educational opportunities.[58] Only now are we beginning to get a sense of how large the problem of revenge porn is since more victims are telling their stories. The fact that nonconsensual porn often involves the Internet and social media, leads the legal system to sometimes struggle to understand the mechanics of this type of harassment and the devastation it can cause.[59]

Cyberharassment is theoretically more responsive to control than real-life harassment.[60] A number of cyberharassment features that magnify the harm of harassment, such as instance and permanence, also make this harassment easier to regulate. Also, since much cyberharassment is recorded and even date- and time-stamped, the evidentiary problems that plague real-life harassment are usually not an issue with cyberharassment.[61] Furthermore, the website operators are clearly identifiable agents of effective control over sites where cyberharassment takes place; therefore, the website operators can control the behavior of users on their sites as effectively as employers and school administrators can control individuals in their respective real-life environments.[62]

It is recommended that website operators should be held liable for cyberharassment, since they are the agents with effective control over the setting of the harassment.[63] Like employers and school administrators in Title VII and Title IX harassment cases, website operators have the most knowledge

about the harassment. They know how vicious it is and whether certain victims are harassed by multiple users; plus, they may also have identifying information about the harassers.[64] Futhermore, they have control over the users of their sites. Just as employers can fire employees, restrict their behavior or eject abusive customers, website operators can warn and even ban users who engage in cyberharassment on their sites.[65] Finally, as a public policy issue, it will encourage website operators to create and enforce policies that will discourage cyberharassment from occurring in the first place and the prevention of harm is better than the mitigation of harm after it occurs.[66]

In order to hold website operators liable for cyberharassment, a change in the language of Section 230 of the Communications Decency Act (CDA) would be needed.[67] Section 230(c)(1) states that *"no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."*[68] This section of the CDA provides immunity from liability to providers and users of interactive websites who publish information by others.[69] Website operators are immunized from the unlawful activities of third parties. Given that cyberharassment perpetrators are often anonymous, the victims of cyberharassment can bring no cause of action because there is no party to hold accountable.[70]

The immunity provided to website operators is not absolute.[71] Section 230(e)(1) states: *Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.*[72] Section 230(e)(2) states: *Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.* Sections 230(e)(1)

and (e)(2) of the CDA provide exceptions for federal criminal law and intellectual property law.[73] The best way to remove the obstacle of Section 230 for cyberharassment cases would be to revise it to include express language on compliance with federal anti-discrimination law. This amendment could include a subsection explaining how website operators, as control agents over message boards and sites, can be held liable for harassment that produces effects in settings protected by current anti-harassment law.[74]

Regulating cyberharassment in this way would provide a much-needed remedy for a serious harm in addition to providing the benefits of relatively low implementation costs, low liberty costs[75] and a great deterrent.[76] In order for the website operator to avoid liability for cyberharassment perpetrated by others on the website operator's site, the website operator would just have to remove the offending threads from the site and ban the user who posted those threads. This remedy has the virtue of efficiency.

IV. CONCLUSION

While workplace harassment has been a serious issue for many years, the rise of workplace harassment in cyberspace demonstrates the increasing complexity of this phenomenon. Workplace harassment law has not kept up with the evolution of online digital media. The current law treats only workplace harassment that occurs in traditionally protected settings such as the physical workplace or school environment and assumes that the act and harm of workplace harassment both occur in the same physical setting. As a result, the current law is unable to address harassment that occurs outside of the traditionally protected settings.

Since cyberharassment creates harm that is equal to or even more severe than real-life harassment, a clear legal remedy for cyberharassment is greatly needed. The legal system is beginning to realize that workplaces and schools are not just physical locations but sets of social relations that may or may not have a distinct geographical nexus. Updating current workplace harassment law to include the multiple-setting approach would allow the victims of cyberharassment to seek proper redress for any harm they may have suffered.

To determine whether online harassment may serve as evidence of a hostile work environment, the courts should examine whether the employer derived a substantial benefit from the online site, thereby categorizing this site as an online extension of the employer's workplace. If the employer derives no substantial benefit from the site, then this would serve as an affirmative defense for the employer.

In cases where the employer is not liable for cyberharassment that can create serious harm in the workplace, the website operators could be held liable for such harassment. Since website operators are the agents with effective control over cyberharassment, they should be held liable for allowing such harassment to continue on their sites. The current law that provides immunity to website operators of interactive websites could be amended to provide a much-needed remedy to those whose professional and educational opportunities have been limited as a result of cyberharassment. Furthermore, since the only action website operators must take in order to avoid liability for cyberharassment is to remove the offending threads and ban the creators of these threads from the site, the new remedy for cyberharassment has the virtue of efficiency.

[1] Carroll M. Brodsky, THE HARASSED WORKER (1976).
[2] Teresa A. Daniel, *Tough Boss or Workplace Bullying*, HR MAGAZINE, June 2009, at 83, 86.
[3] Id.
[4] Id.
[5] William Martin and Helen LaVan, *Workplace Bullying: A Review of Litigated Cases*, 22 EMPLOYEE RIGHTS JOURNAL 175 (2010).
[6] Gina Vega and Debra R. Comer, *Sticks and Stones May Break Your Bones, But Words Can Break Your Spirit: Bullying in the Workplace*, 58 JOURNAL OF BUSINESS ETHICS 101 (2005).
[7] Supra note 5.
[8] See Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW, 283, 293 (2003) (commenting that nontraditional work arrangements continue to expand and that telecommuting appears to be continuing into the new millennium).
[9] Rachel Gely, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARVARD JOURNAL OF LAW AND TECHNOLOGY 287, 301-303 (2007) (discussing how employees are increasing using blogs to communicate with other employees and discuss work).
[10] Defined as: forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos), MERRIAM-WEBSTER DICTIONARY http://www.merriam-webster.com/dictionary/social%20media (last accessed 1/4/2015).
[11] See David K. McGraw, Comment, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-Mail*, 21 RUTGERS COMPUTER & TECHNOLOGY LAW JOURNAL 491, 491-492 (1995) (discussing how the growth of computer networks in the 1980s and 1990s created the means for widespread sexual harassment).
[12] Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 655, 655-657.
[13] *Faragher*, 524 U.S. 775 (1998); *Ellerth*, 527 U.S. 742 (1998) (the Court provided for an employer to raise a defense to a claim of a hostile work environment, if the employer can show that it exercised reasonable care to prevent and correct any sexually harassing behavior, and second, that the plaintiff unreasonably failed to take advantage of any preventative or

corrective opportunities provided by the employer. This created what has become known as the Faragher/Ellerth defense).

[14] *Ellerth*, 527 U.S. 742 (1998) (Held: Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense).

[15] *Faragher*, 524 U.S. 775 (1998); *Ellerth*, 527 U.S. 742 (1998).

[16] See Jeremy Gelms, *High-Tech Harassment: Employer Liability under Title IV for Employee Social Media Misconduct*, 87 WASHINGTON LAW REVIEW 249 (2012) and Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 655, 655-657 (2012).

[17] See Danielle Keats Citron, *Cyber Civil Rights*, 89 BOSTON UNIVERSITY LAW REVIEW 61, 89-95 (2009).

[18] Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 659 (2012).

[19] Id.

[20] See, e.g., *McGuinn-Rowe v. Foster's Daily Democrat*, No. 94623-SD, ("alleged sexual assault of plaintiff also contributed to the hostile environment plaintiff experienced at work, even though this particular incident occurred outside the workplace setting."); *Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007, 1013 (N.J. 1998) (recognizing that while the harassing phone calls to the victim's home took place outside of the workplace, the conduct would have arisen outside of the employment relationship).

[21] 751 A.2d 538, 543 (N.J. 2008).

[22] Id. at 549.

[23] *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

[24] Id. at 851.

[25] Id.

[26] Id. at 858-859, 869; also see John Paul, *Restorative Justice for the Victims of School Bullying: How Far Does the Law Go?* 32 NORTH EAST JOURNAL OF LEGAL STUDIES 113, 120-121 (2014) (for a discussion of cases in which courts find that cyberbullying causes a substantial disruption in school).

[27] J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUMBIA LAW REVIEW 2295, 2313 (1999).

[28] Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 659, 668 (2012).

[29] Azy Barack, *Sexual Harassment on the Internet,* 23 SOCIAL SCIENCE COMPUTER REVIEW 77, 82-83 (2005) (arguing the lack of defined legal boundaries and enforcement mechanisms fosters an online environment that enables harassment).
[30] Jeremy Gelms, *High-Tech Harassment: Employer Liability under Title IV for Employee Social Media Misconduct,* 87 WASHINGTON LAW REVIEW 249, 272 (2012).
[31] See *Blakely v. Continental Airlines, Inc.,* 751 A.2d 538, 551-552 (N.J. 2002).
[32] Id.
[33] Id.
[34] Id.
[35] Id. at 552.
[36] Id.
[37] Jeremy Gelms, *High-Tech Harassment: Employer Liability under Title IV for Employee Social Media Misconduct,* 87 WASHINGTON LAW REVIEW 249, 273-274 (2012).
[38] See, e.g. Rusty Weston, *Facebook: Your Company's Intranet?* FORBES, March 20, 2009, http://www.forbes.com/2009/03/20/facebook-intranet-serena-entrepreneurs-technology-facebook.html (creating relationships that wouldn't have existed if it weren't for Facebook) (last accessed 8/29/2014).
[39] *Blakely v. Continental Airlines, Inc.,* 751 A.2d 538, 551 (N.J. 2002).
[40] See, e.g. *Lapka,* 517 F.3d at 983 (noting that a training program where the employer paid for accommodations and food could qualify as part of the employee's workplace).
[41] *Ellerth,* 524 U.S. at 760; *Faragher,* 524 U.S. at 802.
[42] Id.
[43] Id.
[44] See Danielle Keats Citron, *Cyber Civil Rights,* 89 BOSTON UNIVERSITY LAW REVIEW 61, 89-95 (2009) (application of civil rights doctrine to cyberharassment can help deter Internet mobs).
[45] Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0,* 71 MARYLAND LAW REVIEW 659, 678 (2012).
[46] Ellen Nakashima, *Harsh Words Die Hard on the Web; Law Students Feel Lasting Effects of Capricious Remarks,* WASHINGTON POST, March 7, 2007; Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0,* 71 MARYLAND LAW REVIEW 659, 678 (2012).
[47] Brian Leiter, *Penn Law Student, Anthony Ciolli, Admits to Running Prelaw Discussion Board Awash in Racist, Anti-Semitic, Sexist Abuse,* Leiter Rep.: A Phil. Blog (March 11, 2005) http://leiterreports.typepad.com/blog/2005/03/penn_law_studen.html

(last accessed 8/30/2014).
[48] Ellen Nakashima, *Harsh Words Die Hard on the Web; Law Students Feeling Lasting Effects of Capricious Remarks*, WASHINGTON POST, March 7, 2007.
[49] David Margolick, *Slimed Online*, Portfolio.com (February 11, 2009), http://www.port-folio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying/index.html; Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 659, 678 (2012).
[50] Citron, *Cyber Civil Rights*, supra note 41.
[51] Nakashima, *Harsh Words*, supra note 43.
[52] Margolick, *Slimed Online*, supra note 46.
[53] Id.
[54] Franks, *Cyberlaw*, supra note 42, at 679.
[55] Citron, *Cyber Civil Rights*, supra note 41, at 65-66.
[56] See Howard Kurtz, *Online, Churls Gone Vile*, WASHINGTON POST, March 26, 2007 (noting the increase of offensive comments in the comments section of the Washington Post, which does not have the resources to screen these comments in advance).
[57] See Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARVARD JOURNAL OF LAW & GENDER 383, 387-389 (2009) (describing a group of obscene comments left on a YouTube video trailer for a documentary about a rock and roll camp for young girls).
[58] Danielle Keats Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST LAW REVIEW 345, 347 (2014) (noting that many victims' lives are upended by images they shared or permitted to be taken thinking they would remain confidential and the states as well as the federal government should craft narrow statutes that prohibit the publication of nonconsensual pornography).
[59] Id.
[60] Franks, *Cyberlaw*, supra note 45, at 683.
[61] Id.
[62] Id.
[63] Id. at 684.
[64] Id.
[65] Id.
[66] Id.
[67] 47 U.S.C. § 230 (2006).
[68] 47 U.S.C. § 230(c)(1) (2006).
[69] Id.

[70] See *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (holding that allowing users to post comments under different screen names did not make the website operator under Section 230).
[71] 42 U.S.C. §230(e)(1)-(2) (2006).
[72] 42 U.S.C. §230(e)(1) (2006).
[73] 42 U.S.C. §230(e)(2) (2006).
[74] See KrisAnn Norby-Jahner, *"Minor" Online Sexual Harassment and the CDA §230 Defense: New Directions for Internet Service Provider Liability,* 32 HAMLINE LAW REVIEW 207, 243 (2009) (arguing for statutory clarifications of CDA Section 230 so that website operators can be held liable for creating a hostile online environment).
[75] The costs regulating freedom from oppressive restrictions on one's way of life, behavior, or political views, Franks, *Cyberlaw*, supra note 45, at 687.
[76] Franks, *Cyberlaw,* supra note 45, at 688.

YUKOS OIL COMPANY AND CROSS-BORDER INSOLVENCIES

by

Roy J. Girasa*
Richard J. Kraus**
Peter M. Edelstein***

INTRODUCTION

The Yukos Oil Company (Yukos) and its president, Mikhail Khodorkovsky (Khodorkovsky) became the poster company and star entrepreneur of the Russian Federation which emerged from the breakup of the former Union of Soviet Socialist Republics

---

*Professor of Law, Lubin School of Business, Pace University, Pleasantville, New York 10570, rgirasa@pace.edu.

** Professor of Law, Lubin School of Business, Pace University, Pleasantville, New York 10570, rkraus@pace.edu.

*** Professor of Law, Lubin School of Business, Pace University, Pleasantville, New York 10570, pedelstein@pace.edu.

on December 26, 1991. In the highly publicized government takeover of Yukos and the arrest and initial long-term imprisonment of Khodorkovsky for alleged fraud, embezzlement, and evasion of personal income taxes in October, 2003, it was alleged that the company had underpaid prior years' taxes of approximately $27.5 billion. The Russian Federation Ministry of Taxation (Taxation Ministry) then confiscated Yukos' primary assets. The company suffered enormous losses and sought bankruptcy protection. This paper discusses the Yukos Oil Company takeover and the international regime for dealing with bankruptcies, particularly, in the form of insolvency reorganizations on a multi-national basis. It concludes that the UNCITRAL Model Law on Cross-Border Insolvency, adopted by the United States, offers principles to foster cooperation among the countries affected by the insolvency.

YUKOS TAKEOVER IN RUSSIA

Yukos, a Moscow-based joint stock company organized under the laws of the Russian Federation, issued shares tendered on the Russian stock exchange. Yukos was a holding company that had some 200 subsidiaries organized under the diverse laws of the Russian Federation, Cyprus, and the United Kingdom, among others. Its shares were traded on various European exchanges and on over-the-counter exchanges in the United States in the form of American Depository Receipts. Khodorkovsky was its president, chief executive officer, and largest shareholder. Bruce

K. Misamore (Misamore) was the chief financial and principal accounting officer. The Taxation Ministry determined that Yukos grossly underpaid its taxes for 2000 to 2003 tax years by taking advantage of Russia's preferential tax treatment through sales of oil to 17 affiliated trading companies within remote Federation regions known as ZATOs (Zakrytye Adminsitrativno Territorial'nye Obrazovaniia). The profits from the sales were then returned to Yukos thereby taking advantage of the substantially lower tax market-prices sales. The companies were allegedly sham companies used to avoid legitimate taxes on its sales and profits. Yukos then reported earnings of $1.3 billion and net profit of $850 million for the third quarter of 2002 and a net profit of $988 million for the fourth quarter of 2002. It reported earnings of $3,058 billion for the year allegedly using the United States *Generally Accepted Accounting Principles (GAAP).* Due to the government's claim of false and fraudulent tax filings, Yukos was assessed with underpayments of $27.5 billion that resulted in the Russian Federation's confiscation of Yukos' primary assets and the company's financial downfall.[1]

The Political Background

It was alleged by plaintiffs in the securities fraud action against Yukos that, although Yukos stated in a press release that the company did not engage in financing political parties, its CEO, Khodorkovsky, had secretly met with Russian Federation president

Vladimir Putin who promised not to prosecute Yukos for alleged wrongdoing provided it and its principal officers refrained from opposing Putin. When, in fact, Khodorkovsky did oppose Putin and sought to have his government dismissed, together with financing opposition parties, the result therefrom was to cause the demise of Yukos. Thus, Khodorkovsky was arrested in October, 2003 for alleged fraud, embezzlement, and evasion of personal income taxes. He was sentenced to nine years in prison on May 20, 2005 but was pardoned by President Putin on December 30, 2012. The government then seized his 44% interest in Yukos as security toward the $1 billion he allegedly personally owed in taxes. It further claimed that, as a result of the use of preferential tax treatment by Yukos through its sham companies which received preferential tax treatment, the sum of $3.4 billion was owed for the tax year 2000 and $27.537 billion for the years 2001-2003. Yukos then defaulted on a $1 billion loan from private investors after the seizure of company's assets, including its main production facility and its bank accounts containing billions of dollars.[2]

U.S. BANKRUPTCY COURT PROCEEDINGS

The Texas Filing

On December 14, 2004, Yukos commenced a voluntary Chapter 11 bankruptcy proceeding in federal court in Houston, Texas through its attorney and by Bruce K. Misamore, its chief financial officer.[3] The management

of Yukos authorized the filing of the petition. It requested an injunction to stop the sale of company assets by the Russian Federation. Although Yukos, the debtor in the within proceeding, was an “open joint stock company” organized under the laws of the Russian Federation, it alleged that the Houston federal court had jurisdiction based on the fact that its subsidiary, Yukos USA, Inc., was a U.S. corporation having been incorporated one day prior to the filing of the bankruptcy petition, and which had $2 million in funds in Texas. Its sole director was the said Bruce K. Misamore. Additional grounds for the assertion of jurisdiction were the holding of $6 million in trust by its attorneys, and that its chief financial officer had a home in Houston, Texas as well as in Moscow, Russian Federation. Almost all of the affiliates and subsidiaries of Yukos are Russian companies and almost all of the assets thereof are in Russia. Nearly all of the some 100,000 employees resided in Russia. Investors, both individual and institutional, included U.S. persons.

The company alleged that the tax assessment was wrongfully assessed in violation of Russian law. It sought to have the Texas court halt the Russian government’s actions to enforce its tax claims, have the financial flexibility to obtain loans superior to claims of the Russian government, as well as to finance operations, restructure tax debt and create a surviving entity to seek redress against the Russian Federation and other entities on behalf of shareholders, employees,

and creditors.[4] The court did grant a temporary injunction finding that there was substantial evidence of irreparable injury to the plaintiff.[5] Although the court found substantial evidence that the agencies of the Russian government acted in a manner that would be considered confiscatory under U.S. law by assessing retroactive taxes in excess of Yukos' total revenue for the years 2001-2002, the court had to determine whether the U.S. bankruptcy courts are the proper and suitable forum for determining the needs of the debtor and its creditors and equity security holders.[6]

In the proceeding, one of the creditors of Yukos moved to dismiss the bankruptcy filing. Although the court had initially granted the restraining order, the motion was granted. The court addressed the following issues in making its determination:

Jurisdiction:

The court, after discussing the constitutional and statutory bases for the assertion of jurisdiction, noted that the court may only determine actual cases or controversies under U.S. Constitution, Art. III, §2. The said provision requires that parties initiating cases must have standing to sue. Title 11, U.S.C. §109(a) of the Bankruptcy Code states that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor." The court determined that Yukos had no standing inasmuch as it has no place of business or property in the U.S.

The court acknowledged that having nominal amounts of property in the U.S. as herein may confer jurisdiction and, in fact, did so confer standing to be a debtor under the Bankruptcy Code and subject matter jurisdiction.[7]

Forum non conveniens:
The court refused to decline jurisdiction based on the doctrine inasmuch as Congress has statutorily granted jurisdiction and venue upon the court in bankruptcy cases and has the inherent power to control the administration of the litigation that is before the court.[8]

Comity:
The court defined "comity" as the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[9] The court declined to dismiss the petition on this ground, having found no precedent for doing so but stated it may be considered in connection with a determination of whether cause exists for dismissal.[10]

Act of State Doctrine:
Under the act of state doctrine, a U.S. court should not adjudicate the legality of an action of a sovereign state within its own jurisdiction on the theory that every sovereign state should respect the independence of every other sovereign state and not judge actions done

therein. Grievances resulting from such actions should be addressed diplomatically between the affected states. The court noted that, although as described below, Congress has provided for a mechanism of coordinating the insolvency laws of the U.S. and other jurisdictions, nevertheless, no such mechanism for dispute resolution has been provided where the foreign proceeding is not an insolvency proceeding. In the within action, the Russian government in fact has refused to accept service of process and its actions may have risen to the level of foreign policy that is left to the province of the President of the U.S. Nevertheless, the court concluded that the act of state doctrine did not form an independent basis requiring dismissal of the bankruptcy filing so as to prevent the court from evaluating the efforts of Yukos to reorganize itself financially.

U.S Bankruptcy Code:

The court did conclude the petition should be dismissed based on Section 1112(b) of the Bankruptcy Code that provides a court may dismiss a petition or convert it to a Chapter 7 liquidation proceeding for cause based on a number of factors including inability to effectuate substantial consummation of a confirmed plan. The court determined that the Yukos reorganization plan is not a financial reorganization inasmuch as most of its assets are oil and gas within Russia. Without cooperation of the Russian government, reorganization would be extremely limited. The funds formulating the basis for the claim of jurisdiction were deposited in

U.S. banks less than a week prior to the filing of the petition and were transferred to confer jurisdiction. Yukos has attempted to substitute U.S. law as well as European Convention law, arbitration, proceedings before the European Court of Human Rights, and other jurisdictions in place of Russian law. The court held that no evidence has been presented that makes the U.S. court uniquely qualified or more able to effectuate relief than the other forums. Almost all of the financial and business activity of Yukos occurred and continues to do so in Russia which required participation of the Russian government. Due to the size of its production of oil and gas within Russia, the appropriate forum would be one in which the Russian government participates therein.[11]

The New York Filing

In this federal court action, *In re Yukos Oil Company Securities Litigation,*[12] the plaintiffs, who had purchased securities between January 22, 2003 and October 25, 2003, commenced a securities fraud action under §10(b) of the Securities Exchange Act of 1934 against Yukos alleging that its outside auditor and certain of its executives and controlling stockholders, including Khodorkovsky, concealed the risk that the Russian Federation would take adverse action against the company by its failure to disclose its unlawful tax evasion scheme and Khodorkovsky' political activity that exposed the company to retribution by the government. The specific allegations were the unlawful

taking advantage of ZATO's preferential tax treatment by the sale of booked oil sales well below market prices to 17 trading companies registered within ZATOs and resold to customers at market prices claiming tax benefits with the profits funneled to Yukos and Khodorkovsky's secret meetings with President Putin with other oligarchs and his later denunciation of Putin.

Interestingly, the defendants who defended against the motion to dismiss the reorganization proceeding in Texas, now utilized similar arguments made against to thwart the New York proceeding. Thus, the defendants requested in their motion to dismiss the lawsuit against them and requested the court to abstain from holding them potentially liable based on three theories: (1) the Act of State doctrine; (2) subject matter jurisdiction was lacking as to two of the three defendants; and (3) a failure to state a claim for either primary violations of the securities laws or control person liability.

Act of State Doctrine:

The defendants alleged that by adjudicating the dispute it would require the court to inquire into the actions and motives of the Russian government by its imposition of confiscatory tax levies, penalties and interest on Yukos. Using similar reasoning of the Texas court, the New York court determined that the act of state doctrine does not preclude it from deciding a case that implicates the motives or justifications of a foreign

state's officials but rather applies when the outcome of the case turns upon on the official action by a foreign sovereign.[13] The central question in the within dispute is whether the defendants acted with fraudulent intent in withholding information from potential investors. The validity of the actions of the Russian Federation would not be affected.

Subject Matter Jurisdiction:
The question herein is whether the U.S. courts may be used concerning transactions that are essentially foreign in nature. To make a determination, the court has to consider whether the wrongful conduct occurred in the U.S., i.e., when substantial acts in furtherance of the fraud were committed in the U.S., and whether the wrongful conduct had a substantial effect in the U.S. or upon a U.S. citizen. The court found that all of the defendants' alleged misrepresentations emanated from abroad. Although Yukos filed its 2002 Annual Report with the SEC, its preparation was made abroad and such single filing was not a substantial act in furtherance of the alleged fraud. Additional alleged conduct concerned a singular email to the plaintiff's sole shareholder to inform him of the release of Yukos' financial results and personal appearances of Yukos' executives but no showing of any misrepresentations made at such appearances. Thus, the plaintiffs failed to meet the conduct test. With respect to the effects test, i.e., conduct abroad that caused a substantial effect upon the U.S., there was no evidence of a sufficient

nexus connecting the alleged fraud to U.S. exchanges and investors. Thus, the court lacked subject matter jurisdiction over claims on behalf of foreign bondholders.[14]

Failure to State a Claim:

Under §10(b) of the Exchange Act and Rule 10b-5, it is unlawful to "use or employ, in connection with the purchase or sale of any security…any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may proscribe." To state a claim, the plaintiff must plead that the defendant: "1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which the plaintiff relied; and (5) that plaintiffs' reliance was the proximate cause of their injury." In addition, under the Private Securities Litigation Reform Act (PSLRA),[15] there are heightened requirements of pleading as found in Rule 9(b) which requires that the circumstances constituting fraud must be stated with particularity, i.e., the allegations must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent."[16] In essence, the court, after reviewing the detailed allegations of the alleged false statements and omissions, concluded that the plaintiffs failed to meet the pleading standards of Rule 9(b).

The Yukos case leads us to a discussion of UNCITRAL.s Model Law on Cross-Border Insolvency and its U.S. adoption under the provisions of Article 15 of the Bankruptcy Code.

UNCITRAL AND ARTICLE 15 OF THE BANKRUPTCY CODE

Introduction

Most large business enterprises are multinational in scope, often becoming anational through use of subsidiaries and employing senior executives from diverse areas of the globe. This is true even of newly emerging economies such as China which has undergone unparalleled expansion especially in its quest for energy and mineral resources. As in all such enterprises, companies may expand beyond their ability to attract investors, capital, and customers thus leading to insolvencies requiring reorganization or outright liquidation. The problem arises, however, that with the multiplicity of jurisdictions, accompanied by often conflicting national rules and regulations, how to resolve the inevitable dissolution of failing enterprises. The United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency with Guide to Enactment[17] and the developments in this regard in U.S. law and that of the European Union are pertinent to this situation.

In the U.S., a new Chapter 15, "Ancillary and Other Cross Border Cases" was added to the Bankruptcy Code on April 20, 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[18] It is the U.S. domestic adoption of the Model Law on Cross-Border Insolvency promulgated by UNCITRAL in 1997. It replaced § 304 of the Bankruptcy Code.[19] Similar to a Chapter 11 proceeding, it seeks to facilitate the rescue of financially troubled businesses in order to protect investments and employees. It applies where assistance is sought by a foreign court or a foreign representative in a foreign proceeding. Thus, a Chapter 15 case is ancillary to the foreign proceeding. Where the primary or complex assets are located in the U.S., the proceeding may be one under Chapter 7 (liquidation) or Chapter 11 (reorganization).

The European Union's regulation[20] on cross-border insolvency adopted the provisions of UNCITRAL under Article15. As amended, the Regulation established a European framework for the member states of the E.U. Its emphasis is on the center of main interests conveying jurisdiction on the courts of the member state that has primary jurisdiction which the other member states are to grant recognition in secondary proceedings initiated therein.

UNCITRAL Model Law

The Model Law recognizes that confusion often arises among states (countries) concerning how to resolve issues arising out of insolvencies of companies that are multinational in scope. Accordingly, the Model Law's main objective, while not creating substantive law, is to provide effective mechanisms for states to deal with cross-border insolvencies. Among the countries that have adopted the Model Law in whole or substantial part are the United States, Japan, and the United Kingdom.[21]

Purpose of the Model Law:
The purpose of the Model Law as repeated almost verbatim in §1501(a)(1-5) of the U.S. Bankruptcy Code is to provide effective mechanisms in cross-border insolvency actions to promote the following objectives:

- Cooperation between the courts and other competent authorities of this State and foreign States involved in cross-border insolvency. (§1501(a)(1)(B) repeats the Model Code language and adds "(A) cooperation between courts of the United States, United States trustees, examiners, debtors, and debtors in possession";
- Greater legal certainty for trade and investment;
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

- Protection and maximization of the value of the debtor's assets; and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[22]

The Model Law recognizes that there are differences in national procedural laws and does not attempt to promote substantive unification of insolvency laws nor to critique judicial decisions or to instruct judges on how to determine applications for recognition and relief under State law. It modestly seeks to offer a general guidance by pointing out procedural and substantive issues a judge may wish to consider in making a ruling. [23] While recognizing the differences among national laws, it provides "foreign representatives"[24] (persons administering a foreign insolvency proceeding) with access to the courts of states that have enacted the Model Law; determination of whether a foreign insolvency proceeding should be accorded recognition; provide a transparent regime for foreign creditors to commence or participate in an insolvency proceeding within that state, permit cooperation among courts of the different jurisdictions; and establish rules for coordination of relief.[25]

Basic Principles of the Model Law:
The Model Law is based on four basic principles as set forth in Articles 25-29.[26]
Access principle: Article 25 of the Model Law provides that the state court shall cooperate to the maximum extent possible with the foreign court or foreign representative.

The foreign representative is entitled commence a proceeding under state law if the conditions of state law are met.[27] It further provides that the court is entitled to communicate directly with, or to request information or assistance directly from foreign courts or foreign representatives. §1511 of the Bankruptcy Code permits a recognized foreign representative to commence either an involuntary or voluntary proceeding under §§301-303 if the foreign proceeding is a foreign main proceeding. The petition is to be accompanied by a certified order granting recognition and that the court be advised of the foreign representative's intent to commence a case under this section. §1525 states that the U.S. court is to cooperate either directly or through the trustee and communicate with the foreign court or representative subject to the rights of a party in interest to notice and participation.

The issue arises whether the said foreign representative is entitled to act under state law. It is left to the reviewing court to make the determination based possibly on expert evidence. UNCITRAL's judicial interpretation indicates that a judge may have to be satisfied that there is a foreign proceeding in which recognition is sought, is collective in nature, arose out of a law relating to insolvency, is under the supervision of a foreign court, and the applicant is authorized to administer the reorganization or liquidation of the debtor's assets or affairs.[28]

Recognition principle: Article 17 of the Model Law states that a foreign proceeding shall be recognized in a state court if it is a "foreign proceeding" as defined under

Article 2(a);[29] the foreign representative as defined applies for recognition; the application meets Article 15(2) requirements, i.e., (a) either a certified copy of the decision commencing the foreign proceeding and appointment of the foreign representative, (b) a certificate affirming such proceeding and appointment of representative, or (c) other evidence so establishing such proceeding and representative; and the application is properly submitted. The foreign proceeding may be recognized either as a "foreign main proceeding" (if it takes place in a state where the debtor has the center of its main interests); or a "foreign non-main proceeding" (where the debtor's has economic activity operations outside its main center of interests).

Chapter 15, §§ 1515-1517 of the Bankruptcy Code, sets forth the conditions for recognition of the foreign representative's petition which repeats the above requirements; provides that the court may presume recognition when a decision, certificate, or other documents from the foreign proceeding so indicates; and grants an order of recognition after notice and hearing.

Relief principle: UNCITRAL Model Law Art. 21§ provides for a variety of forms of relief once recognition of a foreign proceeding has been granted: (1) interim (urgent) relief consisting of a stay of the commencement or continuation of individual actions or proceedings or execution concerning the debtor's assets, rights, obligations, or liabilities as well as suspension of the right to transfer, encumber, or otherwise dispose of the said

assets; (2) provide for the examination of witnesses, taking of evidence, or delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities; (3) entrust the administration of all or part of the debtor's assets located within the state to the foreign representative or other designated person; and/or (4) grant such other relief available under state law. §§1519 and 1521 of the Bankruptcy Code are in accord.

Cooperation and coordination principle: Article 25 of the Model Code obligates the courts of the host and foreign states and foreign representatives to communicate and cooperate with each other to the maximum extent possible so as to ensure that the debtor's insolvency is resolved fairly and efficiently with maximum benefits to creditors. Cooperation consists of appointment of a person or body to act as the court directs; communication of information by appropriate means; coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation of agreements concerning coordination of proceedings as well as the concurrent proceedings of the debtor.[30] Bankruptcy Code §§1525-1527 repeat the said forms of cooperation.

Scope of Application: The Model Law Chapter 1, Article 1, and Bankruptcy Code §1501(b)(1-4) state that cross-border insolvency applies where assistance is sought in the state (U.S.) by a foreign court or a foreign representative in connection with a foreign proceeding; by a foreign country in connection with a cross-border insolvency; a concurrent proceeding foreign proceeding

and the state where assistance is sought respecting the same debtor; or by creditors or other interested persons in a foreign country having an interest in commencing a case or proceeding in the country where assistance is sought. The Model Law leaves it to the host country to decide which exclusions apply. Thus, the U.S. Code excludes moneys or other securities required or permitted under state insurance laws for the benefit of U.S. claim holders; an entity subject to proceedings under the Securities Investor Protection Act of 1970;[31] and certain other proceedings.

Public Policy Exception: The Model Law provides that "nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."[32] The Bankruptcy Code repeats the provision in §1506 of the Code and further provides that its provisions may not conflict with an obligation of the U.S. arising out of any treaty or other agreement.[33]

Commencement and Recognition of Foreign Proceedings: The ancillary proceeding commences by the filing of a petition for recognition of a foreign proceeding.[34] The petition may be made by an appointed foreign representative which petition is accompanied by a certified copy of the decision of the foreign proceeding appointing the representative, a certificate or other evidence of the foreign court affirming the existence of such foreign proceeding, and the identification of all foreign proceedings respecting the debtor.[35] After notice

and hearing, an order recognizing a foreign proceeding is to be entered as a foreign main proceeding if it is taking place where the debtor has the center of its interests or as a foreign non-main proceeding if the debtor has an establishment in the foreign state.[36] Once recognition is given by the U.S. court, there is an automatic stay and the foreign representative may continue to operate the debtor's business in the ordinary course. The U.S. court may authorize preliminary relief as permitted by the Code.[37] If the foreign representative initiates a full bankruptcy proceeding, then relief may be made respecting only the debtor's assets within the United States.[38]

Center of Main Interest (COMI): Recognition of the foreign proceeding raises the question of whether the foreign proceeding is a "foreign main proceeding" as defined in Article 2(b) of the Model Law, "a foreign proceeding taking place in the State where the debtor has the centre of its main interest." It is a crucial issue that underlies the refusal of U.S. courts to give recognition to Russian Federation proceedings in the Yukos actions in the United States.

Cooperation with Foreign Courts and Representatives: There are extensive provisions concerning cooperation between the domestic court and the foreign court. The provisions include cooperation with the foreign representative or court (in the U.S. through the appointed trustee) and communication directly with, or to request information or assistance from, a foreign court or foreign

representative, subject to the rights of a party in interest to notice and participation.[39] The forms of cooperation may be implemented by any appropriate means including: appointment of a person or body, including an examiner, to act at the direction of the court; Communication of information by any means considered appropriate by the court; coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation of agreements concerning the coordination of proceedings; and coordination of concurrent proceedings regarding the same debtor.[40]

Relief upon Recognition: Both the Model Code and the Bankruptcy Code provide the following relief upon recognition of a foreign proceeding: staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent that they have not been stayed; staying execution against the debtor's assets to the extent they had not been previously stayed; suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent that they had not been previously suspended; providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the (United States) to the foreign representative or another person , including an examiner authorized by the court extending

relief granted; and granting any additional relief that may be available to a trustee.[41]

The grant of recognition by a domestic court to a foreign main proceeding is binding upon all persons within its jurisdiction. In *In re Tembec Industries,*[42] the U.S. District Court, in its Order Granting Jurisdiction, permanently enjoined all old bondholders taking or continuing any act to obtain possession of, or exercise control over, the Debtor or any of its property that is located within the territorial jurisdiction of the U.S. or any proceeds thereof; (ii) transferring, relinquishing or disposing of any property of the Debtor; and/or (iii) commencing or continuing any action or legal proceeding.[43]

CONCLUSION

The Yukos case highlights the difficulties presented in today's global environment whereby companies that experience financial difficulties are compelled to engage in a multitude of legal proceedings commencing in one country where it center of main interest lies to other countries which are affected by the companies and their subsidiaries. Often, in the past, each country was concerned with its sovereignty which thus precluded it from cooperating with other countries affected by a particular company's insolvency proceeding. Thus, the United Nations in adopting the Model Code has provided the bases and principles to foster cooperation among the countries affected by the

insolvency. The United States, in particular, has adopted the Model Code almost in its entirety and has put into place the mechanisms to assist other nations adopting the Code to conduct and conclude such proceedings.

ENDNOTES

From the Amended Memorandum and Order, *In re Yukos Oil Company Securities Litigation,* 04 Civ. 5243 (WHP) (S.D.N.Y. Oct. 225, 2006).
[2] *Id.*
[3] *In re Yukos Oil Co.,* 320 B.R. 130 (Bankruptcy Ct., S.D. TX, 2004).
[4] *In re Yukos Oil Co.,* 321 B.R. 396, 403.
[5] Adversary No. 04-3952.
[6] *In re Yukos Oil Co.* 321 B.R. 396, 403.
[7] *In re Yukos Oil Co.,* 321 B.R. 396, 408.
[8] *Id.*
[9] *Id.* citing *Hilton v. Guyot,* 159 U.S. 113 (1895).
[10] *In re Yukos Oil Co.,* 321 B.R. 396, 408.
[11] *In re Yukos Oil Co.,* 321 B.R. 396, 410-411.
[12] 04 Civ. 5243 (WHP)(S.D.N.Y. Oct. 25, 2006.
[13] *Id.* citing *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l,* 493 U.S. 400, 401,409 (1990).
[14] *Id.*
[15] Pub. L 104-67, 109 Stat. 737.
[16] *Id.* citing *Novak v. Kasaks,* 216 F.3d 300, 306 (2000).
[17]G.A. Res. 52/158 (Dec. 15, 1997), U.N. UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with*

Guide to Enactment, (hereinafter referred to as the "Model Law"), www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

[18] 11 U.S.C. §101 et seq.

[19] § 304 of the Bankruptcy Code stated as follows:

§ 304. Cases ancillary to foreign proceedings:

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may-

(1) enjoin the commencement or continuation of-

(A) any action against-

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with-

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;
(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
(5) comity; and
(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

[20] Council Regulation (EC) No. 1346 (2000) as amended on Dec. 12, 2012, COM (2012) 744 final, 2012/0360 (COD).

[21] The countries that have adopted the Model Law and dates of enactment are the following:
Australia (2008); Canada (2005); Chile (2014); Columbia (2006); Eritrea (1998); Greece (1998); Japan (2000); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Poland (2003); Republic of Korea (2006); Romania (2002); Serbia (2004); Slovenia (2007); South Africa (2000); Uganda (2011); United Kingdom (2000); (British) Virgin Islands (2003); United States (2005). UNCITRAL, *Status*, https://www.uncitral/en/uncitral.texts/insolvency/1997/Model_status.html.

[22] Preamble of the Model Law.

Op. cit. No. 2, Guide Part two (I)(1-3) and *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*, p. 1, www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2011_Judicial_Perspective.html.

[24] Defined in Model Law, Art. 2(d) as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

[25] Model Law Guide, Part Two (I)(3).

[26] Model Law, Ch. IV. *Cooperation with foreign courts and foreign representatives.*

[27] UNCITRAL. Art. 11.
[28] UNCITRAL, *Judicial Perspective*, III(A).
[29] UNCITRAL Article 2(a) defines a "foreign proceeding" as a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, relating to insolvency wherein the assets and affairs of the debtor are subject to the control or supervision of the foreign court for the purpose of reorganization or liquidation.
[30] Model Code, Article 27.
[31] 15 U.S.C. § 78aaa through 15 U.S.C. § 78lll,
[32] Article 6 of the Model Code.
[33] §1503 of the Bankruptcy Code.
[34] Model Code, Article 15 and Bankruptcy Code, §1504.
[35] Bankruptcy Code, §1515, and Article 15 of the Model Code.
[36] Bankruptcy Code §1517 and Model Code, Article 17.
[37] Bankruptcy Code §1520 and Model Code Article 19.
[38] Bankruptcy Code §1528
[39] *Model Code, Article 26 and Bankruptcy Code §1525.*
[40] Model Code, Article 27 and Bankruptcy Code §1527.
[41] Model Code, Article 21 and Bankruptcy Code, §1521
[42] Case No. 08-13535 (S.D.N.Y., Oct. 31, 208), http://www.insolvency.ca/en/iicresources/resources/Tembecc.15RecognitionOrder.pdf.
[43] For a discussion of the Tembec litigation, see Bruce Nathan and Eric Horn, *Demystifying Chapter 15 of the Bankruptcy Code*, BUSINESS CREDIT (June, 2009).

SOCIAL MEDIA: THE ATTORNEY'S BEST "FRIEND" WHEN INVESTIGATING JURORS

by

Reginia Judge*

I. INTRODUCTION

We live in a technological age. The emergence of the Internet, computers, tablets, and smart phones makes it easy to obtain data. This advanced technology has its advantages. It keeps us abreast with minute-by-minute updates in times of disaster and allows us to check stock prices and make immediate decisions on buying and selling. The use of technology even helps us locate childhood friends and classmates. Yes, having information available with the click of a mouse has many benefits. Attorneys have long used technology to enhance their practice of the law. Databases such as Lexis and Westlaw have assisted them in conducting legal research online. The Internet has also aided them in the investigation of prospective jurors. This paper explores the use of the Internet as a tool for investigating would-be jurors in an attempt to solidify the right to an unbiased jury as well as part of an attorney's overall trial strategy.

II. THE DEFENDANT'S RIGHT TO A FAIR TRIAL

The Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution require

fundamental fairness in the prosecution of all crimes.[1] Fundamental fairness necessitates that impartial juries hear and render verdicts pursuant to the Sixth Amendment.[2] At the center of this right is the guarantee that a jury's verdict will be based only on evidence admitted at trial and will not be motivated by outside influences.[3] "A potential juror, biased as a result of online "evidence" that has not been scrutinized by both sides …or influenced by the status updates of friends on Facebook, undermines the protections offered the defendant by the Sixth Amendment."[4]

The jury must consequently be composed of persons who will fairly hear the evidence presented at trial, and base their verdict solely on it and the relevant law.[5] It is therefore imperative that a juror be an individual who is able to disregard information or views perpetuated by the media, family and friends. Most importantly, he or she must be fair and impartial towards all parties to a lawsuit. Attorneys have begun to ensure this right by using the Internet to investigate prospective jurors.

III. THE JURY SELECTION PROCESS

The selection of jurors is a very important element of criminal trial procedure. Since they determine guilt or innocence, a decision that could send an individual to prison for life or sentence them to death, jurors must be selected with the utmost care. In order to qualify to serve as a juror, one must be a U.S. citizen, have residency in the summoning county, be physically and mentally capable of serving, have no

convictions for indictable offenses, be at least 18 years old, and finally, be able to read and understand English.[6]

Often referred to as a civic duty, the jury selection process begins with the receipt of a summons to appear on a specific day and the completion of a questionnaire. The questionnaire asks for information such as:

> "Their occupation, if they have earned any degrees and their areas of study, whether they belong to any clubs, associations or civic groups, such as, the Kiwanis, Rotary Club, Knights of Columbus, Veterans of Foreign Wars, American Legion, American Civil Liberties Union, National Rifle Association, League of Women Voters or any other organization, if they or any family member or close friend, ever applied to work or actually worked in any area of law enforcement, if they, or any family member, have been a member of any group that lobbies or takes public positions on law enforcement issues, or if they or a family member or close friend have been a victim of a crime."[7]

The goal of the questionnaire is to help the court determine whether one can decide a case fairly. A number of the inquiries found on it are based on the type of case that will be heard. Some questions have been provided by counsels of record with the prior approval from the presiding judge. Based on the questionnaire responses that the lawyers receive prior to trial, decisions can be made regarding whether to approve of a potential juror according to what is learned before going to court. If an attorney is undecided about a potential juror, he/she may formulate follow-up questions they wish to ask them in open court to help them come to a final decision.

Additional decision-making may be derived from what is learned during voir dire[8]. Questions asked may be based on information learned about the prospective jurors via the Internet. "… instead of relying on stereotypes and intuition to vet jurors during voir dire, litigators may use the vast resources available online to find information about potential jurors that is unlikely to come out during the usual voir dire process."[9] As a juror provides information on the websites he/she frequents or social networks he/she is a member of, the lawyer, armed with a laptop, can do on- the- spot research to explore the information found on these websites. A final decision can be made as to whether to keep or excuse the juror based on the information discovered in the few moments that the electronic research was performed.

Traditional methods of juror investigation employed the use of private detectives and jury consultants. These professionals would often use databases that house public information such as property-tax records. To gain insight into the juror's habits and lifestyle, they would also conduct interviews of neighbors and acquaintances.[10] This would yield basic background information such as age, religion, employer, socioeconomic and marital status, and political affiliation.[11] Today, lawyers are more technologically equipped to conduct their own searches. The World Wide Web provides extensive resources for learning about juror experiences and opinions with instant access at minimal to no cost, and without extensive leg work.[12] Essentially, any website containing an individual's name will bring forth results. A site like Social Mention allows searching of blogs, microblogs, networks and videos. In addition, it also enables receipt of daily email of requested search terms.[13]

Consequently, attorneys are better prepared for voir dire having had the opportunity to develop targeted questions from information obtained in advance that is designed to pinpoint biased individuals.[14] They are also armed with the information they need to dismiss those persons they believe would be unsympathetic towards their client.

"The entire group summoned for service by the assignment judge is called the jury panel."[15] They are also referred to as the venire, venireman or venire persons. A number of jurors are randomly selected and sent to courtrooms for further questioning. Upon arrival, the venire receives a brief description of the case that they may be hearing and introduced to the parties involved.

The trial court judge is charged with determining whether potential jurors have formed opinions based on pretrial publicity, or possess any bias that would prevent them from impartially determining a defendant's guilt.[16] This is accomplished during the voir dire phase of the jury selection process. In jurisdictions where attorneys are not allowed to personally question jurors, they are provided the opportunity to submit questions to the judge that are read for them, provided that the judge approves of the questions. Depending on their answers to questions posed, lawyers can excuse venire persons from serving as a juror. Each lawyer possesses a limited number of peremptory challenges to excuse a member of the panel. Attorneys use peremptory challenges when it is believed that a potential juror is prejudiced against their clients.[17] No explanation need accompany the reason for utilizing the peremptory challenge. Defense counsel and

prosecutors may use an unlimited number of challenges for cause to excuse a venireman based on partiality or bias. Here, for example, one can be excused if he/she knows a party to the lawsuit, or believes that the defendant is guilty based on information learned via pretrial publicity.

"Voir dire questions must be fashioned to elicit truthful responses from the potential juror which provide counsel an opportunity to ferret out hidden biases and exposure to the details of the pending case."[18] The trial court is not required to automatically exclude anyone who has heard about a case they might be judging. It is sufficient if the juror can lay aside his impression or opinion, and render a verdict based on the evidence presented in court.[19] Inquiries may include whether the prospective juror knows any of the witnesses that will provide testimony. They might also be asked if they or close friends or relatives were ever involved in a situation like the one presented in the case they might be hearing. In high profile cases, voir dire may contain questions about exposure to pretrial publicity. Probes might include inquiries about the sources of a possible juror's news and information on current events, how much television they watch, what stations they frequent and what magazines and newspapers they read.

IV. WHY IS IT IMPORTANT FOR ATTORNEYS TO USE THE INTERNET TO INVESTIGATE PROSPECTIVE JURORS?

A. To Ensure that an Impartial, Unbiased Jury is Impaneled

Attorneys must be diligent about discovering would-be jurors' online habits. Therefore, our age requires that voir dire include questions about the amount of time they spend on the Internet, their level of use of social media, if they post videos, whether they participate in chat rooms, or post on bulletin boards or maintain a blog. "The Internet's current national and even international influence on information-gathering by the public at large renders it a significant consideration when choosing a jury.]"[20] The aim of this exploration is to discover material that will lead to further investigation of the venire. "Voir dire questions regarding Internet use must be structured to reveal information about venireman's pre-existing opinions about the case and any biases or prejudices they may hold."[21]

A wealth of information can be gained by delving into the online activities of possible jurors. Because voir dire questions are asked in open court in the presence of the judge, counsel, court personnel and others, potential jurors may be hesitant or embarrassed to answer some questions truthfully.[22] Social science research indicates that jurors are typically more candid in their online communications concerning their feelings and opinions on a subject, than they are on questionnaires and during voir dire.[23] "…a user updating a post on Facebook or Twitter or their personal blog, is likely to be more honest and provide "unvarnished" opinions, attitudes or values than they would feel comfortable expressing in a formal setting such as a courtroom. The kinds of candid disclosures that would preclude a potential juror from serving are more and more likely to appear on social media."[24] This is why online investigation of potential jurors is so very important. It is vital that this type of information is ascertained before the use of

peremptory challenges. For example, an attorney representing a defendant who has been accused of animal cruelty may want to use a peremptory challenge to excuse someone who constantly expresses his love for animals on Facebook. This juror's affection for animals would probably cloud his or her judgment. He or she would most likely be biased against someone accused of hurting animals. If the case at bar involves a products liability claim against a boat manufacturer, one who posts numerous pictures of his boat that was made by the same manufacture on Instagram, may be an ideal juror for the defense. This is because said juror would most likely be partial towards the manufacturer. He or she would associate his or her boat with the manufacturer rather than the plaintiff's.

The goal of these online searches is to uncover clues as to potential prejudices that a venire person may possess. It is therefore imperative to ask prospective jurors about the websites they frequent, and whether they use the Internet to obtain news information. The lawyer should therefore note the mission statement or goals of the website visited. Examining the websites frequented by jurors can also indicate whether they have been exposed to pretrial information concerning their client or the criminal justice system in general. "Voir dire that fails to recognize the vast amount and varied content of information to which potential jurors may be exposed on-line will not adequately ensure the selection of an impartial jury."[25]

The *Mu'Min v. Virginia*[26] case provides an example of an attorney attempting to learn what potential jurors knew about his client from information found online. The petitioner murdered a woman after he escaped from a prison work detail.

During his trial, Mu'Min submitted 64 proposed voir dire questions to the trial judge. Some required questioning on the content of news stories that jurors might have read regarding his case. Petitioner argued that his rights were violated when the trial judge refused to question prospective jurors about the specific contents of reports to which they had been exposed. The United States Supreme Court held that the Constitution does not require voir dire inquiries into the specific content of pretrial publicity to which a potential juror has been subjected.[27] It does, however, allow for the ability of defense counsel to inquire as to what forums the juror was exposed to, which includes online mediums. The task of uncovering specific information viewed is the responsibility of defense counsel; not the court. This statement makes online juror investigation essential.

B. To Select Prospective Jurors that are Sympathetic Towards Your Client

One of the attorney's objectives is to determine if the potential juror would be one that is more favorable to their client's position. Clues are therefore used to fathom how that individual might vote during deliberations. These clues were formally solely based on questionnaires, voir dire responses and hunches. The Internet now allows jurists to base these assessments on more concrete data. For instance, a pretrial Internet search revealed a potential juror's membership in a claustrophobics support group. This caused one attorney to select that person for a products liability case. The claim involved an allegation that the plaintiff was injured after he was forced to clean a machine in a confined space. With this

juror as the jury foreperson, a verdict was rendered in favor of the plaintiff.[28]

C. To Confirm the Accuracy of Information Provided by Prospective Jurors

Another advantage of conducting online juror investigation is its usefulness in confirming the accuracy of information included on questionnaires and during voir dire. It helps in discovering omitted information or occasions when someone simply lies. During the 2005 corruption trial of former Illinois Governor George Ryan, *Chicago Tribune* reporters discovered such deceit during the eighth day of deliberations. The Internet search revealed that two jurors had lied about prior criminal convictions. Both were convicted felons but each provided answers to the contrary on their questionnaires. Convicted felons are prohibited from serving on Federal cases. The court substituted alternate jurors during deliberations. Ryan was found guilty and sentenced to six and a half years in prison.[29] "Once jurors realize that many of their voir dire answers can be verified online, they will likely be more truthful or request dismissal from the case."[30]

While conducting online searches, an attorney must keep in mind that, "…there are a number people who post who they want to be, as opposed to who they are."[31] There may also be many people online with the same or similar names. Finally, posted information may be inaccurate. It is therefore important that all potential data found online be verified.

D. To Competently Represent a Client

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[32] Does this mean that attorneys have a duty to conduct online research of potential jurors in order to be considered competent?[33] This question is answered by reviewing the Rules of Professional Conduct. It states that, "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."[34] Comment 6 of Rule 1.1 advises, "In order to stay abreast of changes in the law and its practice, lawyers should have a basic understanding of technology's benefits and risks."[35] A lawyer's competence, moreover, includes awareness of technological developments that may affect the practice of law.[36] Commentators have also suggested that Rule 1.3 regarding diligence, may require counsel to investigate opposing parties and witnesses through social media sources as a matter of due diligence as well.[37] An attorney who fails to use technology to investigate potential jurors does his client a disservice. The accessibility of information online does not make searching for this information an option, but an obligation.

V. ATTORNEY PRETRIAL USE OF SOCIAL MEDIA TO INVESTIGATE POTENTIAL JURORS

The Internet is used to conduct legal research as well as a fact- finding mission to uncover important data for evaluation in the practice of law. "[A]nalysis of social media to conduct investigations of potential jurors can yield important

information."[38] It is imperative that an attorney investigate a venireman before and during the voir dire stage of the criminal justice process. Preparation is the key, and therefore it is wise to scrutinize would-be jurors as soon as the court provides their names and *their* responses to questionnaires. An online investigation begins with the use of several search engines. An individual's name is typed in the search window of a site such as Google, Bing, MSN, or Yahoo. Once the enter key is hit, a variety of related information is retrieved. Web sites, like Facebook, Twitter, LinkedIn, Instagram, Blogger and Pinterest, which contain the potential jurors' name as well as images, are located; provided that their privacy setting is disabled. Users often indicate their favorite television shows, books, movies, genre of music, and other interests on social network sites. Forums for denoting religious and political views and association memberships are also available. Facebook enables one to learn of individual's web screen names, relatives, people they admire and events they have attended or plan on attending. Social Networks allow users the ability to express themselves by posting videos, photos and articles found on other web pages. They can specify likes and dislikes by simply providing comments or opinions. These posts provide insight into a juror's experiences and ways of thinking. Most importantly, viewpoints can be gleaned from what is posted and shared with others.

VI. ATTORNEY USE OF SOCIAL MEDIA TO INVESTIGATE SITTING JURORS

Internet-based investigations do not end once a case begins. Monitoring jurors' social networking pages during the trial and

deliberations is a wise strategy. Doing so may alert the attorneys to instances of misbehavior. Statements posted by sitting jurors on social media websites can give rise to misconduct and the denial of the defendant's right to an impartial jury, thereby resulting in the possibilities of mistrials, motions to dismiss, and motions for new trials.[39] For this reason, lawyers should continue to monitor jurors for the duration of the litigation.[40] This is achieved by constant review of a juror's social network page, blog, etc. for inappropriate conduct.

Such monitoring took place in the *U.S. v. Fumo*[41] case. There it was learned that while Eric Wuest was a sitting juror he was posting statements about a case on Facebook and Twitter. After reviewing Wuest's online comments, the court held that they were innocuous and provided no information about the trial, much less his thoughts on the trial. Therefore, his postings did not cause a mistrial. His words were characterized as harmless ramblings having no prejudicial effect and were virtually meaningless. Wuest raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit."[42] In contrast, Juror Hadley Jons did make such remarks while hearing a Michigan criminal case. Jons was removed from service after a social media search discovered that she posted, "[A]ctually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY.:P." on her Facebook page.[43]

VII. ATTORNEY USE OF SOCIAL MEDIA TO INVESTIGATE RELEASED JURORS AFTER A VERDICT HAS BEEN RENDERED

In addition to conducting online juror searches before and during trial, it is also imperative that similar searches be conducted after a verdict is rendered as well. Some forms of juror misconduct can be the basis of new trials but it must first be uncovered. In some cases, vital information about a juror's behavior while sitting on a case may not be available until after a trial has concluded.

Retrials can be avoided if jurors are honest in their responses to questionnaires and during the voir dire phase. However, accountability does not stop here. The onus is also on counsel to conduct thorough investigations in spite of a belief that a juror has been candid. "'[i]f prospective jurors are better scrutinized during voir dire, [it is] more likely . . . to ….. avoid a mistrial." [44] The time and effort invested in the *Sluss v. Commonwealth of Kentucky* [45] case could have been avoided if the jurors were honest and if counsel had conducted social media searches prior to the trial. Appellant was convicted and sentenced to life in prison after crashing his truck into an SUV carrying Destiny Brewer, who died as a result of her injuries. Sluss requested a new trial after conducting a social media search that discovered that two jurors were Facebook friends with Brewer's mother during trial, and made misrepresentations during voir dire. Evidence suggested that jurors, Virginia Matthews and Amy Sparkman–Haney, were "friends" with April Brewer on Facebook during the trial. This, despite their assurances that they did not know the victim or

her family. Virginia Matthews also stated that she did not use Facebook.[46] The court remanded the case to conduct a hearing to determine if the jurors provided false information during voir dire, and the extent of their relationship with April Brewer. At the conclusion of the hearing it would determine whether the jurors should have been excused from hearing the matter. If so, it would set aside the verdict.[47] This trial could have taken place with other jurors had Matthews and Sparkman–Haney been honest, and if counsel had conducted a thorough online search before and during trial.

VIII. JUDICIAL ATTITUDES TOWARDS ELECTRONIC JUROR INVESTIGATION

Attitudes toward conducting Internet juror research vary. Some judges argue that Internet use interferes with the trial process. However, attorneys contend that it is pivotal to jury selection.[48] Jurisdictions, courthouses, and even individual courtrooms have conflicting policies on use the use of electronic devices for juror investigation. Each judge in state and federal court may set different policies.[49] There are no iron-clad rules about the use of social media research during voir dire or any other stage of the trial process.[50]

A. Against Use

Electronic juror investigating during voir dire was a major issue in the *Carino v. Muenzen* case.[51] Here, the plaintiff appealed after the dismissal of his medical malpractice lawsuit. During voir dire, Carino's lawyer attempted to use his laptop to investigate potential jurors. Defense counsel objected and the court sustained the objection, thereby halting the search. It

reasoned that the ability to conduct the Internet investigation provided plaintiff's counsel with an unfair advantage over the defendant's attorney.[52] The jury ruled in favor of the defense and the plaintiff appealed. While the appellate court affirmed the lower court's holding, it nonetheless found that Carino's counsel should have been allowed to conduct juror research on his computer. It concluded, "Despite the deference we normally show a judge's discretion in controlling the courtroom, we are constrained in this case to conclude that the judge acted unreasonably in preventing use of the internet by Joseph's counsel. There was no suggestion that counsel's use of the computer was in any way disruptive."[53]

Judges in other cases have taken this stance as well. District Judge David Coar banned all electronic searches of prospective jurors in the corruption trial of former Chicago mayoral aide Robert Sorich and codefendant Tim McCarthy in 2006.[54]

B. In Favor of Use

Conversely, other courts have observed that counsel has an affirmative obligation to review publicly available information about potential jurors. Some courts consider juror investigation a mandate. In *Johnson v. McCullough*,[55] juror Mims failed to divulge that she was at various times, a party to several litigation actions during voir dire. A subsequent investigation revealed the nondisclosure after the verdict in favor of the defendant. The trial court found that Mims' nondisclosure was intentional, and therefore presumed bias and prejudice. The verdict was set aside and a new trial ordered. While the court held that the juror acted improperly, it also

noted that litigants should attempt to prevent retrials by completing investigations early in the process. It indicated that a party must use reasonable efforts to examine jurors selected but not empanelled, and present to the trial court any relevant information prior to trial.[56]

C. Attorneys Must Divulge Information Found

Does an attorney have an obligation to provide the court with the results of its searches of would-be jurors? According to *United States v. Daugerdas, et al*.,[57] -the answer is yes. Here, defendants moved for a new trial claiming juror misconduct on behalf of Catherine M. Conrad. During voir dire, Conrad was asked about the highest level of education she had attained. She responded that she had a BA in English literature and classics. She also stated that she did not work outside the home but was a stay-at-home wife. Finally, she had specified that she lived in Westchester County all of her life.[58] All this information was false. Conrad had lied extensively about her educational, personal, and professional background; including failing to disclose her legal education, her suspension from practicing law, and her extensive criminal background. Much of this information was discovered by the attorneys for defendant, David K. Parse. "….prior to voir dire, Brune & Richard had conducted a Google search of the terms "Catherine Conrad" and "New York" and discovered the 2010 Suspension Order, suspending a Catherine M. Conrad from the practice of law."[59] However, they never divulged this information to the court. The firm conducted further research on Conrad during the course of the trial, and determined that she had also lied about other information provided during voir

dire. It never divulged this information to the court either. The court granted new trials to all defendants except Parse. It found that according to Parse's attorneys' investigation, they knew or should have known that Conrad had lied during voir dire. It held that Brune & Richard should have advised the court of the results of its search. Their failure to bring misconduct to the court's attention tainted the integrity of the proceedings. It also waived Parse's right to challenge the partiality of the jury based on juror misconduct.[60]

IX. ETHICAL CONSIDERATIONS - EX PARTE CONTACT WITH JURORS

A lawyer may read public postings on jurors' social media pages before and during trial. However, professional and ethical standards regarding the access and use of social media must be adhered to. This means that counsel must be armed with knowledge of the mechanics of any social media service or website used. Failure to be adequately equipped with knowledge of site could result in inadvertent prohibited communication with jurors. This type of communication occurs when a juror is aware that an attorney has viewed his social network page or profile, even though no actual dialogue was initiated.[61] Ethical rules forbid the ex parte communication between attorneys and jurors. It states that, "A lawyer shall not:

> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;[62]

This means that an attorney may only monitor social networking accounts passively. They may not "friend," "tweet," "follow," or subscribe to their Twitter or YouTube feeds or channels, view them on LinkedIn (since it automatically notifies a user when someone looks at their profile, with no other action by the user viewing the information),[63] message or email venire persons.

Lawyers cannot access information by getting around any privacy blocks the juror has put in place. They may only view that which has been put on public display.[64] This rule may not be circumvented by having another person "friend" a juror. "For example, a lawyer who hires a private investigator to "friend" a witness whose profile is generally private may violate ethical rules unless the investigator clearly discloses an affiliation with the lawyer."[65] "In 2011, disciplinary proceedings were initiated against two New Jersey litigators whose paralegal friended a represented plaintiff."[66] An attorney may not make misrepresentations to obtain information that would otherwise not be obtainable: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."[67]

X. CONCLUSION

Attorneys cannot disregard the fact that the Internet provides a means of zealously representing a client. Many are relying on it to research prospective jurors and gain an advantage at trial.[68] It behooves lawyers to take advantage of the opportunity to go the extra mile when engaged in litigation. Lawyers have the authority to perform online investigations and monitor jurors. Bar Associations and the Model Rules agree that this practice is mandatory if one is to competently represent their client. "[A]ttorneys who understand how social media can help or hurt their clients and have well-defined plans for tackling social media issues, will be in the best position to successfully advocate for their clients."[69] "In the end, however, the net result of this use of research on jurors to select an unbiased jury may be the creation of a balanced panel."[70]

ENDNOTES

[1] U.S. Const. amends. V & XIV, §1.
[2] U.S. Const. amend. VI.

[3] Mark Geragos, *Celebrity Prosecutions: The Thirteenth Juror: Media Coverage of Supersized Trials*, *39* Loy. L.A. L. Rev. 1167, 1169 (2006).
[4] Kristin R. Brown, *Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality* 19 Tex. Wesleyan L. Rev. 809, 814 (2013).
[5] Geragos at 1175.
[6] N.J.S.A. 2B:20-1.
[7] United States, Sample Juror Questionnaire. http://www.fjc.gov/public/pdf.nsf/lookup/dpen0023.pdf/$file/dpen0023.pdf . Last viewed on July 22, 2014.
[8] Voir dire, from French "to see to speak, is the questioning of prospective jurors by a judge and attorneys in court. Voir dire is used to determine if any juror is biased and/or cannot deal with the issues fairly, or if there is cause not to allow a juror to serve (knowledge of the facts; acquaintanceship with parties, witnesses or attorneys; occupation which might lead to bias; prejudice against the death penalty; or previous experiences such as having been sued in a similar case). Law.com http://dictionary.law.com/Default.aspx?selected=2229. Last visited July 8, 2014.
[9] Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 Am. J. Trial Advoc. 597, 599 – 600 (2013).
[10] Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. Kan. L. Rev. 611, 618 (2012).
[11] Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. Rev. Discourse 28, 31. (2011).
[12] Robinson at 609.
[13] Kristin R. Brown, *Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality*, 819 Tex. Wesleyan L. Rev. 809, 828 (2013).
[14] Brown at 828.
[15] New Jersey Courts. http://www.judiciary.state.nj.us/juror.htm. Last viewed on July 14, 2014.
[16] Patton v. Yount, 467 U.S. 1025, 1035 (1984).
[17] Robert B. Gibson, Jesse D. Capell, *Researching Jurors on the Internet--Ethical Implications*, 84-DEC N.Y. St. B.J. 10, 12 (2012).
[18] Erika Patrick, *Protecting The Defendant's Right To A Fair Trial In The Information Age*, 15 Cap. Def. J. 71, 72 (2002).
[19] Irvin v. Dowd, 366 US 717, 722 (1961).
[20] Patrick at 71.
[21] Id. at 89.
[22] Prospective Juror Questionnaires Made Easy. http://www.thefederation.org/documents/v61n2_daniels.pdf. Last viewed on July 17, 2014.

[23] Babcock at 44.
[24] Id at 45.
[25] Patrick at 72.
[26] Mu'Min v. Virginia, 500 U.S. 415 (1991)
[27] Id. at 431.
[28] Hoffmeiser at 626.
[29] Jamila A. Johnson, *Voir Dire: To Google or Not to Google*, Law Trends & News. Vo 5. No. 1. Fall 2008. http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/litigation_johnson.html. Last visited August 26, 2014.
[30] Hoffmeister at 34.
[31] Robinson at 629.
[32] Model Rules of Professional Conduct Rule 1.1 (2013).
[33] Carole Buckner, "Legal Ethics, Social Media, And The Jury" 55-NOV Orange County Law. 32, 33 (2013).
[34] Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2009).
[35] Model Rules of Prof'l Conduct R. 1.1 cmt. 6 (2009).
[36] Steven C. Bennett, *Ethical Limitations on Informal Discovery of Social Media Information*, 36 Am. J. Trial Advoc. 473, 478 (2013).
[37] Maryt L. Fredrickson, *Social Media Competence, Diligence and Other Ethical Issues*, 37-APR Wyo. Law. 28 (2014).
[38] Buckner at 35.
[39] Emily M. Janoski-Haehlen, *The Courts Are All a 'Twitter': The Implications of Social Media Use in The Courts*, 6 Val. U. L. Rev. 43, 46 (2011).
[40] Zachary Mesenbourg, *Voir Dire In The #Lol Society: Jury Selection Needs Drastic Updates To Remain Relevant in The Digital Age*, 47 J. Marshall L. Rev. 459, 465 (2013).
[41] U.S. v. Fumo, 639 F.Supp.2d 544 (2009).
[42] Fumo at 555.
[43] Jameson Cook, Facebook Post Is Trouble for Juror, MACOMB DAILY, Aug. 28, 2010, http:// www.macombdaily.com/articles/2010/08/28/news/doc4c79c743c66e8112001724.txt. Last visited September 4, 2014.
[44] Janoski-Haehlen at 62.
[45] Sluss v. Commonwealth of Kentucky, 381 S.W.3d 215 (2012).
[46] Id. at 220.
[47] Id. at 229.
[48] Janoski-Haehlen at 43.
[49] Robinson at 610.

[50] Zachary Mesenbourg, *Voir Dire In The #Lol Society: Jury Selection Needs Drastic Updates to Remain Relevant In the Digital Age*, 47 J. Marshall L. Rev. 459, 465 (2013).
[51] Carino v. Muenzen, 2010 WL 3448071 (N.J. Super. A.D. Aug. 30, 2010).
[52] Id at 4.
[53] Id at 10.
[54] Anita Ramasastry, *Googling Potential Jurors: The Legal and Ethical Issues Arising from the Use of the Internet in Voir Dire*, May 30, 2010. Findlaw . http://writ.news.findlaw.com/ramasastry/20100730.html. Last visited August 26, 2014.
[55] Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010).
[56] Id. at 558.
[57] United States v. Daugerdas, 867 F. Supp. 2d 445 (S.D.N.Y. 2012).
[58] Id at 451.
[59] Id at 460.
[60] Id at 484 - 485.
[61] N.Y. County Formal Opn. 743 (2011); N.Y. City Bar Formal Opn. 2012-2 (2012).
[62] Model Rules of Prof'l Conduct R. 3.5.
[63] Maryt L. Fredrickson, *Social Media Competence, Diligence and Other Ethical Issues*, 37-APR Wyo. Law. 28, 29 (2014).
[64] Brown at 832.
[65] Hayes Hunt, Brian Kint, and Cozen O'Connor, *Juries and Social Networking Sites*, 37-DEC Champion 36 (2013).
[66] Maryt L. Fredrickson, *Social Media Competence, Diligence and Other Ethical Issues*, 37-APR Wyo. Law. 28, 29 (2014).
[67] Rule Model Rules of Prof'l Conduct R. 4.1(a) (2009).
[68] Gibson at 11.
[69] Hayes Hunt at 36.
[70] Robinson at 630.