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Attorney Duty to Search Case.net for Juror Nondisclosure: Missouri Supreme Court Rule 69.025

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NOTE

Attorney Duty to Search Case.net for Juror Nondisclosure: Missouri Supreme Court Rule 69.025

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

JOHN CONSTANCE*

I. INTRODUCTION

The term voir dire derives from the Latin phrase *verum dicere*, literally meaning "to speak the truth."[1] In American jurisprudence, voir dire has come to mean the pretrial questioning of venire members during which a judge or party is given the opportunity to ask the prospective jurors questions in an attempt to reveal their personal tendencies and possible biases.[2] Missouri courts have held that the right to a fair and impartial panel of twelve qualified jurors is the cornerstone of the judicial system.[3] As such, it is the duty of prospective jurors on voir dire examination to "fully, fairly, and truthfully answer all questions so that qualifications for service may be determined and challenges properly exercised."[4] Or, more simply, they must speak the truth.

Yet, history has shown that jurors are often not wholly honest and forthcoming when answering questions during voir dire, despite being under oath.[5] One study of Illinois criminal trials found that almost one in five prospective jurors withheld information during questioning.[6] Within civil trials, a recur-

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I would like to thank my parents for their continual support and my brother for his research assistance.

1. BLACK'S LAW DICTIONARY 1605 (8th ed. 2004).

2. Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1428 (1994).

3. *See, e.g.*, Beggs v. Universal C. I. T. Credit Corp., 387 S.W.2d 499, 503 (Mo. 1965) (en banc).

4. Payne v. Cornhusker Motor Lines, Inc., 177 S.W.3d 820, 841 (Mo. App. E.D. 2005) (citing Grab *ex rel.* Grab v. Dillon, 103 S.W.3d 228, 240 (Mo. App. E.D. 2003)).

5. *See infra* note 6 and Part V.A.

6. Arthur H. Patterson & Nancy L. Neufer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 CORNELL J.L. & PUB. POL'Y 97, 103 & n.41 (1997) (citing Linda L. Marshall, Juror, Judge, and Counsel Voir Dire Perceptions

rent issue before Missouri courts is whether a prospective juror's nondisclosure of prior litigation has led to an unfair verdict.[7]

Besides physically searching through thousands of court documents shelved in a clerk's office or waiting days for a response from an indexing bureau, disclosure during voir dire traditionally had been the only means by which a Missouri attorney could learn of a juror's prior litigation history. But with the advance of Internet technology and Missouri's subsequent implementation of an automated court record system through Case.net, Missouri attorneys now have a free and potentially easy means to search a prospective juror's litigation experience.[8]

In an attempt to reduce the number of retrials granted due to juror nondisclosure, the Supreme Court of Missouri mandated in *Johnson v. McCullough* that counsel search prospective jurors' litigation history on Case.net and bring reasonable suspicion of juror nondisclosure to the trial court's attention *prior* to jury empanelment.[9] An official court rule explaining the requirement was issued shortly after the *Johnson* decision, and it became effective on January 1, 2011.[10]

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and Behavior in Two Illinois State Courts (1983) (unpublished partial Ph.D. dissertation, Boston University)).

7. In the past five years, there have been at least seven instances in Missouri in which a prospective juror's failure to disclose prior litigation has resulted in a new trial or a remand for an evidentiary hearing. *See* Johnson v. McCullough, 306 S.W.3d 551, 554 (Mo. 2010) (en banc) (per curiam); Overlap, Inc. v. A.G. Edwards & Sons, Inc., 318 S.W.3d 219, 230 (Mo. App. W.D. 2010); Fielder v. Gittings, 311 S.W.3d 280, 282 (Mo. App. W.D. 2010); Sapp v. Morrison Bros. Co., 295 S.W.3d 470, 473 (Mo. App. W.D. 2009); Massey v. Carter, 238 S.W.3d 198, 202 (Mo. App. W.D. 2007); Campise v. Borcherding, 224 S.W.3d 91, 97 (Mo. App. E.D. 2007); Bradford v. BJC Corporate Health Servs., 200 S.W.3d 173, 183 (Mo. App. E.D. 2006).

8. *See infra* note 19.

9. *Johnson*, 306 S.W.3d at 554.

10. Rule 69.025 is as follows:

> (a) Proposed Questions. A party seeking to inquire as to the litigation history of potential jurors shall make a record of the proposed initial questions before voir dire. Failure to follow this procedure shall result in waiver of the right to inquire as to litigation history.
>
> (b) Reasonable Investigation. For purposes of this Rule 69.025, a "reasonable investigation" means review of Case.net before the jury is sworn.
>
> (c) Opportunity to Investigate. The court shall give all parties an opportunity to conduct a reasonable investigation as to whether a prospective juror has been a party to litigation.
>
> (d) Procedure When Nondisclosure Is Suspected. A party who has reasonable grounds to believe that a prospective juror has failed to disclose that he or she has been a party to litigation must so inform the court before the jury is sworn. The court shall then question the prospective juror or jurors outside the presence of the other prospective jurors.
>
> (e) Waiver. A party waives the right to seek relief based on juror nondisclosure if the party fails to do either of the following before the jury is

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It is uncertain if Missouri trial courts can interpret the rule in a way that minimizes the burden on attorneys to perform a Case.net search while still maintaining the rule's purpose – averting the need for retrials due to juror nondisclosure of prior litigation experience. The rule explicitly requires attorneys to search a juror's litigation history on Case.net if they desire to preserve their clients' rights to post-trial relief for juror nondisclosure.[11] If attorneys have reasonable grounds to suspect juror nondisclosure after this search, they must bring the matter to the trial court's attention.[12] What the rule leaves unclear, however, is how exhaustive a Case.net search must be and how much evidence is needed to produce "reasonable grounds" for suspicion.

II. FACTS AND HOLDING

In April of 2008, following a unanimous jury verdict, the Circuit Court of Jackson County entered judgment in favor of Dr. J. Edward McCullough in a medical malpractice action brought by McCullough's former surgical patient, Phillip Johnson.[13] During voir dire, jurors were asked by Johnson's counsel, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?"[14] While others answered affirmatively, venire member Maxine Mims remained silent.[15] Following the initial juror disclosures to the question, counsel asked the question again, "Now did I miss

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> sworn: (1) Conduct a reasonable investigation; or (2) If the party has reasonable grounds to believe a prospective juror has failed to disclose that he or she has been a party to litigation, inform the court of the basis for the reasonable grounds.
>
> (f) Post-Trial Proceedings. A party seeking post-trial relief based on juror nondisclosure has the burden of demonstrating compliance with Rule 69.025(d) and Rule 69.025(e) and may satisfy that burden by affidavit. The court shall then conduct an evidentiary hearing to determine if relief should be granted.

MO. SUP. CT. R. 69.025.

11. *Id.*

12. *Id.*

13. Substitute Brief of Appellants J. Edward McCullough, M.D. and Mid-America Gastro-Intestinal Consultants, P.C. at 7, *Johnson*, 306 S.W.3d 551 (No. SC 90401)), 2009 WL 5250964. Johnson suffered from dysphagia, or difficulty in swallowing. *Id.* at 2. At some point during or shortly after an esophageal dilation performed by Dr. McCullough, a Kansas City-area gastroenterologist, Johnson's esophagus developed a perforation. *Id.* One day later, Johnson was taken to an emergency room. *Id.* at 4. A different doctor, Dr. Gorton, performed a thoracotomy procedure to repair the perforation. *Id.* at 4-5. Johnson filed suit, asking for recovery for damages suffered as a result of the thoracotomy, on the belief that because of Johnson's medical history, Dr. McCullough shouldn't have performed the esophageal dilation. *Id.* at 5.

14. *Johnson*, 306 S.W.3d at 554.

15. *Id.*

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anyone here? I just want to make sure. No other people that have been, not including family law, a plaintiff or a defendant on any case? Let the record reflect that I see no additional hands."[16] Mims never raised her hand, and she was ultimately chosen to sit on the jury.[17] After six days of trial and forty minutes of deliberation, the jury found that Dr. McCullough had not breached the standard of care during Johnson's surgery.[18]

Within forty-eight hours of the jury's verdict, Johnson's counsel searched Missouri's automated case record system on Case.net[19] and found that Mims had indeed been involved in numerous lawsuits unrelated to family law.[20] Mims had been party to a personal injury case, and she had been a

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16. *Id.* at 556.

17. *Id.* at 554-55.

18. *Id.* at 555.

19. The implementation of Case.net traces back to the mid-1980s where, through Administrative Rule 1, the Supreme Court of Missouri authorized the development of "a Statewide Judicial Information System to provide for the management of information disseminated through the state court system." LYNN COOPER HEARNES, MISSOURI STATEWIDE AUTOMATION: A WORK IN PROGRESS 11 (2000). In 1994, the Missouri legislature enacted Senate Bill 420, which created funding through a seven-dollar per-case court fee to fund a statewide court automation project. *Id.* at 14. The project was designated "Electronic Courts/2004" and was to be overseen by the newly created Missouri Automation Committee. *Id.* at 12, 14. The state supreme court's website débuted two years later in 1996 and allowed for public access to court opinions and limited case record and docket information. *Id.* at 17. The new case management system, Justice Information System, came online in 1998-1999 with three sites, Montgomery County, the Court of Appeals, Eastern District, and Jackson County, serving as pilots. *Id.* at 20. Justice Information System (JIS) is case-management software that allows courts to electronically upload case information. *See* Your Missouri Courts, Case.net General Help, http://www.courts.mo.gov/case.net/casenet help.nsf/dd5cab6801f1723585256474005327c8/842898cd604d014d8625681d005927 bb?OpenDocument (last visited Feb. 13, 2011). When an online user accesses Case.net and performs a search, the request is routed through the JIS system. *Id.* Thus, only cases from courts which have implemented the JIS program can be searched on Case.net. *Id.* JIS implementation was completed in all Missouri state circuit courts, appellate courts, and the supreme court by the spring of 2008. Court Specific Help, https://www.courts.mo.gov/casenet/help/CourtSpecificHelp.htm (last visited Feb. 13, 2011) (noting that Greene County was the last county to adopt JIS in 2008). Currently, only a few municipal courts are using JIS. *See id.* Case.net allows free public access to Missouri cases that have been deemed public through Court Operating Rule 2. Your Missouri Courts, https://www.courts.mo.gov/casenet/ base/welcome.do (last visited Feb. 13, 2011). Public case information includes, but is not limited to, attorney and party names and addresses, case numbers, filing dates, judgments, and appellate decisions. *Id.* Case.net can be accessed by visiting http://www.courts.mo.gov/casenet.

20. *Johnson*, 306 S.W.3d at 555; Substitute Brief of Appellants, *supra* note 13, at 7-8.

defendant in multiple debt collection actions.[21] At least three of the lawsuits had been filed within two years of the February 2008 trial date.[22]

Johnson filed a motion for new trial with the circuit court, alleging intentional juror nondisclosure due to Mims' failure to reveal her litigation history when asked during voir dire.[23] Following the motion, the trial court conducted a hearing.[24] Without an affidavit from Mims or any other witness testimony, the trial court granted Johnson's motion for new trial based solely upon Mims' prior litigation experience found on Case.net.[25] The court believed that the question posed by Johnson's counsel to the venire members regarding litigation history was "clear and unambiguous and that Mims' involvement in prior litigation was recent."[26] Therefore, the court found Mims' nondisclosure to be intentional and prejudicial, thereby warranting a new trial.[27]

McCullough appealed the grant of the motion for new trial.[28] At the hearing and on appeal, Dr. McCullough argued that Johnson's post-trial motion for a new trial was not timely.[29] Put differently, Dr. McCullough argued that Johnson's counsel waived the right to a new trial by failing to investigate Mims' litigation history prior to the excusal of alternate jurors, as the infor-

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21. *Johnson*, 306 S.W.3d at 555.

22. *Id.*; Substitute Brief of Plaintiff-Respondent Phil Johnson at 4-5, *Johnson*, 306 S.W.3d 551 (No. SC 90401), 2009 WL 5250962.

23. *Johnson*, 306 S.W.3d at 555.

24. *Id.*

25. *Id.* Prior to the Supreme Court of Missouri's ruling in *Johnson*, so long as the attorney had no actual knowledge of the undisclosed information prior to or during trial, there was no requirement that an attorney bring a juror nondisclosure issue to the court's attention pre-verdict in order to preserve the right to a new trial. *Id.* at 558 (citing McBurney v. Cameron, 248 S.W.3d 36 (Mo. App. W.D. 2008)).

26. *Id.* at 555.

27. *Id.* Missouri common law has established a two-prong test for determining whether a new trial is warranted for juror nondisclosure. *See* State v. Mayes, 63 S.W.3d 615, 625 (Mo. 2001) (en banc). First, it must be decided whether a nondisclosure occurred at all. *Id.* To do so, a court determines if the juror was able "to comprehend the information solicited by the question asked." *Id.* If there was a nondisclosure, then the court must decide if "it was intentional or unintentional." *Id.* If intentional, bias and prejudice are usually presumed if material information was withheld, and a new trial is justified. *Id.* If the nondisclosure was unintentional, then it must be found that prejudice resulted from the nondisclosure. *Id.* Factors such as the recency of prior litigation and the materiality of the undisclosed information are considered in determining if the nondisclosure was prejudicial. *See Johnson*, 306 S.W.3d at 557. An examination of the facts in *Johnson* that led the circuit court to grant a new trial based upon Mims' nondisclosure is beyond the scope of this Note.

28. *Johnson*, 306 S.W.3d at 555. Because the court found the issue of intentional nondisclosure dispositive, it did not address Johnson's additional support for a new trial. *Id.*

29. *Id.* at 558.

mation was readily available for review during the trial through Case.net.[30] The Missouri Court of Appeals, Western District, upheld the trial court's ruling that Mims' nondisclosure merited a new trial.[31] The court rejected the timeliness argument on the grounds that Missouri law did not support the position that "prior litigation experience must be raised before submission."[32]

The Supreme Court of Missouri granted transfer.[33] The court upheld the trial court's grant of a new trial.[34] However, the court mandated that in future cases "a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information *prior to trial*."[35] Additionally, the court stated that it would establish a rule clarifying parties' research obligations.[36] That rule was announced on June 25, 2010 and went into effect on January 1, 2011.[37]

III. LEGAL BACKGROUND

The question of whether an attorney has a duty to investigate a venire member's prior litigation experience far predates the creation of Missouri's Case.net system and even the Internet itself. In the 1955 Supreme Court of Missouri case *Woodworth v. Kansas City Public Service Co.*, which stemmed from the collision of an automobile with a streetcar in downtown Kansas

30. Substitute Brief of Appellants, *supra* note 13, at 12.

In a second point on appeal, McCullough argued that the nondisclosure was not intentional because the question asked to venire members regarding their prior litigation experience "was unclear and did not trigger in Juror Mims a duty to respond with the entirety of her litigation experience." *Id.* at 32. Like the trial court, both the Western District and the Supreme Court of Missouri dismissed this argument, finding the question to be sufficiently clear to warrant disclosure of Mims' previous suit. *Johnson*, 306 S.W.3d at 557; Johnson v. McCullough, No. WD 69772, 2009 WL 1851140, at *3 (Mo. App. W.D. June 30, 2009).

In his last point, McCullough argued that Juror Mims' nondisclosure was unintentional because Johnson only supported the intentional nondisclosure claim with Case.net records, rather than directly with an affidavit or testimony. *Johnson*, 306 S.W.3d at 557. Thus, because there was not sufficient evidence that the nondisclosure was unintentional, McCullough argued that no prejudice resulted from the nondisclosure. *See id.* Both the Western District and the Supreme Court of Missouri rejected this argument on the grounds that Missouri law does not support the argument that such evidence is necessary to show intentional nondisclosure. *Id.* at 558; *Johnson*, 2009 WL 1851140, at *4.

31. *Johnson*, 2009 WL 1851140, at *5.

32. *Id.*

33. *Johnson*, 306 S.W.3d at 554.

34. *Id.*

35. *Id.* at 559 (emphasis added).

36. *Id.*

37. MO. SUP. CT. R. 69.025.

City, Kansas, the defendant moved for a new trial after it was discovered that a juror had failed to disclose a prior claim involving himself and the defendant's streetcar company.[38] The plaintiff contended that a new trial was unwarranted because the defendant had in its business files the record of the juror's prior claim against the defendant.[39] The Supreme Court of Missouri held that even if a party moving for a new trial had access to information that would dispute a venire member's voir dire response, a new trial could be granted so long as there was no actual knowledge by the party of the juror's prior litigation.[40]

In 1972, the Supreme Court of Missouri was again faced with juror nondisclosure in *Rodenhauser v. Lashly*.[41] During voir dire questioning, counsel for the defendant asked the panel: "Let me ask you, if you will, to raise your hand, those of you who have ever brought a suit for personal injuries, or received any money for personal injuries you had . . . ."[42] Even though the question was asked multiple times and counsel for the plaintiff warned that juror nondisclosure could lead to a mistrial, venire member Marie Sikorski kept her hand down and was selected to the jury.[43] Following a jury verdict in favor of the plaintiff, the trial court granted the defense's motion for a new trial after Sikorski's past litigation was revealed.[44]

On appeal before the Supreme Court of Missouri, the plaintiff conceded that under Missouri law a complaining party waived its right to object to juror voir dire nondisclosure only in instances of actual knowledge, but he asked the court to re-examine the law.[45] The plaintiff argued that the law should not allow counsel to "'sandbag' the court" and opposing parties by ignoring "rea-

38. 274 S.W.2d 264, 265 (Mo. 1955). The court's opinion never mentions who discovered the juror's previous litigation or how this information became known to the court. In 1942, the juror settled a "property damage" claim against the defendant for twenty-six dollars, and in 1951, the juror collided with one of the defendant's streetcars while driving his wife's automobile. *Id.* at 270. The juror stated that he did not mention these prior incidents with the defendant because he had "forgotten them." *Id.*

39. *Id.* at 271.

40. *Id.* Though the court was applying Kansas law to the negligence claim, it applied Missouri civil procedure law to decide the juror nondisclosure issue. *See id.* at 265, 270.

41. 481 S.W.2d 231 (Mo. 1972).

42. *Id.* at 232.

43. *Id.* at 233. Sikorski attributed the nondisclosure to her sleepiness at the time of voir dire questioning and her understanding of the question by plaintiff's counsel to mean claims "within a year or so" (whereas her claims had occurred about eight years prior to the present trial). *Id.*

44. *Id.* at 232. Two other jurors who had failed to answer voir dire questioning truthfully also factored into the court's grant of a new trial. *Id.*

45. *Id.* at 235. The case to which the Supreme Court of Missouri referred in determining the current juror nondisclosure law in Missouri is *Piehler v. Kansas City Public Service Co.*, 211 S.W.2d 459 (Mo. 1948).

dily available information during trial . . . with the hope of obtaining a favorable verdict."[46] In this case, the plaintiff reasoned that Sikorski's prior litigation was "readily available" because opposing counsel could have retrieved it through the Claims Indexing Bureau within two days.[47]

The Supreme Court of Missouri upheld the trial court's grant of a new trial,[48] but the opinion appeared to leave open the possibility that counsel could waive the right to move for a new trial for juror nondisclosure even if counsel had no actual pre-verdict knowledge of a juror's prior litigation history. The court noted,

> There is nothing in the record to support plaintiff's suggestion that the claims information was readily available to defendant's counsel and that defendant was 'sandbagging.' We also note that the cases which plaintiff cites as authority from other jurisdictions concern situations where . . . the records of the claims were in the files of the complaining party or his counsel rather than the situation where they were available through an outside service.[49]

The opinion seemed to suggest that had the plaintiff adequately shown that the information about Sikorski's past was readily available or that the defense had chosen not to research Sikorski to maintain plausible deniability of actual knowledge of her past (i.e. "sandbagging"), then the court might have decided that the defense had waived its right to move for a new trial. Also, the court noted that the plaintiff was only able to cite cases from other jurisdictions where the complaining party had records of a juror's previous claims in his or her files, unlike the present case where the records were held by a third-party – the Claims Indexing Bureau.[50] This last statement suggested that rulings in other jurisdictions might be useful as authority to deny a party the right to a new trial if the party possessed evidence of a juror's prior litigation in its records.

In the previously discussed case, *Woodworth*, involving the streetcar collision, the complaining party *did* have evidence of the juror's undisclosed previous litigation in its records.[51] Would the *Rodenhauser* court[52] have barred the complaining party from claiming juror nondisclosure if faced with the facts of *Woodworth*? That question has not yet been answered because there has not been a Missouri case since *Woodworth* in which the complaining party was in direct possession of files confirming a juror's prior litigation

46. *Rodenhauser*, 481 S.W.2d at 235.

47. *Id.* This author was unable to locate any history regarding the Claims Indexing Bureau.

48. *Id.*

49. *Id.*

50. *Id.*

51. Woodworth v. Kan. City Pub. Serv. Co., 274 S.W.2d 264, 271 (Mo. 1955).

52. *See supra* notes 41-50 and accompanying text.

history. Similarly, there is not any known Missouri case in which a party was shown to be sandbagging the court by intentionally waiting until after trial to learn of a juror's past.

Only one year before the *Rodenhauser* decision, the United States District Court for the Western District of Missouri in *Morrison v. Ted Wilkerson, Inc.* did find that a juror's previous litigation history was readily available to the complaining party.[53] In *Morrison*, a juror failed to disclose a prior personal injury claim during voir dire questioning.[54] The court determined that a record of that claim was "readily available to counsel before or during trial" through an insurer's index bureau.[55] Following a jury verdict in favor of the plaintiffs, the defendants discovered the nondisclosure and motioned the court for a new trial.[56] Because the court found the undisclosed prior litigation to be neither intentional nor prejudicial, it was not necessary for the court to decide whether having the information readily available was grounds to reject a party's motion for a new trial.[57] However, in dicta the court expressed its displeasure with the complaining counsel's failure to check the bureau at any point during the four-day trial; the court stated that "[i]t is not in the interest of justice to have counsel wait until a case is lost to make inquiry in depth concerning the selected jurors."[58]

The 1970s decisions of *Rodenhauser* and *Morrison* appeared to pave the way for future Missouri courts to impose a duty upon counsel to investigate a venire member's prior litigation experience. However, the Supreme Court of Missouri in the 1994 *Brines ex rel. Harlan v. Cibis* decision firmly rejected any consideration of such an idea.[59]

As in *Woodworth*, the state supreme court in *Brines* held that a complaining party waives the right to a new trial only if he has actual knowledge regarding a prospective juror's false answer or nondisclosure but neglects to bring forth the information when it is uncovered.[60] The court explained that "[t]his rule does not, however, require that a litigant investigate whether the prospective jurors have answered the questions truthfully unless the litigant had some indication that the answer was false."[61] The court noted the potential problem of sandbagging but dismissed the concern because "[t]he requirement that litigants challenge jurors when the nondisclosure becomes apparent is sufficient to prevent abuse."[62] Furthermore, the court believed that the benefits derived from an attorney obligation to research a juror's liti-

53. 343 F. Supp. 1319, 1333 (W.D. Mo. 1971).
54. *Id.* at 1332.
55. *Id.* at 1333.
56. *See id.* at 1332.
57. *Id.* at 1332-33.
58. *Id.* at 1333.
59. 882 S.W.2d 138, 140 (Mo. 1994) (en banc).
60. *Id.*
61. *Id.*
62. *Id.*

gation history would not outweigh the "delays and logistical difficulties" of imposing such a duty.[63]

It took over a decade for Missouri courts to begin reconsidering the *Brines* position on the issue of the timeliness of a complaining party's efforts in researching the litigation history of venire members. By the time the Missouri Court of Appeals, Western District, heard *McBurney v. Cameron* in 2008,[64] Case.net provided access to the records of forty-four of the forty-five Missouri circuit courts and all of the Missouri appellate courts.[65] Unlike when only the Claims Indexing Bureau or an insurer's index bureau were available, attorneys now had free, twenty-four hour, nearly instantaneous access to many potential jurors' litigation history with just a computer and the Internet. In *McBurney*, the defendants moved for a new trial after they discovered post-verdict that a juror did not disclose that his business had been sued three times in the past.[66]

In its opinion, the appeals court expressed its frustration that defendants' counsel did not research the juror's history until after the verdict, especially since more than a week separated the selection of the jury and the submission of the case.[67] The court wrote that "timeliness in a juror challenge is important in view of the expense and burden to parties and taxpayers of conducting another jury trial."[68] Noting the great advances in Internet technology and the development of Case.net since the *Brines* decision thirteen years prior, the *McBurney* court stated that the "issue [of timeliness] may not necessarily be settled forever," and it "commend[ed] consideration of this matter to the attention of counsel trying future cases."[69]

Less than two years later, the issue of timeliness in a juror challenge was again raised – this time in *Johnson v. McCullough*.[70]

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63. *Id.*

64. 248 S.W.3d 36 (Mo. App. W.D. 2008).

65. Court Specific Help, *supra* note 19. When the trial court heard the *McBurney* case in February 2005, thirty-one out of the forty-five Missouri judicial districts were using JIS. Circuits Using the Justice Information System (JIS) as of June 30, 2005, https://www.courts.mo.gov/file.jsp?id=859 (last visited Feb. 13, 2011).

66. *McBurney*, 248 S.W.3d at 40.

67. *Id.* at 41.

68. *Id.*

69. *Id.* at 41-42.

70. 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam). A discussion of other states' rulings addressing counsels' obligation to research a juror's litigation history has not been included in the text of this Note because none of the Missouri courts' rulings on the issue have ever looked to precedent outside the State of Missouri. Moreover, few states other than Missouri have addressed the timeliness issue.

In 1969, an Ohio court found that counsel did waive its right to object to a juror's nondisclosure of litigation history because it failed to review the files of the defendant's claims department. Kaput v. City of Cleveland, 255 N.E.2d 889, 891 (Ohio C.P. 1969). This case involved a clear instance of sandbagging: while the defendants did not have actual knowledge during trial of the juror's nondisclosure, they

IV. INSTANT DECISION

The Supreme Court of Missouri, affirming the lower courts' judgment, held that plaintiff Johnson's juror nondisclosure argument was timely raised.[71] The court noted its earlier ruling in *Brines*, in which it rejected the defendants' argument that an issue regarding a juror's prior litigation history is waived if not raised before submission.[72] The court also considered defendant McCullough's reference to the *McBurney* decision, in which the court of appeals in dictum remarked upon its "willingness to delve into a claim about the issue of timeliness and waiver" due to the advances in the ability and ease of searching a juror's litigation history via Case.net.[73]

Following the analysis of Missouri precedent, the court held that it could not "convict the trial court of error in following the law in existence at the time of trial."[74] Additionally, the court found that "there was no evidence

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intended to cross reference the jurors with the claims department list for the purpose of seeking a new trial if an unfavorable verdict was returned. *Id.* at 890. The defendant's claims department kept a record of claims for the past thirty years and maintained this information specifically for the examination of witnesses and potential jurors. *Id.* The court held that the law does not require counsel to research potential jurors' venire answers, yet it carved out a very narrow exception to encompass the failure to act pre-verdict by the defendants in the case at hand. *See id.* at 891-92.

Only one state other than Missouri is known to have ruled on the issue during the Internet era. In 2002, the Supreme Court of Florida rejected the appeals court's ruling that counsel must conduct a public records investigation of the venire during trial to satisfy a "due diligence" requirement set forth in a prior Florida decision. Roberts *ex rel.* Estate of Roberts v. Tejada, 814 So. 2d 334, 344 (Fla. 2002). At the time of the *Tejada* ruling, Florida did not have a uniform search tool, such as Case.net, that would allow attorneys ready access to review court indexes. *Id.* at 344-45. Though the court noted that the current system would make challenging juror nondisclosure an "onerous" and "unacceptable burden," it also seemed to say that even if a system like Case.net were available, a venire research obligation would still not be imposed upon attorneys because it "would not resolve issues with regard to one's involvement in matters involving federal or foreign state jurisdictions." *See id.* at 344-46.

71. *Johnson*, 306 S.W.3d at 554. The Supreme Court of Missouri also affirmed the lower courts' ruling that the question asked to Juror Mims was sufficiently clear to warrant a duty to disclose. *Id.* at 557. Though the supreme court noted that the "better practice" would have been for the complaining party to obtain a deposition, affidavit, or testimony from Mims, it found that the trial court did not abuse its discretion in granting a new trial because "intentional concealment of material information has 'become tantamount to a per se rule mandating a new trial.'" *Id.* at 558 (quoting Williams *ex rel.* Wilford v. Barnes Hosp., 736 S.W.2d 33, 37 (Mo. 1987) (en banc)). A more in-depth discussion of the supreme court's rationale for these decisions is beyond the scope of this Note.

72. *Id.* at 558.

73. *Id.*

74. *Id.*

that it was practicable for the attorneys in this case to have investigated the litigation history of all of the selected jurors prior to the jury being empanelled."[75] Therefore, the court upheld the trial court's ruling "that Johnson's juror nondisclosure argument was timely."[76]

But the court went further. It deemed that given recent technological advances that allow parties to bring matters involving jurors' pasts to a court's attention at an earlier stage, parties "should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history."[77] The court held that "[l]itigants should endeavor to prevent retrials by completing an early investigation."[78]

This standard required all future litigants to use "reasonable efforts" to investigate a juror's prior litigation history on Case.net following selection but prior to empanelment.[79] If any pertinent information is discovered by this search then the party is to present this information to the court prior to trial.[80] This standard was to remain in effect until a state supreme court rule could be developed to provide specific direction.[81] To aid counsel, the supreme court directed trial courts to allow ample time for a Case.net review prior to jury empanelment and "provide the means to do so" when counsel communicates that they are unable.[82]

In a note explaining what it meant by "reasonable efforts," the court recognized the limitations of Case.net due to it being an unofficial record.[83] It noted that "Case.net may contain inaccurate [or] incomplete information."[84] Also, the court realized that Case.net may be of limited use in searches involving common or changed names.[85] The court left it to the trial courts to decide if parties had made a sufficient attempt to search Case.net for a juror's prior litigation history.[86] Lastly, the court absolved the parties of any obligation to search computerized record systems besides Case.net.[87]

On June 25, 2010, nearly four months after the *Johnson* decision, the Supreme Court of Missouri announced Missouri Supreme Court Rule 69.025, entitled "Juror Nondisclosure."[88] The rule went into effect on January 1, 2011.[89] The new rule says parties must make a record with the court prior to

75. *Id.*
76. *Id.*
77. *Id.* at 558-59.
78. *Id.* at 559.
79. *Id.*
80. *Id.* The court did not define what it meant by "prior to trial." *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 559 n.4.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. MO. SUP. CT. R. 69.025.
89. *Id.*

voir dire of their proposed inquiries into jurors' litigation history.[90] If a party fails to note its questioning intentions, then that party will have waived its right to inquire as to litigation history.[91]

The court then shall give parties an opportunity to conduct a "reasonable investigation" into whether a prospective juror has prior litigation experience – a reasonable investigation being a "review of Case.net before the jury is sworn."[92] After a reasonable investigation, if a party suspects prospective juror nondisclosure of previous litigation, it must inform the court, who then must address the issue with the prospective juror or jurors away from the others.[93] A party who neglects to conduct a reasonable investigation or who fails to present potential evidence of juror litigation history to the court has waived his or her right to seek relief based upon juror nondisclosure.[94]

The burden of showing compliance with the aforementioned requirements is placed on the party requesting post-trial relief.[95] Upon this showing, the court is then to "conduct an evidentiary hearing to [decide] if relief should be granted."[96]

V. COMMENT

In considering the impact Missouri Supreme Court Rule 69.025 may have upon voir dire practice, it is perhaps helpful to frame the discussion using three general contentions that have been made as to why Missouri should *not* enact a duty to research prospective jurors' litigation history preverdict – the theory of a pure voir dire, the cost-benefit analysis, and the creation of a slippery slope for the courts.[97]

A. "Pure" Voir Dire

In his brief to the Supreme Court of Missouri, Johnson argued that "[c]reating a duty for a trial attorney to investigate juror answers during trial runs counter to the very meaning of voir dire. . . . A trial attorney should reasonably be able to rely on a juror's oath."[98] This notion of an idealistic jury system has been referred to as the "jury mystique."[99] Yet, the jury system is

90. *Id.* at R. 69.025(a).
91. *Id.*
92. *Id.* at R. 69.025(b).
93. *Id.* at R. 69.025(d).
94. *Id.* at R. 69.025(e).
95. *Id.* at R. 69.025(f). The party "may satisfy that burden by affidavit." *Id.*
96. *Id.*
97. *See* Substitute Brief of Plaintiff-Respondent, *supra* note 22, at 11 (discussing these concerns briefly).
98. *Id.*
99. Robert G. Loewy, Note, *When Jurors Lie: Differing Standards for New Trials*, 22 AM. J. CRIM. L. 733, 736 (1995).

not perfect – jurors often do withhold the truth.[100] Though there has been no known studies of juror nondisclosure of litigation history, an analysis of criminal trials in two Illinois state courts found that one in five prospective jurors lied during voir dire questioning.[101] A study of District of Columbia criminal trials indicated that nearly thirty percent of the 190 jurors interviewed withheld information material to the questions asked during voir dire.[102]

Nondisclosure can result from a myriad of factors.[103] Jurors may outright lie if their desire to serve outweighs their desire to tell the truth.[104] Alternatively, jurors may misunderstand questions, be too nervous to answer intimate questions before their peers, or simply feel the questions are too trivial to warrant responses.[105] Regardless of the reason, it is the unfortunate reality that judges and attorneys cannot always rely on a juror's promise to tell the truth. Thus, it would be naïve to reject a juror nondisclosure rule simply because it is not in accord with the idea of a pure voir dire.

B. Cost v. Benefit Analysis

The cost-benefit approach considers whether the costs of a duty to investigate jurors' litigation history outweigh the benefits realized from conducting fewer retrials due to juror nondisclosure. Out of the three arguments against the rule, only the cost-benefit analysis argument has clearly been a factor in Missouri court decisions on the matter.[106]

Prior to the advent of Case.net, the Supreme Court of Missouri deemed that the costs resulting from "delays and logistical difficulties in imposing a duty to investigate every juror's answers" *did* outweigh the benefit of preventing these new trials.[107] The benefits associated with preventing a new trial can be huge.[108] Trials can last days, if not weeks or months, and thus result in large attorney's fees, delays in a court's docket, and time taken from jurors' work and personal lives for little compensation.[109] Yet, before

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100. *Id.* at 734.

101. *See supra* note 6 and accompanying text.

102. Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 453, 455-56 (1991).

103. *See id.* at 455.

104. *Id.* at 456.

105. *See id.*

106. *See, e.g.*, Johnson v. McCullough, 306 S.W.3d 551, 559 (Mo. 2010) (en banc) (per curiam); Brines *ex rel.* Harlan v. Cibis, 882 S.W.2d 138, 140 (Mo. 1994) (en banc); McBurney v. Cameron, 248 S.W.3d 36, 41 (Mo. App. W.D. 2008).

107. *Brines*, 882 S.W.2d at 140.

108. *See id.* at 143.

109. The minimum rate for grand and petit juror pay is six dollars per day. MO. REV. STAT. § 494.455(2) (Supp. 2009).

Case.net, there was not a consolidated, free system through which a juror's litigation history could be found.[110]

Predictably, as court records went online and the time and difficulty it took attorneys to search jurors' litigation history consequently decreased, Missouri courts became more receptive to a research requirement.[111] By the time of the *Johnson* decision in 2010, all Missouri circuit court and appellate court records were available for search on Case.net.[112] In the Supreme Court of Missouri's view in *Johnson*, the scales in the cost-benefit analysis had tipped in favor of the benefit of pre-selection juror searches.[113] But have they really?

Following the Missouri Supreme Court Rule's enactment, it is unquestionable that Missouri attorneys now must search Case.net for a juror's record if they wish to retain the possibility of seeking a new trial resulting from juror nondisclosure of litigation experience.[114] While Rule 69.025 specifically requires Case.net juror searches, it provides little direction as to how the searches are to be conducted. As is discussed below, trial courts are given great discretion in crafting the finer points of the rule, and not until these details are defined will it be known how demanding (and consequently how costly) the rule is in practice.

In a footnote in *Johnson*, the Supreme Court of Missouri said that until the "more specific" new rule was announced, "the trial court must determine whether a party has made a reasonable effort in determining a juror's prior litigation history by searching Case.net."[115] Yet, the new rule added no more specificity as to the extent of attorneys' research obligations. The rule simply states that "a 'reasonable investigation' means review of Case.net before the jury is sworn" and that attorneys must alert the court if they have "reasonable grounds" to believe that there has been juror nondisclosure.[116] The rule does not answer what is meant by "reasonable grounds" or a "review of Case.net."[117] The uncertainty of the meaning of these terms presents trial courts and attorneys with three major issues.

110. *See* HEARNES, *supra* note 19, at 11.

111. *See McBurney*, 248 S.W.3d at 41.

112. Court Specific Help, *supra* note 19.

113. *See* Johnson v. McCullough, 306 S.W.3d 551, 554 (Mo. 2010) (en banc) (per curiam).

114. *Id.*; *see also* MO. SUP. CT. R. 69.025.

115. *Johnson*, 306 S.W.3d at 559 n.4.

116. MO. SUP. CT. R. 69.025(b), (d).

117. *Id.*

1. What Constitutes "Reasonable Grounds" for Suspicion?

Common American names can return thousands of Case.net search results. For instance, a search on January 21, 2011, of "Mary Smith" returned 1,474 records, and a similar search of "Michael Smith" returned 4,140.[118] If the potential juror pool includes a Mary or Michael Smith, do such results, numbering in the thousands, constitute "reasonable grounds" for an attorney to suspect juror nondisclosure, consequently triggering the attorney's duty to bring his findings to the court's attention?[119]

If there are reasonable grounds for an attorney to believe that a potential juror has failed to disclose his prior litigation history based upon a Case.net search then the court is to question the prospective juror away from the other prospective jurors after the attorney has alerted the court.[120] A Missouri statute allows for juries of eight to twelve members,[121] and a trial court has unlimited discretion as to the number of alternate jurors.[122] A recent jury trial in the Circuit Court of Jackson County included a venire of thirty-five potential jurors,[123] and twenty-four of those names returned at least one result in a Case.net search (nearly two-thirds of the venire).[124] Consider a hypothetical voir dire where every venire member claims to never have been involved in any prior litigation.[125] Even though the rule does not require attorneys to alert the court of possible juror nondisclosure until after jury selection, in this example, two-thirds of a selected jury panel would mean that eight out of twelve prospective jurors (and even more with alternates) would have to be questioned separately by a judge to ensure the veracity of their responses. If a trial court segregates prospective jurors for additional questioning in every instance of a name match, no matter if the match is to hundreds of others or to

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118. The search was conducted via Your Missouri Courts, Case.net: Name Search, https://www.courts.mo.gov/casenet/cases/searchCases.do?searchType=name (last visited Feb. 22, 2011).

119. Case.net allows a search to include middle initials. *Id.* However, adding this identifier could actually diminish the accuracy of a search. The initials of persons on Case.net are not always included. *See id.* So a search of Mary S. Smith could return no Mary S. Smith results, but the intended Mary S. Smith may have a record in Case.net that is only listed under the first and last name. Believing that including a middle initial has made the search more accurate could lead to the false conclusion that Mary S. Smith has not been involved in prior litigation.

120. MO. SUP. CT. R. 69.025.

121. MO. REV. STAT. § 494.490 (2000).

122. *Id.* § 494.485.

123. Division 17 *Voir Dire* – Jury Services, Attorney's Case Info Sheet (Mo. Cir. Ct. Jackson County Oct. 11, 2010) (on file with author). The case name was not provided by the court.

124. The two names that only produced traffic violation results were excluded.

125. This hypothetical is not improbable. In *Johnson*, Dr. McCullough claimed that a Case.net search revealed thirty-one venire members who did not disclose litigation experience. Substitute Brief of Plaintiff-Respondent, *supra* note 22, at 12.

Constance: Constance: Attorney Duty to Search Case.net

just one, this could create significant delays in the trial process and perhaps send a message to potential jurors that the judicial system does not believe that they are capable of being honest to the court.

2. Is a Search Restricted to Only Names?

Does a "review of Case.net" require a party do more than simply search a juror's name? If a party is presented with a substantial number of results after a juror name search, a trial court may find it reasonable that the party attempted to narrow down the list. In addition to displaying every Michael Smith listed in Missouri courts' databases, Case.net also provides the addresses of each of these Smiths at the time they came before the court.[126] Is it practical to expect an attorney to compare the address given by the potential juror Smith to the hundreds of Smith addresses on Case.net? With so many names, completing such a task could take hours. An address comparison for every potential juror could balloon to days if the jury pool is filled with jurors with surnames such as Jones, Thompson, or Smith.

3. What Name Should Be Searched?

The rule does not say whether attorneys must search only the juror's name as given to attorneys by the court, or if they also need to search variations of the juror's name.[127] For example, a juror gives his first name as William. Would an attorney waive his right to seek a new trial if he does not conduct an open-ended search of just "Wil" to allow the search to encompass the names Will, William, Willie, Willy, Wilhelm, etc.? Perhaps the juror's litigation history could have been found if "Bill" had been entered instead.

A sample search of Case.net supports this concern. Entering "Andy Johnson" returns only thirty-seven records,[128] yet searching for "Andrew Johnson" returns over 400.[129] Even if the prospective juror's name was listed as Andy Johnson, and the attorney was able to definitively conclude that the juror did not match any of the Case.net Andys, it would be potentially impossible to determine if Andy was actually Andrew in previous litigation.

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126. This information can be located by conducting a search at Your Missouri Courts, Case.net: Name Search, https://www.courts.mo.gov/casenet/cases/searchCases.do?searchType=name (last visited Feb. 22, 2011), discussed *supra* note 118 and accompanying text. The address of each individual may be located by selecting the case number one wishes to view and then by selecting the "Parties & Attorneys" tab.

127. *See* MO. SUP. CT. R. 69.025.

128. The search would be conducted via Your Missouri Courts, Case.net: Name Search, https://www.courts.mo.gov/casenet/cases/searchCases.do?searchType=name (last visited Feb. 14, 2011).

129. *Id.*

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The same idea is true for women who have taken the surnames of their husbands upon marriage, for persons who have changed their names, or for those who used entirely different names in prior litigation. In the previously mentioned *Johnson* footnote, the Supreme Court of Missouri noted the limitations of a Case.net search when a person's name has changed.[130] However, the court did not resolve this issue in its rule.

Besides the uncertainty of "reasonable grounds" and "review of Case.net," another concern which the rule leaves unaddressed is how much support the court will provide to attorneys who do not have Internet access or basic computer knowledge. Plaintiff Johnson argued that a Case.net research requirement should not be imposed on attorneys because it would unfairly "favor[] large law firms with large staffs," in that solo practitioners may not have "access to a computer [or] . . . even know how to use a computer."[131]

In *Johnson*, the supreme court stated that "trial courts are directed to ensure the parties have an opportunity to make a timely search . . . *and* shall provide the means to do so."[132] Yet, Rule 69.025 only requires that "[t]he court shall give all parties an opportunity to conduct a reasonable investigation."[133] The absence of the second part of the court's sentence in the rule can be interpreted to mean that trial courts are not required to provide access to Case.net.[134]

It is unclear if this omission will raise serious practical complications. There have been no known surveys of Missouri trial lawyers determining the number that have Internet access and can navigate Case.net. Because the rule requires that attorneys be given the opportunity to conduct a Case.net search, attorneys would presumably be allowed to leave the court and use some means of public Internet access, such as in a public library, if they did not otherwise have access to the Internet.

C. Slippery Slope

The third concern with Rule 69.025 is that a duty to investigate would put Missouri courts on a slippery slope that could result in the duty being expanded far beyond Case.net to require a search of other databases like the federal PACER system or search engines like Google.[135] However, a slide down this slope is unlikely. In *Johnson*, the supreme court stated that a "[s]earch[] of other computerized record systems" is not necessary,[136] and

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130. Johnson v. McCullough, 306 S.W.3d 551, 559 n.4 (Mo. 2010) (en banc) (per curiam).

131. Substitute Brief of Plaintiff-Respondent, *supra* note 22, at 12.

132. *Johnson*, 306 S.W.3d at 559 (emphasis added).

133. MO. SUP. CT. R. 69.025(c).

134. This interpretation could depend on whether the part of the *Johnson* opinion that created the duty to investigate is considered dicta.

135. Substitute Brief of Plaintiff-Respondent, *supra* note 22, at 11.

136. *Johnson*, 306 S.W.3d at 559 n.4.

Rule 69.025 defines the extent of a juror litigation investigation as only a "review of Case.net."[137]

As previously explained, part of the impetus for enacting the rule requiring investigation of a juror's litigation history was due to the ease and accessibility of Case.net.[138] PACER is not publicly accessible,[139] and it would not be easy to use Google to find further information about a juror's litigation history.[140] There is simply no other tool like Case.net which could reasonably aid in the research of a juror's past litigation experience.

Further, it is unlikely that the rule would be expanded to cover juror questions other than those about litigation history because no other subject lends itself to the verification measures provided by Case.net. For example, there is no publicly accessible system that can confirm whether one has a relative that works in law enforcement or whether one has ever been in a car accident.

D. Assuring that the Costs of the Rule Do Not Outweigh the Benefits

To maintain support for the supreme court's belief that the benefits of the rule outweigh its costs, trial courts must interpret the rule in such a way that will keep the burden on attorneys to a minimum, yet which will also maximize the number of discovered juror nondisclosures.

To try to ensure this outcome, trial courts should read the "review of Case.net" provision of Rule 69.025 to mean that an attorney should only be required to enter the juror's name on Case.net as it is given to him by the court. Referring back to the earlier hypothetical,[141] if the juror's name is given as Will, the attorney need not also search for William, Bill, Willie, etc. An attorney should not have to think creatively about possible nicknames to use in a search for the juror's litigation history; that could impose significant delays to the trial process as well as pave the way for vastly inconsistent rulings among the trial courts (e.g. one court rules that "Willie" should have been included in the search, while another court disagrees). Having attorneys search only the jurors' names as given also eliminates the conflict with maiden names or original names in the case of a name change.

Trial courts should also interpret the rule so that a search of Case.net does not entail a review of the addresses provided with each record. About

137. MO. SUP. CT. R. 69.025(b).

138. McBurney v. Cameron, 248 S.W.3d 36, 41 (Mo. App. W.D. 2008).

139. *See* Pacer.gov, https://pacer.login.uscourts.gov/cgi-bin/login.pl?court_id=00pcl (last visited Feb. 14, 2011).

140. For example, a Google search of "Mary Smith" & "litigation" & "Missouri" returned about 14,700 results. Google, http://www.google.com/search?hl=en&source=hp&biw=1408&bih=658&q=%22mary+smith%22+%26+%22litigation%22+%26+%22Missouri%22&aq=f&aqi=&aql=&oq= (last visited Feb. 22, 2011).

141. *See supra* Part V.B.3.

one in eight Americans moves each year.[142] This rate of mobility undoubtedly leaves a great number of address records on Case.net out of date. To require attorneys to cross-reference the juror's address given by the court to ones listed on Case.net would result in wasted time and provide little benefit.

The biggest issue created by the new rule is how to interpret what constitutes "reasonable grounds" for an attorney to suspect juror nondisclosure. Having every juror whose name matches a record on Case.net be questioned further by a judge could take a large amount of time, thus enlarging costs. Yet, what type of system could be put in place to reduce the number of potential jurors requiring additional questioning? This is a question with no clear answer.

Perhaps a cut-off system could be implemented – for example, if a Case.net search produces over X number of results, then that search would not be considered reasonable grounds for suspicion. However, where should the cut-off point be? Ten records? 100? 500? Any line-drawing would be arbitrary, and creating a cut-off point would allow for a greater number of juror nondisclosures to slip through.

It is also uncertain whether a second round of inquiries by a judge will even elicit different responses from a prospective juror. It is possible to see a judge's line of questioning as follows: "You told the attorney that you have never been involved as a party in a trial? Is this true? Are you sure?" The juror may begin to think that the judge is calling him a liar, or the juror may wonder why the judge is asking him these questions over again. Am I wanted by the IRS? Have I been sued lately and don't know about it? The juror may become defensive or nervous and continue to keep his litigation history to himself.

The inherent problem with using Case.net for identifying juror nondisclosure is that it is an unofficial record, which cannot definitively tell an attorney whether a name in the system is that of a prospective juror. The Supreme Court of Missouri has put in place a rule which has the laudable goal of cutting back on the number of new trials granted due to juror nondisclosure, and the basics of the rule seem sensible upon first glance. However, upon deeper review the rule provides little guidance to the trial courts that have been charged with its implementation. The result may be longer, more costly trials if judges individually interview multiple prospective jurors. And, the rule might prevent only an inconsequential number of retrials due to the limitations of Case.net searches and the apprehension jurors might have in being questioned twice.

142. *See* Sam Roberts, *Slump Creates Lack of Mobility for Americans*, N.Y. TIMES, Apr. 23, 2009, at A1.

VI. CONCLUSION

Long before the implementation of a statewide automated case records system, Missouri courts grappled with how to deal with evidence of juror nondisclosure of litigation history that was accessible to parties prior to verdict.[143] These courts ultimately rejected the idea of placing a duty on attorneys to research databases because they were not easily accessible and a duty to search would place undue costs and burdens upon trial attorneys.[144] With Case.net, attorneys can search for a potential juror's prior litigation experience online at any time for free.[145] The Supreme Court of Missouri's rule mandating that attorneys make pretrial Case.net investigations if they wish to retain the right to seek a new trial for juror nondisclosure[146] demonstrates that the court now feels the costs of imposing such a duty are outweighed by the benefits of reducing the need for new trials – as demonstrated by *Johnson v. McCullough*.[147]

However, the rule creates the potential for Missouri trial courts to implement onerous practices in an attempt to satisfy the rule's ambiguous mandates. The supreme court should not wait to see how the rule plays out and should instead repeal Juror Nondisclosure Rule 69.025 in favor of prior Missouri common law, which provided for a new trial due to nondisclosure so long as an attorney did not have actual knowledge of the juror's nondisclosure prior to verdict.[148]

143. *See, e.g.*, Rodenhauser v. Lashly, 481 S.W.2d 231, 232 (Mo. 1972); Woodworth v. Kan. City Pub. Serv. Co., 274 S.W.2d 264, 265 (Mo. 1955).

144. *See, e.g.*, *Rodenhauser*, 481 S.W.2d at 235; *Woodworth*, 274 S.W.2d at 271.

145. Your Missouri Courts, Case.net, http://www.courts.mo.gov/casenet/base/welcome.do (last visited Feb. 14, 2010).

146. MO. SUP. CT. R. 69.025.

147. 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam).

148. Brines *ex rel.* Harlan v. Cibis, 882 S.W.2d 138, 140 (Mo. 1994) (en banc).