

## JURORS AND THE INTERNET/SOCIAL MEDIA

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(Richard G. Stuhan)

The Internet generally and web-based social media specifically have influenced trial preparation, jury selection, and trial conduct in numerous ways. We concentrate here today on two aspects of the larger phenomenon. **First**, we explore the role of the Internet in preparing for voir dire and striking a panel. **Second**, we examine the dangers presented when jurors use the Internet during trial as a supplemental source of information.

### A. Use of the Internet in Jury Selection

Experienced litigators in high profile cases always have tried to do everything ethically possible to learn as much about prospective jurors as they could before having to strike a panel. In the old days, counsel would send private investigators to potential jurors' neighborhoods to check out bumper stickers on cars, photograph yard signs, and perhaps even interview neighbors. They might also dispatch investigators to the local newspaper office to look for letters to the editor or to the courthouse to determine if any of the prospective jurors had been involved in litigation.

**1. Available Information.** But now, all of that information *and more* is available online. Jurors are revealing valuable tidbits about their lives, their interests, and their social and political leanings on such services as Facebook and Twitter. A basic Google search of jurors' names can find political donations, publications (including letters to the editor), organizational affiliations, driving record, professional licenses, marriage licenses, occupational history, property ownership, criminal record, and litigation history. Most of this information is available quickly and for free from public databases. There also **proprietary databases** that you can search for a modest fee. Even more valuable information can be gleaned from jurors' blogs, online comments, Facebook profiles, and Twitter feeds.

Trial counsel need to take account of the information available about prospective jurors. Indeed, a Florida state circuit court judge has opined that finding out more about jurors online is part of a lawyer's duty of competence; clients might be rightfully miffed if their attorneys are not doing that kind of investigation. The challenge is to strike a balance between attorneys' right to know and jurors' privacy interests.

**2. Limitations.** While the Internet has opened door for juror research, counsel need to be aware of the risks and limitation of using this tool:

**a. Right Person.** You need to be certain that person who shows up in your Internet search is the same person who is in your jury pool. While you are probably safe if the person at issue is Sergey Schmigdolessa (although even then there can be a junior and a senior), you cannot be comfortable if John Smith is one of the names on the list.

**b. Timely List.** Your ability to use the Internet effectively will be severely compromised unless you get the list of prospective jurors in time to conduct the searches. Recognizing the availability of the Internet as a research tool (and concerned that it confers an unfair advantage on corporate defendants), some judges deliberately wait until the jurors have been assembled in court to release their names.

**c. Spying.** If your voir dire questions are informed by material that you could only have acquired by investigating the jurors, you risk fostering a belief that you have invaded the jurors' privacy. The danger that you will alienate a juror is especially present if she comes to the courtroom with negative attitudes about corporations. [There is a reported example of what might happen from the Western District of Washington. In a case there, the lawyers had run a Facebook search on each of the jurors. When they got to Juror No. 5, one of the lawyers asked: "And so how did your daughter do in the horse competition?" That led to a revolt among the jurors.]

**d. Overload.** Particularly if juror names come to you late in the process, you risk having more information than you can responsibly process in the time available. Experience teaches that the vast bulk of information you collect through Internet searches will NOT materially affect your juror evaluations. Statistically, you are likely to find pertinent information about only one or two jurors. In your quest to find those gems which might be critical, you run the risk of overlooking information from other sources.

**e. Better Sources.** Internet searches certainly have the potential to yield valuable information. For example, you might find that a prospective juror was a party to similar litigation against another manufacturer. For the overwhelming majority of jurors, however, there are better sources of information. Internet searches tend to get you demographic information about jurors, and demographics generally are NOT predictive of verdict orientation. Far more important to your juror decisions are attitudes and experiences. Written questionnaires and oral voir dire are far better tools for ferreting out that kind of information.

**f. Ethical Considerations.** While most courts and commentators agree that it is acceptable to view content that the user has designated as public and/or unrestricted – e.g., blogs or unrestricted Facebook pages – you swim in murky waters when users have made efforts to keep their identities anonymous or content private. The time available does not permit a thorough review of developments in this area. Instead, I confine myself to a few observations:

**(1) The ABA Opinion.** On April 24, 2014, the AMA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 466. That opinion concludes that (a) passive review of electronic social media – i.e., without making an access request – of which the juror is not aware does not violate Model Rule 3.5; (b) active review – by making an access request – amounts to an ex parte communication prohibited by Model Rule 3.5; and (c) passive review through which a

juror *become aware of the review* through a site-generated notice is NOT a “communication from lawyer to juror” and, thus, does not violate Model Rule 3.5

**(2) Reactions to the ABA Opinion** have been mixed.

(a) The **Oregon State Bar** has concluded that the opinion is too restrictive. That bar concluded that a lawyer may affirmatively request access to private information on a prospective juror’s social media websites as long as the lawyer accurately represents his or her role in a case if and when asked by the jurors.

(b) In contrast, **the New York State Bar Association** has directed attorneys to ensure not only that they do not proactively contact a juror via social media, but also that there is no automatic notification sent to the juror by the social media service that would put the juror on notice that he was being scrutinized by the trial team.

(c) In the high profile copyright case of *Oracle v. Google*, **U.S. District Judge William Alsup** initially threatened to ban Internet searches on jurors altogether, but ultimately said that he would allow them **provided** the tech giants **told jurors** that they were being researched. Both sides opted not to do that

**B. Jurors’ Use of the Internet/Social Media**

Just as you can employ the Internet to learn about prospective jurors, so, too, **they** can use the Internet during voir dire, trial, and/or deliberations. There is both investigative and anecdotal evidence that this has become a problem.

**1. Is this an issue only for younger jurors?** While some might think that use of on-line information sources is an issue only for younger jurors, the evidence suggests otherwise.

**a. The Internet.** A Pew Research Report published in May 2017 reports that 90% of all adults use the Internet. Usage is 82% among adults aged 65-69 and 75% among adults aged 70-74. It is not until age 80 that usage dips below 50%.

**b. Smart Phone.** 77% of all adults have smart phones. 59% of adults aged 65-69 have smart phones, as do nearly 50% of adults aged 70-74.

**c. Social Media.** 69% of all adults use social media. Usage is 47% among adults aged 65-69 and 41% among adults aged 70-74. Even a quarter of adults aged 75-79 use social media.

Moreover, while there are still gaps, the older generations are making quick strides to narrow the gap; the fastest growth is among those over age 75, where social media use has quadrupled in the last few years.

**2. What are jurors doing with the Internet and Social Media?** There are two major concerns. *First*, jurors are going online to **search for** information pertaining to the trial and introducing it into their deliberations. *Second*, jurors are going online to **disclose** information about their trial experiences.

**a. Internet Searches.** Jurors seek a wide variety of information pertaining to trials in which they are sitting. For example, there are reports of jurors seeking: (1) information about other verdicts in similar cases brought against the defendant or other companies in the same industry; (2) background information about the parties or witnesses; (3) definitions of legal terms; and (4) journal articles, textbooks, and treatises discussing technical issues in the case – the subject matter of expert testimony. Jurors also look for media coverage of high profile trials. One juror told me during a post-verdict debriefing that she wasn't sure that she was understanding the evidence as presented and so looked to the online report on the trial for guidance.

**b. Social Media.** In most instances, jurors who post about their trial experiences comment about relatively mundane matters – the fact that they have been selected or what type of case it is or how boring the experience. Sometimes, however, jurors post substantive comments about the evidence, the witnesses, or the lawyers. Whatever the subject matter, the postings are dangerous because they elicit comments on the postings, which can in turn influence how jurors are thinking.

**3. Why do jurors use the Internet during trial?** There are multiple reasons.

a. In most cases, jurors are simply trying to do the right thing. They want guidance on difficult issues. They seek to be as fully informed as possible. They want to see how other juries have dealt with similar issues. Simply stated, jurors use the Internet in a misguided effort to be thorough.

b. A related problem is that jurors do not understand the court's instructions to preclude these efforts. In most jurisdictions, jurors are given specific instructions that they are not to talk about the case prior to their deliberations and they are not to disclose anything about their deliberations until they are complete. But some jurors are *overly-literal* in interpreting these admonitions. They are careful not to talk about the case at home, but they do not equate updating their Facebook page or tweeting about the case with "discussing" the case. Even those who understand the instructions to prohibit Facebook disclosures sometimes carve out "exceptions" to the rule. They see no harm in tweeting about a lawyer's suit or how bored they are.

c. Some jurors do not understand – or fully appreciate – the reason behind the court's admonition. For example, a juror might see no harm in posting about a lawyer's ugly tie, not realizing that such a post could generate a response that could affect the juror's thinking.

d. Finally, there are jurors who understand that Internet searches and social media postings are forbidden, but do it anyway. Why? It may be that they do not take their jobs seriously. It may be that they get a thrill from posting about a high profile case on which they are sitting. Or it may

be that the Web has become such an important part of their lives that they simply cannot help themselves.

**4. How do we address this problem?** There is a limit to what can be done – especially with respect to jurors who understand the court’s instructions, but won’t or can’t follow them. But here are a few ideas that have been suggested:

**a. Early Instructions.** In many courtrooms, jurors are not instructed to avoid discussing the case until they are sworn in. So, they feel free to comment online about how much they are dreading jury duty or what they are doing in the courtroom – potentially generating responsive comments. Earlier instructions would address this problem

**b. Better instructions.** Counsel should work with the court to improve the instructions on “discussing” the case to **refer specifically** to independent Internet investigations and the use of social media. These instructions should be given in common, everyday language so that laypeople can understand them. The Federal Judicial Conference and the American College of Trial Lawyers have drafted model instructions which incorporate these concepts.

**c. Explain.** The court should not only expand the list of admonitions to encompass electronic communications, but also explain why it is important for the jurors to follow the rules. Many jurors simply do not understand the consequences of disclosing information about the trial or conducting their own research.

**d. Pledge.** Ask the jurors to pledge – or, better yet, have them sign an oath – that they will follow the instructions on use of electronic media. Research has shown that people are less likely to break promises they have made in public and on the record. Remind the jurors of their undertaking during the trial and as they begin deliberations.

**e. Instill Fear.** Inform the jurors that they are subject to criminal penalties for violating the court's instructions.

**f. Explore.** During voir dire, counsel should ask potential jurors if they have an online footprint. Do they blog, have a Facebook page, or have a Twitter account? If so, how often do they post, tweet, update, etc.? At least for jurors who are very active online, ask if they will be able to refrain from saying anything about the trial and/or conducting their own research. Counsel should then follow their sitting jurors online during -- and shortly after -- the trial to make sure they haven't posted anything they should not have posted.

**g. Juror Questions.** Allowing jurors to ask questions of witnesses could alleviate a lot of problems with jurors doing their own research. You will hear/have heard more about this topic elsewhere in the presentation. As stated earlier, most jurors who conduct their own research do so to clarify information they heard at trial, to check on a fact or explanation, or to get additional information they thought was important. Affording jurors an opportunity to acquire this information as part of the trial process could go a long way toward eliminating the incentive to conduct extra-judicial research.

## **CONCLUSION**

The emergence of the Internet and social media creates opportunities and risks for trial counsel. The opportunities are great and the risks are manageable – once they are understood. As the old axiom goes: Forewarned is forearmed.