



Jury selection: There's an app for that

A look at the usefulness of social network information in juror selection and apps for the courtroom that could make voir dire more efficient and effective

BY ANAYAT DURRANI

Most would agree that jury selection can make or break a case. It only takes one bad juror to take a case down in flames. The legendary Clarence Darrow famously said, "Never forget, almost every case has been won or lost when the jury is sworn." So, it is little wonder that attorneys are taking an extra measure to ensure the jury selection process goes

smoothly. Attorneys hoping to get an edge are increasingly mining the Internet to profile prospective jurors, oftentimes before jurors even step foot into the courtroom.

The traditional method of jury selection has relied on the attorney's ability to select jurors on the basis of their responses to a jury questionnaire and voir dire inquiry. This involves asking prospective jurors questions that can

reveal whether they can be objective and fair.

"Jury selection is about understanding whether a juror has a life experience or attitude which may indicate a bias in a certain case," said Dr. Joseph A. Rice, president of Jury Research Institute, a national trial and jury research firm based in the San Francisco Bay Area. "We have found, however, that this traditional approach is not the most reliable way to get



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information. Jurors are reluctant to reveal personal information, or admit to a bias. Everyone thinks they can be fair.”

Facebook and Twitter

So, many attorneys, armed with their iPads and laptops, have taken it a step further, frequenting social networking sites like Facebook and Twitter to extract additional information on prospective jurors that might reveal any bias or prejudice. Lawyers are “Facebooking” potential jurors to uncover posts such as religious and political views, what they watch on TV, organizations they belong to, interests, hobbies, and so on to weed out jurors with certain biases.



Rice

Rice said 20 years ago there were many services that provided a “jury book.” He said investigators could search public records and uncover whether jurors had property, liens or past lawsuits.

“Now we have social networking sites where jurors voluntarily post information about their family, relationships, activities and interests,” said Rice. “Some jurors have blogs. Many have Twitter accounts. As a result we can get an idea about who jurors are in their private lives. We do encourage lawyers to look to these sites and ask jurors about blogs and Twitter accounts.”

But getting that list of prospective jurors ahead of time to do research on depends on the court. Some courts do not publish the names of potential jurors until the morning of jury selection, which doesn’t leave much time for research, explained Dr. Leslie Ellis, a jury consultant with TrialGraphix Services, Kroll On-track, which has offices in San Francisco and several cities nationwide. Ellis said even if there is time to do a little research, sites like Facebook can be “a hit or miss, as well as limited in utility.”

Ellis said, however, that in instances where the court provides the list of jurors ahead of time she does believe online re-

search could be somewhat useful. But, she said the street address of each juror is rarely provided so finding the right juror named “John Smith” in San Francisco, for example, can bring up multiple people.

“In addition, lawyers need to decide whether or not information posted on social networking sites reflects the “real” juror or it is just posturing for others. Most importantly, lawyers need to know what to do with the information they find,” said Ellis. “As a consultant, I have used Facebook to conduct research and encourage clients to do so if they have the budget and a list of the venire is provided in advance. You may not find much, but it can’t hurt to look.”

Rice said he has personally seen an increased use of public and social networking sites by attorneys to find out about juror experiences and attitudes. “To the extent that these sites are public then courts have generally allowed attorneys to look at them,” he added.

What judges think

While many lawyers are “Facebooking” jurors, it did not sit well with at least one judge. In a New Jersey case last year, the trial judge held that counsel’s use of the courthouse Wi-Fi to research jurors on his laptop during voir dire was “unfair” to the other side, who did not happen to bring their laptop to court that day.

However, the appellate court in *Carino v. Muenzen* did not agree. The decision explained, “There was no suggestion that counsel’s use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of “fairness” or maintaining “a level playing field.” The “playing field” was, in fact, already “level” because Internet access was open to both counsel, even if only one of them chose to utilize it.”

Dr. David Cannon, a trial consultant and co-founder of Trial Innovations, which has offices in San Francisco and

Los Angeles, said he has personally never seen anyone doing research on jurors in court, and has rarely had a client request an Internet search of prospective jurors. But, he said, some lawyers may have staff members or consultants search for juror information online in the courtroom during jury selection.

“When I have done computer searches, it has usually been when I get completed supplemental juror questionnaires in advance of jury selection. I then may Google names and the locations of the jurors to get additional information,” said Cannon.

More often, he said, he searches for additional information when jurors list a club, organization, or place of worship that he is not familiar with. He said these instances are when Internet searches prove to be the most useful.

“Once I searched for information on a prospective juror’s church, and I learned that it was a ‘biker church’ that prided itself on unconventional services for bikers. Information such as this can really give me a good idea of what to expect or follow up on when we get to oral voir dire,” said Dr. Cannon.

Regarding “Facebooking” a prospective juror, Dr. Cannon believes it is of little use since profiles are usually “locked” and only viewable by those whose friend requests are accepted. And while he does know of a plaintiff attorney who sent a Facebook Friend Request to someone he was filing a lawsuit against in order to gain additional information to use against them, the practice of “friending” someone for such purposes is unethical.

“Because of the time-consuming nature of it, limited utility of the information, and uncertainty about whether we have actually found the correct person, I do not strongly recommend Internet searches from a consulting point of view,” said Cannon.



Cannon



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Jury selection goes high tech

As more attorneys turn to technology to assist in the process of jury selection, they are availed a number of software programs and applications designed to meet their needs.

First Court, a North Dakota and California-based jury research and consulting firm organized in 1989 by a trial attorney produces mock trials, focus groups and mini-trials nationwide. They provide each juror and client with a touchscreen computer, then link them together in a special courtroom network. Their software generates feedback quickly on the critical issues in the case. First Court says that it highlights the strengths and weaknesses in the case so that it can be resolved either out of court or tried more fairly if a settlement cannot be reached.



Liffri

“First Court has developed its own, proprietary software that highlights the life experiences and attitudes shared by mock jurors who are hostile to our client’s case,” said Mike Liffri, president, First Court, Inc. “This gives a little bit of objective guidance to the trial team as they exercise their strikes in a public trial.”

Liffri said jury selection often comes down to instinct and said his software builds on those instincts, harvesting the instincts and intuitions of everyone on the trial team.

“Our services become quite popular when it becomes obvious that a trial is imminent and a jury is going to be called,” said Liffri. “Nobody likes to lose trials and almost every experienced trial lawyer I’ve ever talked to knows that 90 percent of a trial outcome depends on who sits in the jury box.”

A full-day First Court private jury trial with 18 jurors costs \$38,000, or a half-day with six jurors costs \$12,000. The company says it is doing well and doubled its revenue in 2010 compared to 2009.

An app for that

With the popularity of iPads among attorneys, several jury-related apps have been developed that are both useful and affordable. Stacy Kelly with Terry Bryant PLLC is a plaintiff’s attorney in Houston, Texas, and the creator of an app called Jury Duty (\$39.99).

She had good reason to develop the app. In the jurisdiction where she primarily practices, Harris County, Texas, the judge gives attorneys a diagram of the courtroom with small squares that represent each juror. Attorneys then take the list of jurors and fill in each square with their names and any additional information that can fit into the tiny square. While conducting voir dire, she often found it difficult to read the names and next to impossible to jot down her notes as she went along. When she got her iPad, she looked for an app that would help her during voir dire.

“I searched and could not find anything. Nothing even close. The next day I discussed this with other litigators in my office,” Kelly said. “I told them what I had in mind. The feedback was amazing so I decided to create my own app.”

Her app has only been on the market for two months and has already been getting rave reviews. The Jury Duty app helps lawyers streamline the voir dire process and focus on the skills required to select a jury. By using the app, a lawyer does not have to waste precious time locating a juror’s number or name on a handwritten diagram and it can help them communicate better with the panel of jurors.

“The app allows me to easily record my thoughts and impressions with simple touches on the screen,” explained Kelly. “Because I do not have to lose contact with the panel by taking time to write on a small diagram, I maintain the conversational tone that I believe is important when picking a jury. I want to keep them talking so I learn as much as possible.”

Kelly said a recent upgrade to the app added the ability to e-mail the list of jurors, which she believes some lawyers



Kelly

will utilize to have their staff conduct further background on each potential juror. She is happy with the feedback she has received so far.

“Being that I created it for myself and the other lawyers I work with, I will be happy if I cover the development costs,” said Kelly.

Then there is another app called JuryTracker (\$9.99) created by John Cleaves, a Los Angeles-based Supervisor of Trial Technology Consulting at Latham & Watkins. He said he got the idea for JuryTracker after having been involved in a large number of trials.

“In trial I noticed the attorneys would somewhat haphazardly observe juror behavior and reactions to the evidence and testimony. Then, back in the war room, the attorneys, along with their clients and the jury consultants, would make decisions on how to proceed based on those juror reactions,” said Cleaves. “I thought there could be a better way to record juror reactions, so I sketched out the idea, shared it with a few attorneys and consultants who gave positive and helpful feedback, and then hired coders to build the app for me.”

Cleaves said that while his app is no “Angry Birds” (a popular game app), JuryTracker has been selling several copies a day, which is not bad “considering the limited market – trial attorneys with iPads.” While Kelly’s app is a voir dire app, Cleaves’ app is a jury observation app designed for keeping track of how jurors react to evidence, testimony and other in-court events to help an attorney decide how to move forward with their case. Cleaves said JuryTracker is meant to be used as a tool in a trial attorney’s toolkit.

“It supplements the attorney’s observations by allowing another person, perhaps the client, or a paralegal or secretary or even an intern or non-legal professional, to quickly note juror reactions in a uniform and effective way,”



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explained Cleaves. “Then the attorneys and the trial team can analyze the noted reactions, which are time stamped so that they can be cross referenced to the court reporter’s transcript to refresh everyone’s mind on what was happening that drew the response. It is up to the attorneys and their team to decide what the noted behavior means.”

While the Jury Duty and JuryTracker apps were created by attorneys, iJuror (\$9.99) was created by software/Web developer Scott Falbo who is married to an attorney.

“I created iJuror because I heard my attorney friends talk about the challenges associated with the juror selection process,” said Falbo. “In particular, the difficulty in keeping track of information when working with sticky notes to make a juror chart. This immediately came to mind as a great opportunity for an iPad app, and so with that iJuror was created.”

Falbo, who is owner of Front9 Technologies and develops apps for the iPhone and iPad with a focus on business apps, said iJuror has been warmly welcomed by the legal community and consistently ranked within the Top 100 iPad Business apps since it was released last year. He said feedback from the legal community has been great with many suggesting additional features, which Falbo has added to the app.

“I would describe iJuror as an app to help manage juror selection for the modern legal environment. No longer do attorneys need to keep post-it notes and text documents with information scribbled on them – the information is all

stored electronically in the app,” said Falbo. “The app helps attorneys gather and store information more efficiently and iJuror helps augment the ‘gut’ feeling that should still be relied on during juror selection.”

Good old-fashioned instinct

Whenever jury selection is discussed, the terms “gut” and “instinct” always seem to follow. Scholars have long argued whether “scientific” jury selection is any more reliable to attorneys than good old-fashioned instinct. Many believe jury selection is ultimately a combination of instinct and experience more than any rules.

“Personally, I go with my gut in picking a jury,” said Kelly, who created the Jury Duty app.

Kelly said she would rather ask prospective jurors directly how they feel about a particular subject rather than speculating based on their favorite song as found on Facebook or where they went to college.

“I believe that if I get the group opening up, by making the experience conversational, because I am calling them by name and maintaining eye contact, I will learn all I need to pick a fair jury,” said Kelly.

Dr. Rice of the Jury Research Institute said while he does encourage his clients to use their instincts he cautions that decisions shouldn’t be made on those variables alone. He said it’s easy to be “misled by a juror who gives off socially appropriate cues.” Dr. Rice believes the most reliable juror profile is derived from research.

Jury selection can be viewed as a testing ground for a trial lawyer’s talent, demonstrating how skilled a lawyer is in getting a potential juror to betray sympathies. But even after a lawyer chooses what he considers a good jury, and makes educated guesses about what individuals might do, the dynamics in the jury room are still unpredictable.

With all the time, research, and money put into predicting and analyzing jury decisions throughout the years, when it comes right down to it, jury selection is more art (and luck) than science. And while some may disagree on or differ in their approach of what works best in jury selection, instinct unwittingly finds its way into the courthouse.

Cleaves, who created the JuryTracker app and has over 20 years of litigation support experience said he “whole-heartedly” believes lawyers should rely on their instincts in the courtroom.

“The best trial attorneys know when they are connecting with individual jurors, and with the entire jury,” he said.



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