



Using the Internet and social media in jury selection

The Internet has opened a whole new field for jury panel background checks

BY SONIA CHOPRA

In the past several years there have been countless headline-making stories about juror misconduct related to Internet research and the improper use of social media to communicate information about the trial, “friend” trial participants, or prematurely broadcast the juries’ verdict.¹ The courts and legislatures are becoming more responsive to this problem and changes are being made in how juries are pre-instructed about prohibitions on Internet research and communications.² While much attention has been paid to the problems associated with jurors’ use of the Internet and social media, the fact that many potential jurors have an online presence or digital footprint can be used as a tool by litigators. This article will present ways you can use Internet and social media searches to research potential jurors, monitor them during trial, and locate them following verdicts. In addition, recent research about the characteristics of frequent social media users will be discussed in the context of what types of jurors they might make. Sample voir dire questions for assessing potential jurors’ use of social media and reliance on the Internet for information are provided, along with questions designed to identify jurors who are most likely to have difficulty following the rules about Internet use.

Researching jurors online

Attorneys have always sought to gain as much information about potential jurors as possible before making decisions in jury selection. I remember the time when, assuming we had the juror list

enough in advance and had the budget for it, an investigator might be hired to drive by people’s homes to look for “clues” as to who they really were. Many of you have purchased lists that provide jurors’ voter registration, property values, and litigation history. District attorneys routinely run criminal background checks on the jury pool, and I’ve seen in some instances where they have databases of jurors who’ve previously served and the outcome of the trial.

It only makes sense that the Internet would be a source of information that attorneys turn to when trying to intelligently exercise peremptory challenges or even in some instances, to establish a challenge for cause. That said, using the Web to research jurors can often feel like a needle in a haystack-type exercise. Much of what you get is not valuable and it can be time consuming, particularly if the person has a common name. Every once in a while, however, you can find something good and useful. My typical rule of thumb is that if you have the time and manpower to do it, it can’t hurt, particularly in situations where there is limited opportunity to learn about the jurors in voir dire, such as in federal court.

As previously mentioned, there are services out there that you can pay to do public records searches of jurors to come up with information like their political affiliation, property values, litigation history, criminal records and so on. These companies are now offering social media searches as part of the package. I have not personally utilized these services but my colleagues at NJP have done it with some big cases with a pool of hundreds of potential jurors with jury selection spanning multiple weeks. There are

differences of opinion as to how valuable the information you get is, and whether or not it justifies the cost. You typically pay a premium for a quick turnaround, and usually they are providing data for the entire jury list which is not necessarily cost effective in every case. I don’t know that the services have any better access to jurors’ social media information than you would if you were doing the search yourself. It mostly comes down to time and resources.

So, how do you find jurors online? Most people start with the obvious, and “Google” the names of the jurors. Google searches will yield some, *but not all* Facebook and MySpace pages, LinkedIn profiles, and Twitter accounts of people with the target name. I often find that it is more effective to search for the name in these sites directly after seeing what Google has to offer. Aside from the places most of us know about, there are a number of sites cropping up that bill themselves as “people” or “social media” search engines. Some examples of these include: Spokeo.com, Pipl.com, 123people.com, Peoplefinders.com, and Peoplesmart.com. All of these are paid services, although they vary in price and are typically less expensive than paying for a service to do the research for you. Spokeo runs from just \$3 to \$5 a month, Peoplefinders is \$12 a month if you purchase for a year or \$40 for one-time use.

Some information is given for free on sites like Spokeo, but it may not be completely accurate. For example, when searching myself, my current address did come up, but so did my first college apartment and many of the places I’ve lived since. There was not an indication



Sample voir dire questions on jurors' Internet and social media usage

1. Which Internet sites do you most frequently visit?
2. On average, how much time do you spend online each day?
3. How many times a day do you access the Internet for non-work related purposes?
4. What are the three main reasons you use the Internet?
5. Do you use a smart phone (e.g., iPhone, Droid, BlackBerry)?
 Yes No
6. How often do you use your cell phone to access the Internet?
 - a. Do you participate in any online social networking sites such as MySpace, Facebook, Twitter, Friendster, LinkedIn, etc.?
 Yes No If Yes, which ones?
 - b. How often do you access these sites?
 - c. How often do you post something (i.e., status update, photos, links) to these sites?
 - d. How frequently do you update your profile information?
7. a. Do you regularly read or post to any online message boards?
 Yes No
If Yes, which ones?
 - b. How often do you read or post to these message boards?
8. Have you ever commented on the online version of a newspaper article or story? Yes No If Yes, please explain, including the nature of the news story and why it interested you:
9. Do you have your own or do you contribute to any online blogs?
 Yes No If Yes, please explain, including the name of the blog and your participation:
10. a. Do you read any online blogs? Yes No If Yes, which ones, and how often?
 - b. What is it that interests you about these blogs?
11. If you are selected as a juror in this case you will be instructed that you are not allowed to do any outside research on the case, the attorneys, the parties, witnesses, expert testimony, the evidence, the legal issues, the jury instructions, legal definitions, the judge, other jurors, or anything else. This includes online research of any type. Do you think you would have difficulty following that instruction? Yes No Please explain:
12. If you are selected as a juror in this case you will also be instructed that you cannot discuss the case, the attorneys, the parties, witnesses, expert testimony, the evidence, the legal issues, the jury instructions, legal definitions, the judge, other jurors, or anything else prior to jury deliberations, and then, you may only discuss matters with your fellow jurors until the conclusion of the trial. This includes e-mail messages, blogs, and online posts of any kind, including, but not limited to, Facebook, Twitter, MySpace, LinkedIn, etc. Do you think you would have difficulty following that instruction? Yes No Please explain:

(at least on the non-paid site) which one was current. My profile said that my religion is Hindu – it's not, that is clearly an intuitive albeit incorrect guess based on my name. Property values listed could also be misleading – several of my prior places were apartments in homes that were worth lots more than the individual unit for example.

When to conduct the research?

• Before oral voir dire

If you are lucky enough to get the random list of jurors ahead of time, you can begin research right away. If you are

in this situation, it is likely because you have a juror questionnaire. Evaluating questionnaire responses is usually more important than Internet research and resources should be allocated accordingly. Case-specific information provided in response to a background questionnaire is more telling than a Facebook page. That said, I encourage you to include questions about Internet use and online media in jury selection, examples of which are included in this article. This can not only help you find jurors online, but it can also help you determine who might be inclined to violate rules about

communication or online research as will be discussed below. It's a good idea to have someone in the office who is not working on questionnaire evaluations available to do Internet searches of the jurors.

• During voir dire

If you don't have a questionnaire, you probably won't get the juror list until jury selection starts. In some instances someone on the trial team will have the ability to research the jurors in court through the wireless or on their iPads. Obviously this person can't also be involved in questioning or evaluating juror



responses during the voir dire, so this opportunity may again come down to availability and priority of resources. What we'll often do is use some of the lunch break or evening after the first day of voir dire to see what we can find. This can be more valuable from a time management perspective because you can focus your search on the jurors who are actually in the box or coming up as opposed to those who are gone for cause or hardship or at the very end of the list.

I tend to use Internet research most often when I'm looking for information about non-disclosers or people I'm not sure about. We've all experienced the situation where there is a potential juror who is good on some things and bad on others. Often there will be someone that I like intuitively but I'm worried about because of possible identification with a party or a particular life experience. When it comes down to those gut decisions, sometimes knowing something about their online presence and personality may tip the scales one way or the other.

For example, in a recent failure-to-hire case where the judge denied a jury questionnaire, there was a potential juror who we all felt good about intuitively, but her job title was "management analyst," and we had concerns that she would identify with management in the case. During lunch we found a page with her work history and bio that revealed she had left the private sector for a government job because of beliefs about greed and being fed up with "the focus on the bottom line: profit." She ended up being a plaintiff leader. In another commercial real estate case with a very brief (six questions) questionnaire there was a juror that we thought we liked, but there were several things that made us very nervous about him, including his military history and employment at Lawrence Livermore Lab. Internet research revealed a "Peek You" page with a lengthy autobiography that told us he was not at all a "company man" or conservative and that he had a great sense of humor and level of compassion

that we thought would be beneficial on damages, and it was.

In still another case where we had concerns about the fact that one of the plaintiffs was of East Indian ancestry, even though it was not an issue in the case, there was a juror who was incredibly vocal and outspoken, certain to be a leader, but a mixed bag (a Libertarian who was questionable on damages but also had knowledge and experience with mold exposure and toxicity). Part of what led us to take a chance on him was that visiting his Facebook page revealed he was married to an East Indian woman and had many East Indian Facebook friends.

On occasion, we have also done Internet research with the express intention of supporting a challenge for cause. In a recent example involving a gender/age discrimination and defamation case where the client happened to be lesbian (sexual orientation discrimination was not a cause of action), there are a number of jurors expressing strong anti-gay views on the jury questionnaire. One particular juror mentioned that he was an elder in a church and that litigation involving gays and lesbians was tying up church resources and finances. The judge had denied our challenge for cause. That evening we researched the potential juror and discovered that he was a named party in some of the litigation as opposed to merely being a disinterested church attendee. This level of his involvement was not evidenced in the questionnaire and was not something he disclosed on his own when he was questioned about his response. We used this to argue to the judge that the jurors' feelings were stronger and more deeply ingrained than he had revealed. The juror was ultimately dismissed for cause.

• *After jury selection*

If I haven't had time to do any online research before jury selection, I might look jurors up afterwards to see if there is anything that can be incorporated into opening statement, witness

testimony or closing argument that might appeal to a particular juror. I include any links to online profiles on the juror summaries that I prepare for attorneys.

In a case I recently did with a particularly bad jury pool, and a judge who wasn't giving much on cause, we had to make some tough decisions about who to leave on and ultimately exercised all six of our challenges while the other side passed a number of times. There was one juror in particular I was concerned about. I had rated him poorly based on his questionnaire responses and because he had the potential to be a real leader based on his knowledge of some case issues, but I did like him better in court – I often warn clients about being seduced by someone's demeanor but I'm not immune to it! Knowing he might not be the ideal juror for us but deciding we had no choice but to live with him, he made it on the jury. I did some research to see what else I could find. To my surprise he had an active Twitter account (I don't actually see that all that often) with several recent posts. Looking at who he was following and what he was posting led us to feel better about him. This also allowed for an opportunity for the lawyers to think about ways to appeal to this particular juror during the trial, since we were pretty sure he was going to be influential, which he ultimately was.

In another large federal wage and hour case in the Midwest, we had the questionnaires in advance and had the opportunity to do social media searches on the potential jurors. We didn't turn up anything all that informative. After the jury selection, however, I was preparing juror profiles and did a check on the Facebook pages of seated jurors that we had located. One of the jurors we had thought was pretty good for us had updated his Facebook page to indicate that one of the people/groups he was inspired by was "The Working Poor," which pretty much summed up who the plaintiffs in the case were! Post-trial interviews with this juror confirmed that he was in fact a very strong supporter of the plaintiffs' case. Another reason to do post-jury



selection research on your jurors is to monitor their online activity during the trial to make sure they are not communicating about the case.

• Post-trial

I've also used Internet research to help me locate and even contact jurors for post trial interviews. This is really where I've found the "people finder" search engines most valuable. After the trial in California, with rare exceptions, there are not prohibitions on contacting jurors. I've found jurors on Facebook or LinkedIn and if I am not able to reach them through more conventional means, I might send them a message asking them to e-mail or call me if they were interested in talking about their experience.

In the same wage and hour case I mentioned before, there was a mistrial a few days after the jury was selected. I was asked to interview the jurors to see what they had thought of the case so far and what they knew about the cause of the mistrial because the information had not been disclosed to them. When I was looking up the jurors on Facebook, I saw that at least one of the jurors had posted about the experience, writing, "Well, my stint as a juror was darn short. Declared a mistrial and sent us home." Friends asked her, "Was it the lawyers or the jurors who screwed up the trial?" to which she responded, "Lawyers. I heard the words 'wire fraud' mentioned and after the first day of testimony, I was pretty suspicious myself."

Ethical considerations

An interesting side note in this case involving the potential juror who was the church elder discussed above was that the judge was deeply concerned with the fact that we had done Internet research, and she chastised plaintiff's attorney for doing so, saying she believed it to be improper. The defense joined in, arguing that this was a violation of juror privacy and that it would result in people refusing to serve as jurors. Plaintiff's counsel responded by pointing out that the

information was not privacy protected, that district attorneys routinely do research of jurors using information that is not provided by them in open court, that there are services that you can pay to investigate jurors, and that the practice is common and does not differ from investigative techniques of old. Ultimately the judge reconsidered her position that plaintiff's counsel had acted improperly, but her initial reaction and questions about juror privacy remain hot-button topics amongst legal commentators.

There is some research to suggest that the practice of Internet research is generally accepted and that there is not a widespread belief that attorneys should be prohibited from conducting these searches. A recent article describing the results of a survey with attorneys and judges which included questions on the ethics of Internet research on jurors revealed that the respondents, "almost unanimously held that attorneys should be allowed to research jurors."³

Regular voir dire absent Internet research could be considered an invasion of privacy, but it is accepted by most as a necessary step to ensure fair and impartial juries. Some commentators have suggested that telling jurors they may be researched may actually lead to more honesty in voir dire responses and less likelihood of Internet-related misconduct. A more difficult question is what the attorney doing the research is required to do with the information if they discover something that is potentially disqualifying or would subject the juror to a challenge for cause. There is not yet clear law on this issue.

A more clear-cut ethical guideline is that one should not "friend" a potential juror or attempt to circumvent privacy settings in order to access information that would not otherwise be available to you. Not only is that practice deceptive, but attorneys and their agents are not allowed to communicate with jurors during jury selection or trial, and "friending" someone on Facebook, "connecting" with someone on LinkedIn or "following"

someone on Twitter can be viewed as improper communication. Interestingly, a new service is available that will allow for access to past and present "tweets" of someone without sending the "follow" request that would result in prohibited communication.⁴ It is unclear what, if anything, the person being "followed" would know about this process.

Remember that research can be reciprocal. If you are looking potential jurors up, they might be looking you up too – even if they've been told not to. Make sure your Facebook page has proper privacy settings and that you are comfortable with the possibility of jurors, clients, or opponents viewing your own publically accessible online information.

Characteristics of social media users

One thing is certain – there will be potential jurors in your jury pool who are participating in social media. Some may even have social media "addiction." A recent study of over 1000 respondents found that 48 percent of social media users check and/or update Facebook and/or Twitter after they have gone to bed for the night, and 42 percent check and/or update their status the very first thing in the morning. Over half, 56 percent, said they need to check Facebook at least once a day.⁵

Examining the demographic and personality characteristics of social media users is an emerging area of social science research. Some recent studies have found that, perhaps not surprisingly, Facebook users are more extraverted,⁶ and that extraverted users have more Facebook friends⁷ and belong to more Facebook Groups than introverted individuals.⁸ Facebook users have also been found to have higher levels of exhibitionism, narcissism and leadership than Facebook non users.⁹

In addition, research indicates that people with high levels of neuroticism are more likely to prefer using the "wall" feature in Facebook than those who are more emotionally stable.¹⁰ The authors suggest



that perhaps this is because the wall allows people who have neurotic tendencies to take time thinking of messages and posts, thereby reducing the chance that they will accidentally give away personal information to others.¹¹

While Facebook users might be more extraverted and narcissistic, research has also shown that they have stronger feelings of family loneliness. In comparison, non users are more likely to be conscientious, shy and socially lonely. Lonely people tend to spend more time on Facebook per day, and have higher preferences for the more passive features of Facebook, like games.¹²

Another interesting study found that the intensity of smiles in college student's Facebook profile pictures predicted self-reported life satisfaction both at the time of posting and 3.5 years later. More intense smiles were also associated with better social relationships.¹³

People who are more frequent users of the Internet for news and information, and heavy users of social media may be more tempted to violate court rules prohibiting online research and communication than other potential jurors.

What can you as attorneys, do to help reduce the tendency for juror misconduct? You can start by addressing the issues in voir dire. While the judge tends to take a more passive role, telling jurors what the rules are and asking them to abide by them, attorneys can make it more interactive, and get the jurors involved in the discussion which can increase compliance.

After you know who participates in social media, find out how often jurors tweet, text, post or blog. Ask them how they will adjust to not being able to do that while they are on the jury. You can even ask them to demonstrate what they would post or say if they were selected as a juror. You could generate examples of how even a little bit of information could lead to problems. For example, just saying you are on an employment case would inevitably call into question who the employer is, what the allegations are,

and may result in the juror receiving unsolicited advice about a verdict or information about the case or parties. Propose that jurors could post something stating they are on jury duty and can't read, see, hear, post, or receive any information about the case until it is over to ward off well meaning "friends" who want to know more or provide outside information.

During voir dire, you can talk to jurors about how frequently they turn to the Internet for answers to questions, definitions, or to learn more about a person, place, thing, or process they don't know about. Then ask how they feel about not being able to do that as a juror in the trial but instead having to rely only on what is presented. Make it clear that they are not going to be able to use their phone to Google the parties or lawyers, they are prohibited from pulling up that online legal dictionary to define a term in the jury instructions, and so on. Why do they think that is the case? How do they feel about it?

You can also use voir dire to identify risky jurors based on their Internet habits. You may even get someone removed for cause because of an inability to forego posting, texting, or blogging about the case. I've certainly had jurors removed for cause because they weren't sure they could keep themselves from talking about the case to their spouse or from watching the local news; this is no different and some research on Internet addiction suggests it could be more difficult for some people to give up. Along the same lines you can identify those who think they will not be able to refrain from looking up things online if they have a question or feel like information is being kept from the jury.

The reality is that in the vast majority of cases there will be other topic areas you need to assess in voir dire that will have more importance than juror Internet habits. On a preceding page is a questionnaire on Internet and social media usage that can be included in a jury questionnaire, which can be a more time-efficient way to gather the information.

With a doctoral degree in psychology and law and a passion for research, Dr. Chopra applies current social science theory to a wide variety of legal issues. She has been involved in the litigation consulting field for over 15 years and has worked on hundreds of cases. In her work as a consultant she designs, conducts and analyzes focus groups and trial simulations, and assists attorneys in case analysis, theme development and jury selection. Dr. Chopra also has extensive experience working with both trial attorneys and witnesses on their communication and persuasion skills and she has interviewed hundreds of jurors following verdicts.



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She has served on the Board of Directors of the American Society of Trial Consultants and is the Associate Editor of the trial manual, Jurywork: Systematic Techniques. www.njp.com/consultants_Sonia_Chopra.html

Endnotes

- ¹ See, e.g., "Millennial Jurors and the Internet," Hon. Jacqueline Conner Plaintiff September 2011;
- ² "New California Law Prohibits Jurors' Social Media Use" Eric P. Robinson Citizen Media Law Project (<http://citmedialaw.org>) September 1, 2011.
- ³ "Jurors in the Digital Age" Thaddeus Hoffmeister (<http://ssrn.com/abstract=1668973>)
- ⁴ "Monitor a Juror's Tweets Ethically" Thaddeus Hoffmeister Juries Blog (<http://juries.typepad.com/juries/2012/01/monitor-a-jurors-tweets-ethically.html>) January 10, 2012.
- ⁵ "Is Social Media a New Addiction?" Andrew Eisner Retrevo Blog (<http://www.retrevo.com/content/blog/2010/03/social-media-new-addiction%3F>) March 15, 2010.
- ⁶ "Social Network Use and Personality" Y. Amichai-Hamburger & G. Vinitzky 26 Computers in Human Behavior 2010; "Who uses Facebook? An Investigation into the Relationship between the Big Five, Shyness, Narcissism, Loneliness, and Facebook Usage" Traçii Ryan, Sophia Xenos 27 Computers in Human Behavior 2011.
- ⁷ Y. Amichai-Hamburger & G. Vinitzky supra note 6.
- ⁸ "Personality and Motivations Associated with Facebook Use" C. Ross, E.S. Orr, M. Siscic, I. M. Arseneault, M.G. Simmering, R.R. Orr 25 Computers in Human Behavior 2009.
- ⁹ Ryan & Xenos supra note 6.
- ¹⁰ Ross et al., supra note 8; Ryan & Xenos supra note 6.
- ¹¹ *Id.*
- ¹² Ryan & Xenos supra note 6.
- ¹³ "Intensity of Smiling in Facebook Photos Predicts Future Life Satisfaction" J. Patrick Seder & Shigehiro Oishi Social Psychology and Personality Science October 18, 2011.

