

## **Social Media Craze: How the Internet Is Changing Efforts to Preserve the Judicial Process with Prospective Jurors at Trial**

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### ***Introduction***

We are in the last few minutes of a two-day jury selection when the lead defense counsel overhears one of the prospective jurors discussing with another juror the Google search she completed last night on our client, and how she was “surprised” by the number of links that came up. Unfortunately, the judge had never admonished the jurors to refrain from conducting any Internet searches during the jury selection process. Plaintiffs’ counsel was not enamored with the final panel and saw this as an opportunity for a mistrial.

Long story short, the judge interviewed at the bench each juror who had contact with the Google-searcher. To the luck of the defense, each person claimed not to recall what was said and each also had been previously struck via peremptory or cause. Consequently, the judge decided to keep the panel in place. The Google-searcher remained on the panel and was our foreperson, as the defense agreed she was a strong defense juror based on her voir dire responses. In the end, we received a defense verdict, but this was a happy ending to a scary situation.

### ***Social Media’s Growth***

We have entered a new era – the onslaught of the social media craze has serious implications for how we deal with jurors in the legal system. The statistics are overwhelming. The wealth of information available online, and the speed at which that information is accessible, is greater than ever before – and it is still growing.

Did you know that there are 31 billion searches on Google every month; yet only four years ago this number was 2.7 million? Did you know there are more than 106 million accounts on Twitter and the number of Twitter users increases by 300,000 every day? Did you know the U.S. makes up 33% of the Twitter traffic, where 45% of users are 18-34, 24% are ages 35-49 and 14% are over the age of 50?<sup>1</sup> Did you know there are over 111 million users on Facebook in the U.S. alone? More than 100 million active users access their Facebook accounts via their mobile phones. The statistics go on and on, and expand to MySpace, LinkedIn and other social media sites.

What does this tell us? The Internet and social media sites are now commonplace – in many cases it is a preferred avenue to access news, information, research, etc. The Internet is at our fingertips, literally, and it is now part of our everyday lives. A byproduct of this instant access is that there are no rules, social or otherwise, that govern when to use it, what content is available and where that information came from, etc. So what does this all mean for those of us involved in the judicial process? What are some challenges we are facing and potential solutions for them?

### ***Keeping It Out of the Courtroom***

We have anecdotally heard about ways social media sites have interfered with the judicial process (e.g., a juror tweeting during deliberations about avoiding buying any stock in the

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<sup>1</sup> Source: [www.viralblog.com](http://www.viralblog.com).

defendant's company given their verdict). Here are some documented cases to bring home the significance of how this phenomenon is adversely affecting the legal field.

- In *Russo et al. v. Takata*, a juror received a supplemental juror questionnaire (SJQ) in the mail prior to jury selection and while filling it out decided to conduct Internet research about Takata (a seatbelt manufacturer). Yet this juror did not respond to repeated voir dire questions from counsel about ever hearing about Takata or knowing something that may sway favor for one party in the case. Later, during deliberations, he commented to other jurors that Takata, based on his Internet search, had not been involved in any other cases of this nature; therefore, this must have been a "one-off" case. However, the facts from experts presented during trial revealed numerous other cases about defective seatbelts. Plaintiff was successful in overturning the verdict.
- In a recent case in Missouri where we assisted in jury selection, a juror was silent when asked about his corporate attitudes; however, after conducting a social media/Google search related to this juror, we learned this juror misrepresented himself, as he held strong anti-corporate/socialist attitudes and failed to disclose those attitudes during voir dire. We were successful in getting that juror dismissed by the court.
- *People v. Siegelman* raised questions of potential juror misconduct, in the context of a motion for new trial, in a high-publicity criminal case where the defendants claimed that, during the presentation of evidence and deliberations, some members of the jury had been sending each other e-mails. The motion for appeal was denied because the finality of the jury's verdict could only be challenged by evidence of "extraneous prejudicial information" or "outside influence."

With jurors having information at their fingertips 24/7, what steps can we take to minimize and hopefully eliminate jurors' reliance on the Internet and social media sites? We next focus on solutions for both jury research projects and actual trial settings.

### ***Jury Research Solutions***

- **Collect All Wireless Devices.** In addition to our existing instructions for jurors not to search the Internet for information beyond what is being presented during or after the proceedings, we have taken a significant measure to ensure the confidentiality of our mock trials/focus groups. That is, given the many features of these devices (audio recorders, cameras), we have been concerned that someone could surreptitiously record the presentations or photograph documents. Therefore, for our jury research projects, we collect all wireless data transmission devices such as mobile phones, Smartphones and cameras from mock jurors during our "court" proceedings.
- **Change Names.** While we cannot guarantee that a juror will not breach the project's confidentiality, we do our best to thwart any attempts. That is, to prevent jurors from researching any information about the presenting lawyers outside of the courtroom, we recommend to our clients that the presenting attorneys alter their names, particularly the attorney portraying the "opposing side." Also, in instances where the presenting attorneys are members of the same firm, this strategy prevents jurors from learning "plaintiff" and "defense" attorneys are colleagues.

### ***Trial Solutions***

- **Written Instructions with SJQ.** When sending out SJQs in advance of jury selection, or even when jurors are completing them at the courthouse, it is critical to include within the introductory instructions that Internet research of any kind is prohibited, the reasoning why and the consequences of that action. If a juror doesn't understand a question or any terminology, etc., they should be instructed to consult the clerk of court or note their uncertainty on the SJQ itself.
- **Include Questions about Internet Habits.** On the SJQ, as we have previously recommended in our Volume 7 Insights, include questions related to whether jurors have websites, blogs, social media sites, etc. This will give you an opportunity to research their sites to learn more information about their attitudes and activities.
- **Judge's Instructions.** In court, prior to voir dire, it will be important to incorporate updated language into the judge's introductory and continuing remarks that directs jurors not to search the Internet for any information about the proceedings, including researching definitions of the legal terms, the parties, etc. In a recent case in Missouri, the judge admonished the jurors before voir dire, and at every break, not to use the Internet to do any independent research or to make remarks about the proceedings via any social media sites. We provide a sample instruction that has been used during trial.
  - "I hope that for all of you, this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the Internet and other tools of technology. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn and YouTube."
- **Suspend Websites.** Again, because no one can control what a juror will actually do, innocently or intentionally, we recommend a motion to the judge to pull down all relevant websites, particularly any the plaintiff's attorney may have posted to garner more clients on the alleged defective product, etc.
- **Ask On-Point Questions in Voir Dire.** Because the rules of the Internet are ill-defined and potential jurors do not understand the gravity of conducting research online or commenting about their jury service on Twitter, it would be wise to develop a line of questioning, when tied to the burden of proof that assesses jurors' Internet and social media habits. For instance, "The judge sent out the SJQ in advance to each of you to complete and send back. This is to help make the process more efficient. However, did anyone follow up on any information within the SJQ? That is, did anyone happen to research a definition, phrase or company name?"
- **Search for Potential Jurors Online.**<sup>2</sup> Many jurors are online themselves and, much like information about cases and our clients, not all information online about jurors is helpful. For example, in a pool of 100 jurors, chances are that the majority of them either won't be searchable online, or will have completely irrelevant information to what you would need. However, on the chance that you've found that one juror who is blogging about your case, or

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<sup>2</sup> At Litigation Insights we feel strongly that there are ethical considerations to adhere to when searching for jurors online. For example, we never "friend request" a person whose profile we cannot see. We feel this is jury tampering and a deliberate misrepresentation of intention.

has misrepresented themselves in court, this type of research could save a lot of time, effort and a mistrial in the end.

### ***Conclusion***

What the current internet/social media statistics are telling us is that the way we receive information is ever-changing and the vast majority of jurors will have access to the Internet and social media networks. The ways in which, and the speed with which, we receive information is now a game changer in the legal arena. The solutions we have today may not hold six to 12 months from now. We will need evolving solutions for evolving problems derived by social media phenomena.