

Using Social Media in Jury Selection: Can Jurors Be Your "Friends?"

These seven tips can help when using social media in selecting a jury.

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You're about to begin a major trial, and one of the most critical aspects of it: jury selection. The obligations of zealous representation require you to obtain the best jury for your client you can, which in turn requires you to research, identify and analyze pertinent information about potential jurors. This allows more informed judgments regarding potential bias and hidden agendas, potential reaction to trial theories, and accuracy of voir dire answers, thus more easily substantiating cause strikes.

In today's world of Facebook, Twitter, LinkedIn, and their "friends"—itself a term which has lost all meaning—the volume of information people have affirmatively posted online about themselves is mind-boggling. Can these reservoirs be tapped when the posters become potential jurors? And to what extent does such research run up against another bedrock ethical obligation—the prohibition against counsel communicating with potential or selected jurors?

The following are some suggestions to assist in dealing with these issues.

1. Identify and follow applicable ethical rules and



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opinions: Numerous bar associations and other entities around the country have endeavored to provide guidance.



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The American Bar Association's (ABA) standing committee on ethics and professional responsibility formal opinion 466 ,



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"Lawyer Reviewing Jurors' Internet Presence," concluded that, unless limited by law or court order, a lawyer may passively review a potential/prospective or empanelled juror's public presence on the internet. However, the lawyer may not communicate directly or through another with a juror, and requesting access to a private area on a juror's electronic social media would constitute such communication. Notably, the fact that a social media network setting notifies the juror of counsel's review does not constitute such communication. (But, such a notification may have its own problems if the potential juror reacts negatively to the news he or she has been researched.)

Not surprisingly, there are some variances between different ethics authorities. For example, the ABA opinion expressly did not take a position on whether the standard of care for competent lawyer performance requires using internet research to locate information about jurors relevant to the jury selection process. By contrast, the [Social Media Ethics Guidelines of the commercial and federal litigation section of the New York State Bar Association](#) appear to take the position that standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case, including internet and social media research. In addition, the New York guidelines differ with the ABA opinion as they suggest that communication with a juror that is automatically generated by the social media network may be considered a technical ethical violation by the researching attorney.

Trial counsel should research their relevant jurisdiction's ethical guidelines to determine the applicable interpretations and restrictions.



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2. Determine what court rules may be in play: It is

important to check the applicable local rules to see if this subject has been addressed. For example, in an amendment effective Jan. 1, the [Local Rules of Practice for the U.S. District Court for the Northern District of New York](#) added a new Civil Rule 47.6 providing guidance on the use of social media to investigate potential jurors. The rule allows attorneys to use websites available to the public, including social media websites, for juror or prospective juror research, as long as certain conditions are met. The website or information must be available and accessible to the public; the attorney must not send an access request to a juror's electronic social media; and no direct communication or contact may occur between the attorney and the juror or prospective juror as a result of the research, including, but not limited to, Facebook "friend" requests.

In addition, social media research must be done anonymously; for example, a search on a social media site must not disclose to the juror who is making the inquiry, and it must only seek information available and accessible to the public and not the result of an attorney's account on the site. Deception cannot be used to gain access to any website or to obtain any information, and third parties working for the attorney must comply with all the same restrictions.

3. Recognize the court may raise this issue in your case:

The ABA opinion "strongly encourage[d]" judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the internet. On March 25, in [Oracle America v. Google](#), Judge William Alsup of the U.S. District Court for the Northern District of California issued an ["Order re Internet and Social Media Searches of Jurors."](#) The court called upon the litigants to voluntarily consent to abstain from social media and internet research on both potential and final jurors until the trial was over, to protect the integrity of the trial process and to curb unnecessary intrusions into juror privacy. The court noted that it had the discretion to impose an outright ban on such activities. The parties provided such consent soon thereafter.

In other cases, the issue may also already be addressed in a previously-entered standing order (if the judge has one), instructing as to the specific procedures and protocols for the judge's courtroom. It may also be referenced in the court's standard case management order.



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4. Report identified juror misconduct where required: As

several ethics sources direct, if a lawyer in his or her social media research discovers improper conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the court. For example, a juror may be improperly commenting about the case on social media, or communicating with trial participants. Thus, undertaking such research can potentially create an obligation with regard to acting on the results obtained.

5. Consider retaining a jury consultant: A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. However, a skilled consultant experienced with social media research, including how to proceed in compliance with all applicable directives, may increase effectiveness and reduce the risk of inadvertent contact or other errors.

In addition, jury consultants may have at their disposal sophisticated algorithmically-powered social media analytics tools which may both further increase the return and reduce the risks. Moreover, such tools may tremendously shorten the turnaround—critical in the time-pressured jury selection context.

6. Keep up to speed with legal and technological developments in this area: Social media technologies are changing, and the law, which always struggles to keep pace with technology, is changing as well. Practitioners must keep abreast of evolving guidance as more jurisdictions weight in or modify positions, new social media offerings are introduced or capabilities of existing products change, etc.

7. Take it all with a grain of salt: Like anything else you see on the internet, you can't always believe everything you read in a juror's online websites and social media. Posted statements simply may not be true. They may have been posted by someone else. They may not have been intended to be taken seriously.

Bottom line: Any information you obtain is just a bit more grist for the mill of your instincts and judgment as an experienced trial lawyer.

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