Using Social Media as an Investigative Tool for Voir Dire

by Brandon K. Fellers and Craig E. Ellis

We lawyers prepare for jury trials by analyzing facts, evaluating witnesses, and developing themes to highlight salient points. All of this is done with one entity in mind — the jury panel. Like every persuasive argument, our focus should be on driving an audience. It is our duty to create a panel that will be receptive to our facts, witnesses, and theme. Voir dire is one of our first steps to success.

This article advocates for getting to know your potential panel long before you meet them face to face by using social media. We hope to convince you to use these tools as an integral part of voir dire, to understand your basic ethical obligations in relation to social media, and to introduce you to a set of free user-friendly programs that will allow you a peek into the lives of your panel.

Ethical Considerations
Effective March 1, 2016, the Supreme Court of Virginia amended Rule 1.1 (Competence) reminding Virginia lawyers to pay attention to the benefits and risks associated with relevant technology. This doesn’t mean that attorneys have an affirmative duty to become more educated on technology, but they should be paying attention to the benefits it can provide, such as utilizing social media technology to investigate prospective jurors. The passive gathering of public information from prospective jurors is not unethical, as was confirmed in ABA ethics Opinion 466 on April 24, 2014.¹ Some sites, such as LinkedIn, notify users of someone looking at their profile. The ABA also opines that since it is the provider, not the lawyer, making the contact, there is no ethical issue.² James M. McCauley, Ethics Counsel for the Virginia State Bar, agrees with the ABA opinion.³ As with all good things there are limits. Attorneys, however, may not “friend request” jurors or have direct contact with them.⁴

Beginning Your Search
With respect to juror information, counsel is statutorily guaranteed to receive a list of each juror’s name, age, address, occupation, and employer.⁵ Additional investigation through the prospective juror’s social media applications is necessary to reveal any biases that could affect your case. The best places to begin your research are the basic search engines such as Google or Bing.⁶ Use these engines to refine a broader search, starting with first and last names and your jurisdiction. This information may help you find specific usernames, handles, and aliases.⁷ Once you have refined your search down to a specific handle or username, other tools become more helpful, such as www.namechk.com. This website will show you what social media applications are tied to a particular username or handle. Once you have a list of the social media applications used by a prospective juror, you can go to those applications to see what is publicly available, by way of posts, pictures, tweets, etc.

Three of the most popular applications are Facebook, Twitter, and LinkedIn. Using Facebook is one of the quickest ways to gather a prospective juror’s information. Depending on the privacy settings on a prospective juror’s Facebook page, you can gain a wealth of personal information: the person’s birthday; relationship status; sexual preference; educational history; employment history; political views; religious views; pictures; and favorite books, movies, TV shows, etc. Organized chronologically, posts of your search subject are seen in conjunction with their friends’ and associates’ commentary as well. Twitter, however, was designed for the media to report and relay short captions about ongoing events. A user’s “tweet” is limited to 140 characters, which make them short and often very pointed. While a Facebook post can give you a life’s story and perhaps more reflection, a “tweet” may provide more gut reactions. Finally, LinkedIn offers a look into the employment history of its members. This can be useful when seeking a particular set of occupational skills from your veniremen.

How to Use the Information
Begin organizing your data well before trial. While it has been attempted, searching during voir dire will result in incomplete searches and short tempered judges.⁸ As you gather data, remember that this information will be useful before, during, and after trial.

Prior to trial, you are looking for clues of bias. Take note of “friends” or associates on these sites, socio-political views, and of course any illegal/amoral behavior that may be counter to your trial message. Do not, however, check your gut at the door. Take concise and relevant notes about your investigations, but once you see your veniremen face to face do not ignore the gut reactions you may have to them. Social media sites are mini online autobiographies, so be mindful that your information is filtered through a prejudiced author.

Beyond the simple biases you may encounter, pre-trial Batson motions and for-cause strikes will also affect your case.⁹ Collect your data with an eye for making and beating Batson motions should they arise. Likewise, do not gloss over major life events chronicled in posts. Things such as recent deaths in the family, moves, vacations, or medical

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¹ Vol. 65 | June 2016 | VIRGINIA LAWYER
² www.vsb.org
Droid. This is about learning to prioritize personal time in order to stay sharp. If you never get away, even if it’s just a short walk over the noon hour to get some fresh air, the “always available” lifestyle will catch up with you. Batteries die, engines break down, and hearts stop. I have literally seen guys go down with a heart attack. Trust me, not good. We all need to rest and relax in order to recharge and stay healthy.

Finally, focus on the day-to-day. Even on those occasional fourteen hour workdays on the road I still manage to find time to text the kids, call my wife, and when I can, enjoy a glass of red wine with dinner. It forces me to slow down and refocus. When I am home, I leave work at work and get into the kitchen as much as I can. The whole family loves it when I do, but more importantly, that’s my time. Absolutely life’s milestones are worth celebrating; but if you’re missing too much of the day-to-day stuff you may come to find that no one is there to celebrate with you, or worse yet, that you’re the one missing.

Risk Management

Endnotes:
2 Id.
3 http://valawyersweekly.com/2014/05/22/checking-out-a-jurors-facebook-page/. McCauley took the position that an auto-generated third-party notice to a Facebook or LinkedIn subscriber that their profile has been viewed likely would not violate Virginia’s Rule 3.5 “because the lawyer is not communicating with the juror, the social media provider is…”.
4 Va. Rules of Prof’l Conduct R. 3.5(a) (1) prohibits directly or indirectly communication with a juror. Va. Rules of Prof’l Conduct R 8.4(c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.
5 Va. Code Ann. §8.01-351
7 Usernames, handles, or aliases are often e-mail prefixes (the portion on an e-mail address that precedes the “@”).
9 Final, do not abandon your searches once the panel has been selected. In lengthy trials, use these search tools to check up on your panel. Make sure that jurors are remaining properly sequestered by searching their posts in the midst of trial.11

Resource grab bag:
• http://www.watchthatpage.com/ and http://www.changedetect.com/ Webpage monitoring services that track and collect content for a particular website and notify you when a change has been made.
• www.spydialer.com Reverse number lookup service that allows you to listen to voicemail greetings anonymously.
• www.simplymeasured.com Fee-based social analytics website that tracks social media information.
• www.picodash.com and www.tineye.com Allows you to search for a user’s photos or videos.

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