Social Media

# A New "Must Use" Tool in Litigation?

By Stephen P. Laitinen and Hilary J. Loynes

**The use of social media as a form of informal discovery is inexorably gaining foothold.**

With the exploding popularity of social media and, in particular, social networking sites, lawyers cannot afford to ignore how such media impacts every aspect of litigation. The Internet houses a potential gold mine of information that a savvy attorney can use in various litigation stages, from voir dire to discover and eliminate a potential juror who could prejudice a client, to closing to craft a persuasive argument that is tailored to an audience.

People are putting more and more personal information on the Internet. In the United States, no less than 35 percent of adult Internet users and 66 percent of Internet users under the age of 30 have a profile on a social networking site. Amanda Lenhart, *Pew Internet Project Data Memo* 1, Pew Internet & American Life Project (Jan. 14, 2009), available at http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx (follow "Read Full Report" hyperlink). So while the young are still more likely to have a presence in social media than their elders, American adults have quadrupled their social media usage since 2005. *Id.* Staggeringly, Facebook has more than 400 million active users, and each month more than 100 million people log onto to MySpace. Facebook Press Room, http://www.facebook.com/press.php (follow "Statistics" hyperlink) (last visited July 9, 2010); MySpace Fact Sheet, http://www.myspace.com/pressroom?url=/fact+sheet/ (last visited July 9, 2010). Twitter, the microblogging site, has also made a startling impression on social media—it will soon post its 20 billionth tweet, only four years after its inception. GigaTweet, *Counting the Number of Tweets*, http://popacular.com/gigatweet/ (last visited July 9, 2010).

Importantly for litigators, evidence suggests that the rapid rise of social media sites "is changing the way people spend their time online and has ramifications for how people behave, share, and interact within their normal daily lives." Nielsen, *Global Faces and Networked Places: A Nielsen Report on Social Networking's New Global Footprint* 1 (Mar. 2009), available at http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf. Consequently, in preparing for trial, including voir dire, litigators should expand their searches to include social media sites,

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the places where people are posting, replying, and communicating, such as Facebook and Twitter.

## Social Networking Sites: An Overview

Currently Facebook, MySpace and Twitter are the three most widely used social media sites in the United States. However, there are numerous ways in which a tech-savvy lawyer can find information about potential jurors.

### Facebook

Facebook now boasts more than 400 million active users, and it estimates that people post over 60 million status updates each day and share over five billion pieces of content—web links, news stories, blog posts, notes, and photos—each week. Facebook Press Room, http://www.facebook.com/press.php (follow "Statistics" hyperlink) (last visited July 9, 2010) (last visited July 9, 2010). Facebook also estimates that users spend on average 55 minutes per day on Facebook. Moreover, a recent article claims that people spend more time per month on Facebook than any other Internet site. Adam Ostrow, *People Spend 3x More Time on Facebook Than Google*, Mashable: The Social Media Guide, http://mashable.com/2009/09/17/facebook-google-time-spent/. Finally, more than 100 million active users access Facebook on their mobile devices. This exorbitant usage demonstrates the veritable treasure trove of information available about potential jurors, witnesses, parties, and even opposing counsel.

Facebook enables people to connect and interact with other people by becoming "friends" online. It allows users to organize and connect in "networks" formed around any number of different common factors, such as city, school, workplace, and region. Users each have their own "profile" that they can update by making posts on their "wall," adding pictures, and posting links. Users can also comment on other users' profiles and postings. This information, depending on privacy settings, is generally only available to an individual user's Facebook friends. However, some users allow access to their profile, or parts of their profile, to anyone in the same network.

Facebook also allows users to become "fans" of various things, including businesses, nonprofits, sports teams, people, television shows, and products. Under Facebook's new privacy settings, even if a person has marked his or her profile as private, generally his or her "fan" pages are visible, along with his or her profile picture and a select list of Facebook friends. Consequently, even if a potential juror has privacy settings that limit access to his or her profile to his or her online friends, the list of his or her "fan" pages can provide a practitioner with much valuable information about that person's interests, views, and values.

### MySpace

Currently, MySpace boasts more than 70 million active users in the United States alone. MySpace Fact Sheet, available at http://www.myspace.com/pressroom?url=/fact+sheet/ (last visited July 9, 2010). MySpace defines itself as "a technology company connecting people through personal expression, content, and culture. MySpace empowers its global community to experience the Internet through a social lens by integrating personal profiles, photos, videos, mobile, games, and the world's largest music community." *Id.* Similar to Facebook, MySpace users can connect and organize in a variety of different groups, post bulletins on their "bulletin board" for their MySpace friends to see, and post comments on their friends' bulletin boards.

The main difference between Facebook and MySpace is user demographics. MySpace tends to serve a young age group, generally teenagers, while statistics indicate that Facebook has an older and more professional customer base. In addition, more MySpace users employ "screen names," making them harder to track than on Facebook.

### Twitter

Twitter is a "micro-blogging" site that allows users to send and receive updates known as "tweets." Tweets are limited to 140-character-long posts that are displayed on a user's page and delivered to that user's subscribers. A user may restrict access to their tweets to their circle of friends, or by default, allow anybody access to them. Twitter has gained general acceptance as a method of self-promotion. This type of self-promotion can be useful for litigators in garnering information about a juror or potential juror's bias, opinions, and values.

Twitter was started in 2006, and while it is currently third in size by user base—behind Facebook and MySpace—it is the fastest growing of the three social networks. Michelle McGiboney, *Twitter's Tweet Smell of Success*, Nielsen Wire, Mar. 18, 2009, http://blog.nielsen.com/nielsenwire/online_mobile/twitters-tweet-smell-of-success/. Indeed, over 40 million tweets are sent each day. GigaTweet, available at http://popacular.com/gigatweet/analytics.php (last visited July 9, 2010).

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Twitter's purpose, in contrast to Facebook and MySpace, is to enable users to follow their interests, from politics and religion, to sports and knitting. According to Twitter, it "keeps you informed with what matters most to you today and helps you discovery what might matter to you most tomorrow. The timely bits of information that spread through Twitter can help you make better choices and decisions and, should you so desire, creates a platform for you to influence what is being talked about around the world." About Twitter, available at http://twitter.com/about (last visited July 9, 2010).

### Other Sources of Juror Information on the Web

Potential jurors can have a significant Internet presence without ever having had a social networking page. Information about potential jurors can be found in a near-limitless number of places. Jurors post opinions online via blog postings, comments on newspaper articles or other people's blogs, or in letters to the

editor. Practitioners with limited time to research potential jurors should, in addition to checking Facebook, MySpace, and Twitter, conduct Internet searches in (1) Google, using the potential juror's name and hometown or business or occupation; (2) Google News, which will enable a user to find out if a potential juror has been the subject of a news story; (3) local news sites, which may have information that Google News did not pick up; (4) the business or employer's website where a potential juror is employed; (5) Wink.com, which is a catch-all search engine for blogs, websites, photo-sharing sites, and other social network profiles; (6) Zoominfo.com, which is a business information search engine for announcements and business information; (7) Blogsearch.google.com, for more specific blogging information; (8) Yoname.com, which can reveal if a potential juror uses any other social networking sites; and (9) "general" or "people" searches in common photo-sharing sites, such as YouTube, Shutterfly, and Flickr. Christopher B. Hopkins, *Internet Social Networking Sites for Lawyers*, Trial Advocate Quarterly, Spring 2009. If voir dire in a case lasts several days, or if it is necessary to continue juror investigation during a trial, a litigator can also search arrests and lawsuits on the county sheriff's office and the county clerk's office websites, workers' compensation claims, political contributions, and consumer complaints. *Id.*

**More than one-third** of adults on social networks still allow anyone to see their profile.

These sites can reveal important information about a potential juror's background and potential prejudices. Archived news articles, for example, could show that a potential juror had been in an auto accident similar to the one at issue in a case, filed a consumer complaint about a similar product, or even that the potential juror won a sizable amount in a recent lottery. There is a significant amount of information in cyberspace for practitioners to use, the scope of which is only limited by what is sought and how much time someone has to find it. Practitioners should conduct a cost-benefit analysis before conducting some of the more in-depth searches.

## Social Media and Voir Dire

Social media sites provide reservoirs of information and powerful tools from which a practitioner may glean a general understanding of a potential juror. The wealth of information online, from Facebook posts to letters to the editor, produces a detailed picture of how an individual votes, spends money, and sounds off on controversial issues. While most users restrict access to their profiles and pages, more than one-third of adults on social networks still allow anyone to see their profile. Amanda Lenhart, *Pew Internet Project Data Memo* 3, Pew Internet & American Life Project (Jan. 14, 2009), available at http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx (follow "Read Full Report" hyperlink).

Moreover, with social networks jockeying to make money, either by selling or allowing access to vital marketing information, more information is becoming available as sites change their privacy settings. For example, after Facebook recently altered its privacy settings, users often inadvertently shared more information than they realized, such as photos, network memberships, and their "fan" pages.

A potential juror's willingness to share his or her thoughts and activities with the world can greatly benefit an attorney during voir dire. The purpose of allowing peremptory challenges is to remove jurors that are potentially unfavorably disposed to a client's case or arguments. Social networking sites provide attorneys with additional avenues to find this information, as well as to supplement or verify information provided by a juror on a jury questionnaire or by the juror during voir dire.

For example, during voir dire for a case involving patent rights, a jury consultant discovered that a 74-year-old potential juror had a similar experience in her business as the one that formed the basis of the plaintiff's complaint—someone used her designs without permission. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, Los Angeles Times, Sept. 29, 2008, available at http://articles.latimes.com/2008/sep/29/nation/na-jury29 (last visited July 9, 2010). Having a juror who could sympathize with the plaintiff's case would certainly have boded well for the plaintiff. However, because the information was also available to the defense, the juror was struck from the jury pool. Had the defense not been careful to do due diligence and independently research the potential jurors, it might not have discovered the woman's likely prejudice, which could have yielded unfavorable results.

Another case, which involved the infamous "dirty-bomber," Jose Padilla, further demonstrates the need to conduct independent investigations of potential jurors. In that case, a jury consultant discovered that despite a 100-question survey sent to the potential jury pool, the questionnaire failed to reveal that one potential juror had resigned from public office and was under investigation. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times, Sept. 29, 2008, available at http://articles.latimes.com/2008/sep/29/nation/na-jury29. Rather, this information was only discovered after an independent investigation of each potential juror.

As discussed above, attorneys can find a person's Internet presence by searching Google or individual social networking sites with combinations of relevant information: name, residence, phone number, email address, or occupation. It is important for practitioners to remember that users often use nicknames or screen names, particularly when commenting on articles and blogs, so unless a practitioner asks a the jury panel for this information, he or she might not be able to access potentially relevant information. Of course, an attorney must weigh whether such a request would "turn off" potential jurors because although understandable, jurors may perceive that question as an invasion of privacy.

Consequently, in voir dire an attorney should carefully consider whether to ask potential jurors about their online presence and, in particular, if they have anything

that someone can read online, including blogs or a website. It may be useful to ask a question to uncover whether potential jurors have online presences in the juror questionnaire, if one is used. The benefit of such a question was demonstrated in a Wisconsin case in which the judge asked potential jurors if they blogged. *See A Trial Lawyer's Guide to Social Networking Sites, Part I*, Deliberations: Law, News, and Thoughts on Juries and Jury Trials, available at http://jurylaw.typepad.com/deliberations/2007/10/a-trial-lawyers.html (last visited July 9, 2010). One of the jurors revealed that he was, in fact, a blogger. This information led attorneys not only to the potential juror's "edgy" blog, but also to his Twitter posts from the courtroom. The juror actually posted a tweet, stating, "Still sitting for jury duty crap. Hating it immensely. Plz don't pick me. Plz don't pick me." *Id.* This information would have been difficult to discover had it not been addressed in the juror questionnaire or directly asked during voir dire. As a practical matter, an attorney is best served if the question comes from a neutral vantage point, such as a judge or a juror questionnaire, rather than directly from the attorney during voir dire questioning. A potential juror may easily become suspicious or untrusting of an attorney if the juror feels that the attorney has asked "too many" invasive, personal questions.

A similar incident occurred in another case in which the plaintiff's counsel discovered that a potential juror had updated his Facebook status to "sitting in hell 'aka jury duty.'" Kimball Perry, *Juror Booted for Facebook Comment*," Dayton Daily News, Feb. 1, 2009, at A6, available at http://content.hcpro.com/pdf/content/228698.pdf. However, the information was not uncovered from the person's answers on the juror questionnaire; rather, the plaintiff's paralegal only discovered the post while conducting informal Internet discovery on the potential jurors. The information was recovered despite the juror's privacy settings because the juror belonged to the Cincinnati, Ohio, network on Facebook. He had his page set up so that every one of the 238,000 people that belonged to the network could view his page and, consequently, his postings. *Id.* The plaintiff's counsel requested that the juror be removed from the pool, and the judge granted the request. *Id.*

In addition to discovering information about potential jurors, an attorney can use social media sites to check the veracity of a potential juror's answers to voir dire questions. For example, in one case, a potential juror denied knowing a fellow jury candidate, but his Facebook page revealed that the two not only knew each other, but they were in fact cousins. *See* Posting of Bryan Van Veck, Attorneys Using Social Networking Sites for Jury Selection, to California Labor and Employment Defense Blog (Sept. 29, 2008), http://www.vtzlawblog.com/2008/09/articles/employment-policies/attorneys-using-social-networking-sites-for-jury-selection/ (last visited July 9, 2010). The discovery got the juror dismissed for cause. *Id.* In another instance, Internet research revealed that a juror denied having a criminal record despite having two prior theft charges. *Dixon Jurors Said to Still Chat on Facebook*, Baltimore Sun, Jan. 5, 2010, available at http://articles.baltimoresun.com/2010-01-05/news/bal-md.facebook05jan05_1_five-jurors-facebook-social-networking-site (last visited July 9, 2010). Finally, in another case, social media research provided valuable information about a potential juror's affiliations. In that case, the potential juror, in responding to the juror questionnaire, indicated that he had no affiliations; however, Internet research revealed that he in fact belonged to several fringe, right-wing, conservative groups. Julie Kay, *Social Networking Sites Help Vet Jurors*, Nat'l L. J., Aug. 18, 2008. These compelling examples demonstrate that informal discovery through social media sites can yield valuable information on the veracity of a potential juror's responses to questions during voir dire and can provide valid reasons to have a juror dismissed for cause.

Frankly, the difficulty with pursuing this type of informal discovery is that often attorneys have limited time frames within which to proceed. Some states, for example, do not allow access to potential juror lists until the day that voir dire begins, while others, particularly in federal court, will provide lists well in advance. The strategy chosen for researching potential jurors will greatly hinge on how much in advance an attorney receives potential juror information. However, even if an attorney does not receive the names of potential jurors until shortly before voir dire begins, prudence dictates that an attorney do at least *some* investigating.

One method to obtain "real time" information during voir dire is to bring an Internet-enabled phone or computer into the courtroom gallery, if the trial judge allows it, which is not always the case. Reception permitting, a practitioner can ask the court for two copies of the juror list and have a member of the trial team, preferably well out of the sight of the potential jurors, run a preliminary search on each potential juror and record the relevant information next to each juror's name on the list. If the researcher can discreetly convey the information to the voir dire questioner, the questioner can formulate specific questions to ask prospective jurors to aid in juror selection. However, a researcher can have difficulty accessing the Internet, particularly in heavily shielded federal courts, due to weak signals.

**In voir dire** an attorney should carefully consider whether to ask potential jurors about their online presence.

Attorneys can find a wealth of information about potential jurors online, and since the time that people spend on social media sites continues to grow rapidly, the available information will only continue to grow. Certainly traditional sources of information and, at times, the proverbial "gut feeling" and simple intuition, will continue to govern voir dire. However, clearly, a tech-savvy trial team can uncover extremely useful information online, which will facilitate a careful and thoughtful assessment of a potential juror's background and experiences.

## Using Social Media After Voir Dire

Social media can also prove beneficial in presenting and crafting a case. Consequently, just because a jury has been selected does not necessarily mean that

Internet research is finished. Attorneys can make use of social media to tailor their opening statements and closing arguments. For example, as discussed above, a juror's "fan" lists on his or her Facebook page can provide valuable information about that person's values and opinions. If a juror's Facebook page reveals that the person is a "fan" of a particular environmental group or charity, or that the person is an avid animal lover, when appropriate, a savvy lawyer might be able to use analogies or anecdotes to gain sympathy for a client. *See* Julie Kay, *Social Networking Sites Help Vet Jurors*, Nat'l L. J., Aug. 18, 2008.

**Attorneys should** exercise caution because jurors may feel that their privacy has been invaded and become distrustful of not only an attorney, but also the legal system itself.

In addition, a recent case demonstrates why an attorney needs to monitor a jury's social media profiles even during a trial. In Maryland, five jurors charged with deciding the case of the Baltimore mayor accused of misdemeanor embezzlement became Facebook friends during the trial. *Dixon Jurors Said to Still Chat on Facebook*, Baltimore Sun, Jan. 5, 2010. After the mayor's conviction, the mayor moved for a new trial based on evidence that the jurors had continued to communicate on Facebook, even though the judge specifically asked them not to talk about the case. *Id.* The judge requested that the five jurors hand over printouts of all their Facebook communications during the course of the trial and asked them not to discuss the trial issues before the hearing. However, at least three of the five communicated via Facebook with apparent sarcasm about how they did not "know" each other even after the request from the judge prohibiting communication. *Id.* In another surprising case, an undecided juror posted a poll on her Facebook "wall" with details about a case, stating, "I don't know which way to go, so I'm holding a poll." Daniel A. Ross, *Juror Abuse of the Internet*, N.Y.L.J., Sept. 8, 2009, available at http://www.stroock.com/SiteFiles/Pub828.pdf. After the attorney made the discovery, the judge dismissed the juror and allowed the case to proceed. *Id.* The attorneys in that case would not have known of this egregious misconduct had they not continued to monitor the juror's profile during the trial.

Attorneys also need to be mindful that jurors, especially tech-savvy millennial or Generation Y members, will very likely use social media to research the trial lawyers, clients, and witnesses. It is a good idea for lawyers to know what information exists in the public domain about the various trial participants to anticipate and manage juror perceptions to the extent possible.

Continual Internet research, therefore, is not only valuable for constructing and presenting a persuasive case, it can also help uncover juror misconduct and provide an attorney with cause in the rare instance that misconduct warrants a mistrial or a new trial.

## Okay, But Is It Ethical?

While most people would agree that such extensive "background" checks on potential jurors are arguably invasive, the general consensus is that the practice is not unethical. Conducting background checks on potential jurors has been generally accepted practice as long as an attorney or trial team do not try to obtain information through deceit. In general, commentators dismiss concerns for privacy, arguing that on social media sites users control their own content and privacy settings—namely, "if you post something on the Internet for all the world to see, you shouldn't be surprised if all the world sees it." Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times, Sept. 29, 2008, available at http://articles.latimes.com/2008/sep/29/nation/na-jury29.

Courts appear to share this view. For example, the Sixth Circuit has stated that users of social networking sites "logically lack a legitimate expectation of privacy in the materials intended for publication or public posting." *Guest v. Leis*, 255 F.3d 325, 332 (6th Cir. 2001); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 438 n.3 (Md. 2009) ("The act of posting information on a social networking site, without the poster limiting access to that information, makes whatever is posted available to the world at large."); *Yath v. Fairview Clinics*, 767 N.W.2d 34, 43–44 (Minn. Ct. App. 2009) (deeming information posted on social networking websites public information).

Although relevant legal opinion on this issue is scarce at present, practitioners are encouraged to consider their state's ethics rules and, in particular, ABA Model Rules of Professional Conduct 3.5 and 8.4. The Model Rules instruct attorneys that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rules of Prof'l Conduct R. 8.4. The Model Rules also instruct that "a lawyer shall not seek to influence a judge, juror, prospective juror or other official by means prohibited by law." Model Rules of Prof'l Conduct R. 3.5. Attorneys using social media to gather information on jurors or potential jurors should obviously avoid attempts to "friend" jurors and prospective jurors and very carefully avoid anything potentially construable as an improper, prohibited contact or an attempt to influence a juror. *See*, *e.g.*, *People v. Fernino*, 851 N.Y.S.2d 339 (N.Y. City Crim. Ct. 2008) (finding that a "friend" request on MySpace constituted contact).

In one of the only ethics opinions regarding social media usage in jury selection, the Philadelphia Bar Association issued an Advisory Opinion on informal Internet research in response to an attorney's plan to access a witness's MySpace and Facebook profiles. Philadelphia Bar Ass'n Prof'l Guidance Comm. Op. 2009-02 (March 2009). The attorney planned to have a third party, unknown to the witness, become the witness' "friend" on the sites. The third party would not lie during the process, but would not reveal the attorney's intentions. If the witness gave access to the third party, the third party would pass along information to the attorney. *Id.*

The advisory opinion relied on ethics rules to state that the attorney's plan was indeed impermissible. Even though the

interaction would have been solely between a third party and a nonparty witness, the opinion deemed it unethical because it attempted to acquire information through deceptive means. The opinion found that the proposed action was dissimilar to the ethical practice of videotaping the public conduct of a personal injury plaintiff because in that situation the videographer was not required to enter a private area to make the video. The opinion, therefore, found that the user's privacy settings, which limited access to those persons who were the witness' "friends," implicitly created a private space that an attorney could not access through deceptive means. Interestingly, the opinion noted that if the attorney directly made the "friend" request, and the witness granted it, accessing the profiles would be permissible. Philadelphia Bar Ass'n Prof'l Guidance Comm. Op. 2009-02 (March 2009).

Attorneys engaged in Internet research of jurors and potential jurors should, therefore, be duly mindful of their ethical obligations. In addition, overtly using information gathered on social media sites can be precarious. Attorneys should exercise caution because jurors may feel that their privacy has been invaded and become distrustful of not only an attorney, but also the legal system itself.

## Conclusion

Despite widely divergent viewpoints on the usefulness of social media in litigation, from "everything in war is fair game," to "most of the information is noise, and useless noise at that," its use as a form of informal discovery is inexorably gaining a foothold in litigation strategy. *See* Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. Times, Sept. 29, 2008, available at http://articles.latimes.com/2008/sep/29/nation/na-jury29. While in truth, in most cases attorneys will not find that "smoking gun," the rise of social media increases the likelihood of finding that valuable information on at least a few prospective jurors.

Self-generated social media content is uniquely rich. It can provide a powerful lens through which a practitioner may view a juror or potential juror. What juror's opinions are *not* formed, at least in part, by his or her social background, education, and experience? Because this information can be easily gleaned from social networking and related sites, litigators would be remiss in failing to at least consider using social media as a litigation tool, in the right context. As some suggest, with the wealth of information available to practitioners and their clients, "Anyone who does not make use of [Internet searches] is bordering on malpractice." *Id.*