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Social Media Research — A 'Must' When Selecting a Jury

I used to think that outside research on prospective jurors was a distraction that prevented lawyers from focusing on the more important task of sizing jurors up in open court. I also had faith (and personal experience) that the system worked, that judges would hear jurors out, and that jurors would speak up when lawyers posed simple questions that were easy to answer.

I no longer think that way. It is beyond obvious that in today's world, most prospective jurors have an online presence where their comments, tweets, and "likes" can be directly relevant to litigation. Even when the information is not directly relevant, the internet and voir dire have changed so much over the years that in most cases, when time allows, online information about prospective jurors gives litigants a greater feel for whom jurors really are than the limited face-to-face interactions that occur in the courtroom. The following three case studies demonstrate how.

Case 1

The defendant was a young foreign national, studying at a university scarred by a mass shooting that had occurred 12 years prior. The school had special rules about students who legally owned firearms. The weapons had to be checked in and out of lockers; this allowed local authorities to easily track students who regularly used firearms or purchased new ones. Ultimately, the defendant's habits caught the attention of local police, who followed him to a gun range and claimed that he was using an illegal magazine. The defense team believed the charges were false but was extremely concerned about picking a jury in a case where the client was not a U.S. citizen and the community had vowed to never forget.

The judge made it crystal clear: There would be no voir dire about the mass shooting. Jurors would not be asked if they knew anyone, if they participated in remembrances, if they remembered that day, or if that day would impact their view of the defendant's gun charges.

We received the list of 51 prospective jurors in advance, giving us the weekend to research them. My social media researcher worked tirelessly until she found significant information on almost all of the 51 jurors. She had photographs, posts, tweets, "likes," employment information, and brushes with the law. We knew how they felt about guns, gun ownership, and gun violence. We had a feel for the entire pool just from the social media research, which was significant because none of the defense lawyers were directly experienced with this locale. In fact, on the day of jury selection, I felt like I was hosting a party and knew everyone who was coming. I had arrived early so I could eyeball the jurors. Sure enough, I recognized Mr. "How to Piss off a Liberal" and Ms. "Girls with Guns." I saw Mr. "Every Town for Gun Safety" and Ms. "Stop Gutting Federal Gun Laws." Mr. "My Alarm Tells Me You Are in My House, My Gun Tells Me Not for Long" gave me a very friendly smile.

BY CAROLYN S. KOCH

Of course, the defense was also prepared for traditional voir dire. The defense lawyer started asking the questions, but it did not take long before the judge shut it all down. He was increasingly impatient with a roomful of jurors who had too many affirmative responses. The voir dire came to a screeching halt after eight jurors raised their hands to this question:

- Who believes it should be against the law for a non-U.S. citizen to be able to own a gun while residing in this country?

The judge decided he had had enough, but he could not ignore the jurors who believed the lawful activities of the defendant should be unlawful. Once we got those jurors out of the way, we had to exercise our peremptories. It was perhaps the first time a judge shut down voir dire and I felt perfectly content because we already knew what we needed to know, and the government apparently had no idea. From the social media research, we knew a surprising number of gun zealots were still seated on the jury. Jurors with posts like the images in Figures 1 and 2 were quietly sitting in the box, and the government made no effort to strike them. *(None of the images in this article are the actual images posted by the jurors. Similar images are being used.)*

I could not make sense of the government's strategy for strikes, and I never waste time trying to get in an opponent's head. The defense strategy was simple: We got rid of the jurors who were anguished over gun violence and adamant that gun laws needed to be changed. In today's political climate, these were the jurors most inclined to speak up about their views, and thus it was not hard to flush them out or make successful challenges for cause. The jurors with the strong views in favor of gun ownership sat quietly. They did not offer up anything in open court, and consequently, became part of the jury. We did not have to hold our breath waiting for an acquittal, however, because the judge was unpersuaded by the government's witnesses and refused to let the jury decide the case. The social media lesson remained: We had a rock solid strategy that could not be upended by a judge who shut down the voir dire.

Case 2

This case was an extremely difficult one. Unlike the first example, the defense did not receive a list of jurors in advance. The social media research had to occur simultaneously with the live jury selection. We had to text the names of the jurors to my social media researcher that morning. She had to constantly react and adjust to our texts as she bounced from the entire jury list to the actual jurors picked to sit in the box. Just as challenging were the facts of this case: The defense represented a white police officer charged with the murder of an African American teenager. There had been a great deal of publicity and the case had sparked outrage in a racially divided community.

Considering the many inherent and troubling biases of the jury pool, the court allowed a short written questionnaire that contained nine questions. Jurors were asked what they had read or heard about the case, and they were asked their conclusions as well as their ability to set those conclusions aside. Jurors were also asked their opinions about the Black Lives Matter movement and police officers' use of force against black men.

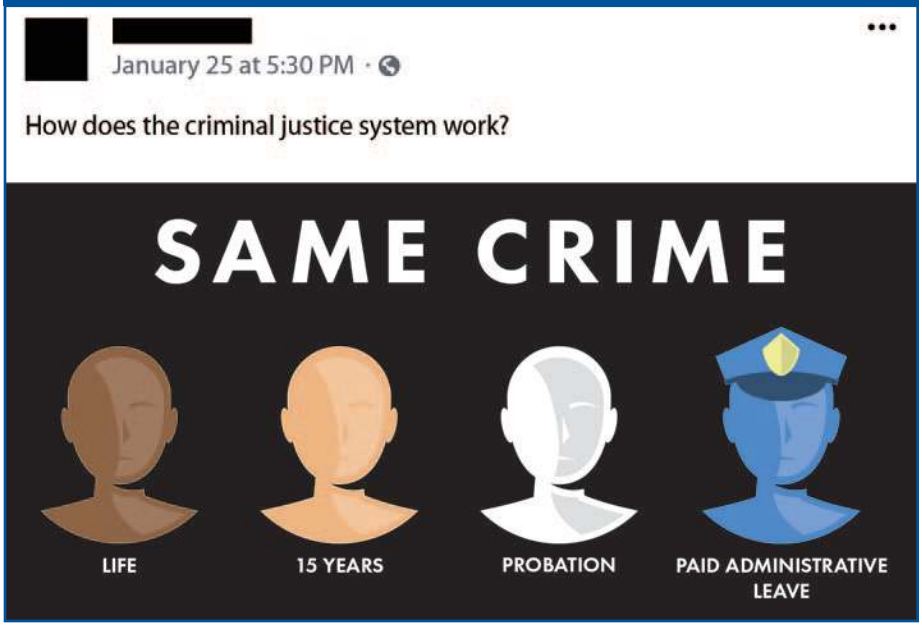
When the questionnaire results came in, we saw that at least 60 percent of the jury pool was seriously biased based on what they had read in the news. The few jurors who claimed to have an open mind went into the "good" pile. If

Figure 1

During a meeting on public safety, Alaska Rep. Lora Reinbold, R-Eagle River, holds a sign warning prowlers against entering her home. The meeting was held Jan. 6, 2018, at the Eagle River Town Center building in Eagle River, Alaska. Armed and angry, Chugiak-Eagle River residents say it's time to get tough on crime. (Matt Tunseth/Chugiak Eagle River Star via AP)

Figure 2

Figure 3



they were called into the box, we might have been able to rest a little bit easier with them than with jurors who admitted their strong biases against the police officer defendant. Meanwhile, my social media researcher was trying to find what she could on the jurors who painted themselves as neutral because these jurors would likely have the greatest chance of surviving the jury selection.

When the jurors entered the courtroom, emotions were palpable. I had never seen jurors openly express such hostility towards a defendant and his defense team. The judge made it clear that almost no one would be excused for cause, and the biased jurors were fine with that. They spat hostility towards the defense lawyer while giving the right answers to the judge, forcing the defense into a tight corner. It should be noted that the hostility transcended race: Some African American jurors excused themselves from service because they sympathized with the white police officer. There were white jurors who expressed extreme anger towards the white police officer and had to be excused. But there were also jurors, of different races, who expressed hostility with their words and body language, and these were the jurors who were determined either to sit or force the defense to use a peremptory strike.

In some courtrooms, the jury is selected in order, from a list. In this courtroom, the clerk randomly picked jurors to fill the box, and voir dire focused only on the jurors seated in the box. The rest watched. After the defense and prosecution took turns with one round of strikes, the empty seats were filled. The judge allowed the lawyers to "back-strike," i.e., they could reach back and get rid of any juror in the box, at any point, as long as they had strikes left. That meant each empty seat created the risk that the devil we knew in the jury box would be replaced with a devil we did not know, sitting behind us in the courtroom.

Because our social media research was occurring simultaneously, in the beginning of the first day of the selection, the written questionnaires were our only indicator of whether a stricken juror would be replaced with what we thought would be a harmful or innocuous juror. As the jury selection continued, we had an ominous sense that there were a lot more "bad" jurors in the courtroom than "good" ones. We made each strike with the knowledge that a replacement juror could be the difference between murder or manslaughter.

We finished the day without finalizing the jury. This gave my social media researcher the chance to pull an all-nighter, researching all the jurors seated behind us in the courtroom. This would help us decide whether it was safe to keep striking jurors. One of the jurors sitting behind us, "Deborah," had been in our "good" pile. She was not someone we had flagged as a concern because she gave all the right answers on the questionnaire. She had an open mind. She had no biases against law enforcement. At least that is what she said in writing, under oath. It was at 3:44 a.m. when we discovered the truth about Deborah.

One of Deborah's social media posts included this headline: "Third Police Officer Sentenced to Prison for Framing Black Males." Another post read: "Racist Cops — A Danger to Society." A final post included an image similar to the one in Figure 3. What was significant about Deborah was that she was the only juror we encountered who provided us with a perfectly sanitized written questionnaire that was completely at odds with her online views. Had these social media posts not been discovered, Deborah would have certainly slipped onto the jury because she was called to fill an empty seat on Day 2. We did not hesitate to use a strike on her because she was perhaps the most dangerous juror in the pool — that rare person who purposely hid her biases to increase her chances of getting on the jury.

The jurors that decided this case was far from perfect, but they did impose a verdict that was consistent with the facts and not prejudices: They convicted the defendant of involuntary manslaughter, which was indeed a victory when compared to the possibility of a murder conviction. Had Deborah sat on this jury, the outcome easily could have been far worse. The neutral-to-positive way she had presented herself in court is a stark reminder that in today's complicated society, jurors' true beliefs are more likely to be found on the internet.

Case 3

This civil case involved a plaintiff who had been incarcerated at the time the claim arose. He had been engaged in a recreational activity when he landed on his nondominant hand, and believed that he had broken his finger. Instead of having the plaintiff evaluated by an orthopedist who could properly set, or do surgery on, the injured finger, the prison doctor ace-bandaged his hand to a flat piece of foam board. The doctor delayed or denied medical treatment until the finger healed incorrectly and was permanently damaged.

Unlike the other two case examples, in this one we had the opportunity to test out the case with an online focus group. Jurors were able to see videotaped testimony of the injured person, the treating doctor, and the plaintiff's expert witness. We learned that a few jurors had no patience for the plaintiff and his claim. They thought he was exaggerating his pain and his damages. They thought he was immature and unable to launch his life very well and was likely using this lawsuit as a lottery ticket. Some of the mock jurors knew people who lost fingers but still were productive members of society, working hard as mechanics and farmers. They did not like the prison doctor or believe he rendered competent treatment, but the last thing they wanted

to do was throw a lot of money toward a plaintiff who seemed undeserving and not seriously injured.

The mock jurors who were most against the plaintiff were the ones who had worked hard to persevere and overcome. They also knew people who suffered and persevered and overcame. These mock jurors knew the value of a dollar and did not want to hand many dollars to a person whose bad choices landed him in prison. The broken finger was just part of that bad decision-making.

Even the mock jurors who were willing to award the plaintiff did not like how much he complained about his pain and suffering. Significantly, the mock jurors did not care at all about the fact that the plaintiff had been incarcerated. This is a detail worth noting because this is what gave the case its strength. We, on plaintiff's side, used jury focus research to confirm that the plaintiff's incarceration was not a weakness but a strength: Mock jurors felt that he was at the mercy of the prison doctor, which made them angry about the medical failures. The defense, however, bet on the opposite and took a "no settlement" stance because it felt that a whiny inmate with a broken finger on his nondominant hand was no match for a medical doctor.

We used the online focus group results to effectuate a simple strategy: The plaintiff would only talk about his efforts to seek medical treatment, all of which failed. He would not complain about his pain or make any attempt to play the sympathy card. The jury selection strategy was also simple: We needed to avoid those jurors who prided themselves on their ability to suffer, persevere, and overcome.

Because the case did not really touch upon hot-button issues like gun violence or excessive force, we wanted to know as much about the jurors' online presence as possible. Unlike the other two cases, we had the luxury of time. The court provided a jury list of only 28 people six days before jury selection. After doing the social media and internet research, we had a clear picture of each prospective juror:

- We could see that some had filed bankruptcy but still lived in extravagant homes. This indicated they were not going to count every penny given to the plaintiff.
- We saw jurors who were single mothers, struggling with low paying jobs to make ends meet and living in very modest homes with no safety net. Unlike the plaintiff who had a strong safety net of two loving and successful parents, these jurors were not likely to have much sympathy for a grown man with no dependents who could not seem to earn a living due to a poorly healed finger on his nondominant hand.

Figure 4

We also had the benefit of jurors' LinkedIn profiles, which gave us their complete resumes. This was particularly helpful in a medical negligence case because we could see that many of our jurors worked in medical environments. We saw this as a positive factor — because they would certainly have much higher standards than this prison doctor.

When the time came to actually pick the jury, this judge was similar to the judges in the other two case examples: He was not interested in a long voir dire and had zero concerns about biases. Every time a juror raised a possible concern, the judge disposed of it by asking, "You're not going to let that influence you though, right?" We learned almost nothing about jurors in open court. But from the social media information, I was able to prioritize our three greatest concerns.

While the online focus group had showed us that older white jurors were the most negative toward the plaintiff (who was also white), our social media research told us that not every older white juror is the same. One had numerous posts about compassion that were similar to Figure 4.

The "compassion" juror also had posts about legalizing marijuana, which was a nice combo with the Buddhism since the plaintiff had committed a serious crime while addicted to drugs. Knowing this unique information about an older white juror allowed us to get beyond the limiting stereotype of "an older white juror might be more conservative and against a plaintiff who was injured while in prison."

Two women on the jury panel were on the top of my strike list because they both fit the profile of "hardworking, make-no-excuses, overcome all odds without anyone else's help." In other words, they were almost the exact opposite of the plaintiff and the type of juror who had the least patience with plaintiff in the online focus group. The social media research revealed that one of these

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two females inserted into her LinkedIn profile that she paid for 100 percent of her college education while working full time. The other one simply posted pictures that made it look like she had a really hard life, with a lot of responsibilities and no familial support.

When the time came to exercise our strikes, the judge let us know that there was no "back-striking." This meant that when it was our turn to strike jurors from the box, we would have to strike all of the jurors we did not want at once because the judge would not allow us to go back and strike that juror on a second round. Thus, the second round of strikes would be limited to the few jurors who were called to fill open seats. Since each side only had three strikes, both sides could not risk blowing two out of three peremptory strikes on Round 1.

On our first opportunity to strike, one of the two hardworking, struggling females was picked to sit in the box. We used our first strike on her because she was one of our top priorities. After the defense struck its juror, our second top priority was randomly selected to fill the empty chair. She was our second peremptory strike. Both sides eliminated two jurors apiece, and the judge seated the jury.

Meanwhile, our opponent failed to get rid of a nurse who posted a negative tweet about an arrogant doctor who had made her wait 20 minutes, stating that apparently her doctor believed his time was more valuable than hers. This should have been a strike for our opponent because the defendant doctor had arrogantly denied medical treatment to the plaintiff for a period of months. And we knew from our research that some of our mock jurors did not think a month was too long to wait for an MRI. This juror, however, believed waiting 20 minutes was an insult. She was not struck from the panel because obviously our opponent had not done the online research that we had done.

Interestingly, the two jurors we struck did not say anything during the actual jury selection. Had we not done any social media research, we probably would not have stricken them. We would have known nothing about them. This was the first time that I had ever used peremptory strikes on jurors who did not say anything during jury selection, based on information gleaned outside of court. It was a strategy that worked beautifully. The plaintiff in this case ended up receiving every penny of damages requested plus punitive damages, resulting in a $1.3 million verdict. The lawyer told me afterwards

that he has gotten a few calls from other lawyers, wondering how in the world he was able to get such a positive result!

Conclusion

I came away from all three of these experiences with the unshakable conclusion that no lawyer can ever again ignore online information about anyone involved in a case: It must be examined for parties, deponents, and jurors. There is no litigation scenario in which online information can be ignored.

Long gone are the days when judges have the patience to fairly evaluate a juror's biases. Years of people "living online" have resulted in a culture in which people openly share their every thought on the internet. Prospective jurors, from their 20s to their 60s, may have hundreds of "likes" that paint a complete picture of them, even with nuances. One can analyze a juror's books, movies, websites, and "likes" to get a sense of that person's values and how they may apply to the facts of a particular case. A man posting Dalai Lama quotes and pictures of marijuana plants is a far cry from a woman who wants employers to know she financed 100 percent of her education while working full time.

The online mosaic can provide a sense of a prospective juror's accomplishments, failures, struggles, and world view. The most sobering takeaway is that social media research can now provide attorneys with a truer sense of a prospective juror than the information the juror discloses under oath, either on a written juror questionnaire or in open court.

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