

# Chicago Daily Law Bulletin

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5Jury trials in the digital worldJeffrey J. KrollBy Jeffrey J. Kroll

Now that Facebook has reached more than 500 million users, and the movie "The Social Network" has graced a screen near you, it's no wonder that it has become increasingly easy to find very personal information about almost everyone, including prospective jurors.

This is a fact, and there's no turning back. Now, what do trial lawyers do with social media websites like Facebook, Twitter and LinkedIn? Do we freak out and use our PayPal accounts to buy the newest version of LifeLock? Or, do we embrace Web 2.0? I say, embrace it!

Open the browser on your smart phone during voir dire and voir?: You might be lucky enough to uncover an enormous amount of juror information, including race, religion, political proclivities and philosophical tendencies.

Off-color and forbidden topics? Yes, you would think so since *Batson v. Kentucky*, 476 U.S. 79 (1986), essentially precluded attorneys from using peremptory challenges to exclude a juror based on race 24 years ago. Yet, many social networking users proudly display such "personal" information as an initial bird's-eye view into their individuality.

Recently, some interesting law has developed in this area. In *Carino v. Muenzen*, 2010 WL 3448071 (N.J. Super A.D. Aug. 30, 2010), a New Jersey plaintiff lawyer using courthouse-provided Wi-Fi Internet access during voir dire in a medical malpractice trial, researched jurors' Web profiles in open court. The judge, curious about the lawyer's use of his computer, inquired:

The Court: Are you Googling these [potential jurors]?

Plaintiff's Counsel: Your honor, there is no code law that says I am not allowed to do that. ...

The Court: Is that what you are doing?

Plaintiff's Counsel: I'm getting information on jurors — we've done it all the time, everyone does it. It is not unusual. There is no rule, no case or any suggestion in any case that says —

The Court: No, no, here is the rule. The rule is it's my courtroom and I control it.

The judge ordered the attorney to close his laptop. The New Jersey Appellate Court exculpated the attorney, stating that prohibiting web searches during voir dire was unreasonable, and noted:

There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining a "level playing field." The "playing field" was, in fact, already "level" because Internet access was open to both counsel, even if only one of them chose to utilize it.

Ultimately, the lawyer failed to demonstrate any prejudice that resulted from the trial court's ruling. Nonetheless, I find the commentary on the use of computers in the courtroom both forthright and realistic.

Attorneys have a *duty* to their clients to make the most informed decisions possible when selecting or deselecting jurors. We should use any and all of the information about potential jurors we can obtain — especially when it's free and instantaneous at our fingertips.

I'm not suggesting that we brazenly allow everyone in the courtroom to view our computer screens during jury selection. Jurors could find this invasive, even if they have an otherwise fluid online presence.

Trial attorneys would be prudent to check local rules, keep your laptops centered in front of you and prepare a brief in support of use of the Internet during a trial. If all else fails, conduct your research outside of the courtroom. Regardless, preparation for jury selection is a must.

In my past three jury trials, I was amazed at how effortless it was to research potential jurors online, many are either unaware of Facebook privacy settings or simply unconcerned with their Web presence.

At my firm, lunchtime during jury selection has been replaced with a mad dash to research as many jurors as possible on Google, LinkedIn or Facebook. We proudly (dare I say, dutifully) collect such information with prowess.

In addition to customary information — such as how many children jurors have or where they attended high school or college — with a click of the mouse or swipe of my finger, I have discovered who potential jurors have "friended," whether they are fans of "I bet we can find 1,000,000 People who Support Same Sex Marriage" and whether their "likes and interests" included contributions to political campaigns. All valuable and timely information, since time is often not a luxury when selecting a jury.

Let's be clear. Googling at or during trial should never be a two-way street. An attorney using the Internet to scrutinize a juror cannot be compared with jurors using the Internet to research pending cases.

The New York Times-coined term "Google Mistrial" surfaced a serious discussion regarding the Sixth Amendment right to an impartial jury and the use of the Internet. In that publicized case, a judge found curious jurors Googling information in a Florida drug case. (John Schwarz, "As jurors turn to Web, mistrials are popping up," The New York Times, March 18, 2009.)

This seems to be just the beginning of a potential trend of juror misconduct.

Recently, a Detroit-area judge removed a juror who posted to her Facebook page that the defendant was guilty. Seemingly innocent, but the scary truth was that the trial was still pending. The punishment for this action: A finding of contempt of court, a \$250 fine and an essay on the Sixth Amendment. This is just one of many examples available by simply Googling "jurors, Internet, news."

Judges must use preliminary cautionary jury instructions to specifically prohibit jurors from commenting on social media websites or conducting Internet research during the jury process. Our states's position on the issue isn't too shabby:

The use of cell phones, text messaging, Internet postings and Internet access devices in connection with your duties violates the rules of evidence and you are prohibited from using them.

Illinois Pattern Jury Instructions (I.P.I.) — Civil, § 1.01.

Personally, I don't think this is enough. I am thankful that our judges can embellish on the instruction, including specific prohibitions against the use of Facebook posts, tweets, blog entries, etc.

Given my druthers, an admonishment against jurors' Internet postings and independent Internet investigations would become akin to the old Chicago voting joke — "Do it early and often." Judges must be firm — perhaps menacing — on this point. A daily reminder to refrain from the Internet would not be overkill.

I do understand that instructing jurors to ignore Internet activity relevant to a case is most likely only mildly effective. The Internet is simply too tempting and convenient. Anyone walking the streets of Chicago knows that these handheld devices have become an extension of one's hand.

When it comes to jury trials, lawyers should aim to eliminate risk when possible, and if using sites such as Google and Facebook facilitates that process, then all the more power to them.

Jurors have a duty to resolve cases based on the evidence presented in court and their reasonable inferences drawn from that evidence. They must not be given free rein to become sultans of the Smartphone.

At the end of the day, however, their oath is all we have. It is our duty to reinforce the importance of that oath in light of the breadth of information available on the Internet. Or, somehow we must come to grips with this issue and recognize we will never catch up with these young jurors but must try to keep up with them.

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