



# SCREENING THE JURY POOL

Take control by using online resources to gather information about potential jurors—without getting trapped by ethical pitfalls.

By || **BRANDON VAUGHN**

Having strangers decide your client's fate is nerve-wracking. Many jurors may not reveal their personal experiences and biases during voir dire, and focus groups and studies have shown that people's implicit biases can impact their pre-deliberation verdict preferences.<sup>1</sup> Gather as much information as you can about the potential jury pool to get a step ahead.

One of the best ways to gather juror information is through the internet and available social media platforms. First, work with the judge and the court administrator to get the jury pool list before trial. If you are in a jurisdiction where the list is made available on the day of trial, come prepared: You should be ready to immediately conduct online research at the courthouse.

Regardless of when you begin researching, an online search of potential jurors' names is always a good place to start. You can discover a variety of information about potential jurors from an online search: blogs and websites, news stories, awards and recognitions, and organizations and schools they may be associated with.

Let's consider this example. You have a potential juror named Justice Seeker. At a minimum, perform a search

with the terms "Justice Seeker" and—if you have the information—the county or city that Justice Seeker lives in and Justice Seeker's age. Google's search page will display the results under the "All" tab by default, but you should also click on the "News" and "Images" tabs.

The "News" tab lists news stories that include Justice Seeker—and you may be able to gather enough information about Justice Seeker to identify a photo from the "Images" tab. For

example, if a newspaper article reports that Justice Seeker won an award, and there is a photo of an individual who won the same award under the "Images" tab, then you probably have identified what Justice Seeker looks like.

Of course, this is just one example—the process of accurately identifying potential jurors is not perfect. Most important, be sure you are identifying the correct juror by including as much information as you can. While a

search for “David Smith” will not likely be helpful, your search results will be more accurate if you include all available information, such as the city he lives in or his date of birth.

In addition to a general search, social media platforms—such as Facebook, Instagram, Snapchat, Pinterest, Twitter, and LinkedIn—let you gather publicly available information that may shed light on whether a potential juror is a good fit for your client’s case. Through these platforms, you can learn about jurors’ lives, professions, political ideologies, interests, and potential biases that may not be apparent during voir dire.

Although some jurors may use online aliases, you can purchase research tools that can help you gather more information. One is Accurant, a LexisNexis research tool that allows attorneys to locate people by searching more than 45 billion public and proprietary records.<sup>2</sup> Accurant searches 9.3 billion unique name and address combinations, 625 million phone numbers, and 607 million unique email addresses to identify specific individuals. Another resource is The Last One (TLO).<sup>3</sup> TLO uses advanced linking algorithms to scour an estimated 95 percent of the U.S. population to deliver comprehensive search results.

### Ethical Pitfalls

Of course, there are ethical issues that you must consider before using social media to gather juror information. The first is whether a judge will allow jury research at all—and, if so, whether he or she will place any limitations on your research.<sup>4</sup> In *Oracle America, Inc. v. Google Inc.*, for example, the court requested both parties’ counsel to agree not to perform internet searches on potential jurors, fearing that it would facilitate improper personal appeals to particular jurors.<sup>5</sup>

However, the court also recognized the value in counsel gathering publicly available information about potential

jurors—particularly if the media and other third parties could access it.<sup>6</sup> In balancing the competing interests, the court concluded that both parties must agree to a ban on internet searches—or each party must explain to the jurors the specific extent to which it would use searches to investigate and monitor them.<sup>7</sup> After this disclosure, potential jurors were permitted to change their privacy settings on their social media accounts.<sup>8</sup>

Several bar associations and jurisdictions have issued ethics opinions outlining what types of juror communications are appropriate. Most focus on Rule 3.5(b) of the ABA’s Model Rules of Professional Conduct, which states that a lawyer should not communicate with a juror or prospective juror during a proceeding.<sup>9</sup>

Standing court orders or local rules in your jurisdiction may also govern juror research. The ABA’s ethics opinion on juror research recommends that attorneys and judges discuss expectations for appropriate conduct when

Responsibility issued Formal Opinion 466, which advises that “passive review” of a juror’s social media website—of which the juror is not aware—does not violate Rule 3.5(b). It also states that passive viewing is not considered an improper communication even if the juror becomes aware that the lawyer has viewed his or her social media page through an “automatically generated notification.” For example, LinkedIn sends an email notification to a subscriber whenever the subscriber’s profile is viewed by someone he or she is not “connected” with on the website.

However, some jurisdictions *do* consider these automatic notifications improper communication.<sup>11</sup> According to the New York City Bar Association, for example, communication is improper if the juror becomes aware through an automatic notification that someone has viewed his or her profile.<sup>12</sup>

Despite the difference in opinion, certain activities are always prohibited: You should never contact potential jurors directly—either by adding them as friends, “liking” their Facebook posts, or inviting them to connect on a social media platform.<sup>13</sup> It is not clear whether “retweeting” a juror’s Twitter post constitutes communication. While



**MANY PEOPLE’S SOCIAL MEDIA LIVES  
MAY ONLY BE A SNAPSHOT—AND NOT  
NECESSARILY AN ACCURATE REFLECTION—  
OF WHO THEY ARE.**

researching jurors, as well as having judges explain to jurors that attorneys may investigate their backgrounds and internet presence.<sup>10</sup>

When using social media to research jurors, the main question to keep in mind is what constitutes “communication.” In 2015, the ABA Standing Committee on Ethics and Professional

the New Hampshire Bar Association held that viewing a potential juror’s Facebook page or Twitter account is not communication if it is viewable to all members of that social media site, the New York County Lawyers’ Association has stated that attorneys who follow a juror’s Twitter account raise significant ethical concerns.<sup>14</sup>

Attorneys—or anyone working for an attorney—also should never create a fake profile or pretend to be someone else to view information that would otherwise be unavailable.<sup>15</sup> If a paralegal or jury consultant creates a profile and sends a friend request to a potential juror, it amounts to communication under ABA Model Rule 3.5 and subjects the attorney to punishment.

### Using the Research

The safest route is to stick with publicly available information, which may be just as useful. For example, you may learn from someone’s Facebook profile that he or she has strong opinions about tort reform, believes there are too many lawsuits, or is in the same industry as the defendant. You also may find that a potential juror has had similar life experiences to your client and may be empathetic.

Don’t limit yourself to social media: Look at court dockets for civil and criminal matters that involve a potential juror. For example, if a potential juror is a small business owner and has been sued several times, he or she may have a bias against a plaintiff bringing suit against another business owner or corporation.

Similarly, a potential juror who has previously been a plaintiff in a lawsuit may have a bias in favor of or against other plaintiffs. While the bias itself does not matter, knowledge of the potential jurors’ involvement in the legal system is something you certainly want to explore during voir dire.

While information gathered online and through publicly available sources may give you a helpful picture of a potential juror, nothing beats thorough voir dire. The information you gather from your internet research can be used to shape questions: Before voir dire, create notecards with key facts about the potential juror so that information

is easily accessible during jury selection. While no single specific piece of information should be used to strike potential jurors, you can certainly note “red flags” before they are seated—so you can potentially build a record to strike them for cause later on.

In jurisdictions where attorneys are not permitted to perform voir dire, your internet research may help provide the court with questions to ask during voir dire. It can certainly be used to draft general questions about a potential juror’s biases that need to be explored. Ultimately, however, it is important to remember that many people’s social media lives may only be a snapshot—and not necessarily an accurate reflection—of who they are.

Finally, despite everything that you learn through voir dire and online research, nothing should trump your gut. If your instinct tells you that a potential juror is not good for your client’s case, follow it.

Gathering information about jurors is an important task, but—as a trial lawyer—your most important job is telling a compelling story to help your client achieve justice. 



**Brandon Vaughn** is an associate at Robins Kaplan in Minneapolis. He can be reached at [bvaughn@robinskaplan.com](mailto:bvaughn@robinskaplan.com). The

views expressed in this article are the author’s and do not constitute an endorsement of any product or service by Trial or AAJ.

### NOTES

1. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471, 539–40 (2008) (“Eighty-eight percent of Whites who have taken the [Implicit Association Test] have manifested implicit bias in favor of Whites and against Blacks. Nearly 83 percent of heterosexuals have manifested implicit bias in favor of straight people over gays and lesbians.”).

2. Accurint is an additional LexisNexis package where existing subscribers can upgrade their account to include access at any time. Accurint uses a transactional “pay-as-you-go” pricing model. Costs per search vary, depending on the type of public records being retrieved.
3. TLO offers three price structures: (1) a pay-as-you-go option for organizations with low search volumes (transactional pricing); (2) a flat rate price based on the number of users with access to TLO (per seat pricing); and (3) pricing based on a minimum volume of transactions (flat rate pricing).
4. *Oracle Am., Inc. v. Google Inc.*, 2016 WL 1252794 (N.D. Cal. Mar. 25, 2016), [s3.amazonaws.com/pacer-documents/27/231846/035114016886.pdf](https://s3.amazonaws.com/pacer-documents/27/231846/035114016886.pdf). See also Am. Bar Ass’n, Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 466 (2014), [www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_466\\_final\\_04\\_23\\_14.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf) (judges may limit the scope of searches that counsel could perform regarding the jurors’ social media accounts if the judge believes it is necessary under the circumstances); *Carino v. Muenzen*, 2010 WL 3448071 at \*10 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (the judge’s prohibition of plaintiff’s counsel from using the internet to investigate jurors because they failed to notify defense counsel was an abuse of discretion).
5. *Oracle Am.*, 2016 WL 1252794 at \*2.
6. *Id.*
7. *Id.* at \*3.
8. *Id.*
9. Model Rules of Prof’l Conduct R. 3.5(b).
10. Am. Bar Ass’n, Formal Op. 466, *supra* note 4.
11. *Id.*
12. N.Y.C. Bar Ass’n, Comm. on Prof’l Ethics, Formal Op. 2012-2 (2012), <http://tinyurl.com/gwh5vew>. (“Attorneys may not research jurors if the result of the research is that the juror will receive a communication.”).
13. “Liking” something on Facebook is also improper because potential jurors become aware that they are being watched, which is “communication” under ABA Model Rule 3.5.
14. N.H. Bar Ass’n, Ethics Comm. Advisory Op. 2012-13/05 (2013), [www.nhbar.org/legal-links/Ethics-Opinion-2012-13\\_05.asp](http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp); N.Y. Cnty. Lawyers Ass’n Prof’l Ethics Comm., Formal Op. 743 (2011), [www.nycla.org/siteFiles/Publications/Publications\\_1450\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications_1450_0.pdf).
15. N.Y.C. Bar Ass’n, Formal Op. 2012-2, *supra* note 12.