

ONLINE RESEARCH IN PREPARATION FOR VOIR DIRE

BY MICHAEL BURKE, ESQ.

Both the United States and Nevada constitutions afford the right to an impartial jury trial.¹ Voir dire is the process where the court and counsel question potential jurors (the venire) to discover whether they will “consider and decide the facts impartially and conscientiously apply the law as charged by the court.”² Boiled down, voir dire is your opportunity to gather information about potential jurors to ensure you obtain a fair and impartial jury for your client. Time constraints and a desire by the court and parties to get the trial going often do not allow you to obtain as much information about potential jurors as you might like.

For instance, a potential juror may profess to be impartial regarding the facts of the case and law, but their own experiences, ideals, beliefs and world views may subconsciously draw them either in favor of, or against, a party. It is also possible that a potential juror may purposefully fail to disclose information in an attempt to either get onto a particular jury or to get out of jury service.

So you might find yourself asking: What can I do to prepare in advance? Increasingly, attorneys are turning to the internet to gather information about potential jurors.



Should You?

Previously, a party wanting to research the venire in advance of trial was generally limited to utilizing the list of potential jurors provided by the court and hiring either a jury consultant or private investigator – both are expensive. Today, with the ubiquity of the internet and social media, the tools for conducting research prior to voir dire are literally at your fingertips.

All it takes to initiate an online search of a potential juror is typing their first and last name into a search engine such as Google. This may reveal a potential juror’s employment status, blogs they publish, their views, articles they have written or are mentioned in, and other useful information.

Seventy-three percent of adults online in the United States now participate in social media networks, the most popular being Facebook.³ Forty-two percent of adults online in the United States use multiple social networking platforms, including Facebook, LinkedIn, Pinterest, Twitter, Instagram and Google+.⁴

With those statistics, there is a good chance many members of the venire will have an online social media presence. When searching social media platforms for information about potential jurors, you are limited to the information that the user makes available to the public. These public platforms often offer an unfiltered look into a potential juror’s views and thoughts on a variety of issues that may prove relevant to your case. This information will allow you to begin to paint a picture of the venire: who they are, what they do and how they transact their lives. Their online presence can provide you with a host of data in addition to the limited material typically provided in voir dire.

What can you do with the information you obtain? You can use it to craft narrowly tailored questions toward a potential juror to determine whether they will in fact approach your case impartially. You can also use the information to reveal a bias that a potential juror has failed to disclose. The information

obtained as a result of this research may allow you to further strategize regarding the use of your challenges for cause and peremptory challenges, in an effort to assemble the best jury possible for your client's case.

Your online research of jurors need not stop at voir dire. You can and should continue to monitor the jurors' online presence, in line with ethical guidelines discussed below, to ensure jurors are not violating the court's instructions about not discussing the case or conducting outside research, which may be grounds for a mistrial.

In conducting research about jurors, whether before or during trial, be sure you are following the court's rules regarding the use of technology in the courtroom.

In sum, the answer to the question of whether you should be conducting online research to prepare for voir dire appears to be, obviously, yes.

Is it Ethical?⁵

Is conducting online research of potential jurors prior to or during trial ethical?

The amount of data about people online has significantly outpaced the adoption of guidelines governing this research. Neither Nevada's Rules of Professional Conduct (NRPC) nor Nevada's courts have addressed the specific issue of whether or not and to what extent it is ethical to conduct online

research of potential jurors; however, NRPC 3.5(e) provides that "[b]efore the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge." An attorney is precluded, however, from conducting any investigation prior to trial "through any means which are calculated or likely to lead to communication with prospective jurors of any allegations or factual circumstances relating to the case at issue." This includes "direct or indirect communications."

A fair reading of NRPC 3.5(e) indicates that it is permissible for an attorney to conduct online research regarding potential jurors prior to or during trial when that information is available to the public. It would be impermissible, on the other hand, for an attorney to utilize online research that would result in direct or indirect communication with a potential juror. By way of example, sending a "friend request" via Facebook, connecting on LinkedIn, or following a potential juror's blog,

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continued on page 14

ONLINE RESEARCH IN PREPARATION FOR VOIR DIRE

continued from page 13

Twitter feed or Pinterest account would go too far. Similarly, writing on or commenting on a social media page or blog, and “liking,” “pinning” or “tagging” in connection with a Facebook page, Pinterest or Instagram account are probably off limits.

This reading of NRPC 3.5(e) – that an attorney may conduct pre-trial online research of potential jurors so long as the attorney does not reach out to a potential juror, directly or indirectly – is consistent with a variety of sources that have addressed this issue.⁶ In other words, you may discover information that is publicly available, and observe or monitor a potential juror’s public online presence, but you may not utilize the internet to interact with a potential juror. Using a third-party to send a “friend” request or obtain additional information about a potential juror that is not otherwise publicly available would also seemingly

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violate NRPC 3.5(e)’s prohibition against having indirect communication with a potential juror.

On the other hand, the American Bar Association Standing Committee on Ethics and Professional Responsibility’s recent ethics opinion on this topic concluded that a lawyer’s research of publicly available online information about a juror or potential juror does not become a prohibited communication just because that person has learned that an attorney is reviewing the data.⁷

If you are still wary about whether it is ethical to engage in this activity, you can always seek the court’s permission before commencing your research.

Should it be Mandatory? Is it Malpractice if You Fail to Conduct this Research?

While the legislature and courts in Nevada have not weighed in on the issue, Missouri requires attorneys to perform an online litigation database search of venire in advance of voir dire in order to preserve the issue of a juror’s non-disclosure during voir dire for appeal. “With the relative present day ease of procuring the venire member’s prior litigation experiences...[w]e encourage counsel to make such challenges *before* submission of a case whenever practicable.”⁸ While not making such research mandatory, one court in the Southern District of Illinois commented that internet research of potential jurors was “reasonable diligence.”⁹ Still other courts have declined to impose such an obligation.¹⁰

Could you be committing malpractice if you fail to conduct online research of potential jurors prior to trial?

Nevada courts have not made this leap. However, because NRPC 3.5(e) specifically allows for pre-trial investigation that does not result in direct or indirect contact with potential jurors, attorneys in Nevada should use common sense in determining what is and is not an appropriate, or necessary, mechanism of research. ■

- 1 U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend VI; U.S. Const. amend VII; *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1983) (Seventh Amendment right to trial by jury implies impartial jury); Nev. Const. art. I, § 3; *Daniel v. State*, 119 Nev. 498, 517, 78 P.3d 890 (2003).
- 2 *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006) (citations omitted).
- 3 Maeve Duggan and Aaron Smith, “Social Media Update 2013,” Pew Research Internet Project, <http://www.pewinternet.org/2013/12/30/social-media-update-2013> (Dec. 30, 2013).
- 4 *Id.*
- 5 The statements made in this section are merely the opinions of the author and are in no way meant to be authoritative as to how courts in Nevada may rule on this issue.

- 6 See, e.g., ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (April 24, 2014); N.Y. Cnty Lawyers' Ass'n Ethics Op. 743 (May 18, 2011); Phila. Bar Ass'n Ethics Op. 2009-02 (Mar. 2009).
- 7 ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (April 24, 2014).
- 8 *Johnson v. McCullough*, 306 S.W. 3d 551, 558-59 (Mo. 2010) (en banc) (quoting *McBurney v. Cameron*, 248 S.W. 3d 36, 41 (Mo. Ct. App. 2008)) (emphasis original), *superseded and narrowly defined* by Missouri Supreme Court Rule 69.025(b).
- 9 *Burden v. CSX Transp., Inc.*, No. 08-cv-04-DRH, 2011 WL 3793664, at * 9 (S.D. Ill. Aug. 24, 2011).
- 10 *De La Rosa v. Zequeira*, 659 So.2d 239, 242 (Fla. 1995) (citation omitted) (holding attorney may rely on potential juror's duty of honesty and refusing to impose duty on attorneys to conduct independent fact-confirming research).



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