

## **Social Media Use and Jury Issues**

**By Corey S. Reitz**

### **I. Mining Social Media for Information about Case Parties, Jurors, and Witnesses**

Although difficult to define due the fluid nature of the technology, social media currently includes messaging and collaboration tools that permit the exchange of video, audio, text, photos, geographic location, and links to other content to be shared between internet-enabled devices. The information shared via social media is often interactive and dynamic, and the uses for the technology continue to expand. The types of information shared via this medium are as varied as the people who use these platforms, and as a result the level of detail and the amount of personal and professional information that is available will vary widely. Make no mistake, social media has taken society by storm as a powerful communication mechanism, and as a result social media has become important in many aspects of modern litigation. As litigation attorneys, it is critical to understand and keep up with the impact that this technology has inside and outside of the court room.

According to Alexa, <https://www.alexa.com/topsites/countries/US> (last visited Feb. 9, 2019), the most popular social media sites that you are likely to run into in the United States are Facebook, Twitter, and Instagram *Id.* These social media sites commonly permit users to re-share content that they like that is generated by a different user. In addition, these sites generally permit the user to pick and choose what content they want to share publicly versus what content they wish to share privately with a select group of individuals. Depending on the security options selected by a user of a social networking site, there may be a lot or very little content that is publicly available to an untrusted user. To see and access private data in litigation, it is highly recommended that written permission from the site owner is sought, and the user name and password for the site is obtained, as they will be necessary to see all of content on the site.

The types of information that can be obtained from a social media site will vary by site. If you are trying to access information about your client, it may be a good idea to ask the client to download their history from the social media site, where possible. For example, one popular social media site called Facebook (accessible at facebook.com), offers users the ability to download their content as an archive How do I download a copy of my information on Facebook?

[https://m.facebook.com/help/212802592074644?helpref=hc\\_fnav](https://m.facebook.com/help/212802592074644?helpref=hc_fnav) (last visited Feb. 9, 2019). In order to perform these steps, the person performing them will need the Facebook username, password, and access to the e-mail address associated with the Facebook account. The following are the steps to download the content:

- Using an internet browser, point the browser to <http://facebook.com> and then login using the username and password.
- Click on “Settings”>”Download a copy of your Facebook data”>“Start my Archive”>”Start My Archive”
- A prompt will then appear notifying the user that the information is being gathered and that an e-mail will be sent to the e-mail account on file when the data is ready for download.
- Within minutes an e-mail will appear at the designated address with a link to the download. The user should click on the link and it will take the user to a website for ultimate download.
- Upon downloading the data, the user is then provided a .zip file that contains the following categories of information from the site:
  - Profile, Contact Info, Wall
  - Photos, Synced Photos, Videos, Friends, Messages
  - Pokes, Events, Settings, Security
  - Ads, Mobile Devices, Places, Survey Responses

In the event that you want to obtain information about another party or a prospective juror on a social media site, you should primarily focus on what is publicly available. The information that will be of interest will depend on the particular legal dispute, but any information that demonstrates that the other party is not acting in a manner that is consistent with their position (e.g. a plaintiff in a personal injury case claiming debilitating injuries while posting video showing the plaintiff dancing or jumping on a trampoline) can be very powerful evidence that can help your client to win at trial. As for jurors or potential jurors, effort should be made to identify posts that demonstrate strong views on societal issues, posts that refer to the case being heard, posts that demonstrate a relationship with the attorneys, judges, or parties in the matter or “friend” status, relationships that are identified via photos posted on a site, or posts that demonstrate outside research has been performed into the matter during the proceedings so that you can prevent a prospective juror from becoming a member of the jury or so that you can inform the judge of the potential impropriety of a sitting juror.

In the Oracle v Google case *Oracle Am., Inc. v. Google Inc.* 172 F. Supp. 3d 1100 (N.D. Cal 2016), Judge William Alsup, U.S District Judge for the Northern District of California gave a very concise synopsis of the types of information that are available from three of the more common social media sources to attorneys who would like to research prospective or sitting jurors. In his order he described the following:

- o “With regard to Facebook, typical profiles contain the following information: lists of personal connections (*i.e.*, “friends”), pictures, videos, check-ins at real-world locations, scheduled events, posts dating back to the creation of the user’s profile (including commentary on news stories and discussions with other “friends”), relationship status, work experience, educational background, current city, home town, contact information, and certain personal interests such as favorite quotes, membership in certain groups, hobbies, political preferences, religious views, sexual orientation, and preferred media. Access to segments of this information can be regulated by the account holder according to various

privacy settings. The highest level of privacy keeps information accessible only to the user. This is rarely used, inasmuch as a key purpose of Facebook is to share information with other people using the platform. The next level of privacy allows a user to reveal information only to his or her "friends" (or to a more limited list). The next level allows access to "friends of friends," which includes not only the user's friends *but all of the friends of the user's friends*, which can vastly multiply access. (For example, if someone has three hundred friends and each of them has three hundred different friends, access would expand to 90,000 viewers.) The most expansive setting is "public," meaning at least everyone with a Facebook account. Certain "public" information, including a user's primary picture, list of likes, hometown, current city, education and work history, and favorite quote, is even available to Internet users without Facebook accounts or who have not logged onto their accounts. Generally, a Facebook user's post history (*i.e.*, the stream of text, articles, discussions, pictures, and videos the user shares) is *not* available to searchers without a Facebook account. By default today, most information is accessible only to friends, although a default setting of "friends of friends" has been employed by Facebook in the past. This means that someone may log onto Facebook and automatically access *all* Facebook information (including post history) on a juror classified as "public," as "friends of friends" (if there is a "friend" in common) or as "friends only" (if the investigator happens to be a Facebook "friend" of the juror). "Public" information (excluding post history) is accessible as well via ordinary Google searches without ever logging onto Facebook. Finally, Facebook does not notify its users when their profiles have been visited.

o With regard to Twitter, a typical user's profile includes that user's "tweet" history, which includes all posts made since the user created the account, the list of other Twitter accounts that user "follows" and the list of other users that "follow" that user's account. When one Twitter user "follows" another Twitter user, the latter's posts appear in the former's default real-time feed of tweets.

Access to this information is regulated by a choice between two privacy settings. The default privacy setting keeps all of a user's tweets public, in which case anyone may view those tweets, *even without ever logging onto a Twitter account*. Additionally, anyone who is logged onto Twitter can view the list of a user's "followers" and the accounts that user "follows" if the user's tweets are made public. Alternatively, a user may elect to keep tweets "protected," in which case the above information is available only to other Twitter users whom the user has affirmatively approved to view that information. Twitter does not notify its users when their profiles have been visited.

o With regard to LinkedIn, a typical user's profile includes a picture, the user's employment and education history, contact information, a list of skills, publications, awards and interests, among other line items that might appear on a résumé. The profile also includes information such as a list of the "connections" the user has established on the site. (Two users "connect" once one user sends a request to connect and the other accepts the request, which opens up additional personal data and avenues of communication.) A user's profile also displays a list of groups established on the site that the user has joined. Users can post content, such as links to news articles or original writing. For each item on a user's profile (except for the list of "connections"), the user may elect to publish the item to his or her "public profile," making it visible to everyone, including individuals who are not even logged onto LinkedIn, or to make it visible only to the user's "connections." A user may further select whether to reveal his list of personal connections to other users. Unlike Facebook and Twitter, LinkedIn's default setting is to display a notification informing a user each time his or her profile is visited by another LinkedIn user and identifying that visitor by name. A visitor may change that setting so that a visatee receives no notification, or so the notification only displays the visitor's place of employment without any further identifying information."

As illustrated by this tech-savvy judge, the volume and breadth of information that is available via social media make it difficult to imagine a situation where it would not be of value in researching case parties, jurors, and witnesses.

## **II. Researching Private vs. Public Social Media Accounts- What's Ethical?**

Using a “friend request” or similar medium to make contact and gather information about an individual from a social media site is an ethical question that, based on a quick Google search, appears to have been debated by many state bar associations. Determining if there is an issue or not generally hinges on who the attorney is trying to friend, why the attorney is seeking them out, and what motives the attorney shares with the individual when making the request.

For the purposes of using “Friending” to gain access to information from an opposing party who is represented by counsel, the rule in New Mexico appears to be quite clear. Under New Mexico Rules of Professional Conduct, Rule 16-402 NMRA, it states that “a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” The rule committee commentary states “The prohibition contained in Rule 16-402 NMRA applies to social media contact about the subject of the representation. A lawyer shall not contact, or direct or authorize a nonlawyer assistant to contact, a represented person to seek access to the restricted portion of the person’s social media profile unless provided an express authorization by the person’s counsel.”

When considering the ethics of reaching out to unrepresented persons via social media, we look to New Mexico Rules of Professional Conduct Rule 16-403 NMRA. This rule requires that the attorney “not state or imply that the lawyer is disinterested” in their communication. The committee commentary for the rule further states that:

“With the client’s consent, a lawyer or a lawyer’s nonlawyer assistant may request permission to view the restricted portions of an unrepresented person’s social media, website, or profile, provided that the lawyer or the nonlawyer assistant (1) uses a full name, (2) provides status as a lawyer or a nonlawyer assistant, and (3) discloses the name of the client and the matter. A lawyer or a nonlawyer assistant must not use deception or misrepresentation to gain access to information about the unrepresented person that would otherwise be unavailable. Special caution must be used when a lawyer represents a client who is adverse to an unrepresented party. If the unrepresented person asks for additional information from the lawyer or the nonlawyer assistant in response to the request that seeks permission to view the social media profile, the lawyer must accurately provide the information requested by the person or withdraw the viewing request” Committee Commentary, New Mexico Rules of Professional Conduct Rule 16-403 NMRA.

The Rules Committee clearly has given attorneys more leeway when communicating with unrepresented persons, as long as they are clear with them about who they are, the reason for the communication, and are clear if they represent someone that is adverse to their interests.

When considering the extent to which searching the social media of a prospective or active juror is within ethical bounds, it is important to review New Mexico Rules of Professional Conduct Rule 16-403 NMRA that addresses preserving the Impartiality and Decorum of the Tribunal. In this rule, lawyers are instructed that they shall not “seek to influence a judge, juror, prospective juror or other official by means prohibited by law” *Id.* The rule goes on to explain that ex parte communication during the proceeding is prohibited, and only permitted if by law or court order *Id.* The Committee commentary to this rule states that “A lawyer may view and research a prospective or sitting juror’s public social media profile and posts. A lawyer may not have direct communication with

the juror, whether initiated by the lawyer, the lawyer's nonlawyer assistant, or the juror. An automatically generated communication to a juror by the social media service that is not intended by the lawyer or the nonlawyer assistant, is not a communication within the meaning of Rule 16-305 NMRA" *Id.*

The rules in New Mexico are clear that communication with a represented party without the permission of their attorney is off limits. It appears that accessing information that is publicly shared on a Facebook or other social media sites is fair game, but the act of friending could be treading on the fringes of what is ethical and may place the attorney in an awkward position of having to explain themselves to the judge and an ethics board if not done with the rules in mind. When in Federal Court for the District of New Mexico, "The Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico apply except as otherwise provided by local rule or by Court order" D.N.M.LR-Civ. 83.9. As a result, these rules of professional conduct regarding social media use also apply to any civil action in a District of New Mexico federal trial.

### **III. Uncovering Juror Misconduct and What to Do About It**

The Federal Judicial Center distributed a survey in November 2013 to all active and senior federal judges with one of their goals being "to assess the frequency with which jurors used social media to communicate during trials and deliberations in the past two years, and to identify strategies for curbing this behavior" Meghan Dunn, *Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations*, Federal Judicial Center, pg. 3 (May 1, 2014). The survey resulted in 494 responses, with only 33 judges reporting that they had detected jurors using social media during a trial or deliberation, representing 6% of the respondents *Id* pg. 4. Of those judges who reported jurors using social media, 97% had only experienced the issue in one or two cases *Id.* The most common forms of social media detected by the judges were Facebook (17 surveys),



instant messaging (four surveys), Twitter (three surveys), and personal blogs (three surveys) *Id* pg. 5.

The judges that responded to the survey noted that it is quite difficult to detect jurors' using social media in an inappropriate manner, "and that judges rely on others to bring it to their attention" *Id*. Pg. 6. The survey revealed that other jurors, attorneys, court staff, or one of the parties are generally the ones to bring such juror behavior to a judge's attention. From the survey results, "only one judge reported observing jurors using electronic devices in the courtroom", identifying the activity on their own *Id*. Pg. 6. When looking at the ways that jurors used social media during trials or deliberations, the judges shared that a number divulged confidential information about the case, some attempted to communicate with case participants (including attorneys, witnesses, parties, and judges), and still others revealed information about the deliberation process *Id*.

The survey provides insight into how jurors use of social media is managed by judges. When confronted with such activity, most judges cautioned but allowed the juror to remain on the jury *Id*. Pg. 5. In a minority of cases the judge removed the juror from the jury *Id*. In only one instance was a juror held to be in contempt of court *Id*. A few judges learned of and dealt with the social media activity of a juror after the trial had ended. In these instances, the judges either held a post-trial hearing or considered the behavior in post-trial motion practice. It is unclear what action was ultimately taken with these jurors *Id*. Pg. 6.

To prevent jurors from using social media inappropriately during trial, the judges surveyed took a number of steps. The most common approach used by judges was to "explain, in plain language, the reason behind the social media ban" and to "instruct jurors at multiple points throughout the trial" *Id*. Pg. 9. In particular, "Over half of the responding judges remind jurors at voir dire to refrain from using social media while serving as a juror" *Id*. Pg. 10. Many judges warn the jury of the potential consequences

of acting in violation of the court, citing individual fines or the possibility of being held in contempt of court. Additional actions taken by some judges included confiscating electronic devices each day or at certain key moments (deliberations), the court house not permitting electronic devices in the courtroom, and asking jurors to sign a statement that states that they will comply with social media instructions while serving *Id.* Although less common, some additional approaches that were taken include posting signs in key areas of the court house that state the policy, administering an oath to jury members that mentions the prohibition, and asking jurors if they complied with the policy *Id.* The majority of the judges surveyed (67.6%) believed that the preventive measures that they had taken were “very successful”, but nearly a third (29.3%) stated that they did not know if their efforts were successful *Id.*

The survey from the Federal Judicial Center provides a good foundation for litigation attorneys to understand the state of the courts efforts to address the issue of juror misconduct. With that background, the prudent litigator should then create a strategy to ensure that their clients get a fair trial by identifying any of the mitigations mentioned in the report that the attorney feels are warranted, or others that the attorney believes are reasonable, and request that they be applied in their cases. Addressing any potential gaps or anticipated issues with the judge as early as possible is key.

#### **IV. State Statutory Efforts to Control Jury Social Media Use – Prevention and Penalties**

States provide uniform jury instructions that should be used to inform jurors of their responsibilities. In the State of New Mexico, the following are the instructions provided via State Statute that relate to social media use:

UJI 14-101 NMRA Explanation of trial procedure

## Conduct of jurors

There are a number of important rules governing your conduct as jurors during the trial. You must decide the case solely upon the evidence received in court. You must not consider anything you may have read or heard about the case outside the courtroom. During the trial and your deliberations, you must avoid news accounts of the trial, whether they be on radio, television, the internet or in a newspaper or other written publication. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the case.

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in this case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I know that many of you use cell phones, the internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone or any other device that can access the internet through email, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, such as \_\_\_\_\_ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, or YouTube*).

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, computer, or any other device that can access the internet; the internet, any internet service, or any text or instant messaging service; or any internet chat room, or by way of any other social networking websites, such as \_\_\_\_\_ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, YouTube, or Twitter*), to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

UJI 14-114 NMRA. Recess instruction.

During recess, do not discuss this case with other jurors or with any other person, or allow anyone to discuss the case with you or in your presence.

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in this case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I know that many of you use cell phones, the internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not



communicate with anyone about the case on your cell phone or any other device that can access the internet, through email, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, such as \_\_\_\_\_ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, and YouTube*).

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, or any device that can access the internet; the internet, any internet service, or any text or instant messaging service; or any internet chat room, or by way of any other social networking websites, such as \_\_\_\_\_ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, YouTube, or Twitter*), to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

Avoid any publicity this case may receive. Do not read, listen to or watch any news accounts of this trial.

Do not express any opinion about the case or form any fixed opinion until the case is finally submitted to you for your decision.

#### USE NOTE

This instruction may be given at recesses and at the end of each day of the trial. After the initial reading, the court may abbreviate the instruction as necessary.

[Approved, effective October 15, 2002; as amended by Supreme Court Order No. 11-8300-005, effective March 25, 2011.]

**Committee commentary.** — This instruction is not mandatory. It is a summary of several admonitions contained in the explanation of trial procedure, UJI 14-101 NMRA.

Some potential consequences for juror misconduct during jury selection may include curative instructions by the judge, removal of the juror for cause, and a mistrial. Preventing & Addressing Internet-Related Juror Misconduct: A Judicial Curriculum, Center for Jury Studies, <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/Jurors%20and%20New%20Media%20Curriculum/JNM%20Faculty%20Guide-with-cover.ashx> (last visited Feb. 9, 2019)

## **V. Attorney Use of Social Media at Trial**

The November 2013 Federal Judicial Center social media in the courtroom survey went beyond just looking at jurors, it also looked at attorney use of technologies during voir dire. Meghan Dunn, *Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations*, Federal Judicial Center, pg. 11 (May 1, 2014). Based on the survey results, most judges (73%) were not sure if attorneys were using social media during voir dire. *Id.* Only 7% of the judges noted that attorneys were using social media during the voir dire phase of their trials, and of those, 84% of the judges reported that they witnessed social media being used in less than five cases. *Id.* In those cases where noted, social media was being utilized in one or more of the following ways: looking at prospective jurors Facebook pages, searching for their names in a search engine, looking at LinkedIn profiles, looking at personal blogs, and reviewing personal websites. *Id.* pg. 12.

The survey also asked judges for their stance on allowing attorneys to use social media to research prospective jurors during voir dire. In response to this question, nearly 69% of judges stated that they don't address the issue with the attorneys who

come before them, 26% of the judges expressly forbid the attorneys from using social media, and 5% allow attorneys to use social media *Id.* Pg. 13. Some of the reasons given for forbidding the use of social media included protecting potential juror privacy, concerns about potential juror intimidation, distraction caused by the activity, and the risk of the research prolonging the voir dire process *Id.*

For those attorneys who wish to be cutting edge and search social media to profile potential jurors, there are at least a couple software applications that can speed up the process while providing recommendations using actionable intelligence. Voltaire (accessible at <https://voltaireapp.com>), is one such software application that may be of interest. This software application allows the attorney to take a picture of the prospective juror list and send it to the company for analysis Voltaire, <https://voltaireapp.com> (last visited Feb. 9, 2019). The company then searches through several data sources including voter registration records, criminal history records, social media (focused on online authorship, likes, and interests), campaign contribution records, financial and real estate records, and other available professional information to create a corpus of data regarding each juror *Id.* This data is then processed using the company's proprietary algorithms that utilize behavioral and psycholinguistic analysis to give the attorney key information and prospective juror recommendations *Id.* For the skeptical attorney, the company allows a prospective client to receive a report for free on one person (including yourself), to try it before you buy it to see if it meets your needs.

Another software application that may be of interest to attorneys looking for an edge is Vijilent (accessible at <https://www.vijilent.com>). This company utilizes and searches publicly available records such as social media, criminal records, property records, voter registration, real property records, business incorporation filings, in order to provide the requester with a personality profile Vigilent, <https://www.vigilent.com>, (last visited Feb. 9, 2019). The company provides curious

attorneys a look at what their reports offer at <http://www.vigilent.com/data-portrait/>. This application allows the attorney to even search for keywords within the retrieved social media posts to expedite analyzing the retrieved data. This company is very open about their pricing, with different levels of data being compiled per search. Vigilant, <https://www.vigilent.com/pricing/>, (last visited Feb. 9, 2019). The company will only charge a nominal fee if the search results indicate that the prospective juror doesn't have an online presence, because they state that "only 60-70% of the US population has an online presence" *Id.* New users are given five free searches before they begin to be charged *Id.*

A lawyer may search for information of interest using the native social media applications themselves (e.g. Facebook), may utilize applications such as Vigilant on their own, or they may engage a trial consultant. Such consultants can take the information that is found on-line via social media searches and combine that information with the information the consultant sees and hears during the voir dire process. Trial consultants generally have experience in sociology, psychology, and law and may be of great value to attorneys dealing with high risk litigation that need an extra edge against their opposition. Such consultants can be helpful in identifying certain traits in potential jurors that may make them less likely to be objective. For example, a consultant may be able to "determine personality factors by the way people write on Facebook and Twitter and analyze them" Scott Carlson, Software provides real-time predictions on how potential jurors might vote, [http://www.abajournal.com/magazine/article/voltaires\\_software\\_provides\\_realtime\\_predictions\\_on\\_how\\_potential\\_jurors\\_mi](http://www.abajournal.com/magazine/article/voltaires_software_provides_realtime_predictions_on_how_potential_jurors_mi). With the number of preemptory challenges being limited, such consultants can be key to uncovering "hidden bias of potential jurors" that can aid the attorney in forming the ideal jury Use of Jury Consultants, <https://courts.uslegal.com/jury-system/selection-process-at-the-courthouse/use-of-jury-consultants> (last visited Feb. 9, 2019).



