

Social Media Law Update

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[The Anatomy of a Trial With Social Media - The Jury](#)

By [Michelle Sherman](#)

This article is the first in a series on how social media is being used in trials.

Jury Selection

When picking a jury, some cases have enough at stake that a client will pay for mock trials and jury consultants, who will recommend the ideal composition of a jury in that case. It is also the case that the ideal jury may not be reflected in the actual jury pool for that judicial district. Thus, the trial attorney must select from people who are not his ideal jurors. The trial attorney is left to rely on answers given during the voir dire process. Depending on the judge, the attorneys may be allowed to question the prospective jurors, or the judge may do all of the questioning with input from the attorneys.

Fortunately, attorneys now have another tool available to them in cases where the jurors are identified by their full name, and not just a juror number. The case law is not well developed in this area, but one state court has held that attorneys can research prospective jurors using social media in the courtroom during jury selection. Internet research and access to social media has the potential for opening up a whole new avenue to excuse a juror for cause. Social media activity may show that despite a juror's responses to questions, the juror is not being candid or truthful.

In [State v. Dellinger](#), 696 S.E.2d 38, 225 W. Va. 736 (2010), a juror lacked complete candor in her responses to voir dire questions. She did not disclose that she knew the defendant, and had sent him a message between receiving her jury summons and appearing for jury duty. Juror Amber Hyre sent the following message to the defendant and appellant on MySpace, a social networking site (with the misspellings left uncorrected here):

"Hey, I dont know you very well But I think you could use some advice! I havent been in your shoes for a long time but I can tell ya that God has a plan for you and your life. You might not understand why you are hurting right now but when you look back on it, it will make perfect sence. I know it hard but just remember that God is perfect and has the most perfect plan for your life. Talk soon!"

On appeal, Dellinger argued that Juror Hyre's lack of candor on voir dire should have been grounds for a new trial. The Dellinger Court reversed the trial court and ordered a new trial. "[T]he totality of Juror Hyre's responses during the June 11, 2008, coupled with her repeated silence during voir dire, leads this Court to conclude that she had such connection with Appellant and witnesses Frame and Slaughter that bias must be presumed. "

As trial attorneys, there is sometimes a gut feeling that a juror is holding back on strong biases against a particular case in order to exercise vigilante justice through the jury process. Research on social media may reveal a blog site or posts that can support a request to the court that the juror be excused for cause.

Monitoring the Jury through Social Media

Using social media to get more information on your jury should not end with picking a jury. Attorneys should ask the court to have the jury list any blogs or web sites for which they post on a regular basis, and check those sites during the trial and after to make sure the juror has not breached his legal obligations as a juror. In one widely reported case, a criminal defense attorney's son was doing further research on the jurors in a resisting arrest case, and found the following troubling Facebook post: "gonna be fun to tell the defendant they're GUILTY." Juror Hadley Jons did not wait until jury deliberations to make this post. She posted it before the defendant put on her case. Juror Jons was removed from the jury, fined \$250, and ordered to write an essay on the Sixth Amendment of the Constitution by the judge.

Juror Jons is not an isolated case. There are a number of other known examples, and likely others that are not discovered. In a murder case in Ventura, California, a juror blogged about the case during trial. In his blog called "[The Misanthrope](#)", the juror posted photographs of the 15-inch, double-edged, saw-toothed knife that was used as a murder weapon. The juror also had a chat room set up so that visitors to the blog could ask him questions about the trial. The defense attorneys learned of the blog, and informed the judge. The defense also moved for a new trial during the sentencing phase based on juror misconduct. The court denied the motion, but it will be an issue on appeal when the defendant appeals his 27 year sentence.

Courts have responded appropriately, and have included social media in the jury instructions before the trial begins, and also prior to the jury beginning its deliberations. Counsel for the parties should make a point of asking the court to instruct the jury not to discuss the case on Facebook, Twitter, LinkedIn, a blog or any social media. Even vague references to the case should not be permitted.

It is too soon to know if appellate courts will order new trials based on juror misconduct. The courts seem reluctant to do so unless there is some showing that the jury was prevented as a result from rendering a fair verdict based on the evidence introduced at trial. *Cf. In re Methyl tertiary Butyl Ether Products Liability Litigation v. ExxonMobil Mobil Corp.*, 2010 WL 3720406 (S.D.N.Y. Sept. 7, 2010). However, if the jury is specifically instructed not to discuss the case on social media, and ignores this instruction, then the facts may be stronger for the court granting a motion for a new trial.

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