



## ETHICAL IMPLICATIONS OF SOCIAL MEDIA AND JURORS

In January 2018, approximately two-thirds of U.S. adults (68%) used Facebook, with a majority of users visiting the site at least once a day, according to the Pew Research Center. Social media continues to influence numerous aspects of society, including the litigation process, and has become an important resource in juror research. In a world of easily-accessible information, what are the ethical rules and implications regarding social media research of jurors? How are judges handling the presence of this technology in the courtroom? What is the future in juror research?

The American Bar Association, and many state bar associations, have released ethics opinions regarding the electronic information attorneys may access related to a juror. These opinions agree that attorneys (and their agents) are permitted to view information made public by the user on a social media profile, analogizing it to driving by the juror's house. The opinions also agree that attorneys will violate Rule 3.5(b) if they attempt to communicate with a potential, or actual, juror by gaining access to private information by "friending" or inviting to connect on a social media platform.

The ethical guidelines differ on one key issue: whether notification sent from a social media platform indicating the juror's profile was viewed is prohibited communication. The ABA concluded that such notice is not forbidden under the Rules because the attorney is not directly communicating with the juror. The New York State Bar Association, however, has held attorneys should not act in any way in which the juror becomes aware of the monitoring.

Despite some bar associations permitting social media juror research, a judge may prohibit attorneys from such research. The Federal Judicial Center conducted a survey in 2014 regarding the use of social media in trials. 494 judges from

all 94 federal districts participated in the survey. 143 judges expressly addressed the issue of attorneys' use of social media to research prospective jurors during voir dire. The results showed 84% of those 143 judges reported prohibiting attorneys to conduct such research, citing juror privacy concerns, logistical considerations, distractions, prolonging voir dire and possibly creating an unfair advantage for one side. Most judges, however, were unaware of whether attorneys were researching the potential jurors' social media during voir dire.

While most jurisdictions allow attorneys to conduct social media research using a juror's public profile, the line between properly investigating jurors and improperly communicating with them is becoming increasingly blurred with the ever-changing technology. To assist attorneys with this challenge, there are legal technology companies, such as Voltaire, Inc., which utilize artificial intelligence to generate powerful insight on potential jurors.

According to Michael Miceli, the Chief Marketing Officer of Voltaire, Inc., the state and federal judges have not barred the use of social media research during voir dire. Mr. Miceli's statement appears consistent with some of the current ethics opinions. Juror research through social media, however, is evolving and the ethical implications faced by the judicial system will continue to evolve as well.

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