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FROM THE UPCOMING ISSUE

Vetting jurors via MySpace

Social Web sites contain a trove of data for attorneys.

Julie Kay / Staff reporter
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Tampa trial lawyer Linda Moreno
Charles W. Luzier / Reuters

In last year's federal terrorism case against alleged "dirty bomber" Jose Padilla, a team of defense lawyers were sitting at a back table in the Miami federal courtroom with their laptops searching online all the jurors when they discovered one had lied on her jury questionnaire.

The woman, a Miami-area government employee who has not been identified, said she had no personal experience in the criminal system.

It turned out she was currently under investigation for malfeasance, according to Linda Moreno, a Tampa, Fla., solo trial lawyer who served as a jury consultant for one of Padilla's codefendants. After the judge was informed, she dismissed the juror. *U.S. v. Hassoun*, No. 0:04cr60001 (S.D. Fla.).

The Miami case was not unusual. As more and more information on people becomes available on the Internet, through posting on personal blogs, MySpace, Facebook and other social networking Web sites, the Internet has, in the last few years, become an important tool for jury consultants and trial lawyers.

Jury consultants say such sites are a treasure trove of information about potential and seated jurors that can be used in picking the right jurors, bouncing potential jurors and even influencing jurors through the trial and in closing arguments.

To mine the gold, jury consultants have begun turning to private investigators, some of whom have started niche businesses offering Internet jury research and "personality profiling" of jurors.

"If it's within the law, with peoples' lives at stake and millions and millions of dollars at stake, people will do whatever it takes to win a case," said Marshall Hennington, a Beverly Hills, Calif., jury consultant at Hennington & Associates. "The stakes are getting higher and higher, and it's becoming increasingly difficult to persuade jurors that have strong biases ... so we need information ahead of time. Everything is fair game."

Jury consultants and trial lawyers typically compose jury questionnaires for jurors to answer during voir dire, if approved by judges. Some of the questionnaires are basic — employment, marital status, age, criminal record. But some are dozens of pages long and highly detailed.

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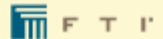
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Still, consultants and lawyers have found that jurors don't always answer the questions honestly. So they have, in recent years, begun hiring private investigators and conducting their own research on jurors.

Jeffrey Frederick, a jury consultant at National Legal Research Group of Charlottesville, Va., now routinely checks the Internet for juror information, and has had some success.

Two years ago, he discovered through an Internet text search that a juror had won the lottery. Working for defense counsel in a personal injury case, Frederick feared the juror might "treat the case like a lottery," or think nothing of awarding a large amount of money. He recommended striking the juror, although the case wound up being dismissed.

Frederick also found, through an Internet search that turned up a news story, that a juror on a recent personal injury case had an accident almost identical to the plaintiff's. He urged the defense lawyer he was working for to strike that juror.

About a year and a half ago, Frederick said, he started asking on jury questionnaires whether jurors have pages on MySpace, Facebook or other social-networking sites. It's helpful to ask, Frederick said, because sometimes the page will be under a different moniker than the juror's actual name. About 10% of jurors report they have such a site, he said.

A different picture

In addition to searching jurors' names, Anne Reed, a jury consultant and shareholder at Reinhart Boerner Van Deuren of Milwaukee, asks all jurors whether they have social-networking sites.

"You get a picture of the juror that's almost always different," Reed noted. "It's often well worthwhile to look."

Reed gives the example of "Erin," a young blogger who achieved some notoriety in Florida after blogging last year about being a juror. The post on Sept. 28 was entitled, "I will eat your babies, bitch!" In her post, she states that she is terrified of white people because "I am pretty sure they all gang rapists."

"I totally understand how innocent people that go to prison turn into hardened criminals," she stated in her obscenity-laden post.

Then, three days later, she posted, "I am a juror."

The lawyers might not have struck Erin simply because of her outspoken blog, but they certainly would have known about it, Reed said.

"You'd hate to leave Erin on your jury without having seen her writing," said Reed. "A juror's blog tells you things about the jurors that she probably won't tell you herself."

Last year, Fort Lauderdale, Fla., jury consultant Amy Singer was doing Internet research on potential jurors for a products liability case involving a maintenance worker who was severely injured after being forced to get inside a machine to clean it.

Singer — who was working for the plaintiff's attorney — hit paydirt when she found out that one of the jurors divulged on his MySpace page that he belonged to a support group for claustrophobics.

Singer instantly knew this juror would be sympathetic to her client and advised her client to keep him on the panel. He wound up becoming the foreman. The plaintiff prevailed.

Jury consultant Robert Hirschhorn of Cathy E. Bennett & Associates of Lewisville, Texas, agreed that what people post on their MySpace or Facebook pages is far different from what they state on their jury questionnaires.

Hirschhorn recalled a recent case in which a juror checked "no affiliations" on his juror questionnaire and, through Internet research, Hirschhorn discovered that he belonged to "fringe right-wing" conservative groups.

"For whatever reason, he forgot to mention it," said Hirschhorn, co-author of Blue's Guide to Jury Selection and a jury consultant since 1985. "If we hadn't had this amazing resource, we wouldn't have found that. The Internet is an amazing tool for lawyers."

Letters to the editor

In recent years, Hirschhorn and others have started searching online for letters to the editor written by jurors. In fact, Frederick recently discovered that a juror on a death penalty case had actually written a guest editorial on the death penalty.

The difficulty of Internet research is time. Lawyers are typically not given lists of jurors until a day or even hours before jury selection begins. With federal trials, lawyers might have several days' notice.

This means that the minute jury lists are obtained at Los Angeles-based jury consultant Vinson & Co., employees furiously begin typing away on their computers, doing Internet searches.

"You get lists with dozens, even hundreds, of names on it," said Vinson's president and chief executive officer, Stephen J. Paterson.

Some jury consultants and lawyers, however, still want to research their juries even after jury selection, for different reasons. For one thing, the information can be used to get a case overturned on appeal if it turns out a juror lied on a questionnaire.

Additionally, some consultants and lawyers are beginning to use Internet information they've obtained about jurors to influence them during the trial, particularly during closing arguments.

This can be tricky, said Paterson.

"You don't want to tip off jurors so that they know you've been investigating them," he said. "And you don't want to pander to them. That can be dicey and potentially dangerous — although I'm sure a skilled trial lawyer could find a way to weave information into his words."

Miami criminal defense lawyer Richard Sharpstein of Jorden Burt has used the Internet extensively to research witnesses and prosecutors, and famously got a Miami-Dade County prosecutor thrown off a high-profile case for posting about the case on MySpace. But Sharpstein said he never thought to research potential jurors, until now.

"The next time we get a case, you can bet I'll have an associate sitting there with a laptop plugging in names," he said. "It's another tool for the arsenal."

But is it ethical?

Dan Small, a litigator at Holland & Knight out of Boston and Miami and a former federal prosecutor, is reluctant to research jurors, even though he acknowledges that "the Internet is a great resource for lawyers.

"You are taking people who are doing their civic duty and didn't sign up to have their whole life probed," Small said. "It scares people. They wonder; 'Are they going to hack into our e-mails next?' The Internet in so many areas creates an extraordinary conflict between the desire for information and the desire for privacy."

Hirschhorn also cautions his clients to avoid tipping off a juror that he or she has been investigated.

"The juror might then go to the other jurors and say, 'You know what that lawyer did, he investigated me,' " he said. "They may think you're invading their privacy and think ill of you."

Instead, Hirschhorn tells his clients to keep information gleaned off the Internet hush-hush. They'll use it for peremptory strikes, without giving any indication why the person is being bounced, he said.

Additionally, Hirschhorn said he is just now starting to see lawyers use information in opening and closings. For example, a lawyer discovered from a person's MySpace page that his favorite book was *The Seven Habits of Highly Effective People*, and found a way to subtly include that reference into his closing arguments.

"I haven't seen any abuse, such as a lawyer discovering a juror loves eating at Christina's Mexican restaurant and then making sure food is brought in during jury deliberations from Christina's Mexican restaurant," he said.

For her part, jury consultant Singer insists that using Internet research to influence jurors is perfectly ethical.

"If you find that someone is a member of an environmental group, or believes in a charity, you might use analogies to gain sympathy for your client," she said. "If someone puts on their MySpace page that family is the most important thing to them, you can argue that a person was injured and will not be able to enjoy their families."

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