

# Utilizing Technology for Winning Trial Themes in High Profile Litigation

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# *Technology for Winning Trial Strategies*

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# **TECHNOLOGY FOR WINNING TRIAL STRATEGIES**

## **KNOWLEDGE IS POWER: SEIZE THE KNOWLEDGE, WIELD THE POWER**

### **INTRODUCTION**

In 1996 we authored and edited Mealey's Toxic Tort Law and Science Manual. A majority of the research utilized in that 983 page book was performed over the internet (believe it or not on dial up). We utilized highly reliable sites from medical/scientific journals, government, industry, trade group and associations (ACGIH, ANSI, ASTM, ACS, etc.) and university sites. We would not have been able to research and publish that incredibly informative book in such a short time period without the internet. The internet gave us access to a wealth of reliable information from a multitude of disciplines. That research experience lead to our second book which was published by Defense Research Institute (DRI): Toxic Tort and Medicine Internet Directory, in 1998. By the beginning of 2000, our Internet Directory was DRI's number one best seller; however, by the end of 2001 that book became obsolete. The reason: the internet and information technology evolved at a hyper pace and still does to this day. The internet has become a powerful tool for litigators (research, communication, investigations, jury selection and trial presentations) that has transformed the way we practice. It allows David to compete with the Goliaths and dramatically levels the playing field between plaintiff's attorneys and large corporations, as well as small and large law firms in high stakes/high profile litigation (drug medical device, industry wide and toxic/mass tort litigation).

The internet and information/social/entertainment technology has truly transformed society in general and the mindset of jury panels across the United States. It has reshaped how jurors think and learn, obtain information, communicate, entertain themselves, shop, and conduct business. The effects have been numerous: Tower Records and numerous record stores became obsolete as a result of people being able to digitally download music (e.g. iPod); print news media has taken a back seat to web news sites (Drudge, MSNBC, Yahoo®, etc.); the creation of blogs have effected the outcome of presidential elections, Tweets have challenged despots (Iran: Election protest) and

shopping has been transformed via the internet. The internet and smart phones have even changed the way many people interact with “Social Networking Sites” such as MySpace®, Facebook®, etc. and Blogs such as Twitter.

Trial attorneys must keep pace with these changing dynamics to be successful in the courtroom. Technology has transformed our trial readiness and our trial presentation. A successful trial attorney understands that a case must have a good simple theme that resonates and connects with jurors. Your theme of the case must relate to their life experiences if you want to win their hearts and minds. You must know your target audience and what sells with them. Over the years we have all developed *voir dire* techniques and general profiling to learn more about the jurors who are ultimately going to decide our client’s fate. However, if you really want to connect with the jurors, you need to see if you can directly connect with them by using the information available through the internet. The internet can give you a wealth of information on the **actual** jurors on a panel and ultimately sitting in the box. Trial attorneys already know their jury makeup from traditional tools, prior trials, jury focus groups, mock trials, socio-economic and demographic studies, opinion polls, general and micro societal trends and value shifts, etc. However, we now have at our disposal the means to gain critical information about each of our individual jurors through the internet. Those means include: (1) Google™ and other mega search engines; (2) social network sites; (3) blogs; and (4) follow up internet research based upon the information obtained through *voir dire* (work place, activities and groups, professional licensing information, clubs, associations, etc.). The remainder of this paper will discuss: how the make-up of juries has changed over the years; how to develop a theme that effectively persuades post 9/11 jurors in the Obama Era; and how social networking sites and internet research can give you an in depth profile on individual jurors. For a detailed paper on Winning Defense Trial Themes, please refer to Winning Trial Themes: Hitting the Key Notes, Mealey’s LexisNexis Trial Strategy Seminar by John J. Delany, III, December 2007.

## **I. WINNING TRIAL THEMES: HITTING THE KEY NOTES**

"Just Do It"... "Built Ford Tough"... "Priceless"... "It's the Real Thing"... "Reach Out and Touch Someone"... "Like a Rock".. "The Ultimate Driving Machine.".., "Mm, Mm, Good"... "It Brings Good Things To Life". When you hear a slogan or tag line, a company wants you to think of its company or product in a positive way. For the same reasons Madison Avenue uses tag lines and slogans in "branding," trial lawyers should use themes to "sell" their ideas to a jury. The concept of branding started with consumer products, but recently proliferated into other areas (celebrities, news personalities, professional businesses, hospitals, political campaigns, etc.) where there is competition to capture market share. Proof of the importance and demonstrated effectiveness of a theme is the 2008 Presidential elections, "Hope/Change" versus \_\_\_\_\_. The same factors that make a slogan or a branding campaign effective also apply to developing an effective trial theme. A good theme conveys a powerful, memorable, simple message to the jury that leads them to the desired outcome you. A major theme may contain several sub-themes that touch on the core issues of the case. Themes and sub-themes must connect with the particular jurors at the trial to be effective. The more you know about your jurors, the more you can be sure that your themes resonate with them.

### **A. KNOW YOUR TARGET AUDIENCE: THE JURY**

Who is the person you have to convince? What sells in Philadelphia does not sell in Carbon County, PA and what sells in Salem County, NJ does not sell in Essex County, NJ. You need to connect with your jury, and in order to connect it is beneficial to know each member's life experiences, value sets, socio-economic backgrounds, and multicultural and generational differences. Social networking sites and internet research can give you vital information on your jurors.

A plaintiff's counsel's task is much easier than a defense attorney's because, from the start, jurors tend to identify with the individual plaintiff more than with the corporate defense team. People naturally feel sympathy toward the injured and his or her family, and want to reach out and help. Think of the public's reaction to the victims of 9-11,

Hurricane Katrina and the Indonesian tsunami. People want to help, and juries know they are in a position to do so. Plaintiff's counsel also has an easier script, that has been presented over and over again in Hallmark cards, pictures of starving children and 1-800-GIVENOW ads on television. Plaintiff's counsel also know that 45 to 65 percent of the jury (depending on the industry you represent) already has a bias against your company. Plaintiff's theme will capitalize on this "stacked deck" with the jury. You can count on it.

Sound pretty bleak for the defense? Should you just get out the check book and settle? The answer is "no." In fact, there should be more jury trials. While arbitrators and judges often overvalue cases, juries get it right eight out of ten times. (As always, there are jurisdictions and venues that skew those statistics: Philadelphia, the Bronx, and Madison County Illinois, to name a few.)

The key is to pick your battles, and once you do, to develop and implement a proactive litigation strategy. Developing an effective defense theme that connects with the jury is critical to increasing your success rate. Know your jurors.

### **1. Jury Make-Up**

Although jurors tend to relish the trial experience once it is complete, most begin their trials not wanting to be there. You are taking precious time away from them, their families, their careers and their normal routines. You have just forced them into a position that they would rather not be in: they are responsible for deciding the outcome of a dispute that will have real life consequences for real people over a lifetime. You will force them to take positions and discuss intimate issues with strangers. Always remember that. Respect it and deal with it.

We have probably opened to more than 75 juries and closed to more than fifty since passing the bar decades ago. The make-up of juries has changed dramatically over the past twenty-five years, and especially in the last five. Your theme must target and be "bought" by this ever-changing audience. For the same reasons Proctor & Gamble performs market studies and targets a product for a certain consumer group, a trial attorney must target his or her theme to the jury seated for that trial. There is no better evidence of this than the acceptance of the "Obama Agenda" and the decline of rugged

entrepreneurial individuals being able to reap the rewards of their hard work and sacrifice. (Redistribute the Wealth – juries have been doing that for years).

For the defense counsel, juries are more difficult to deal with today than they were even five years ago. Numerous jury studies have shown that juries are more inclined to render larger verdicts and not hold plaintiffs personally responsible. Why? Because they do not hold themselves responsible. Hence the mentality of you should pay my mortgage (despite the fact that I am financially over extending) and while you are at it you should pay my healthcare, credit card bills, education, and pension as well and you should bail me out regardless of my inept business decisions. This accepted mind set/agenda is due, in large part, to a shift in value sets - your jury's value set.

## **2. Not –My-Fault Society**

I should be able to sue McDonald's<sup>®</sup> because I am obese; it is not my fault that I over-ate. I should sue tobacco companies for my lung cancer, although I personally chose to disregard the warnings and overwhelming medical literature. It is the gun manufacturer's fault, not the person who pulled the trigger, or the government's lax gun laws. It is the property owner's fault when a driver hits a pole, although that driver was negligent and chose not to wear a seatbelt. It is the saw manufacturer's fault that I sawed off my fingers, not mine for taking the guard off and not paying attention. Everyone is a victim, and no one is accountable. If my business fails, “you” bail me out. If my pension fund is troubled, “you” pay for it. If I cannot pay my mortgage, “you” pay it. You are responsible and I am not. If I cannot pay for what I want, “you” pay for it. Redistribution of hard earned money is the accepted norm. John Wayne does not sell. Three quarters of your jury will not even know who he is.

## **3. Disassociation with the True Value of Money**

Every day one reads stories of large sums of money being given to sports players. (The batter who gets a hit 27 percent of the time gets a \$35 million contract); executives are being paid \$15 million while people are being laid off; actors get \$25 million per

movie; and government deficits are in the trillions. Large sums of money are seemingly commonplace, and therefore the true value of money has been tainted, even though the median household income is \$48,201, only 17 percent of household incomes are \$100,000 or more, and 20 percent of household incomes are below \$23,202. Evidence of this phenomenon is seen in the sub-prime mortgage crisis, the record number of delinquent credit cards, skyrocketing personal bankruptcies, government bail outs, stimulus packages funded on trillion dollar deficits, and unpaid student loans.

So why is there a shift in the financial independence/viability of the U.S. family, businesses and government? Household incomes (even when accounting for inflation) exceed that of the mid-to-late 1950s (the so-called economic golden years). The reason seems to be a culture of "I want it, I must have it, and I am entitled to it." Think of the "haves" of your typical 2008 household compared to a 1976 household. In 1976 parents did not have the extra burden of paying for the family's cell phones (you were lucky to have two phones in a household), cable TV (it was free), monthly internet service (did not exist), laptops, MP3 and iPod, or two and three cars. The "everyone is a winner mentality" leads to everyone going to college (on or offline). When everyone is special, no one is. We all have more and the financial burden of obtaining the "must haves" for a 2009 family has dramatically increased. Those "must haves" are purchased, whether people, businesses, or governments have the money or not. Poll after poll confirms that families today believe they are not as well off as prior decades, despite their accumulated possessions and achievements. This attitude translates into a true reality/money disconnect. It is those disconnected jurors who decide the money issues in your case. The meaning of the "at issue dollars" seems to be lost on them. It all becomes monopoly money. An attorney's theme must counteract that phenomenon so that the jury can discuss an award realistically during deliberations. The first task is to find a jury who understands responsibility, accountability and the true value of money.

#### 4. Anger Management

Also, today's jurors tend to be angrier and more cynical as a result of the Enron scandal, healthcare crises, and being generally overtaxed and underpaid. The public

uproar (based on a liberal media spin) on AIG bonuses is a perfect example. Despite the fact that many of those executives did not feel the sinking ship, had a valid contract, worked long hard hours at great personal sacrifice and that this would be the only compensation they receive, the public wanted their bonuses taxed away. Countless studies have revealed the public's general distrust of big business and corporate executives. This accounts for the plethora of corporate governance laws and regulatory rulings enacted within the past six years. The average American, and the average juror, is inundated with headlines about companies closing plants in the U.S. and heading overseas, jobs being outsourced, the corporate scandal of the month, the dangerous drug or product rushed to market, toxic paint on toys, bacteria-contaminated food, increased healthcare costs and reduction of benefits, record-setting executive pay, and the tight relationships among lobbyists, big business and politicians. Again, plaintiff's theme will capitalize on this bias and the defense must deal with it.

Most defendants have their own compelling stories that can be told in a positive way (rags to riches, keep America growing, etc.) A positive personal image of your client's company must be woven into your theme and sub-themes. The company's corporate mission, quality and safety programs, and efforts to do the right thing as a good neighbor should be all critical to your argument. You must develop the corporate witness who is proud of his or her company and work; this witness will help you hit your theme home. You want the jurors to identify with that corporate witness. Your witness becomes your client and must embody your theme.

## **5. The Generation Gap Within**

The generational make-up of today's jurors is dramatically different as well. In 1995, the jury pool consisted of 31 percent Seniors, 34 percent Baby Boomers, and 35 percent Generation X'ers. Today the pool consists of 15 percent Seniors, 35 percent Baby Boomers, 42 percent "Generation X'ers", and 8 percent "Me" Generationers. What theme sells to the approximate 50 percent Generation X'ers and Me Generation jurors? Their mindsets, values and learning style are totally different from that of older jurors. The "Me" entitled, narcissist generation is becoming more and more of a factor. "Look at me, I am

special. Just read my Facebook® page. I know you want to know what I am doing all the time. That is why I Twitter.”

They are the texting, Ipod, laptop, MySpace® and video game generation. With this group, a multimedia presentation enforcing a consistent, memorable theme is essential. As a group, they lean more to the left and tend to be more oriented to the plaintiff. However, the internet and social networking sites are a great source for finding information about this generational group and how you may persuade them.

Trial attorneys know that the composition (education, gender, socioeconomic level, vocation, and generation gap) of a jury panel does not typically represent the ultimate jury selected. However, when you say "Lend me your ears" (presently your whole body gestalt, as a result of trials being a multi-media experience), know to whom the ears belong when developing your theme. Everything matters.

## **6. The Female Factor**

On May 18, 2009, the National Law Journal's front cover story was entitled, The Female Factor: litigators, experts say the mostly female jury is the new norm. Gender differences are well-documented and wide-ranging: psychological, educational, emotional, behavioral, social and physical. Women and men think, learn and react to stimuli differently. Certainly gender stereotypes are inappropriate; however, understanding gender differences is crucial in being a successful trial attorney. With female-dominated juries now being the norm, knowing those differences has never been more important. Although there are many books and articles written on female jurors' tendencies in criminal trials, until recently that issue has not been analyzed in civil litigation. The most likely reason is that it has not been until recently that the gender issue has become appreciated as such a major factor in determining how jurors make decisions.

As a trial attorney if you believe in old stereotypes of women, you will not connect with the jury. Women have made great strides in politics, (Hilary Clinton, Nancy Pelosi, and Justice Sandra Day O'Connor) and business. They set policy, rule governments, are leaders in businesses and hold majorities in many a boardroom. A trial

attorney must understand that what persuades a woman may not persuade a man; how a woman interacts with her fellow jurors may not be the way a man interacts with his jurors; what is important to a woman in a case may not be important to man; how a man learns and the presentation he prefers may be different for a woman. There is no better representative of these differences than how Madison Avenue markets its products, movies, cars, drinks, books, and sports to a man versus a woman. One must be cognizant of those differences if one wants to ultimately connect with the jury. Also understanding male/female dynamics in a group setting is important.

## **B. COMMON THREADS**

There are common threads that are true with most juries:

1. Countless studies have revealed that a great percentage of jurors have a **pre-conceived bias** that you are unlikely to change, regardless of the oath the jurors just took. Your battle is for the hearts and minds of the undecided, neutral and “I Don't Know” jurors. They are your swing vote. Think of the wife who believes her husband will change after they get married. It almost never happens. Likewise staunch Republicans or Democrats are not going to change their party vote on Election Day, regardless of the issues. Elections are won by capturing the moderates and undecideds. Juries are won by providing defense-biased jurors with evidence to utilize in swaying neutral jurors during deliberation and neutralizing your plaintiff-biased jurors.

As defense counsel, you need to understand each juror's preconceived impression of your client, its product and its industry and develop a theme accordingly. Obviously, you are not going to center the theme of your case around your client if you represent a slumlord in a childhood lead case. Your theme and attack is all about the science (dose, diagnosis, alternative cause and the measure of damages).

2. Jurors develop an impression of an attorney and client within **the first ten minutes** of a trial, or even before. Recently, I had a juror tell me after a several-week trial in New Jersey, that before I said a word she knew my client was right (i.e. before she

heard the evidence). Although I prevailed, I understood it had nothing to do with me as far as that juror was concerned.

Because a majority of jurors decide the case preliminarily during opening statements, your theme needs to be clear from the start. Thereafter, jurors may see the evidence through tainted glasses. They are more ready to believe and accept evidence that validates their preliminary intuition and ready to reject or not even hear evidence that contradicts it. Recently, during a mock jury exercise, I observed a very pro-plaintiff juror totally disregard stipulated evidence during deliberations and even invent facts that did not exist to support his position. This juror had already made his decision about the case by the end of the opening statements (probably before).

3. Jurors remember **simple facts that coincide with their values** and gut sense of fairness. Common-sense analogies that strike a chord with their own life experiences are easily accepted as being true. Your theme needs to hit those chords. You must understand that value sets of individual jurors may be generational, multi-cultural, socioeconomic and education-based. Themes must be developed that have broad acceptance among the various groups.

4. Understand how jurors learn and are persuaded in our age of YouTube, MTV, CSI, Internet, texting and MySpace®. Video animation is compelling and snippets, sound bites, analogies, associations, metaphors, and clichés are all memorable. Short, **pulsating, repetitive memory bursts** are the key. Your theme needs to be repetitively communicated in that way. We always phrase key questions with that in mind.

## II. UTILIZING THE INTERNET AND SOCIAL NETWORKING SITES IN A CIVIL TRIAL

In May 2008, Jack Delany picked a jury in front of Judge Quinones in the Court of Common Pleas of Philadelphia. The remainder of this paper will discuss (while protecting the privacy rights of the jurors) basic information that we were able to garner from the internet through social networking sites and other internet research methods on the jury panel generally and the specific jurors that were ultimately chosen. We predict

that over time we will have more jurors on our panel utilize social network sites, therefore over time you will be able to garner more and more information about those individual jurors. Researching social networking sites of prospective jurors is typically more beneficial for people under 33. However, traditional internet research should be performed on all jurors. MySpace® and Facebook® have over 200 million subscribers. That is a large segment of our population, to which your jurors may belong.

**A. BACKGROUND ON SOCIAL NETWORK SITES**

Social networking websites have become the new phenomenon that engages tens of millions of internet users, worldwide, on a daily basis. Social networking websites create a virtual community. A person need not be tech-savvy to engage in the social networking realm. These sites may seem high-tech, but are very user-friendly. The influence behind the social networking sites is illustrated in the sheer number of users connecting with each other. Social networking sites have gained momentum and power, and have become a fundamental part of social revolution.

These sites can be used for meeting friends, dating, networking, or even for forming valuable joint ventures. There are various features offered on these sites, and there are privacy settings for most of the features. Since consumers may be concerned with offering too much information online, the sites allow the consumer to control how much information to remain accessible to the public. All of this can be completed with a couple strokes of the keyboard, and a few clicks of the mouse. In almost an instant, the world can have access to your personal profile, containing information regarding the following: employer, contact, religious views, political views, educational, ethnicity, hometown, birthday, relationship status, sexual orientation, smoking/drinking, body type, number of children, etc. On the social networking site, the consumer becomes the publisher. The consumer can add website content in the form of text, photographs, videos, and slideshows. Since the most popular social networking sites are free of charge, any individual with access to the internet can become a member of one of these sites.

MySpace® and Facebook®, just two of the most recognized networking sites, were previously used only for the sole use of communication on the internet with other members of the network. Now, MySpace® and Facebook® have transitioned themselves into the “whistle blowers” of our current progressive society. Potential employers are using these social networking sites to their benefit. MySpace®, Facebook® and other sites are used daily to conduct background checks on potential candidates wanting to join their organizations.

Just as employers are conducting searches on social networking sites to discover what their candidates are truly like, lawyers are now taking advantage of these sites for a different purpose. Law firms around the world can now perform background searches on potential jurors, for the sole purpose of discovering more about each individual, allowing them to gain more insight into what the potential juror is all about. The search has the ability to shed light on potential prejudices and beliefs, enabling the lawyer to be more educated on his/her selection. It may provide you with intimate knowledge on who it is you have to ultimately persuade.

## **B. UTILIZING SOCIAL NETWORK SITES IN JURY SELECTION**

Never have trial attorneys had a greater ability to define the type of juror they believe they should have, as well as the means to obtain their perfect juror. The Court and the attorneys continuously state throughout jury selection that they want a fair and impartial juror. There can be nothing further from the truth. The goal of voir dire in our adversarial system is not to get a fair and impartial jury, but rather a prejudiced one that is slanted towards one’s camp or at least neutral. Jury voir dire is not having the ability to select the perfect defense juror. More often than not, it is an exercise to insure that the perfect plaintiff’s juror is not seated in the box.

### **1. The O.J. Murder Trial; The Importance of Jury Selection**

There have been numerous articles written about the O.J. Simpson murder jury trial, jury nullifications, the effect of Judge Ito, the Dream Team Defense, and the

bumbling mistakes of the prosecutors, etc. How could the prosecutors lose a case with such strong overwhelming evidence? They choose the wrong jury, given their fact pattern at that time in history. (Post Rodney King). The prosecution lost the O.J. trial before a juror was ever sworn in, when it decided that the trial would occur in downtown Los Angeles versus Santa Monica (which would have been the typical locations) as a result of where the crime occurred. Simply if the case was filed in Santa Monica, the jury pool would have consisted predominantly of Caucasians. Pre-trial polls clearly showed that the majority of African Americans believed that O.J. was innocent, while a majority of Caucasian believed he was guilty. Race should not have been, but was the determining factor. Vincent Bugliosi, the famous prosecutor in the Charles Manson case, stated the single biggest factor of why O.J. was not convicted of murder was the racial makeup of the jury and the prosecutor's mistake of not having the case tried in the judicial district where the crime occurred (Santa Monica). The O.J. Simpson jury make up was:

**Race** - nine African Americans, one Hispanic and two Caucasians;

**Gender** – ten women and two men.

**Education** - two college graduates, nine high school graduates, one non-high school degree.

Do not make the O.J. prosecutors' mistake. As litigators, your goal is to put in the box as many jurors who will lean to your client's side. Traditionally, the means of finding the right juror profile was through: jury focus groups, mock trials, prior trial experience, cultural, social/demographic and economic studies, opinion polls, verdict analysis, current events, and general jury studies. The voir dire process is the means by which you find the juror who more likely than not fits the jury profile you desire. Your tools to help locate that juror had been conventional means (questioning, in court analysis), yet have now expanded to include the internet, specifically social networking sites, blogs, and general internet/digital research.

## C. TYPES OF SOCIAL NETWORKING SITES

The trial attorney has a wide range of weapons to assist in selecting juror(s). They consist of:

1. Basic social network sites;
2. Ethnic and special interest community sites;
3. Micro Blogs;
4. Blogs and social network hybrids;
5. Business networking and professional sites and associations;
6. Niche community; and
7. General internet searches (name searches, articles, news account, credit reports, IDEX searches,).

### 1. BASIC SOCIAL NETWORKING SITES

A basic social networking site typically is a site that hosts members' personal web pages. Those web pages can consist of personal information regarding that person. The most popular social networking sites are: Myspace, Facebook, Orkut, and Zude.

### 2. ETHNIC AND SPECIAL INTEREST COMMUNITES

These are social networking sites that permit people having similar interests to link together within their respected communities. For example there is [Asianavenue.com](http://Asianavenue.com) and [blackplanet.com](http://blackplanet.com). During the Presidential campaign, numerous candidates had their profiles listed on a multitude of venues.

### **3. BLOGS**

A Blog is in essence a personal journal or an ongoing updated newsletter. Individual blogs are typically supported by blogging platforms such as Lexblog, Typepad, and Blogger, etc. There are a number of search sites engines that wherein one can search all blogs at once for a particular person. Those blogs are Technocratic, Google blog search, Feedster, and Blog digger.

### **4. MICRO BLOGS**

The most famous micro blog is Twitter. It permits a contemporaneous instant message out to a community or series of communities. Although Twitter is the most popular micro blog site, there are many others designed not just for the internet, but mobile phones as well (Rabble). There are numerous search engines that concentrate on finding and searching micro blogs as well.

### **5. BUSINESS SITES**

These are sites that create a business network where people keep each other apprised of their career needs, opportunities, etc. The most popular business site is perhaps LinkedIn. Various vocations have their own professional link sites, such as Counsel Link, Law link, etc. It is important that you utilize these to find the right juror, in combination with general internet searches and Googling.

### **6. GOOGLE AND INTERNET INVESTIGATION**

Once you receive background information on a particular juror, you should perform a generalize Google search related to that person, and an internet investigation. One should digitally investigate that person's career, vocation, social clubs, associations, educational and employment background and other interests. Also old-fashioned investigation into a potential juror's credit history, prior lawsuits, and criminal

background may be important as well. We employ a similar search strategy that we use on experts.

**D. PROCEED WITH CAUTION**

Before using any internet-based information, a trial attorney needs to realize that who a person truly is, as opposed to who that person appears to be in cyberspace, may be two totally different individuals. Whereas one may be vocal and outgoing in the cyber community, he or she may be an introvert and reclusive in person-to-person interactions. Never lose sight of the human factor and remember to keep an eye on how a potential juror holds him or herself out individually, with the other panel members, as well as what he or she is wearing, reading, doing and reacting to utilize the typical Sherlock Holmes analysis of that person in the moment.

**E. DO NOT STOP AT JURY SELECTION: FUSE IT INTO YOUR TRIAL PRESENTATION**

One should use this research information not just during the jury selection process but to infuse it into your trial theme, opening statements, closing arguments, examination of witnesses, analogies utilized in questioning experts and in your general overall persuasive presentation.

**F. JURY SURVEILLANCE AGAIN**

Ronald Reagan stated “trust but verify,” regarding his relationship with the Soviets. There have been a number of recent articles that have revealed that jurors have utilized Facebook<sup>®</sup>, MySpace<sup>®</sup>, and Twitter during trials despite the Court’s instruction to avoid this behavior. This has occurred during criminal trials, after jurors were repeatedly told that they should not discuss the case with other members of the jury or perform any investigation or speak about the case with anyone outside of the courtroom. Jurors felt compelled to keep the outside world posted on the happenings inside the jury

room and courtroom. In March 2009, a federal jury convicted State Senator Vincent Fumo, one of the most powerful politicians in Pennsylvania, of numerous corruption charges. The morning before the jury announced its verdict, the defendant presented a Motion for a Mistrial based on one of the jurors announcing over the weekend that the jury would give its verdict on Monday. The court questioned the juror for approximately two hours and ruled that the jury could continue to remain with the jury and that there was no miscarriage of justice. Several minutes later the jury announced its verdict of guilty. This scenario has played out in both civil and criminal matters across the country. It is important in high stakes litigation that you monitor the internet activity of your jurors to insure that the sanctity of the jury process is maintained.

### **III. THE PHILADELPHIA EXPERIMENT**

In Spring of 2008 before a Common Pleas Court Judge, Jack Delany was presented with forty jurors on a panel and we ultimately selected 12 jurors and 2 alternates. The next section of this paper will discuss what we were able to find about the panel at large and the ultimate jurors who were selected for the case. In an effort to protect the privacy of those jurors we have just designated each juror with a number. We performed a search for them on Facebook®, MySpace® and a traditional Google™ search. In addition to the aforesaid, based upon information that we were able to garner through *voir dire*, we obtained an in-depth analysis of their backgrounds by reviewing their employment history and other traditional research. This paper will primarily discuss our Facebook®, MySpace® and Google™ results, not our proprietary in-depth investigation (in an effort to maintain privacy).

	<b>Facebook®</b>	<b>Myspace®</b>	<b>Google™</b>
Juror 1 (J-1)	no	Yes- unable to view	No
Juror 2	no	No	No
Juror 3	No	No	No
Juror 4	No	No	No
Juror 5	No	No	No
Juror 6	No	No	No

Juror 7	No	Full profile: interests, music, movies, friends, pictures	No
Juror 8	No	No	No
Juror 9 (J-2)	No	No	Mentioned in article: praise for her autistic teaching
Juror 10	No	Full profile: interests, friends, jobs, etc.	No
Juror 11	No	Yes- unable to view	No
Juror 12	No	Full profile: interests, family, pictures, friends	No
Juror 13 (J-3)	No	Yes- company profile	Company website-information about her company, biography, resume, projects
Juror 14 (J-4)	none	none	None
Juror 15	8 maybes	none	None
Juror 16 (J-5)	Full Profile- pictures, interests, friends	none	None
Juror 17	none	none	None
Juror 18 (J-6)	Profile- birthday, no picture	None	None
Juror 19	Yes- unable to view	none	None
Juror 20	One maybe	none	None
Juror 21 (J-7)	20 possibles	none	None
Juror 22	Over 20 possibles	1 possible	None
Juror 23 (J-8)	1 maybe	None	Maybe track star?
Juror 24 (J-9)	1 maybe	2 with full profiles	None
Juror 25	None	Yes- unable to see	None
Juror 26	None	None	None
Juror 27 (J-10)	No	No	No
Juror 28	No	Possible profiles	No
Juror 29	Full profile: interests, religion, friends, pictures, etc.	Yes: unable to view	No
Juror 30 (J-11)	Full profile: interests, political views, friends,	No	No

	interests, pictures		
Juror 31	No	No	No
Juror 32	No	No	Business profile
Juror 33 (J-12)	No	No	e-mail
Juror 34	No	No	No
Juror 35 (J-13)	No	No	No
Juror 36 (J-14)	Possible profiles	Four possible profiles	No
Juror 37	No	Possible- full profile, all info	No
Juror 38	No	Yes: unable to view	Possible articles
Juror 39	No	No	Possible LinkedIn professional profile
Juror 40	No	No	No

If you can view a full profile on Facebook® or Myspace®, the profile will list the juror’s favorite music, books, movies, heroes, their job, education and salary. Often, the profiles will also have pictures, sometimes hundreds. Facebook® profiles are primarily utilized by college students, so they will often include groups, classes, fraternities and sororities, and political views. From the 40 jurors, just by searching for a few minutes, we were able to find some kind of information about at least 18 of them, possibly more if we could confirm their identities from their pictures. Six had fully accessible profiles online. For example, Juror 16, one of the selected jurors, has a Facebook® profile. From looking at the profile, we can look through over 205 pictures of Juror 16. She does not smoke, likes Philly sports teams, and we can view all of her favorite movies, books, and television shows. We can listen to her favorite songs. By looking at Juror 29’s profile, we can see that she is a moderate Christian Baptist, perfect information to know while picking a jury.

Also, sometimes simply typing the juror’s name into Google™ or another search engine will produce information. LinkedIn® is a business networking site, with resumes and information on companies and employees. Juror 13, listed above, had a full biography and resume posted on the business site. Articles written about the juror are accessible, allowing access to information on accomplishments and criticisms.

Blogging is another way to get information about jurors. Bloggers write almost journal-like entries on various topics, from their lives and views to comments on other people's blogs. The problem with these sites is that most people take a false name or nickname, and use that name to keep themselves more anonymous. The same is true for websites designed to display pictures, such as Webshots and Shutterbug- the names are often listed under nicknames.

Other articles written on social networking and jury selection:

<http://juryboxblog.blogspot.com/2007/10/myspace-is-well-stocked-arsenal-for.html>

<http://jurylaw.typepad.com/deliberations/2007/10/a-trial-lawyers.html>

## **CONCLUSION**

In conclusion, trial attorneys need to perform internet research on each prospective juror and the ultimate juror in addition to traditional *voir dire*. It will become more important to conduct this research and the results will become more fruitful as the population ages (there will be more jurors on your panels who belong to social networking sites and utilize the internet as time goes on). Once counsel finds information about the jurors on its panel, he or she needs to weave that information into the overall theme to ensure that the theme connects with those jurors' life experiences. Information is knowledge, knowledge is power, seize the knowledge, wield the power. Make sure you are not the only trial attorney in the courtroom who is not "in the know." Jury profiling via the internet is no longer a luxury, it is a must, especially in high stakes/high profile litigation.