

## RESEARCHING JURORS ON THE INTERNET

What you should know about *catlover38* for voir dire

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Imagine a world where you could learn a tremendous amount about a juror by simply knowing their name. Beginning around 1000 A.D., this world existed. In an effort to create a less confusing society, people in Europe began tying their occupation and class to a second or last name: John Blacksmith worked with iron and steel; John Taylor repaired garments; John Carter drove or made horse carts. The working class could finally stop wasting time asking: "Which John?"

As the trend caught on, the potential information expanded. For example, one could also learn where a person was from or an important fact about them through their last name: Carl Goodman is a great guy; Wesley Churchill grew up near a church on a hill; Paul Armstrong is known for his strength, Peter London comes from... well, you get the point.<sup>1</sup>

In modern times, a new generation of medieval surnames is developing: The "screen name." Take for example: *catlover38*, *LawmanNYC*, *GOP4Ever*, and *KoolMom3*. According to Internet World Stats, almost 228 million Americans are now online (79.6% of the U.S. population over the age of 4).<sup>2</sup> More amazing is the fact that 82% of those online users are participating in social networking sites (up from 56% in 2007).<sup>3</sup> This means that almost two out of three Americans are connecting with other people through some sort of online social media (Facebook, LinkedIn, MySpace, etc.). Unbelievably,

by 2020, trend experts predict that 41.3% of all marriages will have begun through a connection made via the internet (often utilizing dating sites such as Match.com and eHarmony).

Okay, we made that last statistic up. However, the point is still valid: We are witnessing the evolution of a digital society, and one's name is a gateway to personal information.



The explosion of online users and the desire to create an identity in this sea of information has spurred the uploading of unfathomable amounts of private data. This, combined with the increasing practice of posting public documents (e.g. criminal records, foreclosure listings, etc.), would suggest that all it would take is a crafty mind and a Google search to find out what a potential juror had for dinner last night.

Before attorneys make the decision to delve into the digital ocean of intelligence known as the World Wide Web to research potential jurors, they should consider these three warnings:

### **1. Information is often not available:**

According to 411.com, there are 157 John Bakers listed with landlines in the State of Washington. (I bet you know the occupation their ancestors held.) This does not include those John Bakers who are unlisted or only have cell phones. The question becomes, how do I know I found the *right* John Baker? Common names are very difficult to research without multiple,

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corroborating facts. For example, even if you know the juror's age and geographic area, it may still be the wrong person. If there are 157 John Bakers listed in the phone book, probability suggests that many will be within two years age of each other and could live close to one another (especially in metro areas with significant population densities).

That being said, jurors with unusual names have a much higher likelihood of being found. For example, if you turn up information on a potential juror named Gaston Pendergraff from Bellevue, Washington, it's likely the right person. When you feel confident in your identification, move on to warning number two.

**2. Information is often not accurate:** Let's assume that you have uncovered the MySpace page for Gaston Pendergraff from Bellevue. It provides a wealth of information about him; however, the next question becomes how accurate is this information? If we discover that Gaston lists his occupation as a record producer who earns \$250k per year, should we believe him? If Gaston says that he "likes to party," but we see very few photos of him with anyone other than his mother, what should we think? It may not be news to some, but we issue this cautionary statement: People can be anybody they want to be online.

**3. Information is often not valuable:** So, let's assume that we feel confident that we have the right Gaston Pendergraff and believe the information that he has provided on his MySpace page is accurate. The final hurdle we must pass is the value test. Despite our feeling that we now know Gaston intimately, is this knowledge valuable in guiding our decisions for peremptory challenges? For example, we may have learned that Gaston has a golden retriever; his favorite TV show is *24*; and he roots for the Denver Broncos. However, unless your case is against an Oakland Raiders player who stole Keifer Sutherland's dog, this information may not be helpful.

Often, we have seen attorneys get excited about facts for which we have more tempered reactions. Internet searches may reveal a juror's religion, political party affiliation, bankruptcy history, or social club memberships; however, these nuggets

are only valuable if pertinent to the case at hand. If the information is not related to a subject area you considered probing during voir dire, then it is likely not vital to the de-selection process.

In our experience, around 5-10% of the time we have been able to overcome these hurdles and find information we considered important to the use of peremptory challenges. Rarely, have we discovered a fact that has trumped all other voir dire information, but it has happened. For example, we uncovered a stealth juror on a drunk driving case after learning through an Internet search that she failed to mention her leadership in a local MADD chapter. And, while researching the panel in an SEC case, we found a juror who frequently blogged about apocalyptic anarchy and Wall Street conspiracies. These instances, however, do not represent the norm. As a result, we would recommend that any attorney considering Internet research on potential jurors perform an honest cost-benefit analysis of their time and budget for trial.

If you have a high stakes case and are given a sufficient window of time to review Juror Questionnaires, then it could be valuable to research your potential jurors (keeping in mind the warnings above). However, if you are confined to limited juror biographical information and have only a short time to make decisions, it would probably be best to invest your resources elsewhere. There is no right or wrong decision, only a careful weighing of the options and the information you discover.

In 1996, Bill Clinton said, "*When I took office, only high energy physicists had ever heard of the World Wide Web... Now even my cat has its own page.*"<sup>4</sup> While it is unlikely that Socks would be called for jury duty, his website was a harbinger for today's ubiquitous online world. Today, average citizens have personal homepages and a debate has emerged over whether searching these sites is even ethically allowable for jury selection. In what direction this debate heads is anyone's guess, but in the meantime, you might consider setting your profile to "private." ■

<sup>1</sup>Powell, Kimberly. "Last Names - What They Mean & Where They Came From." About.com Guide [www.internetworldstats.com/america.htm](http://www.internetworldstats.com/america.htm) (Updated January 12, 2010)

<sup>2</sup>Bernoff, Josh. "We're a Nation of Joiners, Spectators and Creators: New Data Show Nearly Everybody Uses Social Technologies." Advertising Age. [www.adage.com](http://www.adage.com) (Posted August 25, 2009)

<sup>4</sup>Bill Clinton, announcement of Next Generation Internet Initiative, 1996

# TESTIMONY

## *Why Jurors Sometimes Miss the Point and What You Can Do About It*

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Jurors can find trial overwhelming as they are thrust into the middle of a matter where everyone talks as though the jury knows as much as they do. It's like enrolling in a college course mid-semester, trying to learn calculus before understanding basic math, or building a puzzle without the box-top. Exacerbating the problem is the often confusing succession of the case – defense witnesses being called adverse, the city representative testifying about the street lighting before the eye witnesses explained how visible the car was, the damages expert testifying in the middle of the liability case, a witness takes the stand only to be excused after a long sidebar, or, three experts testify about the seemingly identical aspect of the business valuation.

Isn't this just the nature of trial? Well, to some extent, yes. You can't do anything about the unnatural question/answer transmission of the story, and you can't always control the order of the witnesses. But a good line of questioning can reduce juror bewilderment.

Attorneys assume the relevance and implications of a witness's testimony are apparent; however, jury research has consistently shown that jurors often have difficulty ascertaining the point you are attempting to make, and more importantly, understanding how the testimony relates to the ultimate decisions they must make. The solution to these problems is to provide context to the questions you are asking--not only from the outset of your examination, but throughout the entire line of questioning. Consider the following suggestions:

*The solution to these problems is to provide context to the questions you are asking.*

**1. Provide a roadmap.** At the beginning of the testimony, provide jurors with a roadmap of the testimony so that they know exactly what you intend to discuss with the witness. For example, "Mr. Smith, I want to talk to you about four issues today: The research leading to the development of the product, the testing phase of the product, the marketing phase, and the recall phase. Are you generally familiar with these areas?" Or, "Up to this point in the trial we've been talking about how the accident happened. Now we are going to take a quick departure from that topic and talk about the damages. Mr. Smith, can you tell the jury what you know about the damages in this case?"

**2. Provide transitions.** Between each of the key topic areas you should let jurors know exactly where you are in the examination. For example, "Mr. Smith, I want to move on from the issue of the testing phase of the product and ask you a series of questions about the marketing phase of this product." This tells jurors that it is time to switch gears and re-orient themselves. This may also help jurors organize their notes so that they are more accessible in the heat of deliberation, which ultimately results in jurors being better armed advocates in the jury room (i.e. helping them find a key topic area among pages upon pages of notes).

**3. Make the testimony relevant through clear introductions.** In an effort to remind jurors of the issues before them, use introductions to reinforce those issues and/or reference key themes. For example, "Mr. Smith, we've talked a lot about X over the course of this trial, so I want to ask you a few questions about that. First..."

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(Testimony continued)

**4. Relate the issue to the verdict form and jury instructions.** In the end, jurors have a verdict form and often no idea of how the testimony actually relates to the questions on it. Even if you do not know the exact format or wording of the verdict form questions, you have some idea, so reference the appropriate language or question in your examination. For example, “Mr. Smith, one of the issues the jury will ultimately have to decide is X, so let me ask you...”

**5. Reference the critical exhibits.** Attorneys often go back and forth with the court clerk to determine the appropriate exhibit numbers, which can leave jurors in the dark. To make sure jurors get the exhibit number into their notes, reference it in the question. Having exhibit numbers in their notes will help focus their attention during deliberations. Simply add, “You’ll recall that Exhibit #357 is X, what do you think ...”

**6. “Bottom-line” the testimony.** You might think the point or the implication from the testimony is obvious, but often it is not. Instead of leaving jurors wondering what the point was to either a particular line of questioning, or to the entire examination, bottom-line it for them. For example, after you have elicited answers to a series of questions, conclude with, “So Mr. Smith, if what your saying is X, would that mean...,” or “So Mr. Smith, let’s summarize what you’ve been testifying about for the last few hours. Can you tell me in a few sentences what your overall opinion is on this issue?”

While these suggestions may seem simple, they can often make the difference between an examination that is understood and retained by the jury, and one that is not. By the time a case gets to trial we sometimes forget that there was a time when we were in the same position as the jury - learning the facts for the first time. Adding a few context-building elements to your examination questions can go a long way in helping jurors remember what you need them to remember in order to return a verdict favorable to your client. ■

## TSONGAS WELCOMES MATT MCCUSKER

At the start of 2010 we welcomed Matthew McCusker to the Tsongas team. Matt came to Tsongas via trial consulting positions in Los Angeles and Atlanta. He has worked on many high-stakes cases, ranging from billion-dollar lawsuits to death penalty cases. His specialty practice areas include negotiation strategy, case tactics, mock trials, shadow juries, and jury selection.

Matt currently serves as Treasurer on the Board of Directors of the American Society of Trial Consultants and has lectured across the country at law schools, professional conferences, and training programs. His presentation topics cover a wide array of subject matters, including: Jury selection, negotiation tactics, the Internet’s effects on the jury trial, and more.

As a trial consultant, Matt has been a valuable advisor on both criminal and civil cases, and offers the experience of a consultant who works both sides of the aisle. This familiarity has enhanced his ability to present alternative theories and predict potential tactics that opponents may utilize.

Prior to becoming a trial consultant, Matt worked as a mediator for civil litigation. He handled a variety of cases ranging from insurance disputes to domestic matters. Additionally, Matt served as a negotiation consultant for a national insurance company. As a trial consultant and former Mediator, Matt has gained a unique perspective on negotiation. Not only has he helped plaintiffs and defendants, but he has also acted as the neutral party between the two.

Matt completed his undergraduate work at Kenyon College where he double majored in Psychology and Biology. He then went to Virginia Tech to earn his Master’s Degree in Psychology. ■