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Using Social Media & Other Background Research in Voir Dire

WHY JURORS DON'T CARE, BUT YOU SHOULD

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VINSON & COMPANY

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WHY JURORS DON'T CARE, BUT YOU SHOULD

NEW CLIENT: SAM

Recently I was in a pre-trial meeting with a new client, Sam, an experienced trial lawyer. Having never elected to hire a jury consultant, Sam was unsure how best to utilize my particular skill set. Sam's client was a large pharmaceutical company defending a fraud allegation in a high stakes personal injury lawsuit. Plaintiff's counsel had built his reputation by successfully representing individuals involved in litigation against pharmaceutical companies. For several days, Sam and I had been strategizing how to best approach voir dire, which was scheduled to commence early the next morning. Both the plaintiff and defendant had agreed to administer a questionnaire to prospective jurors; consequently we were tasked with analyzing 100 jury questionnaires, copies of which had been provided by the Court to both sides.

BACKGROUND INFORMATION

In addition to the questionnaires, the trial team had also prepared and printed out supplemental, or background, information for each juror. While each questionnaire contained valuable attitudinal measures which would be helpful in assessing these individuals, experienced trial teams and jury consultants today routinely conduct searches for publicly available information on prospective jurors. Voter registration rolls, court records, as well as any publicly viewable postings on social media outlets such as Facebook, Instagram, and Twitter often reveal much more about individuals than a questionnaire.

WHAT BIG PHARMA DOESN'T TELL US

While discussing each juror, the background information we had acquired revealed important insights into the potential biases of two individuals in particular. The first, an older retiree named Mary, had recently posted a photograph of a horribly disfigured woman who had ostensibly taken the same bone strengthening medication made by the defendant in our case. While the plaintiff in the current matter had not taken the same medication, it was nevertheless a very graphic representation of an individual allegedly harmed by one of the defendant's products. The caption that accompanied the photo read, "What big Pharma doesn't tell us." I suggested that we follow-up with the juror to verify that she was indeed the individual who posted this, to see if she shared the view that was implicit in the message, and to determine what effect that might have on her ability to serve as a fair and impartial juror in this case. There was, obviously, a strong probability that her responses to such an inquiry would provide a basis for a successful cause challenge. Sam was comfortable with that approach and we planned on it.

SOCIAL JUSTICE

The second juror presented more of a dilemma. We had uncovered concerning information about Vivian, a young woman who utilized multiple social networking platforms and was a prolific user of social media – posting, tweeting, Instagraming, etc. She supported a litany of politically liberal causes, had not been shy about promoting the Occupy Wall Street movement, and frequently commented about economic inequality worldwide, but especially in the US. She had also made numerous sympathetic comments in postings about a young girl suffering from cancer. Most concerning to us were posts and tweets applauding Bernie Sanders and his views on social justice and further comments about supporting a redistribution of wealth in the US. Finally, the juror had multiple litigation-related issues in her background, from several worker's compensation claims to petty larceny. None of this information had been asked for or disclosed in the jury questionnaire, and nothing in her questionnaire responses had indicated that she held any alarming views. So at this initial stage, there was no outright reason to challenge Vivian's ability to serve as a fair and impartial juror. I suggested that, should our general voir dire of this juror prove to be a dead end, we follow-up with her on specific issues related to these findings obtained from our background research.

SAM HAD CONCERNS

While Sam was fine with questioning Mary with regard to her views about pharmaceutical companies, he was immediately reluctant – and had numerous concerns – about following up with Vivian. He argued, “The judge will not like that we did searches on political and social issues that would appear to have little bearing on this case.” He worried that, “The juror will hate me, find it an intrusion and might tell the other jurors. And then they might hate me and be suspicious of me for having pried into their social media.” Further, he predicted, “The plaintiff's attorney will want this to be handled in open court and of course I can't do that.” Finally, he worried that, “The plaintiff will know we have conducted these searches and demand to see what we've found!”

I HAD REASSURANCES

While understanding his concerns, I offered reassurances: “First, as for the judge, we have done nothing improper and, based on my experience, I'm sure the judge has dealt with this before.” I continued, “We shouldn't need to use a peremptory strike on Vivian. Assuming she does not divulge anything with regard to her views that would provide a basis for a cause challenge during voir dire, we should approach the Court with the information we have obtained and seek to follow-up with her about this information, in private.” I added, “The Court likely understands that this needs to be done in private, otherwise it could potentially taint the entire pool and I have suggestions as to how we should address this if the Court refuses to inquire privately.” I continued, “In my experience I have found that most lawyers, including this plaintiff's lawyer, conduct these same type of background searches. And he likely knows what we know. So sharing our information with him would do nothing to help him and, if he asks for us to do so, we should request that he share his information with us.” Finally, I pointed out that most jurors are sophisticated enough these days that they fully expect that what is posted on a public forum will be available to anyone interested, including the Court and attorneys.

QUIET AS A MOUSE

During voir dire the next morning, Vivian hid out. She did not raise her hand to any group questions asked by the plaintiff. Likewise, she did not respond to any of Sam's general group questions. Sam then proceeded to question, one-by-one, individual prospective jurors about specific issues we had noted from either their questionnaire responses or responses they had given in answer to plaintiff's voir dire. When he got to Vivian, she offered polite and seemingly honest answers to each of his questions. Yet those answers – which indicated she had no strong opinions, that she felt neutral towards both parties – gave us no useful information and completely contradicted what our background research had uncovered. Without the background information we possessed, we might have assumed she would be the “perfect juror” – one without any strong predispositions about the parties or the case issues. But we did have the information. And we were certain this juror had to go, one way or another.

SAM'S COMFORT WAS PARAMOUNT

Despite my reassurances regarding approaching the Judge with the information we had uncovered about Vivian, Sam was still uncomfortable with the idea of confronting Vivian about it. We both agreed that we would instead use a peremptory strike on her. I thought it was unfortunate that we were forced to burn one of our limited peremptory challenges on a juror who could have potentially been removed for cause. I was also convinced that there were good reasons to alert the Court to what we had found and confront this juror, with little downside to us. Later, however, after discussing this issue with other consultants and other lawyers, I learned that opinions were widespread and there was no consensus. Some thought as Sam did – that discretion was the correct approach; others believed that prospective jurors would not be at all concerned to learn that counsel had conducted background investigations; some felt that the conditions needed to be controlled carefully before confronting a juror with such information; and others felt that there might be a core group of jurors for whom this practice would be considered abhorrent, but that the vast majority would see it as something that competent, thorough trial lawyers routinely do.

HARD DATA AND EXPERIENCE SHOULD INFORM

Being a trial consultant is not about engaging in conjecture and speculation. I have always felt that recommendations should be based upon hard data amassed under controlled conditions dovetailing with experience gained over many years in the courtroom. Although my experience suggested one approach to using background information about jurors, the scientist in me required data to either confirm, deny or qualify my hypothesis.

Testing My Hypothesis

My hypothesis was that jurors do not view Internet searches into their backgrounds – conducted by attorneys or members of the trial team using publicly available information – as anything that would be concerning to them. My view is based on numerous experiences with surrogate and real jurors. As an example, I have observed surrogate jurors during research exercises checking their cell phones to look up lawyers, law firms, companies, net worth, profits, similar products,

other cases, product recalls, personal injury lawsuits, definitions of legal terms, and the amount of damages awarded by jurors in similar cases, etc. - essentially using the Internet blatantly and casually. Additionally, in spite of the Court's admonitions to the contrary, real jurors do the same and more: posting photos of the courtroom, making comments about their jury duty, the justice system, and posting photos of or comments regarding other jurors on Facebook and Twitter.

How do we test this hypothesis? Can we quantify what jurors' reactions might be if they were to learn that lawyers research publicly available Internet information about them and would they be offended if a lawyer followed up on what we had found? It was with this goal in mind that we devised a survey to examine the matter.

METHODOLOGY

On March 9, 2016, one hundred jury-eligible adults completed a 31-question survey online. The respondents were volunteers and members of a national database who were provided shopping gift cards for their participation. The survey took an average of 9 minutes to complete. Quotas for gender and age were introduced to ensure a representative sample on those characteristics and security checks were in place to confirm the respondents' identities.¹

METHODOLOGICAL CONCERNS

As with any research study of this nature, it would be wise to consider the implications of having to use volunteer subjects. While respondents could certainly not be compelled to participate, there is always a concern that those who do partake - having, essentially, selected themselves to serve as our respondents - may differ in some significant way from the general population of jury-eligible individuals. Might our results be biased as a result? We think not.

First, one could argue that simply showing up for jury duty entails a process of self-selection. One could further argue that showing up for jury duty represents self-selection of a much higher order of magnitude than participating in an online survey, due to the sacrifices required and the opportunity costs involved. Prospective jurors and survey participants alike engage to some degree in self-selection.

Second, the general demographics of our survey sample are quite similar to what one would expect to see in courtrooms throughout the country. Aside from the gender and age quotas mentioned above, the vast majority of our sample included people who are employed either full-time or part-time with a smattering of folks who are homemakers, retired or unemployed. In short, the overall profile of our sample is consistent with that of the general jury-eligible population - and not with that of professional survey-takers.

¹ Sample summary statistics are listed at the end of this paper.

Third, our sample includes many who have been called for jury duty, who have sat through voir dire, who have been excused for either a hardship or cause, or have actually served as jurors. Interestingly, their real-world jury duty experience had important implications for how they viewed the issues in question here. But, on the whole, their responses mirrored the same overwhelming feelings and opinions expressed by those who had never been called for jury duty.

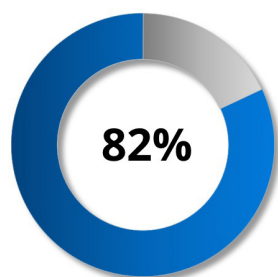


THE FINDINGS

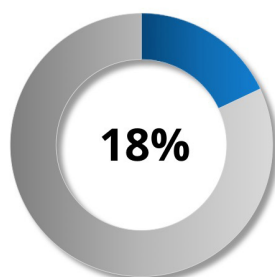
Respondents Were Not Surprised

When the practice of conducting Internet searches and background checks on prospective jurors was briefly explained,² fully 82% of respondents said they would expect the lawyers to do it while 18% said they were surprised to hear that it is done. While respondents may have never considered the possibility before, the fundamental reaction of the vast majority was that they would expect it and it was not surprising to hear.

REACTIONS TO LEARNING ABOUT INTERNET SEARCHES & BACKGROUND CHECKS



WOULD EXPECT IT

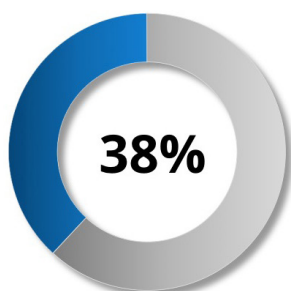


SURPRISED TO HEAR IT

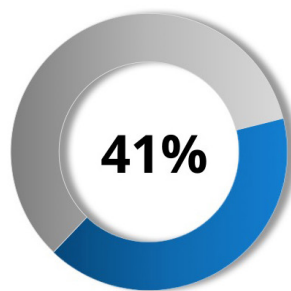
Respondents Were Not Concerned

Respondents did not seem overly concerned about the practice of lawyers obtaining additional, publicly available information about jurors. Only 21% said they did not approve of the lawyers doing it because they would consider it an invasion of their privacy. However, 38% said they approved of the practice and 41% had no opinion one way or the other.

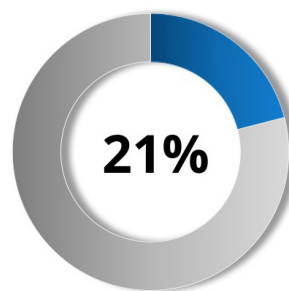
REACTIONS TO LEARNING ABOUT INTERNET SEARCHES & BACKGROUND CHECKS



APPROVE



HAVE NO OPINION



DISAPPROVE

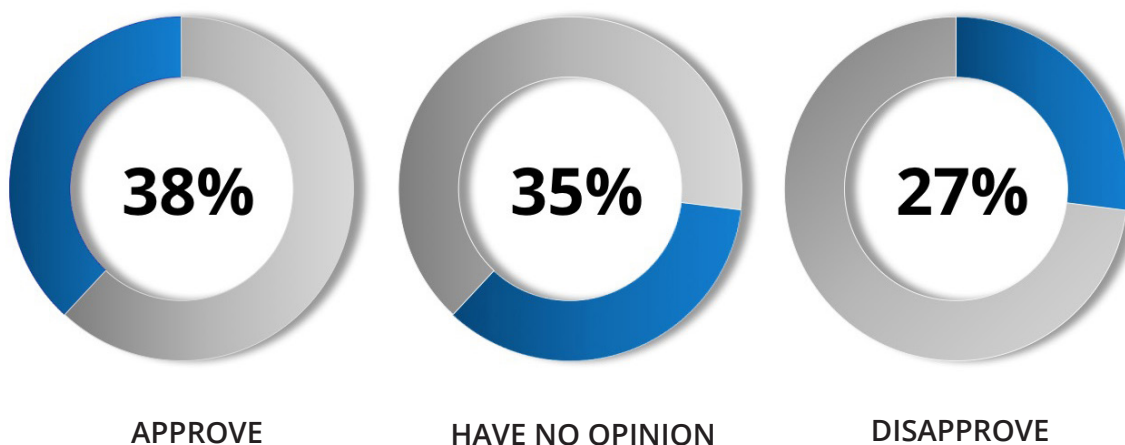
Throughout the survey, leaving a clear and consistent trail to follow, there was a core group of approximately 20% of respondents who disapproved of this practice. This suggests that in jury selection, roughly 2 out of every 10 jurors may have a problem with it.

² "Lawyers for both parties often conduct Internet searches and background checks on prospective jurors to uncover information that might be relevant to the particular case at hand."

Most Respondents Were Not Concerned With Specifics

Even when more detailed descriptions of the type of information obtained from background searches was provided to respondents (e.g., criminal history, legal problems, bankruptcies, organizational memberships, political preferences, postings on social networking sites and opinions about social issues), 27% said they did not approve of lawyers gathering such information about jurors, an increase of only 6%. The majority either approved of the practice (38%) or had no opinion about it (35%).

REACTIONS TO LEARNING *THE SPECIFICS* ABOUT INTERNET SEARCHES & BACKGROUND CHECKS



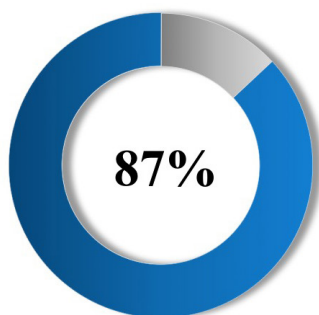
More detailed information regarding the type of publicly available information obtained through background searches led to a slight but noticeable increase in the proportion of our sample who said they do not approve of lawyers engaging in such activities. Interestingly, and as discussed further below, the inclusion of political preferences in the list of specifics is what drove the disapproval responses slightly higher. Political preferences, as we will see, hold a sacred place in the private matters of many Americans.

Previous Jurors Were Somewhat More Approving Of This Practice Than Others

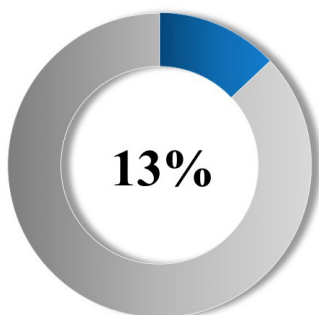
Respondents who had not served as jurors before were somewhat more likely to say they would not expect lawyers to conduct background searches, and were somewhat more likely to disapprove of the practice than respondents who had served as jurors before. Of those respondents who had not served on a jury, 25% said they did not approve; only 13% of respondents who had served on a jury said they did not approve. Further, when specific details regarding the type of information obtained through these searches were provided, those who had served as jurors previously were less surprised by the practice and less disapproving of it than those who had never served before. This suggests that either a) respondents who had served as jurors were – as a result of their experience – more comfortable with, and less suspicious of the judicial system or, b) individuals who trust in and are comfortable with the judicial system end up on juries more often.

REACTIONS TO LEARNING ABOUT INTERNET SEARCHES & BACKGROUND CHECKS

PREVIOUS JURORS

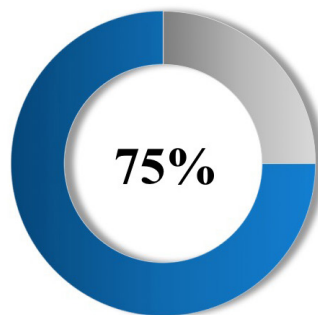


APPROVE OF IT OR
HAVE NO OPINION

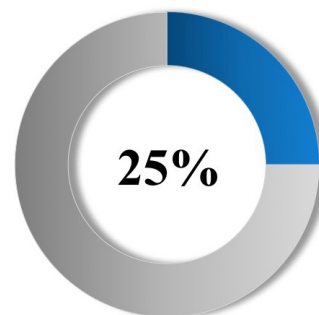


DISAPPROVE OF IT

NON-JURORS



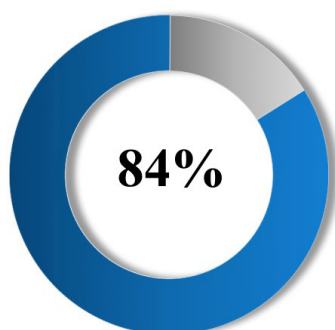
APPROVE OF IT OR
HAVE NO OPINION



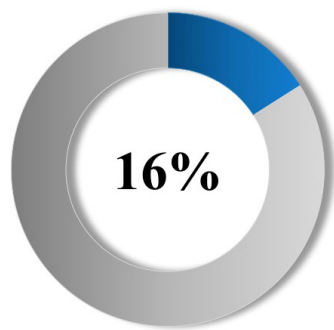
DISAPPROVE OF IT

REACTIONS TO LEARNING *THE SPECIFICS* ABOUT INTERNET SEARCHES & BACKGROUND CHECKS

PREVIOUS JURORS

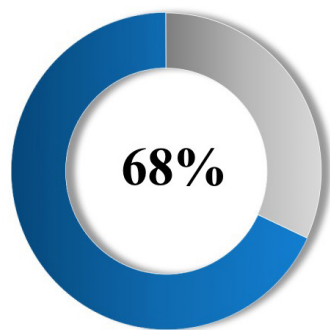


APPROVE OF IT OR
HAVE NO OPINION

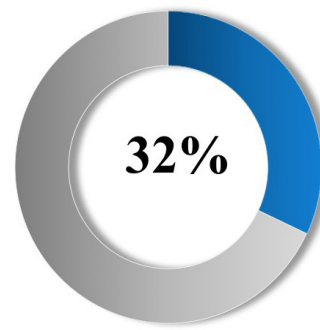


DISAPPROVE OF IT

NON-JURORS



APPROVE OF IT OR
HAVE NO OPINION

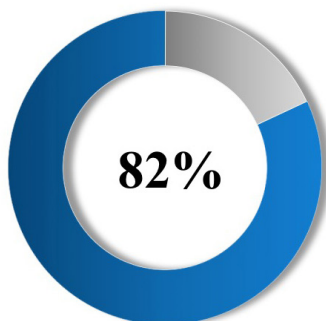


DISAPPROVE OF IT

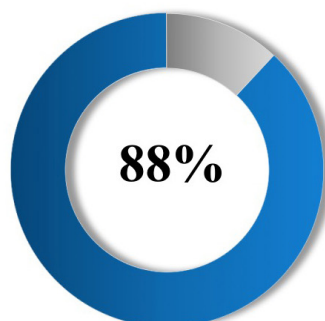
Respect for attorneys who conduct background investigations of prospective jurors goes beyond just those who have served on a jury. A large percentage of our sample had been summoned for jury duty but excused for one reason or another, such as for hardship or cause. Seventeen percent (17%) of respondents said they were aware that they had been excused from jury duty because of a bias or prejudice³ related to issues in the case they were called to serve on and, surprisingly, 94% said they would expect an attorney to conduct background searches to discover possible biases or prejudices. When asked for their reaction to the general concept of an attorney conducting Internet searches on prospective jurors, over 80% of that group felt they would respect, rather than dislike, the attorney who questioned a juror about the information obtained, regardless of whether the questioning was in public or private. Those who had been excused from jury duty for hardship were more sensitive about being questioned in public about such information, but had no problem with private questioning. This suggests that respect afforded the attorney by those who had been excused for a bias was not due to the manner in which the information was addressed, but arose from respondents' expectations that counsel perform their duties diligently and thoroughly.

WOULD RESPECT AN ATTORNEY FOR CONDUCTING INTERNET SEARCHES & BACKGROUND CHECKS

RESPONDENTS WHO HAD BEEN EXCUSED FROM JURY DUTY DUE TO *BIAS*

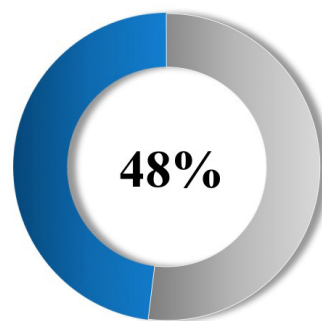


IF QUESTIONED PUBLICLY

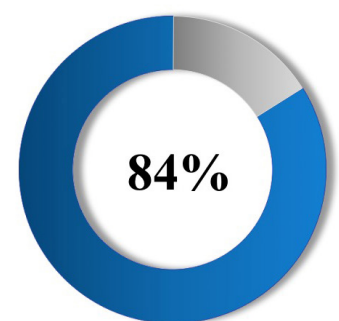


IF QUESTIONED PRIVATELY

RESPONDENTS WHO HAD BEEN EXCUSED FROM JURY DUTY DUE TO *HARDSHIP*



IF QUESTIONED PUBLICLY



IF QUESTIONED PRIVATELY

³ 25% said they had been summoned for jury duty and excused for hardship, and 19% said they had been summoned and were excused, but did not know why.

Respondents **Were Concerned With The Manner Used for Follow-up**

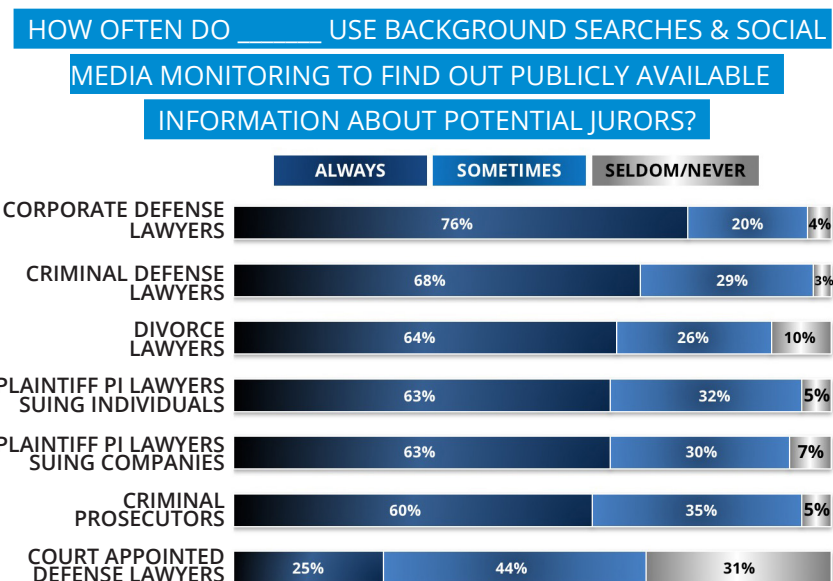
While respondents professed a lack of surprise or concern with the practice of attorneys conducting background Internet searches on prospective jurors, it became apparent upon further investigation that the manner in which such information would be discussed in court was a concern. Specifically, whether the attorney followed-up with the information in open court or in a private setting yielded different responses. Only 20% of those who participated in this survey felt that discussing this type of information in front of the venire would be appropriate. On the other hand, 62% felt it would be appropriate only if discussed in private. The remaining 18% did not feel it would be appropriate to discuss the information at all. Additionally, while women were no more likely than men to disapprove of a lawyer’s inquiry into such matters, they were more likely than men to want the lawyer’s inquiry to be conducted in private.

Some Information Is Sacred

The desire that certain information not be discussed in public was further confirmed when respondents were asked what kinds of questions they felt would be too intrusive for the Court and lawyers to ask during jury selection. Approximately half felt that it would be too personal, too intrusive, or simply rude to ask prospective jurors about voting behaviors, political preferences or religious matters. Thus, while most respondents were comfortable with being asked about certain personal information in private, it appears that most prospective jurors have an expectation that one’s faith and political convictions are not to be considered when selecting a fair and impartial jury.

The Stakes Are High For Corporate Defense Lawyers

Perhaps recognizing that Internet background searches of dozens if not hundreds of prospective jurors can be costly yet necessary for a corporate defendant – particularly one for whom the stakes are high – 76% of all respondents felt that corporate defense lawyers who work for large companies would “always” conduct background and social media searches on prospective jurors. Court appointed defense lawyers, in contrast, were seen as the least likely to employ such searches. Interestingly, aside from court appointed defense lawyers, most respondents believed that attorneys involved in all other legal specialties would “always” use background searches.

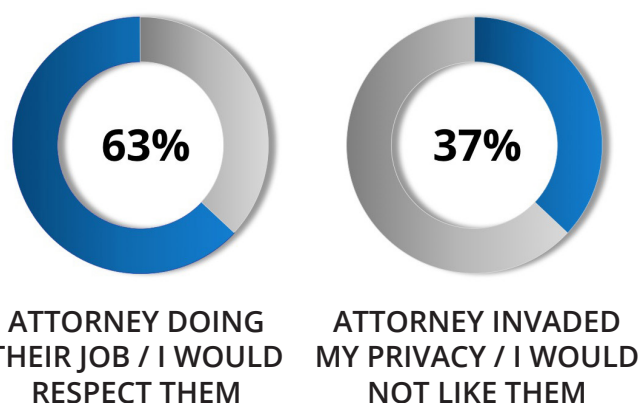


Respondents Respect Lawyers For Doing Their Job Discreetly

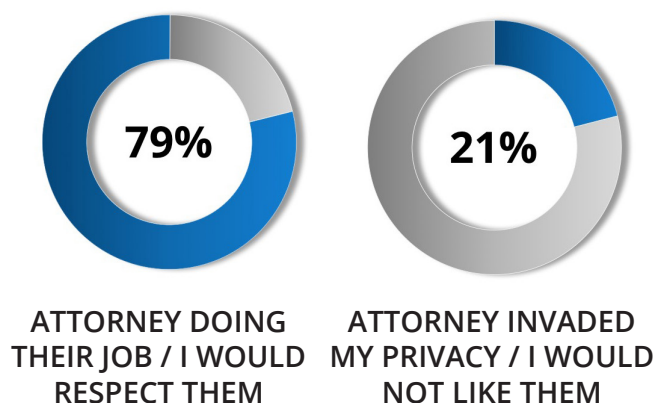
The *setting* in which counsel asks jurors questions about background information was an important factor in how jurors would perceive the attorney asking those questions. When respondents were asked what their reactions would be to the attorney conducting the inquiry, respondents indicated that they were less likely to feel the attorney had invaded the juror’s privacy if discussions about the information that had been obtained were conducted privately. Only 21% felt that private discussions about such material represented an invasion of privacy and would dislike the attorney as a result. However, almost twice as many, 37%, said they would dislike the attorney for raising the information publicly, in front of others.

REACTION TO ATTORNEY ASKING JURORS ABOUT THEIR SOCIAL MEDIA POSTINGS

IN FRONT OF OTHERS



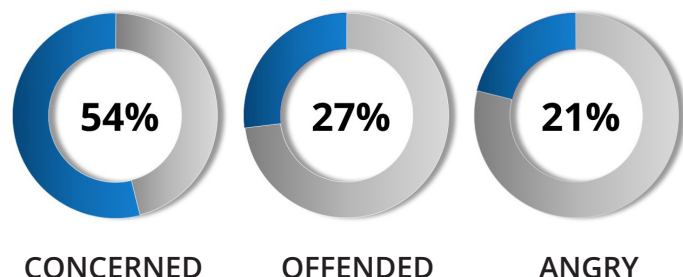
IN PRIVATE



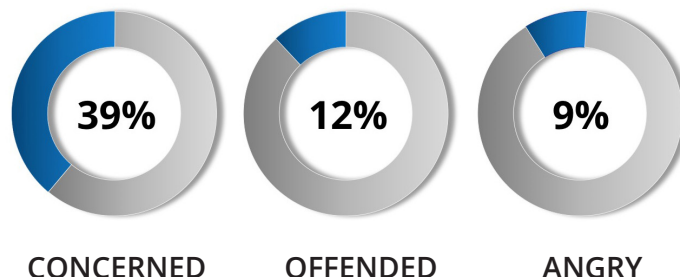
Respondents were also less likely to say they would be “concerned” about answering questions regarding this type of information when asked about it in private and less likely to say they would be “offended” or “angry.”

REACTION TO ATTORNEY ASKING JURORS ABOUT THEIR SOCIAL MEDIA POSTINGS

IN FRONT OF OTHERS



IN PRIVATE

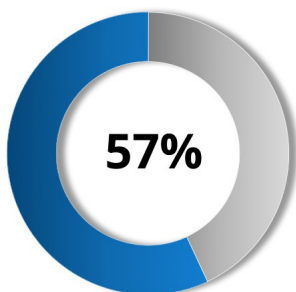


Heavy Social Media Users View Public v. Private Inquiries Differently

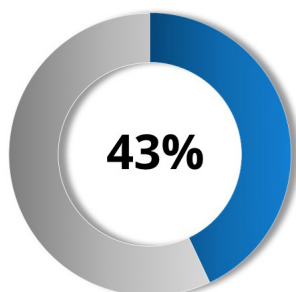
Heavy and Light social media users⁴ do not differ in how they view being questioned about background information; approximately 79% felt the attorney would be doing his/her job. However, if the information were to be brought up in front of others, heavy social media users would feel more negatively toward the attorney who raised it publicly.

REACTION TO ATTORNEY ASKING JURORS *IN FRONT OF OTHERS* ABOUT THEIR SOCIAL MEDIA POSTINGS

HEAVY SOCIAL MEDIA USERS

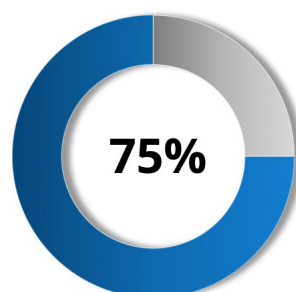


ATTORNEY DOING THEIR JOB / I WOULD RESPECT THEM

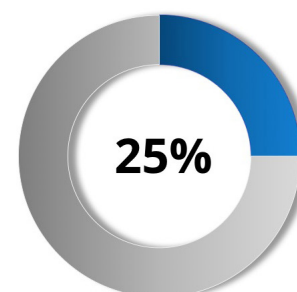


ATTORNEY INVADED MY PRIVACY / I WOULD NOT LIKE THEM

LIGHT SOCIAL MEDIA USERS



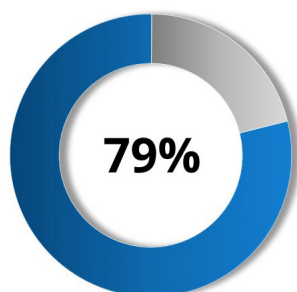
ATTORNEY DOING THEIR JOB / I WOULD RESPECT THEM



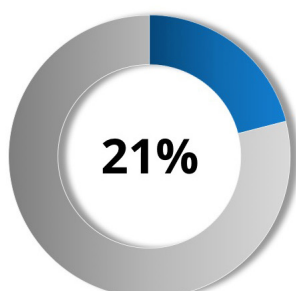
ATTORNEY INVADED MY PRIVACY / I WOULD NOT LIKE THEM

REACTION TO ATTORNEY ASKING JURORS *IN PRIVATE* ABOUT THEIR SOCIAL MEDIA POSTINGS

HEAVY SOCIAL MEDIA USERS

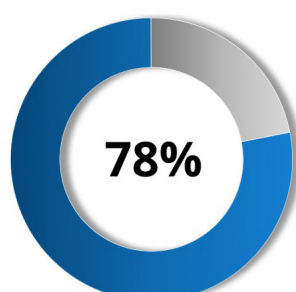


ATTORNEY DOING THEIR JOB / I WOULD RESPECT THEM

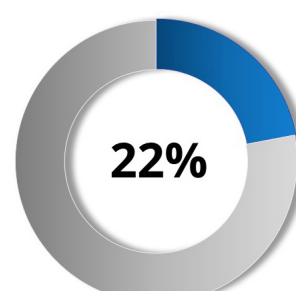


ATTORNEY INVADED MY PRIVACY / I WOULD NOT LIKE THEM

LIGHT SOCIAL MEDIA USERS



ATTORNEY DOING THEIR JOB / I WOULD RESPECT THEM



ATTORNEY INVADED MY PRIVACY / I WOULD NOT LIKE THEM

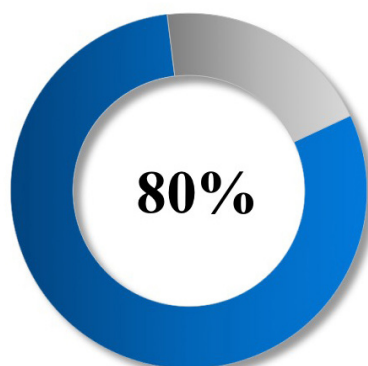
⁴“Heavy” social media users are defined here as those with two or more social media accounts.

Respondents' Use of Privacy Settings Reflects Their Awareness of the Internet's Transparency

The use of privacy settings reflects users' knowledge regarding the medium and a respect for social media's potential. Data from this study revealed that a prospective juror who posts heavily and makes extensive use of privacy settings is more likely to approve of the attorney asking questions than the heavy user who is lax about privacy settings. For those who are heavy social media users and do not always use privacy settings, 80% felt that it was an invasion of privacy to be asked about their social media postings.

REACTION TO ATTORNEY ASKING JURORS ABOUT THEIR SOCIAL MEDIA POSTINGS

HEAVY SOCIAL MEDIA USERS WHO DO NOT "ALWAYS" USE PRIVACY SETTINGS



INVASION OF PRIVACY

The heavy social media user who is lax about privacy yet feels his/her privacy has been invaded when those postings become known to the lawyers or the Court represents a paradox, the meaning of which should be carefully considered by counsel and their consultant within the context of the dispute and whatever other information is available about such a juror.



THE BOTTOM LINE

Prospective Jurors Have Expectations

The majority of venire persons will expect that attorneys conduct Internet searches and background checks on prospective jurors and are not concerned by it. Beyond simply being unconcerned, most jurors today have expectations, realistic or not, about how lawyers conduct their trials. Courtroom dramas on TV and film have portrayed the trial lawyer as someone who would go to extraordinary lengths for the client, using every legal means necessary to obtain justice. In fact, the adversarial process is the basic tenet of our justice system: two champions battling until one prevails. The symbolism is embedded in our culture and even today holds sway over our assessment of a lawyer's competency. "We will fight for you" has more marketing appeal for an attorney than, "We will sit back and see what happens." Researching the individuals who will ultimately cast the deciding votes in a trial seems, to most prospective jurors, prudent lawyerly behavior which, if not performed, borders on legal malpractice.

Empty Souls

Venire persons who are heavy users of social media and lax about privacy settings are most concerned with their postings becoming known to lawyers, and perhaps rightly so. Because these persons are frequent users of social media, their opinions are more often expressed through that medium, providing the lawyer with a huge advantage. In essence, counsel is afforded access to expressions of sentiment not generally obtained in a jury questionnaire that was agreed to by all parties and is necessarily limited in scope. It could also be argued that frequent or heavy users of social media who post "several times a day" are individuals with many extreme opinions who want to share them with the world in the only way they have available. To quote Yeats, "All empty souls tend toward extreme opinions." A litigant should be concerned about an empty soul eager to express his or her extreme opinions to a captive audience – the jury.

They May Have Reason for Being Upset

There will be a core of venire persons (maybe 20%) who will be upset and concerned when confronted by an attorney who has uncovered information about them or other venire members, using social media searches. The nature of the information that is uncovered for these 20% may be the reason they would feel upset and may be the very reason counsel would want to confront that juror, regardless of how they feel about the practice. Certainly if the information uncovered is that troubling to the lawyer, the juror is going to be excused one way or another, either through a cause challenge or peremptory strike. The juror's feelings about the attorney or the Court, at that point, are moot. What is concerning is the impact that juror may have on the rest of the pool. The downside of that person feeling upset or resentful has more to do with the person's continued presence among other potential jurors and the potential for that juror to taint the venire. For that reason, it would be prudent to recommend to the Court that a juror who has been excused, based upon background information, be immediately released from jury duty and sent home.

Jurors Do Not Hold Grudges

One question that is almost always contained in a juror questionnaire is, “Have you ever served on a jury before?” There are times when, through mock trial research, we find that such information is not informative, while at other times having served on a jury is highly correlated with how a surrogate juror decides the case in question. The finding of interest in this survey is that prior jurors were somewhat more accepting of lawyers conducting Internet and social media searches than those who have never served on a jury before.

Some respondents in this survey indicated that they had in fact been excused from jury duty for various reasons – a hardship, a bias, or some reason that was never made clear to them. A substantial percentage seemed to be aware of having been excused for bias. For those who said they had previously been excused from a trial for bias, the experience did not appear to negatively influence their evaluation of an attorney conducting Internet searches on prospective jurors. Most prospective jurors acknowledge when they harbor a bias or, at the very least, begin to understand and admit to their bias as it is revealed during voir dire. Most jurors try to do the right thing⁵, abide by the Court’s instructions, tell the truth during jury selection and concede when they truly believe they cannot be fair and impartial. The takeaway here is that a prospective juror who has been excused because of a bias recognizes a lawyer has a job to do and respects the lawyer for keeping jurors honest. More importantly, as the survey findings suggest, those who are not excused recognize the value of lawyers being thorough in their review of potential jurors and understand the importance of excusing jurors who harbor strong biases.

The Other Side Does It Too

More likely than not, the other side conducts its own Internet searches and background checks. This is an emerging practice, especially in high stakes litigation. I have been involved in trials where the other side has openly raised concerning information uncovered in background searches. I’ve also been involved in trials where the other side has not admitted that background searches were conducted, but their use of peremptory challenges could have only been based upon useful information obtained from such activity that did not rise to the level of a cause challenge. In one trial the plaintiff attorney excused a juror who on the surface appeared to be an eminently good juror for the plaintiff. Background search information, however, had revealed to me – and in all probability to the other side – that the juror was an active member of a very conservative religious group whose pastor was an outspoken advocate for tort reform. Because the juror had answered on the jury questionnaire that she had no strong opinions, one way or another, regarding tort reform or damage awards in civil disputes, the plaintiff’s attorney felt it was not enough to raise a cause challenge issue with the Court.

⁵ The caveat here is that there will always be the rare stealth juror who consciously or more rarely, unconsciously, harbors deep-seated biases and hides them. The overwhelming majority of jurors, however, are not stealth and truly want to do the right thing if given a chance.

Instead, in an abundance of caution, the attorney chose to exercise a peremptory strike on the juror. I have also observed an adversary exercising systematic peremptory challenges on members of one political party, absent any other apparent reason for doing so based on the voir dire; strong circumstantial evidence that the strategy for using peremptory strikes was based upon political party affiliation obtained from voter records.

What About Batson?

Remember Vivian? Recall Sam's hesitancy to confront her with the background information we had obtained? As it happened, Vivian, being female and a minority, was a member of a protected class. Her gender and minority status were not the reasons for our use of a peremptory strike – it was the information we had found via our social media searches that concerned us. Vivian had offered nothing on the jury questionnaire or during voir dire questioning that would indicate she could not be a fair and impartial juror in our case. Opposing counsel, therefore, raised a Batson challenge. In response, we produced the background information we had obtained. Luckily for Sam, the judge was willing to deny the Batson challenge solely on the basis of the information we had produced. The judge felt the contrast between the outspoken tone of the postings and the non-responsiveness of Vivian's voir dire answers was justification enough for our use of a peremptory challenge. This situation turned out in our favor, but judges can be quite different from one another. It is difficult to predict how another Court might rule in similar circumstances. I have been in a situation where a judge said, "You should have addressed this during voir dire."

The Benefits Generally Outweigh the Risks

The benefit of following up with a juror – in an appropriate forum – about whom background information has been obtained, generally outweighs the downside. A corporate defendant in a plaintiff-friendly venue, for example, would be more likely to uncover useful information through background searches than the plaintiff. A corporate defendant has a wide range of attitudes to be concerned about in a plaintiff-friendly venue, and those attitudes may be expressed on social media sites. They may include antagonistic feelings towards the client company or the defendant's industry in general, bad personal experiences with the defendant or the defendant's products, anger toward corporate America, dissatisfaction with government regulators, or support for high damage awards as a means to "send a message." These extreme attitudes are more likely to be vented on social media in a plaintiff-friendly venue than are the attitudes or issues that may concern a plaintiff. On the other hand, in a more conservative, defense-friendly venue, the plaintiff lawyer may glean more useful information through Internet and social media searches. Plaintiffs hot topics might encompass opinions such as a dislike of personal injury attorneys, concerns about frivolous lawsuits, growing numbers of people who are "sue happy," suspicions about malingerers, rewarding undeserving individuals with high damage awards, support for tort reform, or criticisms of persons who "just don't take responsibility for themselves." All of which would be examples of attitudes likely to be expressed with greater frequency in a defense-friendly venue.

The potential benefit of background searches depends additionally on factors extraneous to the bent of the venue. The most crucial of these is the expertise and skill with which the lawyer and jury consultant use the information obtained to successfully develop and then defend a cause challenge.

Judges Generally Prefer Private Vetting of Sensitive Information

It would behoove a judge to allow inquiry regarding pertinent background information obtained about a prospective juror from publicly available sources rather than risk a reversal on appeal for failing to have done so. Whether to allow it privately or in front of the entire venire is the decision a judge must make. In my experience, if the information is at all sensitive (and it usually is), the judge will not want to risk airing it in open court, which risks polluting the entire venire and causing a mistrial. Additionally, if the information is important, judges tend to be appreciative rather than irritated by it. Most judges want to get things right and avoid reversal, so they tend to err on the side of caution when vetting jurors. The lawyer's task is to determine what is relevant and what is superfluous and proceed with the judge accordingly.

But What Do You Do If Your Hand Is Forced?

In my experience, there have been occasions when – for one reason or another – Courts have been reluctant to entertain requests to inquire of any jurors at sidebar or meet with them in camera. This, of course, puts counsel in the very predicament they and – according to these survey results – jurors would like to avoid. What can be done in such a situation?

There are various solutions to this problem. Some are strategic in nature, and can be set in motion during pre-trial hearings. Others are more tactical, and involve careful crafting of oral voir dire questions and their sequencing. When executed skillfully, they can allow counsel to walk that fine line that separates “appropriate” and “inappropriate” methods for using background and social media research to explore and reveal juror bias.

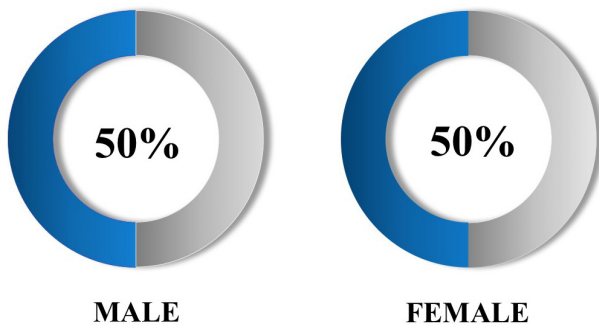


CONCLUSION

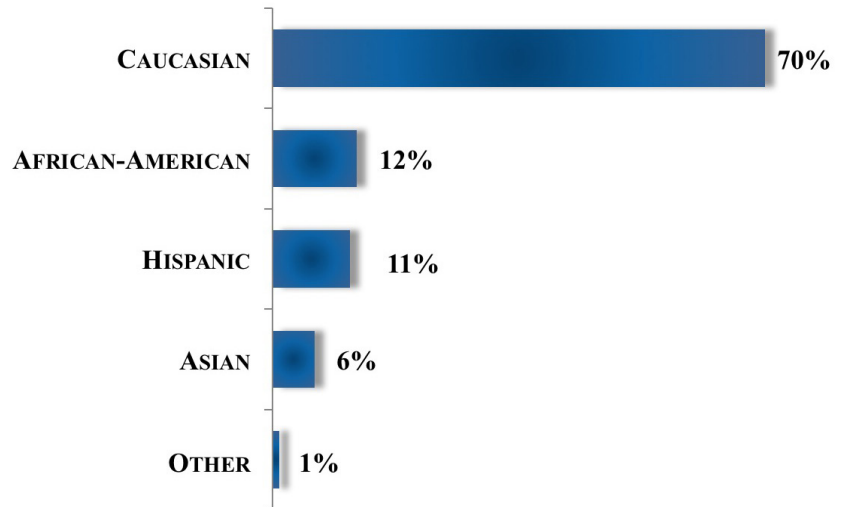
As we have seen from these survey results, most prospective jurors will not be overly concerned with an attorney searching the Internet for publicly available information about them. Prospective jurors will be concerned, though, with how that information is addressed in the courtroom. Additionally, certain types of information, specifically one's political and religious beliefs, will be considered by most to be too personal. While the overwhelming majority of prospective jurors will not be concerned if they are questioned in private about their public postings, there is a core of about 20% who will disapprove of the practice regardless of how it is conducted. Heavy social media users seem to be more concerned than light social media users with the prospect of their postings being aired in front of others in a courtroom. However, they are no different from light social media users when it comes to their attitudes about discussing such information privately. Women were no more disapproving than men of background information being investigated and addressed, but they were more inclined than men to favor private, rather than public, discussions of such information.

Appendix I: THE SAMPLE - DEMOGRAPHICS & JURY DUTY EXPERIENCE

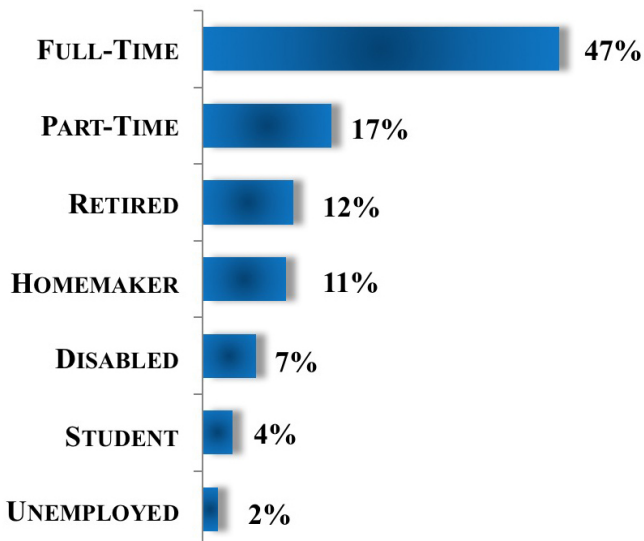
GENDER



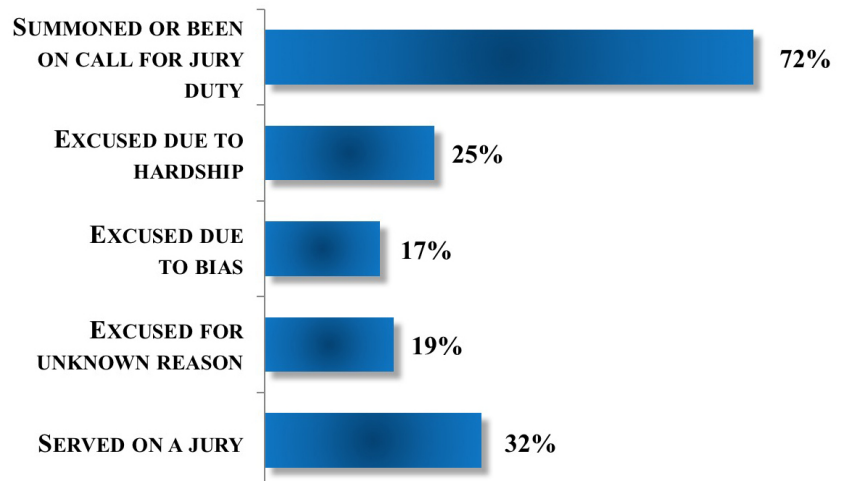
ETHNICITY



EMPLOYMENT

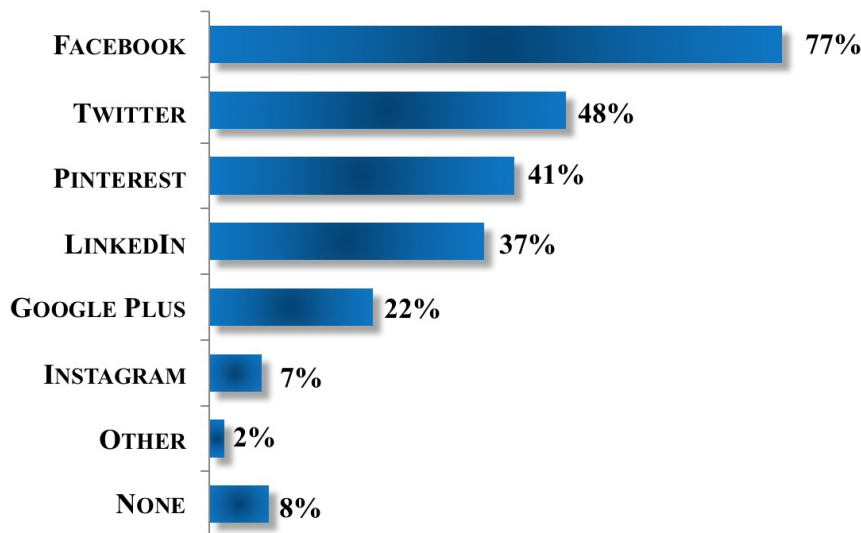


JURY DUTY EXPERIENCE

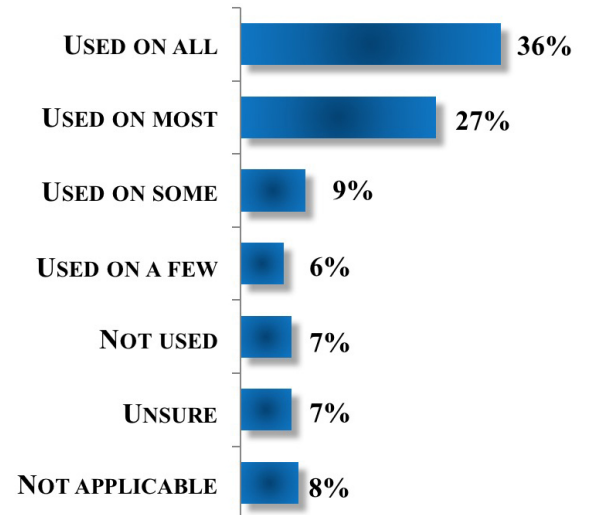


Appendix II: THE SAMPLE - SOCIAL MEDIA USAGE

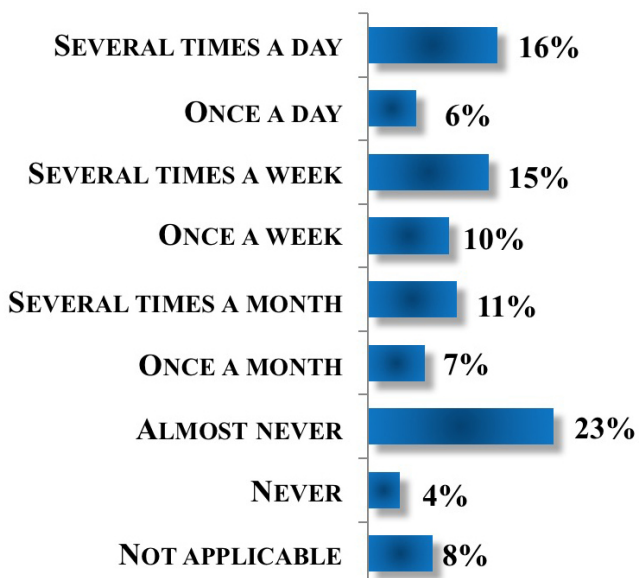
SOCIAL MEDIA ACCOUNTS



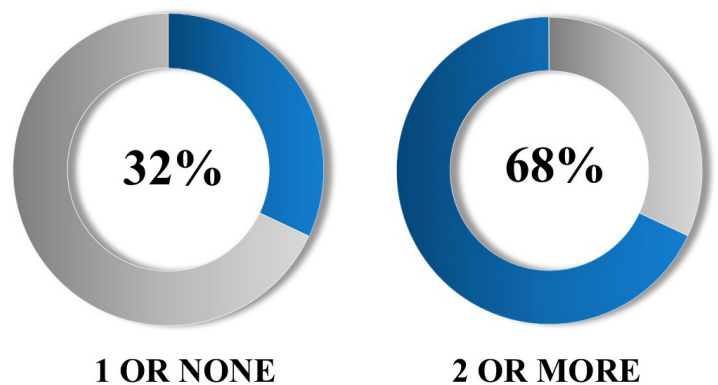
USE OF PRIVACY SETTINGS



FREQUENCY OF POSTINGS ON SOCIAL MEDIA



NUMBER OF SOCIAL MEDIA ACCOUNTS



About THE COMPANY



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