The Whisper
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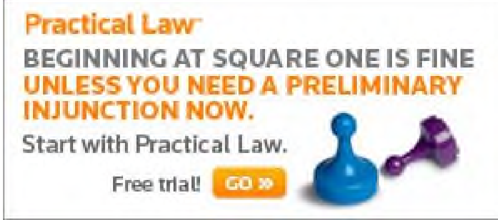

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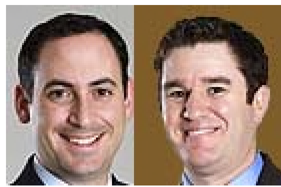
Courts and Social Media

by Thomas J. D'Amato and Adam M. Koss



A year ago we published an article in *The Whisper* titled *Please Jurors, Check Your iPhone With The Bailiff* (Vol. 7, Issue 2.) The article discussed the increasingly frequent problem of jurors' use of the Internet to do their own research and the use of social media sites such as Facebook and Twitter to communicate with each other and the world outside of the courtroom regarding the trials in which they serve. The temptation of a sitting juror to do her own research, or to discuss the case with other jurors or outsiders, has always been there; it is just that the advent of the digital age has made the ability to succumb to temptation so much easier. Clearly, courts have taken notice of the problem. Our article last year discussed the nature of the problem and what you, the lawyer, could do to learn of and handle the problem when it occurs. This article will in turn discuss what courts and legislatures around the country have done, and to suggest what more should be done to combat the problem at its source.

In the past year, there have been countless stories of jurors tweeting, posting to Facebook, blogging, or doing internet research during an ongoing trial. In a recent criminal case in California the jury was excused for a *Mardsen* hearing, which is when a defendant requests a new court-appointed attorney based upon a claim of ineffective assistance of counsel. During the hearing, which must be held outside the presence of the jurors, several jurors used a cell phone to Google the meaning of the hearing. The judge found out and was forced to declare a mistrial. Before releasing the jury, the judge reprimanded the jury and told them the consequences of their actions – that the State would have to pay for a new trial, and that the defendant, who may in fact be innocent, would have to spend the next few weeks in jail awaiting his new trial. Thus, the judge advised, the State incurred substantial funds and a man lost his liberty, all because the jurors spent less than five minutes on Google during a trial. Had the jury been better warned, with an explanation of potential risk, the jury may not have committed the misconduct.

Another example is that of Seth Rogovoy, a Massachusetts juror who was dismissed from a trial in February 2011 for his tweeting during his service. The tweets included a post which stated: "I am in contempt of court, de facto if not de jure" and "Sucks that you can't tweet from the jury box. What's the fun in that?" These tweets show that Mr. Rogovoy both understood

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Courts and Social Media

DRI's 2011 International Seminar—Comments from the American and European Perspectives

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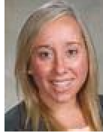

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that he was not allowed to make the posts and the potential consequence to himself, yet he did so anyway. After being dismissed by the judge, Mr. Rogovoy stated: "I never mentioned any of the people: the defendant, the witnesses. I never mentioned the court I was sitting in." In an interview later given to Bob Gardinier, as reported in the February 9, 2011 Albany Times-Union article *Rape trial of ex-priest now before jury: Deliberations set to start in case; juror dismissed after using "Twitter,"* Mr. Rogovoy stated that, given the popularity of social media platforms like Twitter, judges will be forced to confront them in the courtroom. In that respect, Mr. Rogovoy is absolutely correct.

In order to prevent further juror misconduct through the use of social media, legislatures need to make it clear that it will not be tolerated, and courts need to instruct juries specifically on the impropriety of discussing or researching regarding an ongoing trial, why it is improper to discuss or research an ongoing trial, and the consequences to the juror if he or she fails to follow those instructions. This instruction should be made several times throughout the course of a trial, including when candidates are first called for jury duty, before voir dire, at the beginning of trial, before every recess, and before deliberations. The court must then monitor the jurors as best it can, and follow through with the threatened punishment. Most courts are now doing something about the social media, and in fact most of these suggestions are being followed by at least some jurisdictions. However, no jurisdiction has yet put them all together in a comprehensive effort to combat the social media problem. Without a strong message that juror misconduct is impermissible, the problem will only get worse.

More than half the state and federal courts now have jury instructions that at least make a passing mention of the internet when advising jurors or prospective jurors on the prohibition of performing outside research or discussing an ongoing case. This is a good first step, as many of the jurors who have made social media postings in the past have relayed that they did not understand this to be a "discussion" which was prohibited by the rules. For this reason, it is important that the instructions make more than a mere passing reference. Rather, the instructions should be as specific as possible, mentioning sites such as Facebook and Twitter (or whatever the prevalent form or social media of the day happens to be). At least then, the rule itself will be clear to the jurors.

Additionally, the most effective jury instruction not only gives the rule, but also explains the reasons behind the rule. While lawyers understand that some evidence is inadmissible for one reason or another and will not be known to the jury, many laypersons have a different view. They see lawyers and judges as keeping information from them that they need to know. Thus, not only are they curious, but many believe that they must know all the facts in order to be the best juror they can be. It is also important, as many model instructions now realize, to give the jury the reasons so that they understand that it is important that they follow the rules. Just as important is to advise the jury of the consequences to the courts and parties if they do not follow the rules, and the likelihood of a mistrial.

Often these instructions are repeated in one form or another several times throughout the trial. This, coupled with a recitation of the policy reasons underlying the instruction, will

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provide the jury with a constant reminder of the prohibition and sound basis for not falling to temptation. While it may seem repetitive, the ease with which a person in today's world can pull out their cell phone and record a status update which can jeopardize the entire trial necessitates the constant reminder as seen in the examples above.

In San Francisco County, in response to a jury pool of over 600 that was dismissed in 2009 following the realization that they had all researched a high-profile case prior to voir dire, the court takes a more aggressive approach. Prospective juries are given a questionnaire with a cover sheet that states in part:

> *You are ordered not to discuss this case with anyone; do not allow anyone to discuss the case with you. The only information you may tell anyone is that you are in a jury pool for a trial and the time requirements of that trial. You are also ordered not to read, listen to, or watch any news, Internet, or other media accounts of this case, past or present. You may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet to obtain or share information. (CCP §1209(a)(10))*

In addition to the instruction on prohibition, there must be consequences for a juror's willful disobedience of the rules. There are many individual instances where a judge has held a juror in contempt of court for violating the prohibition on research and discussion, and held hearings. This may need to be a more frequent and publicized occurrence to stem the growing problem. California recently passed a new law, AB 141, which went into effect on January 1, 2012, that makes a willful violation of the prohibition on research or use of social media punishable by not only civil contempt, but also makes it a misdemeanor. *See* Cal. Civ. Proc. Code § 1209(a)(6); Cal. Penal Code § 166(a)(6). In addition, the bill amends current law and requires that the jury be specifically instructed, before trial and before recesses, on the prohibition of research or dissemination of information, in all forms including electronic and wireless. *See* Cal. Civ. Proc. Code § 611; Cal. Penal Code § 1122. If anything, the bill does not go far enough. For instance, it could require offending jurors to pay for the consequences of their action, including the re-trial of the case if necessary.

While several judges in California and in other jurisdictions have taken it upon themselves to hold a juror in contempt for prohibited conduct, including the use of social media or performing internet research, the California Legislature's codification of this violation as not only civil contempt, but also a misdemeanor, is a step in the right direction. However, while California's new law requires the judge to advise juries regarding the prohibition on internet research and use of social media, it does not require the judge to instruct the jurors on the consequences of their actions if they fail to follow the rules. This too is important. While advising the jury of the reasons behind the rule appeals to their sense of civic duty – the carrot – advising the jury of the consequences of failing to adhere to the instruction lets the jury know that there will be real punishment – the stick. Both the carrot and the stick are necessary in order to have the best chance of strict adherence

to the rules.

Finally, not only is it important that there be a law in place for handling a juror's violation and that the jury be advised of that law. The law must be enforced, possibly by the district attorneys as a misdemeanor rather than the judge as civil contempt. The instruction could also contain a request that the jurors report to the court if they know or suspect that one of their co-jurors may be violating any of these orders, which would in essence be self-enforcement.

Other courts have experimented with the prohibition of cell phones in the courthouse for everyone, or at least for jurors. Indiana, for instance, requires the bailiff to collect and store computers, cell phones and other electronic communications devices prior to deliberations. This rule was implemented after the Indiana Supreme Court considered a case wherein a juror took a cell phone call during deliberations. There, the Indiana Supreme Court wrote: "We additionally observe that permitting jurors, other trial participants, and observers to retain or access mobile telephones or other electronic communication devices, while undoubtedly often helpful and convenient, is fraught with significant potential problems impacting the fair administration of justice….The best practice is for trial courts to discourage, restrict, prohibit, or prevent access to mobile electronic communication devices by all persons except officers of the court during all trial proceedings, and particularly by jurors during jury deliberation." *Henri v. Curto*, 908 N.E.2d 196, 202-203 (Ind. 2009). Although helpful for times when the jurors are actually at the courthouse, this solution may not provide much in the way of curbing the practice of Internet research and social media discussions after hours, unless the jury is sequestered for the entire trial.

Our jury trial system is dependent on the jurors who are privy only to the evidence admissible in court, instructed on the law solely by the judge at the conclusion of the evidence and who have not been predisposed to outside opinions or discussions of the case before deliberation with their fellow jurors. While no solution is perfect, it is clear that courts, legislatures, and lawyers must do more to halt the increasing episodes of juror misconduct.

Tom D'Amato *is a shareholder with Murphey, Pearson, Bradley & Feeney in San Francisco. He maintains an active litigation and trial practice in state and federal courts, and in administrative proceedings before regulatory and government agencies. Chief among his areas of practice are professional liability, business disputes, intellectual property, real estate, employment and personal injury. Mr. D'Amato also regularly represents clients in appellate courts.*

Adam Koss *is an associate with Murphey, Pearson, Bradley & Feeney in San Francisco. Mr. Koss focuses his practice on all phases of litigation, representing clients at mediation, arbitration and through to trial if required. Mr. Koss has an active practice defending professionals and their businesses, specifically in malpractice actions. Although he focuses predominantly on the defense of professionals and businesses, he also represents clients in a variety of other fields, including products liability, employment law, real estate, contract disputes and general negligence.*
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