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Featured Articles

Please Jurors, Check Your iPhone with the Bailiff

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

It is hard to remember a time when the Internet was not a part of our daily lives. Just twenty years ago, email was not a commonly used form of communication. Since the time of dial up modems and America Online, things have changed quite a bit. In the last twenty years, information has become literally available at our fingertips, all the time. In the past, if we wanted to know something about a new subject many of us would have consulted Encyclopedia Britannica. Now, with a few clicks of the mouse, the first place most people go to learn about an entirely new subject is Wikipedia, a user contributed, and often-times inaccurate, online encyclopedia. We live in a world where iPhones, BlackBerrys, and Android phones connect us instantaneously at all hours to a seemingly endless digital frontier. Advances in wireless phone technology connect us to the Internet at speeds unheard of even in the late 90s, and put a growing global network in the palm of our hands. It should be no surprise that the digital world has entered the courtroom and taken a seat in the jury box.

According to a recent Census Bureau survey, a full 70 percent of U.S. households have Internet access of some kind. Sixty percent have broadband or high-speed Internet. The figures for cell phones are even higher. CTIA, an international non-profit representing the wireless industry, reports that ninety-three percent of Americans have a mobile phone. According to the latest Nielson ratings, 28 percent of cell phones in use today are smart phones and the figure is rising fast. Just one year ago, it was only 21 percent. More telling, 41 percent of all new phone purchases are smart phones. At the same time last year, it was only 30 percent. Neilson estimates that by the end of 2011, more

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than half of all mobile phones in use in the United States will be smart phones. Thus, the issue of jurors' access to the Internet, at any time of day or night, is here to stay. The urge of jurors to perform research outside of the courtroom on their own has always been there; the means to do so, however, has never been greater.

Twenty years ago, and even ten, if a juror wanted to see an accident site, she would have had to drive there. Sure, the curiosity may have existed, but it would have taken a concerted effort to follow through, and hopefully the juror would have realized that it was improper to do before actually going. Now, during a 10-minute break in deliberations, that same juror can pull out her iPhone or BlackBerry and have a satellite picture of that site in question. A party's criminal past, prior marital status, or insured status can be checked in a matter of seconds. Whether another defendant has settled a case and for how much is available on many court websites. Thus, it is available to any juror with an iPhone during a break in deliberations. All of this information is generally excluded from the jury, and with good cause. Where it used to take a substantial effort to obtain such improper and prejudicial information, it can now be accessed in a matter of seconds.

It is not only the technology and access to information that should concern judges and lawyers. The ability to disseminate information instantly is also ever increasing. There are now over 500 million different users of Facebook worldwide, a third of whom access their accounts via mobile phone according to a recent Facebook announcement. Twitter has more than 175 million users and there are said to be more than 65 million tweets sent out in any given day. Thus, not only does our potential jury pool have access to vast amounts of information at their fingertips; they also have the ability, in real time, to send out information about the trial in which they are participating.

Examples of Juror Misconduct Through the Use of the Internet

Throughout the United States, courts have attempted to deal with the relatively new problem of jurors' use of the Internet both to research on their own outside of court and to post information regarding trials on which they are serving. The following cases are but a few of the examples.

John Schwartz reported on one particularly egregious example of jurors' outside research on the Internet. *See* J. Schwartz, *As Jurors Turn to Google and Twitter, Mistrials are Popping Up*, New York Times (Mar. 18, 2009) at A1. According to Mr. Schwartz, a Federal trial in Florida resulted in a mistrial because nine separate jurors had been doing research online during their own time. Thus, eight weeks of the Court's and lawyers' time


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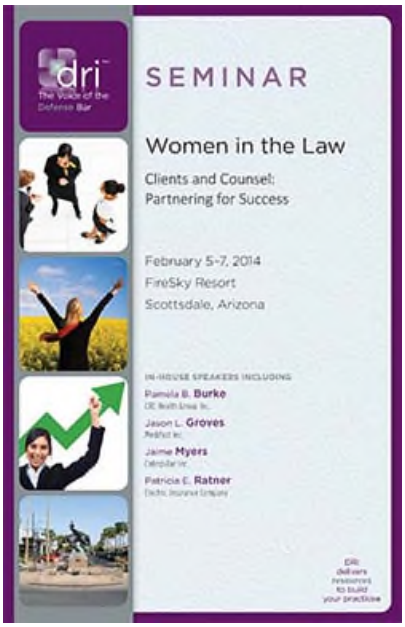
was completely wasted. The jurors had conducted Google searches on the judge, the lawyers, and the witnesses. They had also looked up news articles about the case. When asked why, one juror simply responded: "I was curious."

Another criminal case involving a juror's extracurricular Internet research took place in West Palm Beach, Florida. However, the juror in *State v. Tapanes*, 43 So.3d 159 (Fla. Ct. App. 2010) did not even bother to go home before doing his research. Rather, the juror, who was the foreman, used his iPhone during a short break from deliberations at the courthouse to look up the definition of "prudence." *Id*. at 162. The Court, in finding a mistrial, stated: "Although here we confront new frontiers in technology, that being the instant access to a dictionary by a smartphone, the conduct complained of by the appellant is not at all novel or unusual. It has been a longstanding rule of law that jurors should not consider external information outside of the presence of the defendant, the state, and the trial court." *Id.* at 163.

In a Michigan case, juror Hadley Jons declared a defendant guilty on Facebook before the prosecution had even finished presenting its case. Christina Hall's September 3, 2010 article *Facebook Juror Gets Homework Assignment* in the *Detroit Free Press* reported that Jons' Facebook status read: "gonna be fun to tell the defendant they're GUILTY." Judge Diane Druzinski's 17-year-old son, who was clerking for his mother, found the post during a court break. Judge Druzinski had Jons removed from the jury, and found her in contempt. Jons was fined $250, and ordered to write a five-page essay on a defendant's right to a jury trial in order to have the civil contempt order purged.

In Arkansas, a jury found Stoam Holdings liable for $12.6 million. One juror, Johnathan Powell sent eight messages on Twitter during the trial, including the following two: "oh and nobody buy Stoam. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter. //www.stoam.com/"; and "So Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money." The Judge declined to grant Stoam Holdings' motion for a mistrial, perhaps because the tweets appeared to be sent after a verdict was reached. Through interviews with the Associate Press following Stoam Holdings' motion for new trial, Mr. Powell seemed surprised by the Court's and media's attention, stating, "I didn't really do anything wrong, so it's kind of crazy that they're trying to use this to get the case thrown out."

In New York, a juror took Facebooking to a new level. Noeleen G. Walder's March 5, 2010 *New York Law Journal* article reported that juror Karen Krell sent a friend request to a witness in *People v. Rios*. She stated



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she "impulsively" searched for the witness on Facebook, and when she saw his picture, she "impulsively" sent a friend request. Since the request went unanswered by the witness, and since the Judge ruled that Krell's alleged "feelings" toward the witness did not taint the guilty verdict, she found that the misconduct was not sufficient to overturn the jury's verdict (however, it was overturned on different grounds). The Judge did note, however, that Krell's communication was "unquestionably a serious breach of her obligations as a juror and a clear violation of the court's instructions."

A more high profile case involving jurors and the Internet took place in Eastern District of Pennsylvania. In 2009 Vincent Fumo, the 30-year state senator, was convicted on 137 counts of corruption and was ultimately sentenced to 55 months in Federal Prison. The United States' case against Fumo and his co-defendant Ruth Arnao, his former aide, lasted more than five months. Throughout the course of the trial juror Eric Wuest made several posts to his Facebook and Twitter pages as well as his personal blog website. The posts were mostly innocuous, such as status updates which read, among other things: "Eric Wuest is wondering is this could be the week to end Part I" (referring to the end of the government's case); "Eric Wuest is not sure about tomorrow" (the night before the second day of deliberations); and "Stay tuned for the big announcement on Monday everyone!" (after the week's deliberations had concluded). *U.S. v. Fumo* 2009 WL 1688482, *62 (E.D.Pa. 2009). These posts were viewable not only by Wuest's Facebook friends, but also by the 600,000 members of the Philadelphia network of which he was a member. *Id*.

Upon hearing of Wuest's Internet activity, Fumo's attorneys moved for a new trial. The Judge determined that Wuest did violate the Court's admonition against discussing details of the trial, but that the comments he made were harmless and there was no outside influence excerpted on him. *Id*. at *67. The Court also found there was no prejudice and denied the motion for a new trial. *Id*. Perhaps most surprisingly, even though Wuest had commented on a high profile trial in spite of the Court's admonition not to, the Judge stated: "I just - honestly, want to make sure my thoughts are on the record about this guy. My take on him is entirely different. My take on him is this is one conscientious guy trying very much to comply with all the rules and regulations that I've established, more so then I would ever imagine that a juror would do. And I think that, you know, I've heard him and I don't have any trouble with keeping him on the jury." *Id* at *58.

Also in 2009, former Baltimore mayor Sheila Dixon was tried for embezzlement. Judge Dennis M. Sweeney presided over the case, which was widely followed by the local Baltimore media, including the Baltimore Sun

and WBAL-TV. On several occasions, the Judge specifically instructed jurors not to text, tweet or in any other way discuss the case outside the deliberations room. Despite these warnings, five jurors became Facebook friends, and over the Thanksgiving holiday discussed the case with each other via posts on their respective Facebook walls. Following Mayor Dixon's conviction, defense attorneys moved for a mistrial, in part arguing that the five jurors improperly communicated outside of deliberations, formed an improper clique which altered juror dynamics, and that at least one of them received an outsider's online opinion of what the verdict should be. Lending credence to this argument was the fact that, following the 3-day break and after deliberations had already been going for a week, some jurors asked for more time to deliberate because of new things brought to light, which suggests that something may have been said or learned during the Thanksgiving holiday.

In December, following the guilty verdict, Judge Sweeney sent a letter to the five jurors asking them to bring copies of their Facebook communications made during trial and specifically requesting that they "not discuss this matter with anyone, including your former fellow jurors, the media or anyone else until after the hearing" on the new trial motion. At least three of the jurors did not adhere. Among the postings made following that request was that of James Chaney, which read: "If you see me on the news, remember you don't know me. F*** the judges and the jury pimpin." At the hearing, Judge Sweeney asked Chaney about the offensive comment and was told: "Hey Judge, that's just Facebook stuff." Ultimately, Mayor Dixon entered a plea on the day of the hearing, and so the Court had no chance to declare a mistrial.

Finally, and in possibly the worst example of the use of social networking by a juror, a woman on a British jury polled her Facebook friends as to how she should vote in a sexual assault and child abduction case. The status update stated only: "I don't know which way to go, so I'm holding a poll." The indiscretion was reported before trial deliberations, and she was dismissed from the jury.

A recent Reuters survey shows that since 1999 at least 90 verdicts have been challenged based at least in part on Internet-related juror misconduct. In the past two years alone, 28 cases have resulted in mistrials due to Internet misconduct. Just a few of the examples are cited above. Unfortunately, these are only the cases that are actually reported. There are countless blogs and accounts of jury duty which can be found on the Internet with a simple Google search. Many of those blogs are posted "live" during jury duty or deliberations. Twitter feeds will show the same.

In fact, just this past month, comedian Steve Martin began a series of tweets supposedly from the jury

box. The first one, on December 20, 2010, read: "REPORT FROM JURY DUTY: defendant looks like a murderer. GUILTY. Waiting for opening remarks." A few minutes later, he posted: "REPORT FROM JURY DUTY: guy I thought was up for murder turns out to be defense attorney. I bet he murdered someone anyway." A bit later, Martin tweeted: "REPORT FROM JURY DUTY: Prosecuting attorney. Don't like his accent. Serbian? Going with INNOCENT. We're five minutes in." Thankfully, and in this case obviously, Martin was kidding although his publicist reported that he really was on jury duty, and that he was awaiting selection. After several more tweets made in jest, Martin sent a tweet on December 23, 2010 which read: "Serious note: I actually will be on jury duty soon. I urge every citizen to experience it. I've never not been moved by the system."

We Know There Is an Issue; What Do We Do About It?

All of the above examples show that the issue of Internet related research and social media posting is tangible and may have significant impact. The question then becomes, how do we as lawyers deal with it? The first, and most obvious answer, is to address it in jury instructions and during each and every jury break. Many jurisdictions already do this. California's recommended preliminary jury instruction states in part: "Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty." Judicial Council of California Civil Jury Instruction 100. Similar instructions are now being given all over the country, and in the Federal Guidelines. Many are even more specific, mentioning Facebook, MySpace, Twitter or LinkedIn, among others, by name.

Other courts are experimenting with prohibiting mobile phones from being turned on during jury deliberations, or even being allowed in the courthouse at all. Still other states have requirements that jurors check their phone with the bailiff at the start of deliberations. Overall, it is clearly evident that no single method of dealing with the prevalence of technology has yet been established.

Above are measures being taken by the system as a

whole to deal with issues posed by technology. But what can you, as an attorney, do to ensure that your jury is not obtaining outside information or sharing information, and that if they do, you become aware? Push for a specific jury instructions prohibiting social networking, blogging, and any outside research, including on the Internet. During voir dire, ask the jurors if it will be a problem for them not to use the Internet for research or to use social networking sites to communicate during the trial. Ask how many of the jurors have a blog, a Facebook account or a Twitter account, and how often they use it. Find out what type of information is contained in those blogs or social networking account. Perform your own Google and Facebook search of the jurors before they are selected. Ask that the Judge reiterate her instruction regarding use of the Internet at *every* break, no matter how short. Following the trial, be sure to ask the jurors whether they or anyone other juror performed outside research or posted on the Internet. As the cases above show, you may have a good case for a new trial motion, particularly if the misconduct involved outside research or influence. Finally, and probably most importantly, make sure that if you or your client do have Facebook pages, Twitter accounts or blogs, that you do not post anything on them that a juror could see. This may be obvious for a lawyer, but, as shown above, to a layperson it may not, and your client may need to be reminded. If the examples above show us anything, it is that no matter what you do or say, there is at least a possibility that one of the jurors will perform his or her own research into you and/or your client and the case. Be prepared.

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