

ARE TWEETERS OR GOOGLERS IN YOUR JURY BOX?

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“Guilty until you prove to me otherwise.” “I say hang’em for parking violations and increase punishment from there.” “Someone has to do something about these personal injury lawyers.” “Hung over for jury duty.” These are just a small sampling of “tweets” found in a 15 minute search at www.twitter.com. Puffing? Perhaps. Exaggeration? Most likely. But wouldn’t you want to know if these statements came from your jury pool or seated panel? The information is just a click away. Not all, but many “tweets” are linked to a name and location, and even include a photo of the “tweeter.”

Twitter is a rapidly growing, internet based communication source. Subscribers send short text messages, “tweets” to anyone choosing to receive them. These messages transmit through computers or cell phones and are typically used to announce one’s activity, such as “went to the movies,” or “have jury duty.” This newest form of social networking has found its way into the courtroom. Social networking cites and internet research advancements raise a series of new or at least expanded issues regarding juror communication.

Many attorneys and judges are up to speed with the latest technology and communication media. However, recent survey data indicates that only six percent use Twitter or any other source of microblogging.¹ Therefore, a vocabulary briefing may be in order. A basic social networking site allows members to have a personal page where they can update friends with their likes, dislikes, photos, thoughts, etc. Friends can respond and networks of friends can link together to form common groups. Access may be open to the public or limited to invitation. The most common of these sites include MySpace and Facebook. Blog is short for web log. It is basically an online writing that can contain personal thoughts and opinions resembling a journal, or be more professional in nature such as an article or online newsletter. Twitter is considered a “microblog.” There are many other specialized sites and communities as well.²

Information Moving Out from the Jury Box

The influx of easily accessible and portable communication and research devices affects the jury system in several ways. Information is being sent out by jurors, responses come back in, jurors are conducting their own Internet research, and

attorneys have access to more information about jurors than ever before. In March 2009, attorneys for former Pennsylvania state senator Vincent Fumo sought a mistrial in a five month federal corruption case because a juror posted updates on Twitter and Facebook during the trial. The judge did not dismiss the juror and Fumo was convicted on 137 counts. His lawyers plan to appeal. According to the defense motion, the juror posted a message on Facebook that said, “Stay tuned for a big announcement on Monday everyone!” and tweeted, “This is it...no looking back now!” When questioned by the judge, the juror said that his posts were intended to express his thoughts rather than communicate with others.³

Within days of the Fumo case, a building products company asked an Arkansas court to overturn a \$12.6 million judgment because a juror used Twitter to send trial updates. His tweets included, “I just gave away TWELVE MILLION DOLLARS of somebody else’s money” and “Oh and nobody buy Stoam. Its bad mojo and they’ll probably cease to Exist, now that their wallet is 12m lighter.”⁴ The juror insisted that he did not post any substantive messages until after the verdict had been delivered. The judge concluded that although the posts were in bad taste, they did not amount to improper conduct. The defense argued that the tweets showed that the juror was biased against their client, Stoam, and “predisposed toward giving a verdict that would impress his audience.”⁵

Some jurors may be looking for their fifteen minutes of fame. Cynthia Cohen, President of the American Society of Trial Consultants (ASTC), explained that jurors on big cases may feel empowered because they have a hand in the outcome. “With Twitter and instant messaging, being first, getting something out immediately is a thrill for them. They get caught up in the excitement instead of following the rules and laws of the legal system. It’s definitely a problem.”⁶ Ms. Cohen also noted that the ASTC is working on a handbook on trial ethics which will include juror and social networking.⁷

This electronic communication seems to have an unusual, addictive hold on many. Commenting on the August 6, 2009 social network crash, former ASTC president, Douglas Keene, observed that “[s]ome ‘users’ panicked as much as you might have expected from drug addicts. Users were ‘jittery’, ‘naked’, ‘freaked out.’”⁸ For such compulsive users, it may be much easier to refrain from discussing the case over dinner than to lay off their technology.

Admonishing jurors not to discuss the case outside of the deliberation room is certainly not new. It seems, however, that many jurors do not see blogging, tweeting, or posting as communication, or at least don’t consider it to fall within the rubric of traditional admonitions. In a California felony trial, the judge admonished the jurors orally and in writing to not discuss the case. Nevertheless, a juror (who was an attorney) blogged about the trial stating that “[n]owhere do I

recall the jury instructions mandating I can't post comments in my blog about the trial. (Ha. Sorry. will do)" The Court of Appeals vacated the judgment and the California State Bar suspended the juror.⁹

Another concern is that the advent and popularity of new avenues of communication are increasing the stakes. In the past, the judge's admonition was primarily to prevent jurors from discussing the case with family, close friends, or co-workers. With Twitter, Facebook, and blogs, the potential impact is raised exponentially. Now a juror can communicate with thousands of people with one click, and the recipients can likewise forward to their groups. In turn, the array of comments, information, and biases coming back is limitless, particularly in high profile cases. It would be difficult to argue that a juror could remain impartial and untainted upon receiving a barrage of opinions from cyberspace.

Information Coming Into the Jury Box

It is not just outgoing information that causes problems, but also the new propensity for juror research that these handheld portals to information facilitate. Even "good jurors" with no intention of impeding the judicial process can get caught up in the technology. On March 17, 2009, the front page of the New York Times reported that a juror in a federal drug case admitted to conducting internet research during the case. Moreover, upon questioning the jury panel, the judge determined that eight other jurors had done the same. The judge declared a mistrial after eight weeks of trial. The defense attorney commented that "[i]t's the first time modern technology struck us in that fashion, and it hit us right over the head."¹⁰

Historically, we have encountered some issues with jurors visiting the scene or conducting amateur sleuthing. Now jurors can click Google Earth and in seconds see the scene in the palm of their hand. Likewise, information on just about any subject is only a Google away. Motions in Limine and other pre-trial evidentiary rulings will go out the window if jurors conduct their own research. Curiosity is a powerful driving force. Jurors are generally very astute and if they sense missing pieces of the puzzle or are left with unanswered questions, the temptation to "cheat" by running a quick internet search from their couch may be hard to resist. Others may actually feel compelled to find out as much as possible before they are comfortable rendering a verdict despite the court's admonition to only consider evidence presented at trial. In such cases, jurors may base their verdicts on excluded or erroneous information.

Even pre-trial research by potential jurors can be problematic. In June, a San Francisco judge had to excuse an entire panel of 600 jurors. During the voir dire process, a juror said that he had done Internet research on the case and when

questioned replied that he hadn't been ordered not to do so. Several more jurors admitted to conducting Internet investigation as well. Although one recalled some sort of verbal admonishment, the juror didn't understand that it included research on the Internet. The questionnaires did not have a cover sheet with a written admonition. The case prompted the San Francisco Superior Court to propose a new rule requiring jurors to be specifically instructed that, "[y]ou 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."¹¹

The South Dakota Supreme Court recently upheld an order for new trial in a case where a juror had done two Google searches on the defendant months before his jury duty, and then mentioned the searches in deliberations. In Russo v. Takata Corp.,¹² a juror Googled the defendant after receiving a juror summons and questionnaire, but before voir dire and being seated on the jury. The summons stated in part: "Do not seek out evidence regarding this case and do not discuss the case or this Questionnaire with anyone."¹³ During voir dire, attorneys asked if anyone had ever heard of Takata before and no one answered affirmatively. No one specifically asked about Internet searches and the juror at issue did not mention his search.

Several hours into deliberations, a juror asked whether Takata had ever been sued. The Googling juror responded that he did a search on Takata but didn't find any lawsuits. Another juror reminded the panel that they were not supposed to consider outside information, but no one reported the breach to the court. The jury returned a verdict for Takata. Plaintiffs learned of the discussion and filed a motion for new trial. The trial judge granted the motion and the Supreme Court affirmed, but noted that it was a close case and by its ruling it was not announcing a hard and fast rule that all such types of research prior to trial would automatically doom a jury's verdict.¹⁴

In a footnote, the Court commented that the instruction in the jury summons may not have been specific enough for the juror to realize that performing a Google search on the name of the Defendant would constituted "seek[ing] out evidence."¹⁵ It suggested that, "courts consider using simpler and more direct language in the summons to indicate that no information about the case or the parties should be sought out by any means, including via computer searches." It further recognized that "[t]he potential for inaccuracies and its [the internet] wide availability also support voir dire questions designed to identify any jurors who may have accessed information about the parties on the internet."¹⁶

What's Happening in Arizona

Arizona has also seen these technologies disrupt the system. Pima County Judge Kenneth Lee recently removed a juror for repeatedly texting during the trial. The

juror explained that his sister had been trying to get him to baby sit. There was no indication that the juror was sharing any information about the case, however, the attorneys and judge agreed replace the juror with an alternate. Although daydreaming, drowsy, or doodling jurors are not new, portable electronic devices present unwarranted competition for a juror's attention. We live in an era where texting and tweeting occur in the midst of a dinner date, business meeting, or class lecture. Why not the courtroom? Moreover, texters are becoming so adept that some can even text from their pockets. We simply cannot assume that jurors even realize that this is not appropriate unless it is clearly specified and reinforced by the courts.

In Maricopa County, a mistrial was called during the penalty phase of a capital murder case. The defendant had been convicted of killing defense attorney Justin Blair in a drive by shooting. Judge Paul McMurdie specifically directed jurors that they could not tweet, blog, or use the Internet in any way to either investigate the case or to communicate about it. After several days of deliberations, a juror informed the judge that he was the only juror favoring death and that the remaining eleven jurors were unduly pressuring him to change his mind. The juror claimed that another juror had accessed the internet via her cell phone during deliberations to find out what would happen if a unanimous vote was not reached. He further claimed that earlier in the trial, an alternate juror had searched the internet for elements of the trial. Subsequently, the judge and attorneys questioned the jurors in detail. According to defense attorney, Treasure VanDreumel, it became apparent that the jurors had not used the internet, as alleged, and the juror who wrote to the judge was just trying to end the deliberations. Ironically, the juror used the judges' explicit instructions regarding the Internet to manipulate the system and cause the mistrial.

Arizona appears to be very progressive in addressing these issues. The Criminal Jury Instructions Committee has drafted Preliminary Criminal 13 – Admonition which is specific and direct about the use of electronic devices, the Internet, and both incoming and outgoing communications during trial. The Admonition in part reads as follows:

Proposed Admonition

“Each of you has gained knowledge and information from the experiences you have had prior to this trial. Once this trial has begun you are to determine the facts of this case only from the evidence that is presented in this courtroom. Arizona law prohibits a juror from receiving evidence not properly admitted at trial. Therefore, do not do any research or make any investigation about the case on your own. Do not view or visit the locations where the events of the case took place. Do not consult any source such as a newspaper, a dictionary, a reference manual, television, radio or the Internet for information. If you have a question or

need additional information, submit your request **in writing** and I will discuss it with the attorneys.

Do not talk to anyone about the case, or anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones, I-Touches, Google, Yahoo, or any internet search engine, or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.

One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

If you have cell phones, laptops or other communication devices, please turn them off and do not turn them on while in the courtroom. You may use them only during breaks, so long as you do not use them to communicate about any matter having to do with the case. You are not permitted to take notes with laptops, Blackberries, tape recorders or any other electronic device. You are only permitted to take notes on the notepad provided by the court. Devices that can take pictures are prohibited and may not be used for any purpose.”

In addition to its specificity, this admonition educates the jurors providing a rationale for the prohibitions. This type of explanation may prove particularly helpful for those jurors who want to do the right thing, but have a misguided notion that they are helping by conducting their own research. Pending approval by the Board of Governors, many Arizona judges have already implemented similar language into their admonitions.

[note: the Board is scheduled to consider for approval on November 20, so this section may need to be updated to reflect the decision and action]

Even with the proposed Admonition, several issues remain. Who should be allowed to carry electronic devices into the courthouse? How should people be punished for violating a judge's order? Judge Jan Kearney, the presiding judge of the Pima County Superior Court, said that she would like to form a committee to discuss these issues.¹⁷ The Director of Jury Management, Maricopa County, Mitch Michkowski, Ph.D. offered his thoughts on the matter. "I believe that most trial courts continue to enthusiastically embrace the fortunes of technology, though as in the case in Maricopa County Superior courts, judges understand the importance of wanting to avoid juror misuses of cell phones, computers, and other electronic communication devices. Jurors are customarily cautioned by our judges by means of an admonition which is designed to specifically clarify the ground rules that apply. Jurors are expected to observe and follow all judicial instructions in order to avoid unnecessary mistrials and in the vast majority of cases, our jurors have understood and complied admirably."

Other Possible Solutions and Recommendations

In addition to strengthening the admonition, some courts are also considering restricting the use of, or banning, cell phones, Blackberries, and other electronic devices in the courthouse, or at least in the jury room. In the San Diego case regarding Jennifer Strange, the mother who died during a radio contest to see who could drink the most water without going to the restroom, the defense was concerned about jurors conducting independent research due to the vast media coverage. They noted that tens of thousands of results come up when Googling "Hold Your Wee for a Wii" or "water intoxication." As reinforcement to his admonition, the judge ordered that the jurors must sign declarations attesting that they won't use "personal electronic and media devices" to conduct independent research or communicate about the case. These declarations are to be made under the penalty of perjury, both before and after the trial.¹⁸

Although many of the protections against prohibited juror communication must come from the courts, there are several things that a trial attorney can do according to Susan C. Salmon of Quarles & Brady.

- Ask the trial judge to expand his/her boilerplate admonition to incorporate an explicit explanation of the policies behind the rule and the consequences of violating the rule. Be prepared with your own draft admonition and submit it with your jury instructions.
- To the extent that the judge or your jurisdiction permits you to do so, use voir dire to (1) educate the panel regarding why they shouldn't do outside research, including Internet research, and (2) enlist the jurors in helping the court enforce that restriction.
- In Arizona, where I currently practice, jurors can submit questions to be asked of a given witness. Sometimes those questions may clue you in that

jurors are doing improper outside research. Be alert to that possibility, and be prepared to ask the court to inquire.

- Bone up on your e-discovery law, and be prepared to subpoena text message records, laptop hard drives and other ESI if you suspect juror misconduct created an appealable issue.¹⁹

Additionally, trial attorneys will want to become very familiar with the language and terminology associated with social networking so that they will be prepared to conduct appropriate follow up during voir dire. Moreover, they may want to incorporate a line of questioning during voir dire to identify jurors who may have problems following the court's instruction to only consider the evidence presented during trial, or even believe that such an instruction is wrong. Finally, attorneys can monitor on line writing during and after trial. One of the best methods is through a feed reader. Google Reader is user friendly and will search various internet cites for key words that you input, such as case name, city, jury duty, and any other terms that might make your case identifiable. It then gathers all relevant writings in one convenient place for your review.

The advancements are not all bad for the jury system. In fact, attorneys can use social networks and internet capabilities to learn more about their prospective jurors. As referenced at the beginning of this article, some "tweets" can tell you quite a bit about jurors' attitudes. Similarly, paying attention to jurors' social networking, blogs, and websites can tell a lot about their values, attitudes, and experiences that would never be fully revealed in voir dire. Even with this upside, attorneys should proceed with caution. Just as juror internet research may not be credible, attorneys cannot trust that information from a juror's blog, My Space, or Facebook is truthful. Then again, the fact that someone posted inaccurate information may be telling in and of itself. Attorneys may also want to tread lightly when questioning jurors about their networks. Although blogs, My Space, and Twitter may be public displays, some jurors might feel personally invaded if they sense they are being researched. Attorneys and consultants will want to be careful not to conjure up images of Gene Hackman in *Runaway Jury*, but will need to address the issue.

Beyond juror use, technology is wreaking havoc in other trial areas as well. Tucson attorney Laura Udall recently learned that a witness had repeatedly texted another witness during trial to tell him how to testify.²⁰ In Portland, a judge was shocked to discover that a defendant accused of domestic violence was texting the victim while she was waiting in the courthouse to testify.²¹ Jurors, witnesses, and parties have always found ways to try to circumvent or thwart the system. However, we can expect that increased ease will directly equate to increased activity and need to be prepared.

The issues are new, many, and widespread. The solutions are still evolving. Some will have to come from the courts. For now, carefully addressing these issues in voir dire can help identify undesirable or problematic jurors, educate the jurors regarding their role, and reinforce the admonition. It will be critical to query jurors on whether they have mentioned jury duty in twitter messages or blogs. If so, get them to the bench to determine the exact wording of their comments. Ask jurors if they have been reading internet info on the jury duty experiences of others, and if so, determine what this entailed. Judges will need to specifically instruct the panel not to discuss the case through emails, twitter messages, blogs, chat rooms, or other internet options. Without question, new technology and communications call for new courtroom practices.

¹ 2009 *Networks for Counsel Study*, Leader Networks, at 12, available at www.leadernetworks.com/documents/Networks_for_Counsel_2009.pdf.

² See Anne Reed, *A Trial Lawyer's Guide To Social Networking Sites*, Deliberations, available at www.jurylaw.typepad.com/deliberations/social_networking.html.

³ Scott Michels, *Cases Challenged Over 'Tweeting' Jurors*, ABC News, March 17, 2009, available at www.abcnews.go.com/print?id=7095018.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ Robert K. Gordon, *No tweeting during the trial, please*, The Huntsville Times, Oct. 20, 2009, available at www.al.com/news/huntsvilletimes/local.ssf?/base/news/125603014432660.xml&coll=1.

⁷ *Id.*

⁸ Douglass Keene, *Panic on Tweet Street: "Without Twitter, I felt jittery and naked"*, The Jury Room, August 7, 2009, available at www.keenetrial.com/blog/2009/08/07/panic-on-tweet-street-without-twitter-I-felt-jittery-and-naked/.

⁹ The juror also failed to disclose he was an attorney; CAL. BAR JOURNAL, August 2009, available at www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2009&month=August&YEAR=2009&sCatHtmlTitle=Discipline&sJournalCategory=YES.

¹⁰ John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, The New York Times, March 18, 2009, available at www.nytimes.com/2009/03/18/us/18juries.html?_r=1&pagewanted=print.

¹¹ Erin Geiger Smith, *California Jurors Will Be Told Not To Tweet*, The Business Insider, Sep. 21, 2009, available at www.businessinsider.com/california-jurors-will-be-told-not-to-tweet-2009-9; see also Kate Moser, *Court Lays Down Law on Jury Internet Use*, The Recorder, Sept. 9, 2009.

¹² *Russo v. Takata Corp.* (2009), available at www.sdjudicial.com/opinions/downloads/y2009/24726.pdf.

¹³ *Id.* at 2.

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 14.

¹⁶ *Id.*

¹⁷ Kim Smith, *Internet, cells raise new jury concerns*, Arizona Daily Star, Sept. 8, 2009, available at www.azstarnet.com/sn/printDS/308049.

¹⁸ Greg Moran, *Revised jury instructions: Do not use the Internet*, The San Diego Union-Tribune, Sept. 13, 2009, available at www3.signonsandiego.com/stories/2009/sep/13/revised-jury-instructions-do-not-use-internet/.

¹⁹ Susan C. Salmon, *Googling and Tweeting and Facebooking, Oh My! Jurors Conducting Outside Research During Trial*, E-Discovery Bytes, March 17, 2009, available at

www.ediscovery.quarles.com/2009/03/articles/miscellaneous/googling-and-tweeting-and-facebooking-oh-my-jurors-conducting-outside-research-during-trial/.

²⁰ Kim Smith, *Internet, cells raise new jury concerns*, Arizona Daily Star, Sept. 8, 2009, available at www.azstarnet.com/sn/printDS/308049.

²¹ Adam Worcester, *Jurors' tweets, texts upset trial judges*, PORTLAND BUSINESS JOURNAL, Sept. 18, 2009, available at www.portland.bizjournals.com/portland/stories/2009/09/21/focus2.html.