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Friend or Foe? Social Media, the Jury and You

BY LESLIE ELLIS

Leslie Ellis, Ph.D. is a Senior Jury Consultant with TrialGraphix, and works out of its Washington. D.C. and Atlanta offices. She works primarily on complex civil and white-collar criminal matters, and has worked in venues across the country. She assists clients with mock trials and focus groups, witness preparation, jury selection, venue surveys, theme development, opening statements/closing arguments, and general litigation strategy. You can read more about Dr. Ellis at her company's web-page.

Introduction

Jurors' improper use of social media, and the ensuing appeals, mistrials and reprimands, have been covered in dozens of press articles over the last several months. Just in the last year we have seen jurors write online about how they are going to get out of jury duty, their verdict preferences, and – in perhaps the most egregious uses of social media – poll Facebook friends about what the verdict should be, and "friend" a defendant during deliberations. There have also been reports of witnesses, attorneys and judges misusing social media.

It can be difficult and time consuming to keep up with all of the ways in which trial participants can publish or receive information about their jury service. Some have decided not to bother tracking the technological advances, arguing it is irrelevant or too difficult to keep track. However, information flows both to and from online jurors. If properly used and monitored, social media can be a help and not only a hindrance. This article will discuss how to take advantage of jurors' online footprints, the ways in which social media is disrupting jury decision making and the trial process, and ways to minimize those disruptions.

Making Social Media Your Friend

Most of the publicity about social media and juries has been about jurors' inappropriately disclosing information about their case via various social media sites, such as Facebook or Twitter. However, experienced litigators have been using social media and other online resources to learn more about their jurors for years, and to great advantage.

Some people may remember stories of private investigators going to potential jurors' homes, interviewing their neighbors, and taking photos of yard signs and bumper stickers. Not only have many courts now prohibited parties from doing so, it isn't really necessary. You can see jurors' virtual bumper stickers via blogs, online comments, Facebook profiles and Twitter feeds.

According to the Pew Center's Global Attitudes Project, 46 percent of Americans use social networking websites.[i] Litigants can and should use social media to their advantage prior to and during the voir dire stage. If the parties can get the list of potential jurors prior to jury selection, parties have ample time to research them. If they don't get the list of names until the start of voir dire, searches can be done on the fly using laptops, iPads or smartphones in the courtroom. At its most basic, a Google search of jurors' names can find political donations, publications, organization affiliations, blogs, prior occupations and more. A more exhaustive search of public databases, usually for a fee, can identify litigation histories, liens, mortgages and car registrations. Finally, searches of networking and updating sites such as Facebook, LinkedIn and Twitter can be a source of information about people's opinions and experiences, if their profiles are public.

It is true that there is a technology age gap – younger jurors are likely to be online and using social media sites more often than older jurors. However, the gap is not as large as many people think. The Pew Center study found that roughly three-fourths of people ages 18-29 use social networking sites, compared to 55 percent of people ages 30-49. And in a recent comparison of internet use among generations, the Pew Center found that older generations are making quick strides to tighten the gap.[ii] Within the last two years alone, use of social networking sites has gone from 20 to 50 percent in Young Boomers (45 – 55 years of age) and from 9 to 43 percent in Older Boomers (55 to 64 years of age). The fastest growth in the use of social networking sites has been among those 74 and older, which quadrupled from 4 to 16 percent.

However, the information is only valuable if the parties know how to use it. You must be able to confirm that the people you have found online are the same people in the courtroom (and not just people with similar names) and have a well-planned voir dire strategy in place to be able to make quick use of whatever information you may find. Otherwise, the jumble of information will be just that – a jumble – which is not helpful in the heightened pressures of trial and speed of voir dire. Decades of research tells us that, in most types of civil litigation, demographics are not predictive of verdict preferences, with the exception of cases in which a particular demographic is the basis of the litigation, such as harassment or discrimination cases. Rather, jurors' case-specific experiences and attitudes are most predictive of verdict preference. Therefore, counsel should determine in advance which experiences and attitudes will work for or against them. Then, when they find that a juror has donated to a certain politician or belongs to a certain special interest organization, they will quickly be able to use the information to their advantage in trial.

In addition to learning about jurors' backgrounds, corporate litigants should also search social media for references to the company. People blog, tweet and post about their experiences with companies, as well as post recommendations for employees and employers. These can be valuable sources of information on popular sentiment about your company. Just as your marketing, public relations or branding teams want to know what the public is saying about your company, you want to know what jury pools are saying about your company. Keep track of what is in the ether about your company and its practices. Then you will know what kinds of attitudes potential jurors may have about your company, and your trial counsel can be prepared to ask about them in voir dire.

Finally, litigants who use social media sites to gather information about jurors should be very careful not to cross ethical boundaries. While most people agree that it is acceptable to view content that the user has designated as public and/or unrestricted (e.g., blogs or unrestricted Facebook pages), the issue gets murkier when users have taken efforts to keep their identity anonymous or their con-

tent private. Recent ethics opinions in New York County[iii] and Pennsylvania[iv] state that it would be in violation of their Rules of Professional Conduct to directly, or through a third party, contact a juror (the subject of New York County's opinion) or witness (the subject of Pennsylvania's opinion) through a Facebook "friend" request. Resist the temptation to join restricted chat groups, "friend" people, or otherwise gain access to restricted information in order to find out more about your potential jurors – the risk is not worth the reward.

Inappropriate Disclosures via Social Media

It is a common misconception that only young people use wireless devices to go online or frequent social media and networking sites. As of September 2009[v], 30 percent of adults aged 30 or over had gone online using a cell phone or other handheld device. By August 2010, the number of adults ages 50 and older who used social networking sites doubled, from 22 percent to 42 percent.[vi] The use of the updating site Twitter among older adults is not as high (6 percent of all internet users ages 50-64), but is still higher than many would expect.

The popularization of such sites, as well as the frequency with which many people access them in a day, have led to dozens of problems when jurors and other litigation participants took to the "airwaves" to discuss their experiences. The two major concerns are when jurors go online either to disclose information about the trial or to search for information and introduce it into their deliberations.[vii]

A recent study by Reuters Legal found that Internet-related juror misconduct has led to 21 overturned verdicts or new trials since January 2009.[viii] However, judges found instances of misconduct in three-fourths of cases in which the verdicts were challenged but not declared mistrials. This is indicative of what you find when you look closely at what jurors are writing online about their jury experiences – a vast majority have nothing to do with their job as a fact-finder.

Jurors are given very specific instructions that they are not to talk about the case prior to their deliberations (with the exception of civil trial jurors in Arizona, Colorado and Indiana) and they are not to disclose anything about their deliberations until they are complete. However, they do not receive that instruction until they are sworn in, so potential jurors feel (and are) free to comment online about how much they are dreading jury duty, what they are doing in the jury room, etc. Even after being sworn in, most posts are fairly innocuous – jurors may say they are serving on a murder case or mention how bored they are during the long breaks, or even "friend" each other during the trial. These posts do not refer to the evidence or parties, and are usually determined to be harmless.

More troubling, some jurors take the instructions very literally – they do not equate updating their Facebook page or tweeting about the case with "discussing" the case. They are careful not to talk about the case at home with their families, but they do not think that posting about an attorney's ugly tie or how bored they were during a witness' testimony is prohibited. This is more likely to cause problems, because jurors may divulge evidence or their opinions without realizing it is prohibited. Moreover, even though the jurors' disclosures may be permissible, they are not the only cause for concern. Comments on their posts can influence what they are thinking. The information jurors are considering is no longer subject to the regular rules of evidence, which is a key issue for judges when they are deciding whether a jurors' disclosure is problematic.

Most problematic is when jurors understand the intent of the judge's instruction and simply ignore it. Publicized examples of this scenario include a juror who tweeted about giving away millions of dollars of someone else's money or how "fun" it would be to tell a defendant he is guilty before the jury reported their verdict to the Court. In a worst case example, a juror in a Queens County, NY rape trial emailed his friends, one of whom was a prosecutor, about his jury's deliberations. We cannot know why these jurors decided to defy the instructions so directly – it may be that they did not take their jobs seriously, could not resist the urge (one blogger reported getting out of jury duty because said there was no way she would be able to stop herself from blogging about the case during the trial), or did not understand the consequences of their actions.

And not all violations have been from jurors. A witness was caught sending text messages to counsel from the witness stand during a break, and a judge in North Carolina was reprimanded for "friending" an attorney who was trying a case before him and commenting to each other about the case. It appears that all types of trial participants have trouble understanding how the old rules apply to new types of communication.

As much as instances like these seem to be more and more common, we must ask ourselves, is this really a new phenomenon, or are we just able to catch them now? A study in 1986 found that 10 percent of former jurors admitted discussing the case before their deliberations, and that was those who would admit it.[ix] We do not know if these kinds of violations are more common than they used to be, or just more public.

Inappropriate Research via Social Media and Online Sources for Research

We can assume that jurors' use of online sources for their own research is more common, simply because the information is more accessible. Another Pew Center study found that 41 percent of Americans surveyed said the internet is their main source of news, which is up from 24 percent in 2007.[x] The Internet passed television as the main source of news for those younger than 30. More than one-third of adult internet uses had consulted Wikipedia, and Wikipedia use far surpasses any other educational and reference online source, including Dictionary.com and Merriam-Webster Online. Until recently, Google was accessed more often per day than any other Web site (Facebook surpassed it for the first time in January 2011). Clearly, the first place many people go for information is the Web. Why should jurors be any different?

Research on jury decision making has proven that the old concept of "Tabula Rasa" – that jurors are empty tablets to be filled with information – is inaccurate. Rather, jurors are very active users of information. They also try very hard to make the right decision, and they struggle when they think they are missing a critical piece of information.

Just as we have heard about dozens of incidents of jurors' disclosing information online, we have also heard about many incidents of jurors' bringing in information they acquired online. And as with the disclosures, we do not know if they are doing it more often than they used to, or we are just hearing about it more often. Jurors may have a more difficult time understanding why they cannot have the information they want in the age of instant access. Verdicts have been overturned when jurors looked up definitions of legal terms, searched defendants' criminal histories and looked up symptoms of "rape trauma syndrome," just to name a few examples.

What Are the Remedies?

It is easy to talk about all of the problems caused by jurors' use of social media and the Internet. But what are the solutions? Unfortunately, there is no silver bullet. Judges will always instruct jurors not to disclose or import information, and some jurors will always ignore them. But there are a few ways to reduce the frequency with which it happens. Judge Dennis M. Sweeney (Ret.) has recently published a very thorough review of several remedies that judges can undertake (as well as a few that are unlikely to work).[xi] Attorneys can take a proactive approach by suggesting the remedies discussed here, when judges are less attuned to the problems or unsure how to best address them.

One remedy is to be proactive about it in voir dire. Trial counsel should ask potential jurors if they have an online footprint. Do they blog, do they have Facebook or MySpace pages, or do they have Twitter accounts? If so, how often do they post, tweet, update, etc.? This will give counsel an idea of how prevalent an issue it might be. Some medical and research professionals have discussed the existence of "internet addictions" or "online addictions," which can be generally defined as "online-related compulsive behavior which interferes with normal living."[xii] The validity of such a disorder is heavily debated, but some people do find it difficult to stay offline. Additionally, those who have become reliant on having constant access to information might also find it difficult to abide by the judge's orders not to do any investigations. Counsel should ask the necessary questions to find out if any potential jurors fall into those categories.

More importantly, counsel and/or the judge should ask jurors if they will be able to refrain from saying anything about the trial (in the broadest sense of the word) online. Make them promise not to do so, out loud. We are less likely to break promises we have made in public and on the record. Some have suggested asking jurors to sign forms promising they won't violate the rules[xiii], and research suggests that having jurors promise to do so at the start of trial (perhaps followed by reminders) will be more of a deterrent than having them say they haven't done so at the end.[xiv] Counsel can ask the judge to have jurors sign such a form. Finally, counsel should follow their sitting jurors (and witnesses, judges and opposing counsel, to be safe) online during and shortly after the trial to make sure they aren't posting anything they should not.

The second remedy is to improve the instructions on "discussing" the case and conducting independent investigations, referring specifically to the use of social media and information sites. Several states[xv], the Federal Judicial Conference[xvi], and the American College of Trial Lawyers[xvii] have drafted instructions on the topic, some of which are better than others. California has made great strides in writing their pattern instructions using common, everyday language so laypeople can more easily understand them, and their preliminary instructions on using technology to research or communicate about a case is no exception. The instruction is very explicit in what jurors are not to do.[xviii] However, they only expand the list of admonitions, without explaining why it is important to follow the rules, and what the consequences might be if they do not.

Many jurors may not understand the consequences of disclosing information or doing their

own research. Most instructions simply tell jurors what not to do. But jurors, like small children, ask, "Why?" They want to know why something is or isn't important, or why someone did or didn't do something. And telling them why helps them follow the rules. The instructions proposed by the American College of Trial Lawyers explain why relying on untested information is problematic (and, interestingly, asks jurors to sign an oath that they will not violate the instructions). Further, participants in a small survey estimated that jurors who were instructed on why they should not disclose or research case information would be less likely to do so than jurors who were not.[xix] Whether informing about the consequences of their actions would help is less clear, but California is considering adding a discussion of consequences to their instructions. A Massachusetts judge recently fined a juror $1200, the court costs to retry a case, after he told the other jurors about the defendant's criminal history, which he found online[xx], and a judge in England recently sentenced a juror to jail for eight months when a juror "friended" and communicated with a defendant via Facebook, during deliberations, leading to a mistrial in a case that has already cost the justice system over £6 million[xxi].

Finally, allowing jurors to ask questions of witnesses could alleviate a lot of problems with jurors' doing their own research about the case. More than 30 states permit jurors to pose questions to witnesses. Only 10 states prohibit the practice[xxii], but it is almost always at the judge's discretion – very few states mandate that jurors be allowed to pose questions[xxiii]. The Seventh Circuit recently conducted a study on the impact of several jury trial innovations, including juror questions.[xxiv] They found that the majority of questions were asked to clarify information, check on a fact or explanation, or get additional information they thought was important. The majority of judges and attorneys reported that jurors asked either the right amount or not enough questions, and that most or all of the questions were relevant.[xxv] Most importantly, a full 86 percent of jurors reported that being able to ask questions increased their understanding of the case. That improvement comes at little cost – two-thirds of attorneys and three-fourths of judges said the process either had no impact or *improved* the efficiency of the trial process.[xxvi] A study conducted in Pima County Superior Court in Arizona found that allowing jurors to ask questions increased the length of the trial by a mere 33 minutes.[xxvii]

Conclusion

Jurors, like the general population, are accessing social media and information on the Internet more and more frequently. We are just now beginning to understand the impact this can have on the trial process and identify ways in which it can be minimized. It is important to note there are literally thousands of trials a year. While instances of juror misconduct and mistrials receive a great deal of press, they are disproportionately reported. We don't hear about the thousands of trials in which nothing went wrong, so we should be careful not to overstate the problem. However, it is a real problem that can have real consequences for litigants. But, being aware, proactive, progressive and vigilant can help turn potential problems into opportunities.

References

[i] http://pewglobal.org/2010/12/15/global-publics-embrace-social-networking/

[ii] Pew Internet & American Life Project, "Generations Online in 2010" Report, December 16, 2010

[iii] New York County Lawyers Association Committee on Professional Ethics Formal Opinion No. 743 (Issued on May 18, 2011)

[iv] Philadelphia Bar Association Professional Guidance Committee Opinion 2009-2 (March 2009)

[v] Pew Internet & American Life Project, "Social Media and Young Adults" Report, 2010

[vi] Pew Internet & American Life Project, "Older Adults and Social Media" Report, 2010

[vii] A third concern regarding the use of social media, and one that is growing, is that of trial participants or observers contacting jurors during the trial. Judge James Zagel, who presided over both prosecutions of former Illinois Gov. Rod Blagojevich, kept the jurors' identities in both trials secret until after the trial, arguing in part that it would keep people from trying to contact jurors. This is not an unreasonable fear – the friend of a defendant in Fort Valley, Georgia did try to contact at least one juror through Facebook, and a review of tapes of jailhouse telephone conversations revealed the defendant gave his family members and friends the names of multiple jurors and instructions to contact them during the trial, resulting in a mistrial and an investigation into jury tampering. See http://www.macon.com/2011/06/23/1606284/alleged-jury-tampering-halts-start.html.

[viii] http://www.reuters.com/article/idUSN0816547120101208

[ix] Loftus, Elizabeth F.: "Do Jurors Talk?" (Trial, vol. 22, 59-60, 1986)

[x] Pew Center, "Internet Gains on Television as Public's Main News Source." January 4, 2011

[xi] Sweeney, Hon. Dennis M.: Worlds Collide: The Digital Native Enters the Jury Box. (*Reynolds Courts & Media Law Journal,* vol. 1, 121-146, 2011).

[xii] Young, Kimberly S. Internet Addiction: The Emergence of a New Clinical Disorder. (*CyberPsychology and Behavior,* vol. 1, no. 3, 237 – 244).

[xiii] The American College of Trial Lawyers have a recommended form, at page 6 of their Jury Instructions Cautioning Against Use of the Internet and Social Networking, which can be found at http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213

[xiv] Shu, Lisa L., et al. "When to Sign on the Dotted Line? Signing First Makes Ethics Salient and Decreases Dishonest Self-Reports." (*Harvard Business School Working Paper,* vol. 11-117, 2011).

[xv] Examples from Florida, Arizona, New York, and other states have been compiled by the National Center for State Courts and can be found at: *http://www.ncsc.org/topics/media-relations/social-media-and-the-courts/state-links.aspx?cat=Jury%20Instructions%20on%20Social%20Media*

[xvi] The Federal Judicial Conference's suggestions instruction can be found at: *http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf*

[xvii] The proposed instructions from the American College of Trial Lawyers can be found at: *http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213*

[xviii] Judicial Council of California, §100 Preliminary Admonitions. Last revised December 2009.

[xix] Diamond, Shari S. "Jurors and the Electronic World." Paper presented at the National Jury Symposium, October 2010

[xx] Timmins, Annmarie, "Juror Behind Mistrial Pleads, Pays $1,200." Concord Monitor, October 9, 2010

[xxi] *http://www.bbc.co.uk/news/uk-13792080*

[xxii] When permitted, jurors write down their questions for a certain witness and give them to the judge, who reviews them with counsel for objections. The permitted questions are then posed to the witness by the judge or counsel. The judge may choose to explain why the unasked questions were not permitted.

[xxiii] Mize, Hon. Greg E. (Ret.), et al., The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report. (The National Center for State Courts, April 2007)

[xxiv] Seventh Circuit Bar Association American Jury Project; the report can be found at: *http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf*

[xxv] Ibid, p. 61

[xxvi] Ibid, p. 62

[xxvii] Diamond, Shari S., et al.: "Juror Question During Trial: A Window into Juror Thinking." (*Vanderbilt Law Review,* vol. 59, issue 6, 1927-1972, 2006)

