



The Dark Side of the Internet: In the Jury Room

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“There is an online quitting-Facebook-for-Lent support group. But how is it possible to communicate support on Facebook without breaking your vow? Serving on a jury is one of those instances when the cell phone and the laptop are best left at home¹.”

Trials have been being disrupted due to the internet from as far back as 2001 according to the Citizens Media Law Project². The difference in our attention to it now is simply due to a dramatic rise in frequency and in media coverage so we all hear about what has happened. The recent proliferation of social networking sites (MySpace, Facebook, Plaxo, LinkedIn, and Twitter, for example) has resulted in a sense of always being ‘connected’. Cell phones are ubiquitous and we can ‘text in’ updates to our status on multiple websites to our friends and followers.

This cultural/experiential shift has posed innumerable challenges for a justice system designed for a simpler time, with news stories of texting jurors, witnesses and even attorneys and judges causing disruptions to the courtroom process. This paper overviews the issues and then identifies strategies for litigators use in taking a modern jury to a fair trial. We will first offer a:

1. brief overview of how entrenched social media has become in our lives and then
2. describe the range of behaviors reported in the media (from attorneys to judges to witnesses to parties to jurors),
3. review the reasons behind these problematic behaviors,
4. examine the efforts made to update jury instructions to include social media use,
5. public reactions to the legal system’s desire to stop this behavior, and finally
6. recommendations on what can be done to maintain a fair hearing of the facts to ensure that justice is done.

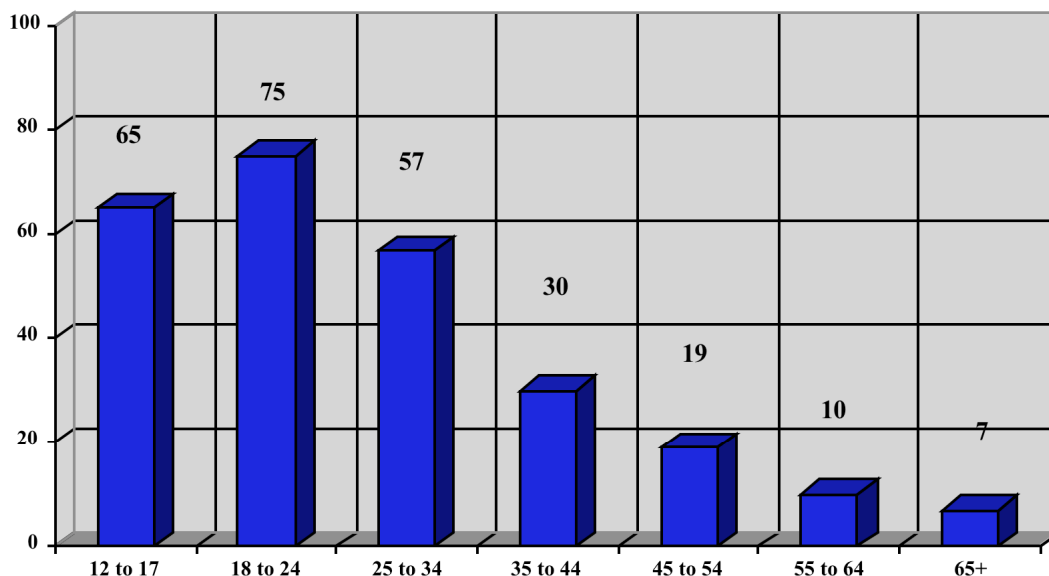
It is amazing how deeply social media has become entrenched into our lives. Adult internet user profiles on on-line social network sites are up from only 8% in 2005 to 35% in January, 2009³. Many of us (more than 34 million American adults) send text messages on our cell phones. The most likely texters⁴ are members of Generation Y, ages 18 to 27.

Courtroom trials⁵ are being ‘tweeted’ live by reporters, 140 characters at a time. Twitter users⁶ are compared to non-Twitter users and found to be more likely to consume news/do research on the go with their internet-enabled cell phones. They are not the only ones, however. In fact, by July of 2009, more than half (56%) of American adults have accessed the internet by wireless means⁷. Cell phone access (32%) is only slightly behind laptop access (39%) and now, on a typical day, 19% of us access the internet on a mobile device. This number may seem low to the uber-connected attorney, but it is up from only 11% in December, 2007—for a growth of 73% during that 16 month period.

An interesting aside: African Americans⁸ are the most active users of mobile internet. 48% have used the internet on a mobile device and, on an average day, 29% go online. Additionally, growth in mobile handheld use on an average day since 2007 among African Americans is 2x the national average—up 141% as compared to the 73% average increase.

Teenagers⁹ check social networking sites repeatedly throughout the day although their parents grossly under-estimate their children’s involvement with these websites. Baby Boomers are making inroads into social networking, but they complain they feel “left out”¹⁰ and that the experience is not targeted to their age group. Contrary to the media reports saying “Grandma’s on Facebook”¹¹, the experience remains largely the province of the young as illustrated by a recent Pew Internet Project¹² report. Use of social media is most pronounced among those 25 years of age and younger, with sharp cut-offs as we age.

Percentage (by age) with social network profiles



This pattern is true among attorneys as well except attorneys seem “more connected”¹³ than the general population. Even with higher use among attorneys in general, younger attorneys are more comfortable with social media than their older colleagues. A recent survey conducted for

LexisNexis reports that 86% of attorneys between the ages of 25 and 35 are members of social networks compared to only 66% of those over age 46.

In short, social media is a fact of life. If the current patterns hold true, we will see increasing numbers of jurors for whom social networking is so habitual and life-integrated, they will be hard-pressed to see the justification for abstaining from “updating their status” during trial. Really. If a burglar can’t resist checking his Facebook¹⁴ status while in the high-adrenaline process of burglarizing your home, what’s to stop a juror during courtroom tedium? And as you’ll see on the following pages, it isn’t just jurors breaking the rules.

Who’s doing it? Attorneys, judges, witnesses, parties and jurors

While maybe we can understand witnesses, parties and jurors communicating about trials on social media—it seems like attorneys and judges should know better! And most do. There are several examples of both judges and attorneys who became ensnared in social media impropriety.

Judges

Like the magistrate in England¹⁵ who got in trouble for tweeting about his cases—seemingly step by step by step. He ended up being turned in by a fellow magistrate who saw the tweets and complained. So, the judge tweeted his explanation: "I didn’t tweet whilst sitting in court but in the retiring room during the break and at the end of the hearing."

Or the judge who met a lawyer in chambers during a divorce/child custody case and then “friended” him on Facebook where they commented on the case via Facebook. The wife in the divorce found out about the “friendship” after the case ended and complained. Oh dear. A public reprimand from the State Judicial Standards Commission. *Ex parte*, anyone?¹⁶

And the judge who had off-color humor on his family’s web server which was not intended to be public but somehow was seen. A three-judge panel admonished him for being “judicially imprudent”¹⁷ in not securing the web server.

Attorneys

Blogging about a “Judge Clueless” and thinly disguised case facts and client identities resulted in this 19-year assistant public defender¹⁸ losing her job.

Another attorney blogged about a case while he was a juror on that case! Forty-five day suspension, \$14K in legal fees and finally, lost his job¹⁹.

A young attorney asked a judge for a delay due to a death in the family. The judge granted the delay but then checked the attorney’s Facebook²⁰ page and saw partying but no real grieving going on. The lawyer sought a second delay. The judge declined and contacted a senior partner in the firm to share her on-line research. The young attorney has since “un-friended” the judge.

And finally, a Florida attorney blogged about a judge calling her an “evil, unfair witch”²¹. He claimed it was “free speech”. The State Supreme Court begged to differ.

Witnesses

During a video deposition, the deponent (in California) and his pro hac vice counsel (in Michigan) were shown only from the waist up. Turns out they were texting “below the waist”²² and PHV counsel accidentally texted plaintiff’s counsel. Court order for the text messages which violated Federal Rules of Civil Procedure.

A mistrial was declared when a Circuit Court judge in Florida discovered a witness texting his boss²³ while still on the stand during a side bar conference. And that’s not all! The same witness had been reprimanded for texting²⁴ another witness in the same case during deposition two months earlier!

Parties

A doctor who blogged under the pseudonym “Flea” decided to blog his own medical malpractice trial. He blogged about the trial, his impressions of the plaintiffs’ lawyer (whom he nicknamed) and said jurors were dozing off. He was on the stand when, in a “Perry Mason moment” the plaintiff attorney said, “Are you Flea?” and he actually admitted he was. The plaintiff’s attorney was obviously prepared to delve into the blog in open court and the case settled²⁵.

The trial of a man being prosecuted for third-degree rape and sodomy ended in mistrial when a juror reported receipt of a text message²⁶ sent from a relative of the defendant. The defendant remains in custody (unless his \$25,000 bond has been paid) and a new trial is scheduled for February 2010.

And finally, a New York model sued a billionaire for pressuring her into sex when she was only 16. Reporters found her MySpace page²⁷ and reported that “she” was in fact, a “he” and was probably much older than 16 at the time of the alleged affair. Her suit against the billionaire fizzled but she then sued the newspaper for defamation. The judge did not support her second suit.

After all that, you may find the stories on jurors to be disappointing! They are, in general, not as colorful as the attorney/judge/witness/parties stories but they have caused a major stir. Juror stories will be presented in two groups: jurors doing ‘research’ and jurors communicating about cases while sitting in judgment.

Jurors using the internet to do research, everywhere, including during jury duty

There are multiple recent cases where we have learned that jurors have done research and sometimes, their research has disrupted court proceedings.

In March, 2009, a federal drug trial was derailed when the judge discovered that 9 of the 12 jurors had done internet research on the case. They were eight weeks in when the mistrial²⁸ was declared. When asked why they did the internet research, one juror replied “I was curious”²⁹.

August, 2008 in England. A judge in a manslaughter trial receives a Google Earth map of the alleged crime scene from a seated juror and a list of 37 detailed questions about case.

Another trial on an allegation of child cruelty resulted with a juror doing internet research³⁰ on the defendant.

Juror research is not always on the internet. Sometimes it's done in the bathroom. The recent Widmer case found jurors experimenting to see how long it would take for human skin to dry. Retrial³¹ scheduled for next year and in mid-September 2009 Dateline NBC³² ran a television show on the case!

Jurors communicating about cases

These are illustrative only. There are other stories floating about the internet but this sample offers a snapshot of how jurors communicate in violation of courtroom rules.

November, 2008: A Facebook poll for English jurors' verdict. A juror was uncertain which way to vote on a jury in a child abduction/sex abuse case so she posted details about the case and then held a Facebook poll to help determine her vote. She was dismissed³³.

September, 2009. Jurors in Pennsylvania had been updating their Facebook pages. Defendant was convicted but lawyers laying groundwork for appeal³⁴.

March, 2009: "I just gave away TWELVE MILLION DOLLARS of someone else's money" tweeted³⁵ a juror in the case against Stoam Holdings in an Arkansas court. Defense asked for a retrial but juror says he tweeted after the trial concluded.

July, 2009: Friending the firefighter. A Bronx schoolteacher-juror sought out a firefighter witness on Facebook while jury was deliberating and issued a 'friend' invitation. Firefighter responded after the trial was over and then reported her. She says "that was a total mistake. I should not have done that".³⁶

We've seen that both people who should know better (judges, attorneys) and laypeople (witnesses, parties, jurors) can, and do, all get caught in the web of social media. It is so easy, so constantly present, we forget the same rules about communication apply to these new forms of communication.

Why is this happening now?

Some would say that people are more self-centered now and do not consider the impact of their behavior on others. This seems an easy explanation (without any empirical support) and the answer is most assuredly more complex than that. We live in an era when access to information is ubiquitous. We are used to having a question cross our mind and checking for the answer³⁷. We do it without thinking. And jurors do too. A recent quote³⁸ in an article on jurors doing research on the internet illustrates the habitual nature of social media in our lives:

"People tend to forget that e-mail, twittering, updating your status on Facebook is also speech. There's an impersonality about it because it's a one-way communication—but it is a communication."

In Harris County, Texas this year, a tech-savvy court administration decided to provide wireless internet access in the courthouse. What good do we anticipate will come from that? When our access to data via the internet is so available, some wonder if it is even possible to control juror access³⁹ to data any longer. And jurors are not allowed to ask questions in trial. Questions do come up. How can they find the answers they believe they must have to understand the facts presented at trial? Google⁴⁰. Is that witness' alibi about time to drive from one place to another accurate? Check Google Maps. Complex technology underlying a patent claim? Simplify it⁴¹ via Wikipedia. Jurors may not see this as 'wrong' but merely clarifying and unfortunately, less tech-oriented judges may not understand⁴² the technology enough to know how to instruct.

The issues we need to address are juror curiosity and juror naïveté about why such behavior is prohibited. There are good reasons for the rules of the legal system but we have to educate jurors and train ourselves to anticipate the questions that will arise and modify our case presentation to respond to them.

Legal system sentiments

The legal system has reacted with distress to the steady stream of social media/social networking incidents within the legal system. The focus has been on revising jury instructions so that jurors are explicitly told to not do research on the internet. Multiple ideas have been proposed regarding modification of jury instructions:

An e-discovery⁴³ blog recommends asking the judge to expand boilerplate instructions to include explicit education about why jurors should not do research (including internet research), what will happen if they do, and that jurors should help the court enforce that restriction.

The Jennifer Strange (water intoxication as a result of a radio station contest) case has resulted in revised jury instructions in a San Diego court that specify "Do not use the internet"⁴⁴ and jurors are asked to sign declarations saying they will not use personal electronic and media devices (including computers, cell phones and laptops) to research or communicate about any aspect of the case.

The FindLaw Knowledge Base offers a "Motion for the Court to Further Issue Preliminary Instruction to Jurors"⁴⁵ which they recommend be given to jurors at each recess and lunch and perhaps even have the entire instruction re-read to jurors at the beginning and end of each day.

"You may not receive information about this case from any source other than what you are presented in this Courtroom concerning the case. That means do not "google" any party or lawyer or court personnel in this case; do not conduct any research whatsoever on the Internet about this case or the parties or facts involved in it; you may not "blog" about the case or events surrounding the case or your jury service; you may not "tweet" about anything to do with the parties, events or facts in this case or your jury service on this case. Do not send any email to anyone conveying your jury experience or information about this case. In the jury room, you are not to use your cell phone at recesses or lunch to call anyone to ask

questions about issues in this case or to report facts about this case. You may not use Facebook, YouTube or any other “social” network on the Internet to discuss your jury service or issues in this case or people involved in the case, including the lawyers. Do not attempt to recreate by experiment at home any evidence which you hear as testimony in this Courtroom. Failure to abide by these instructions could result in your being found in contempt of court, or cause the trial to end.”

A California court had to excuse an entire panel of 600 jurors when several of them admitted they had conducted internet research on a case. Jurors on that panel expressed confusion about whether “not doing research” applied to the internet. San Francisco Superior Court⁴⁶ is proposing a rule that would become operative on January 1, 2010:

"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."

Others have recommended that the detailed instructions about internet device usage be repeated often⁴⁷ and that they be very specific: “No Blackberry. No Google. No Twitter. Nothing.”

The Michigan Supreme Court is the first to ban all electronic communication by jurors during trial. Their new rule⁴⁸, effective September 1, 2009, requires “state court judges to instruct jurors not to use any electronic communication devices while in the jury box or during deliberations. Jurors will also be told that they cannot use electronic devices to obtain or disclose information about the case when they are outside the courtroom”.

Public sentiment

Public sentiment about this issue is mixed. The New York Times article on jurors and the internet⁴⁹ gathered almost 300 comments very quickly. Most of the comments were along the lines of “take away their phones!” but there were two other groups of commenters.

A second group (not as large as the first but substantive) thought that the legal system should figure out how to deal with a new issue because it wasn’t going to go away. They saw the expectation that jurors’ phones would be taken as silly and not really addressing the issue since jurors could simply do research at home after hours.

A small (but very vehement) third group thought that the efforts from the legal system to keep jurors off the internet and from doing research was a systemic effort to keep jurors from learning the truth and that jurors, therefore, needed to dig deeper to uncover the truth. This group was clearly negatively disposed toward the court system, but there was a darker undercurrent of suspicion and governmental interference with real justice.

While the first two perspectives make rational sense, the third is disturbing in the strength of the belief that legal rules in place for years are there to circumvent true justice. While it is a small group, it is a loud and angry group and needs to be considered. A sampling of their comments⁵⁰ follow, but keep in mind that the article to which they are responding was posted on March 17, 2009, at about 2:00. All of these comments were submitted within 60 minutes of the time the article was published, and there were over 300 at the time the comments were closed:

Take their phones

Dave, Brooklyn, NY, March 17th, 2009, 2:22 pm

Simple solution here: confiscate all cell phones, pagers, cameras, or palm pilots before jurors enter the courtroom. C'mon, is this really that difficult a problem to solve?

Steven, Parsippany, NJ, March 17th, 2009, 2:22 pm

That's nice...in a time when Florida along with the vast majority of other states face record deficits, let's cost the state a fortune by breaking a rule everyone who watches television knows. There's no need to change any rules...these people are just idiots. Everyone knows you're forbidden to research a trial you're sitting on the jury of. This is no different from a juror reading an editorial in a newspaper. Now, luckily, we can catch the jurors.

We have to figure out how to make this work

Csdiego, Washington, DC, March 17th, 2009, 2:05 pm

Jurors have always been on their honor not to look up facts of the case. The difference now is that, with Facebook and Twitter, it's easier to find out when a juror has broken the rule. I admit that when I was a juror a few years ago, I broke the rules and went to have a look at the intersection where the crime took place, just out of curiosity. That didn't influence my judgment at all, and the jury ended up hanging anyway.

Jlt, Ottawa, March 17th, 2009, 2:22 pm

This is the new reality. The legal system will have to adjust; it can't just rely on the rules developed for jurors in medieval communities.

They are trying to hide the truth we can't let them get away with it

Bill, Camarillo, CA (Los Angeles), March 17th, 2009, 2:43 pm

If evidence and testimony provided to jurors in the courtroom is incomplete, I feel that any rational and responsible juror would seek additional information on their own. The object of any court proceeding is to ascertain the facts and arrive at a fair judgment using ALL facts obtainable by any means available. If I am ever called and sit on a jury, you had better believe that everything said will be recorded and photographed so I can take it home and do whatever research is required to unravel the case using due diligence.

James, Los Angeles, March 17th, 2009, 2:46 pm

The entire adversarial judicial system is based on the judge and the attorneys being in the know about everything and the jury being in the dark about some things. Why? Does ignorance make for impartiality? Why does a judge know better than the jury what kind of evidence is biased or not? Isn't it problematic when the trier of fact is given limited facts? The whole ancient system is classist. Messy information cannot be pre-sifted into biased and not. It's a mess and that is why there is an enormous amount of injustice.

Suzanne Cordier, Portland, Oregon, March 17th, 2009, 2:48 pm

Fully informed jurors? Oh, no. How will lawyers manage to continue subverting truth and justice now?

Edward Virtually, United States, March 17th, 2009, 2:48 pm

I'd love to know the justification for allowing judges to exclude evidence not challenged by the defendant, as it seems little more than a way to rig the outcome of the trial by suppressing facts inconvenient to the outcome desired by the judge and/or prosecutor.

Recommendations and strategies for addressing the issue of jurors and the internet

The scope of the problem is large and might seem daunting. But there are a number of things that can be done to improve the likelihood that jurors will abstain from doing internet research on the case for which they sit in judgment.

What is inescapably clear is that instructing jurors to avoid internet activity that touches on the case issues is no more effective than a court instruction to be fair-minded. Most do, but as a practical matter many find it impossible. If it is not dealt with in a very pointed and thorough voir dire examination, there are going to be problems. Instructions are crucially important, but are not going to be enough.

1. Revise jury instructions with specific language about electronic device usage (iPhones, Blackberrys, and other smart phones), internet research (Google, Yahoo, Bing, etc.) and social networking applications (such as Facebook, Twitter & MySpace).
2. Repeat the instructions, at the start of the day and the end of the day, at breaks and recesses. Leave the instructions fresh in the minds of jurors.
3. Have jurors sign declarations that they will not research the case details on the internet.
4. Educate jurors on the importance of hearing a case based only on facts presented in court, reporting any outside research or text messages, and to remind each other in the deliberation room that they are to make decisions based only on what is presented as evidence.
5. Encourage jurors to think of the courtroom as a playing field where both sides have agreed to play by a set of prescribed rules. One of those rules is that the party(s) on trial will be judged only by a set of facts that both sides have had an opportunity to examine and challenge.
6. Make it clear that violations of these rules are a violation of law, for which punishment can be imposed. Make it important, not merely polite.

7. Add voir dire questions that address actual juror internet use (will they be likely to violate the rule and/or have they already done so?⁵¹)
8. Ask in voir dire whether jurors would abide by judicial instructions not to do internet research on the case. If a juror acknowledges they could not abide by that instruction, they are a cause strike.
 - a. Note the experience of an attorney in a Kansas City trial⁵²: “During voir dire, we asked whether jurors would abide by instructions to not do research on the Internet, and probably six to 10 potential jurors said they could never abide by that.”
9. Consider what questions our jurors will have as they listen to a story unfold. Jurors today avidly watch courtroom dramas on television and expect a similar approach to storytelling in the courtroom. Sequence your case presentation so that it answers jurors’ questions as they would naturally arise.
10. Be credible and persuasive. This is easier said than done, but there are verbal and non-verbal cues jurors (and the rest of us) see as signs of honesty and candor. Transmit those signs. Jurors want to hear a compelling story but they are also suspicious and vigilant to the possibility of being lied to, tricked or fooled.
11. Learn from pre-trial research. After living with a case for so long, you are often blinded to the reactions “normal people” will have to the case. Do the research. Identify the questions caused by confusion or doubt. And weave the answers into your presentation.

We can’t expect jurors to stop looking for answers to questions that arise for them—they have felt the pleasure of quick and convincing research tools, and many refuse to set them aside. Our mock trial work and post-verdict debriefings of jurors teaches us again and again that jurors take their work seriously and want to do the right thing. We have to take seriously the responsibility of teaching them how to deliberate both effectively and fairly in the 21st century.

Reference List

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[Http://www.insidecounsel.com/Issues/2009/June%202009/Pages/Mobile-Misdeeds.aspx?Page=2](http://www.insidecounsel.com/Issues/2009/June%202009/Pages/Mobile-Misdeeds.aspx?Page=2)

⁴⁸Texts and “tweets” by jurors, lawyers pose courtroom conundrums
<http://www.justice.org/cps/rde/xchg/justice/hs.xsl/10049.htm>

⁴⁹As Jurors Turn to Web, Mistrials Are Popping Up
<http://www.nytimes.com/2009/03/18/us/18juries.html>

⁵⁰Readers’ Comments: As Jurors Turn to Web, Mistrials Are Popping Up
<http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html>

⁵¹Mobile Misdeeds: Jurors with Handheld Web Access Cause Trials to Unravel: When jurors have the Web at their fingertips, trials can quickly unravel.
<Http://www.insidecounsel.com/Issues/2009/June%202009/Pages/Mobile-Misdeeds.aspx?Page=2>

⁵²Lure of Internet has courts worried about its influence on jurors
<http://twincities.bizjournals.com/twincities/stories/2009/05/11/focus3.html?B=1242014400%5E1825130>