

Jurors & the Internet Age

By Margaret M. DiBianca, Esquire

Jurors' misuse of social media is a challenge for practitioners and courts across the globe. Recently, there has been a flood of news stories involving jurors who use social media during trial with significant negative consequences. The question of how to best prevent these problems is far from resolved, but there are some lessons to be learned.

Identifying the Issues

The Chatty Juror

One of the most commonly reported scenarios involving juror misconduct with social media is the juror who posts about the case before deliberations have closed. For example, in June 2014, in Macomb County, Michigan, lawyers for the defendant in a murder trial moved for a mistrial after comments by two jurors were discovered on Facebook. In the motion, the defense alleged that it found the communications on the jurors' public Facebook profiles on the same day the jury returned a guilty verdict. The motion claims that the jury foreman made comments suggesting he was "predisposed to a certain verdict." The motion also alleges that, less than four hours after the verdict was announced, a different juror posted that the case had been in the newspapers, suggesting that he had read newspaper coverage of the trial before the verdict had been reached.

The Inquisitive Juror

One-way commentary is not the only type of juror misconduct involving social media. Jurors also are conducting online research via their smartphones, contrary to the court's instructions. Such was the case following a trial in May 2014, in St. Louis. In that case, the jury awarded the plaintiff, a former St. Louis police officer, \$300,000 in compensatory damages and \$7.2 million in punitive damages after finding that she had been subject to unlawful sexual harassment and retaliation. The defendant-employer's motion was based on a juror's acknowledgment that he used his cellphone during deliberations to search for the phrase, "where do punitive damages go." After reading a Wikipedia entry, he told his fellow jurors that the plaintiff would receive some or all of a punitive-damages award.

Delaware courts are not immune from this trend. In May 2014, the Delaware Supreme Court reversed a judgment entered after a jury verdict in favor of the defendants. The plaintiff appealed on several grounds, including the Superior Court's failure

to conduct any investigation into alleged juror misconduct based on Internet research by one of the jurors.

In *Baird v. Owczark*, one of the jurors attempted to contact the trial judge and the plaintiff's counsel to report that another juror had done Internet research during the jury's deliberations, in violation of the court's instructions. The plaintiff moved for a new trial based on the allegations of misconduct. Following oral argument, the motion was denied without any investigation.

The Supreme Court held that, once presented with evidence of Internet research by a juror, "it is incumbent on the trial judge to conduct an investigation." Such an investigation, the Court went on, is "mandatory" and failure to conduct an investigation constitutes grounds for reversal.

Juror as Victim

But, jurors can be on the receiving end of misconduct, as well. In Georgia in May 2014, a woman was arrested after she agreed to create a fake Facebook profile and send a message to one of the jurors in the trial of her godson. The mother was later arrested and charged with a felony count of criminal attempt to influence a juror.

Addressing the Issues

The problems that arise from jurors' use of social media during trial are not easily solved. Many courts have adopted model jury instructions that expressly address social media in the hopes of preventing the types of communication and online-research issues discussed above. Nevertheless, courts are often faced with having to address jurors who ignore the court's instructions. And, when that happens, the responses have been widely varied.

For example, in 2011, a juror was found to have sent a Facebook friend request to a defendant who appeared in the juror's "suggested friends" list, which is automatically generated. The juror was found in contempt, but was ordered only to serve community service.

In 2012, a juror in Sarasota was sentenced to serve three days in jail after he sent a friend request to one of the defendants and then bragged on Facebook when he was dismissed from serving. Two jurors in London received far stiffer sentences — two months in jail — as a result of comments they posted on Facebook in 2012.

And, more recently, in May 2014, a juror in Boca Raton, Florida, was arrested and charged with contempt for posting

comments about the case on Facebook and denying that he had made the comments when questioned under oath. The presiding judge ordered the juror to remove the comments prior to entering the contempt order.

Risk Management

Attorneys who recognize the potential for juror misconduct in advance of any actual problems are in a far better position to mitigate problems in the event they should arise. For example, counsel should consider requesting jury instructions that specifically address social media misconduct. They also may want to consider whether they should conduct an online search during voir dire. And, once the jury has been empaneled and trial begun, counsel should consider whether they should continue to monitor jurors' online posts. 🗣️

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