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PERSPECTIVE

Protecting the jury process from ubiquitous social media

By Michael D. Kibler and Sarah Luppen

On Dec. 8, an Arkansas juror's Twitter postings during sentencing and deliberation in a capital murder case caused the Arkansas Supreme Court to reverse a murder conviction and death sentence and remand the case for a new trial. Prior to opening statements, the trial judge had explicitly instructed jurors not to "Twitter anybody about this case." The juror's actions in spite of the instruction highlight social media's growing threat to the trial process.

Every day, there is more evidence that jurors are using Google to search the parties and lawyers in the cases before them, consulting Wikipedia to better understand legal concepts or complicated issues in those cases, and visiting Facebook and Twitter to post about confidential jury deliberations. To combat this growing problem, California recently took two affirmative steps: In December 2010, the Judicial Council of California's Advisory Committee on Civil Jury Instructions approved amendments to the pattern preliminary admonitions to now explicitly prohibit online communications and research by jurors; and in January 2012, State Assembly Bill 141 will go into effect, requiring courts to expand their jury admonitions to prohibit electronic and wireless communication by jurors.

These changes mean that, beginning in January, judges across the state must instruct jurors that their oath to refrain from conducting outside research or discussing the case with outside parties includes Internet research and online social networking. However, most commentators agree that jury admonitions regarding the use of electronic media must be specific, explanatory, and include deterrents to be effective. Although a step in the right direction to catch-up to the ubiquitousness of social media, California's approach, much like Arkansas', fails in all three regards.

First, many jurors do not equate tweets or status updates with "discussion," so they are surprised to find that the court's ban on discussing the case includes their minute-by-minute updates to "followers" and "friends." For instance, in the Arkansas case, the offending juror tweeted at lunch on the day evidence was submitted in the sentencing phase, "Choices to be made. Hearts to be broken. We each define the great line." Concerned the tweet offered insight into the juror's thoughts on the sentencing phase, the trial judge confronted the juror with the tweet and asked the juror if he had violated his oath to not discuss the case. Apparently believing his online musings on the death penalty did not constitute a prohibited discussion of the case, the juror told the judge he had "[n]ot discussed any of the case."

Another high-profile example of juror confusion involved former Pennsylvania State Sen. Vincent Fumo's trial for federal corruption, where a juror posted on Facebook about the jury's verdict before it was announced. When asked about his unauthorized disclosures, the juror responded, "What were my postings but announcements?" Given the juror's narrow understanding of the prohibition against "discussion about the case," it is essential that jury instructions be specific in order to prevent what are often unintentional violations.

California's pattern instructions go part of the way toward specifically instructing the jury on forbidden online practices. For instance, the instructions warn that the prohibition against discussing the case "is not limited to face-to-face conversations" and "extends to all forms of electronic communications." The instructions also explain that "use of the Internet in any way" is prohibited, "including reading any blog about the case or about anyone involved with it or using Internet maps or mapping programs...to search for or to view any place discussed in the testimony." However, the instructions are not materially different from those given to the Arkansas jurors inasmuch as they fail to name any social networking sites or search engines by name, and they do not adequately explain that "posting" and "announcing" about the case online and "discussing" or "talking about the case with anyone" are synonyms for purposes of the prohibition.

Second, California's approach fails to take into account research showing that jurors are more likely to abide by an instruction that is tied to policy concerns. To illustrate, a different Pennsylvania court recently declared a mistrial where a juror conducted Internet research on the victim's symptoms in a "shaken baby" murder case. Facing contempt charges, the juror's lawyer told the judge, "She just wanted to be the best juror possible." This example shows that jurors may believe, in good faith, they are helping to "serve justice" by doing their own research, believing they cannot render a "correct" verdict until they have fully educated themselves on all aspects of the case. Others may feel their research is harmless and will not bias them. Still others may feel the plaintiffs' and defendants' exclusive control over the information presented is reason to distrust that information. Out of misguided — albeit well intentioned — "diligence," they go online to verify the lawyers' presentations.

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For all of these reasons, jurors are more likely to comply with an instruction if they understand the reasoning behind it. Yet California's new bill does not require, nor do the pattern instructions provide, an explanation of the policy reasons for prohibiting online research and networking. This failure is a significant hole in California's approach and likely explains why Arkansas' instructions were not successful.

Finally, California's admonitions fail to incorporate deterrents in two significant ways. First, although AB 141 makes a juror's willful disobedience punishable as either a civil or criminal contempt of court, the pattern instructions do not include this critical point. Not only should jurors be educated as to the consequences of their actions, but instructions that do not include these consequences are not taking advantage of what could be an effective deterrent.

Additionally, the instructions do not encourage jurors to informally monitor and supervise each other's Internet use and to report any misconduct. Commentators agree that enlisting fellow jurors in policing compliance can be effective, reasoning that even if a juror decides to ignore the admonition and conduct outside research, the juror will refrain from tainting the rest of the jury with the information for fear of being caught. Indeed, it was a fellow juror in the Arkansas case who reported the misconduct to the trial judge.

In sum, California's approach to online juror misconduct is insufficient and trial judges and practitioners are left to fill in the gaps. Because judges are now required to instruct on the use of social media and the Internet, prudent lawyers would be well-served by proposing their own preliminary admonitions — supplementing the pattern instructions — to include: specific reference to common Internet search engines and social media sites; clear examples of prohibited online activities, including an explanation that such prohibited activities include posts, tweets, or updates on anything from the difficulty of sentencing to announcements that deliberations are over to the fact that you find a particular attorney attractive (or, more likely, unattractive); an explanation that Google searching and tweeting, though seemingly harmless, in fact fundamentally undermine the fairness of trial by circumventing the rules of evidence and introducing potentially misleading, inaccurate, or incomplete information for consideration, without giving the parties a chance to confront that evidence; an explanation of the potential ramifications of even a single tweet — e.g., convictions reversed, verdicts overturned, jurors dismissed, and significant time and resources wasted; and finally, an instruction to monitor each other and a warning that violation of the instruction will subject the juror to civil or criminal contempt charges.

With more robust instructions than California currently requires, jurors are more likely to power off their smart phones, block their emails, silence their tweets and, in so doing, prevent the dreaded #mistrial or #reversal.

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