

Juror, back away from the iPhone!

To the frustration of judges and attorneys, jurors are using BlackBerrys and iPhones to research cases or post updates on trials

By Anayat Durrani

Facebook. Twitter. MySpace. LinkedIn. YouTube. Anyone with a cell phone with Internet access is probably more than familiar with these sites. And while mindlessly tapping away on one's electronic device has become a socially acceptable pastime, for the juror, it is a big no-no.

Jurors attached at the wrist with their phones have wreaked all kinds of havoc in the courtroom, causing mistrials, overturned convictions and delays in court proceedings. Last year a San Francisco Superior Court judge dismissed 600 potential jurors after learning that several of them had gone online to research a criminal case before them.

A federal drug trial in Florida ended in a mistrial last year when nine jurors announced they did Internet research on the case they were hearing. In another case, there were calls for a mistrial after it was discovered that a juror twittered and posted trial updates on Facebook in the prosecution of Vincent Fumo, a former Pennsylvania state senator convicted of

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graft. Incidents like these have even earned themselves a new legal term: "Google mistrial."

Juror use of BlackBerrys and iPhones to research cases or post case updates during trial breaks has frustrated judges and practitioners. Texting, "twittering," and "Googling" has become a problem so much so that in January the federal court' s top administrative office, the Judicial Conference of the United States, released "Twitter instructions" to all federal judges, that are to be read to jurors at the beginning of the trial and before deliberations.

The guidelines state, "You may not use any electronic device or media" related to the case and warns against visits to "any Internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter."

The new rules were necessary explains Judge Amy St. Eve, a district judge on the U.S. District Court for the Northern District of Illinois, who chairs the subcommittee of the Judicial Conference Committee on Court Administration and Case Management that developed the jury instructions. She said the instructions were developed for federal judges to "deter jurors from using electronic technologies to research or communicate about cases on which they serve."

Judge Eve said the guidelines are not mandatory and were created by the committee to "address the increasing incidence of mistrials, exclusion of jurors, and impositions of fines resulting from jurors' use of electronic devices to conduct research on the Internet or communicate electronically with others about cases." She said the rules can "help judges avoid costly mistrials and delays occasioned by these events."

The entire court system is facing a challenge of "an increasingly cynical audience" that the courts hope to control by enforcing a set of rules, says Dr. Joseph A. Rice, from the San Francisco office of the Jury Research Institute.

According to Dr. Rice:

> Ever since the OJ criminal trial our society has learned that trials are not necessarily about the truth – they are about winning. As a result, many jurors feel that the parties – plaintiffs and defendants – control the flow of information to enhance the perceptions of their clients. Jurors, not trusting they are getting a complete story from the attorneys, are driven to go online to Google a term or check out the background of the parties. In the world of instant social networking this becomes even more of an issue as people are compelled to alert their friends and followers to every moment of their day.

In March 2009, the losing party in an Arkansas case filed a motion for a new trial, after a juror tweeted: "I just gave away TWELVE MILLION DOLLARS of somebody else's money, oh and nobody buy [stock in] Stoam [the losing defendant]. Its bad mojo and they'll probably cease to exist, now that their wallet is 12m lighter." The trial court said the tweets were in "bad taste," but did not affect the verdict. The losing defendant has filed an appeal.

While there are instructions for federal courts, there are no nationwide instructions for the state courts, because each state adopts its own set of jury instructions. And many of them have.

Greg Hurley, Management Analyst for the National Center for State Courts, stated:

> Although it does not appear that a significant number of verdicts have been overturned by jurors' unauthorized use of internet and electronic devices, the situation has created enough concern that court leaders in Maryland, Michigan, New Jersey and Ohio felt it was appropriate to create new policies, rules and jury instructions. Connecticut is in the process of developing this type of a rule.

On January 1, San Francisco Superior Court began including such instructions after some of the 600 jurors explained they did online research because there were no specific rules against doing independent research. "You may not do research about any issues involved in the case," the new instruction states. "You may not blog, Tweet, or use the Internet to obtain or share information."

A California legislator even introduced a bill in February that would charge cell phone-happy jurors with a crime. Assemblyman Felipe Fuentes, D-Sylmar, introduced legislation that would amend contempt laws for civil and criminal proceedings and allow punishment of jurors who use electronic and wireless communication to discuss confidential legal proceedings.

Despite new rules from judges, many jurors cannot resist the temptation to Google, Tweet, and blog. There are those moments during breaks in trials or bathroom breaks where jurors will have to resist the temptation to let their fingers do the tapping.

"I find that the biggest problem is that the courts – the judges – do not give jurors the basis for the rules. Simply issuing an order that "Thou shalt not Google, Tweet, etc." does not address the cynicism many jurors have of the system," said Dr. Rice. "Judges must take the time to explain the reasons for the rules and provide examples which allow jurors to appreciate the harm that is caused by independent research. I believe that most jurors will follow the rules – if they understand the basis for the rules."

Dr. Rice added that merely giving orders to jurors only serves to reinforce their views that "jurors are pawns in the system" when in reality they are the "most important participants in the trial."

In one case in November 2009, the jury that convicted Baltimore's Mayor Sheila Dixon communicated with one another through Facebook in violation of Judge Dennis Sweeney's order not to do so during a four-day Thanksgiving break. Some jurors posted their opinions on Facebook about whether the mayor was guilty while the jury was still deliberating. The court will determine if a new trial is needed.

Dr. Donna Shestowsky, a Professor of Law at the University of California-Davis, and a trained psychologist who studies

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juries, said that rules instructing jurors not to do something sometimes backfire. She said the "twitter instructions" appear to fit that paradigm.

"Instructions to disregard evidence presented at trial, for example, have been studied extensively for years and that research has shown that jurors often rely even more on a piece of information when they are expressly told to disregard it than when they are not so instructed," said Dr. Shestowsky. "This type of finding suggests that there is a risk in telling jurors to not do something – that can make them do the forbidden thing more, sometimes quite subconsciously and unintentionally."

Dr. Shestowsky explained that if jurors mine the Internet to find information about the case they are involved with, learn something new about the case or the litigants involved, and then try to ignore that information, "there is ample research support to suggest that many of them will be unable to do this successfully, even if they want to." She said the information they uncover could have an effect on their deliberations in the case "thereby making it less likely that a just verdict will be produced."

San Diego trial attorney Harvey Levine last year dealt with the problem in a different way for a Sacramento civil trial on the death of Jennifer Strange, a 28-year-old mother of three. The incident, well-documented in the media, involved her death hours after drinking large amounts of water in a Sacramento radio station's contest, "Hold your wee for a Wii," where the winner gets a Nintendo Wii. Levine, who represented Strange's son, wanted to prevent jurors from researching the case or looking up water intoxication. Levine persuaded the court to require jurors to sign affidavits, before and after the trial, swearing under penalty of perjury that they did not use electronic media. The family was awarded $16.5 million in the wrongful death lawsuit.

In an age of such technological reliance, incidents of juror use of electronic devices or media may continue to pose problems in the courtroom despite judge rules. But sometimes it is the approach in which the judge or practitioner takes in explaining to potential jurors the hazards of such actions that can make all the difference.

"In the end, jurors need to be treated with more respect for their intelligence and common sense," said Dr. Rice. "The attorney that conveys such a faith in the jury will go a long way in having his or her message heard and accepted."


Durrani

Anayat Durrani is a professional freelance journalist with a Master's degree in Journalism and International Relations. A versatile writer, her work has been featured in publications worldwide, including Cairo's Al-Ahram Weekly, California Lawyer Magazine, Caesar's Player *magazine, and* 944 *magazine, among others.*

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