

Self-service, instant-access society: Social media implications for the jury box

Is Google or Twitter deciding your case? How to disconnect jurors so they pay attention to the evidence

By Teresa Rosado

Whether by choice or conditioning, we have become a society that prefers self-service. We pump our own gas, scan our own groceries, and use self-service kiosks for air travel and hotels. We often become impatient if we are forced to wait for live service. This self-service trend may be just a natural extension of the increasing speed of modern life, but it is clearly driven by advances in technology. One of the most influential outcomes of this trend is our ability to have full access at the click of a button. Today, when we hear something we want to know more about, it is almost instinctual to Google it. And with 74 percent of American adults on the Internet, there is a lot of Web searching going on.[1]

Another characteristic of this instant-access trend is the ability to collaborate and interact with friends and family, as well as people we hardly know. Today's Internet is built on communication, sharing and creativity. There are online video sharing sites like YouTube, online social networks like Facebook, MySpace and LinkedIn, and then there are status update services like Twitter.

The recent explosion of these sites reflects the desire of some people to always be connected. Recent research indicates that while only 46 percent of online American adults use social networking sites, for some this sense of connection has become almost addictive.[2] In March of this year, survey results from Retrevo indicated that not only do adult users check Facebook and Twitter throughout the day, almost half said they check in bed.[3] Forty percent of survey respondents said they didn't mind being interrupted by an electronic message; 32 percent said it was okay to be interrupted during a meal; and seven percent said it was okay to be interrupted even during sex.[4]

Implications for the jury box

Internet use and involvement in social media has become a fact of life. So it is no surprise that this instant-access, always-connected trend has implications for the jury box. This issue first surfaced almost 10 years ago, but has only recently received widespread attention due to the increased number of high profile and disruptive incidents during trials.[5] Here are a few examples. In 2009, nine out of 12 jurors in a federal drug trial in Florida admitted they had done research on the case, despite being instructed not to.[6] They ran Google searches on the lawyers and defendant, read online media coverage of the case, consulted Wikipedia for definitions, and located evidence that had been explicitly excluded by the judge. And it wasn't just the younger jurors that were improperly accessing information. The nine jurors who had done some form of Internet research on this case ranged in age from 20-68.[7]

Jurors have used Twitter and Facebook to send trial updates.[8] They've used Google maps to measure distances between key locations or virtually visit the scene of an accident.[9] Parties, witnesses and jurors have "friended" each other during trials.[10] In a 2008 criminal case in England, a juror even held a poll on her Facebook page because she was undecided during deliberations.[11]

Last year in Maryland at least two convictions were reversed because of juror-conducted research. In a first-degree murder case, a juror was confused about a medical term, so he looked up the definition on Wikipedia. The retired engineer said, "It was just a definition, like going to the dictionary. It was very innocent."[12] And the list goes on and on.

Virtual sequestering?

This Googling habit and the idea that jurors can easily conduct research on their own is terrifying to trial attorneys. Some only want bench trials in the future, and others tout confiscating all technology while jurors serve. But while virtual sequestering sounds like a good idea, it is nearly impossible to stop media savvy jurors.

So, what is currently being done about this issue and what can litigators do next time they have a jury trial? The rules for jury service in state and federal courts are evolving to deal with this 21st century issue. Some courts are banning all

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wireless communication devices in courthouses and jury rooms. But unless jurors are sequestered, we don't know what they are doing after they leave the courthouse. Another problem is that many jurors already perceive jury duty as a pretty big sacrifice, and so taking away their lifeline to the outside world will make them even more unhappy and less willing to serve. It's important for people to be accessible to their children and spouses at a minimum. Judges need to balance new technology with due process.

Judges have long included Internet searches in their traditional warning about seeking outside information during trials. But with the information superhighway now as close as a juror's cell phone, many believe that clearer rules are needed to ensure that tech-savvy jurors follow the "don't read, don't tell" instruction.[13]

Tips for handling social media

Here are a few tips that may help encourage jurors to follow the restrictions on information-sharing and research during jury trials.

• **Request revised jury instructions**. First and foremost, it is essential that the jury instructions adequately address these social networking issues. Following the approach of several state courts, federal courts received new advisory guidelines in January of 2010 that mention common social networking sites by name and ask jurors not to conduct research online. Also included is a laundry list of technologies that jurors should not use. Here is an excerpt from the new instruction:

> You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the Internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom…
> ...You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube.[14]

The thought behind the so-called "Twitter instruction" is that more explicit mention of the various methods and modes of electronic communication and research in jury instructions would help jurors better understand and adhere to the scope of the restriction. The revised instruction is given both before trial and at the close of the case.

• **Encourage jurors to police themselves**. Unfortunately, modified jury instructions are not enough. One of the reasons the electronic media issue is challenging is because it is so accessible and anonymous. Many jurors think there is little risk or harm in going online. Therefore, it is important for judges to not only remind jurors throughout trial of the restrictions on discussing or researching trial details, but also to explain to jurors *why* the restrictions exist. This reasoning may also encourage jurors to better police themselves. Ask jurors to promise in voir dire that if another juror brings information that's not in evidence to deliberations, they will report it to the judge.

• **Ask for signed juror pledges**. In addition to revised instructions, a San Diego court asks jurors to sign declarations saying they will not use "personal electronic and media devices" to research or communicate about any aspect of the case.[15] Jurors sign the declarations, made under penalty of perjury, both before and after they serve.

• **Conduct mock trial or focus group research**. Conducting pre-trial research on your case will help you determine what questions jurors need answered and where they might get sidetracked in their decision making. Once you uncover what potential questions jurors may have, those issues can then be factored into the examination of witnesses. Having a clear presentation of evidence and argument could help reduce the amount of research the jury feels it needs to do.

• **Allow jurors to ask questions during trial**. Another way to plug information holes and discourage juror Googling is to let them ask questions during trial. Studies show that jurors who are allowed to ask questions at trial are more engaged, attentive and empowered. Jurors submit written questions to the court at the end of each witness' testimony. Away from the jury, the judge and lawyers will determine which questions are inadmissible, irrelevant or prejudicial. The judge will ask the rest. A side benefit is that juror questions will clue you in to what jurors are thinking throughout the trial and alert you to any missing information or confusion while there is still time to make changes.

• **Ask specific voir dire questions**. Ask jurors about their use of social media and online research habits during voir dire or with a supplemental juror questionnaire. Find out if they have a habit of posting to Twitter, Facebook, blogs, etc. Then ask if they will abide by instructions not to use the Internet for information sharing and research. Some may admit they will have trouble following the court's restrictions and be excused for cause. This information will also help you know which jurors you should keep tabs on during trial. For example, Twitter users, compared to non-Twitter users, are found to be more likely to consume news and do research on the go with their Internet-enabled cell phones.[16]

And don't forget to ask the jury pool about any Internet research they might have already done on the case. In San Francisco Superior Court last year, a judge dismissed 600 potential jurors after several acknowledged going online to research the criminal case before them.[17]

• **Use social media as an investigative tool**. It is probably unrealistic to think your

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jurors will not seek any outside information on the parties or the case, so you need to be prepared. Do some research of your own to find out what possible case-related information the jurors might find. Plaintiffs, defendants, witnesses, and experts may have social profiles and you should know what is in them.

You should also be aware of any media coverage of the case or parties. Track search terms that could be commonly used if a juror resorts to independent research. Google Alerts is a great way to be instantly aware of all news or information about a client, issue or adversary. You will be automatically notified when new content on the Internet matches the search terms you select. Find out what key, case-related definitions are provided on Wikipedia that could be searched. All of this information can help inform your research and trial strategy.

Concerned about information-hungry jurors finding out too much information about their lawyers or their firm, some law firms have started maintaining two Web sites: one for normal times and a separate one for pretrial and trial. You need to think "outside the jury box" in terms of what information jurors may be exposed to and how that may influence their decision making.

• **Research prospective jurors**. If possible, you or a member of your trial team should check blogs, social media pages and Web sites of prospective jurors for information that may assist you during jury selection. If it isn't possible to do this research beforehand, by all means research your jury panel as soon as you can. Social media may be used to verify juror answers on questionnaires or to get a clearer picture of juror beliefs. During trial check Twitter postings, Facebook entries, juror Web sites, blogs, etc. for information that might be circulating in the virtual world about your case.

While only a few state courts have declared mistrials so far, juror use of social media during trial is a growing problem. The courts are working on methods to help deter jurors from using electronic technologies to research or communicate about the cases on which they serve. The challenge for modern jurors is moving from a world of complete transparency in their everyday lives, to one of total secrecy in the courtroom. That is why judges need to be more diligent in not only instructing jurors about the restrictions on these technologies, but also in explaining the reasoning behind them. Today's jurors will have a propensity to find answers to their questions. Litigators need to understand how jurors use technology and social media as part of this self-service, instant-access trend, and then develop strategies to deal with the implications.

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