

SEPTEMBER 2011

# Millennial jurors and the Internet

## *The Internet brings instant information to jurors that can lead to big problems at trial*

**By Hon. Jacqueline Connor**

There are daily references to the differences between the generations. Much is cultural, much relates to technology, and much relates to the interaction of the two. A recent article in the LA Daily Journal referenced the generation gap in the legal profession[1] and pointed out the disconnect that occurs when a "Millennial" (born between 1980 and 1998) actually prefers technological communication to face-to-face contact. The author, Wendy Behan, describes the sense of disrespect experienced by a Baby Boomer attorney who had asked an associate to come to his office. The Millennial having sent an immediate text "What's up?" feels he has shown his responsiveness. The generations simply don't speak the same language.

The impact of technology shows up not just with communication but also with perceptions. The Millennials live and breathe instant information access, which directly affects their sense of world and their sources for information about their world. Is this a problem?

### Texting, tweeting, posting, blogging

In one short month in the Los Angeles Superior Court recently, one judge was advised that a juror was tweeting about the trial and had even posted strictly-forbidden photos of jurors in the court hallway on his Facebook page. His actions were discovered when someone who followed him on Twitter was unsettled about his blatant disregard for the restrictions of jury service and contacted the court.

Another judge was contacted by jury administration officials when a journalist doing research on jurors' use of the Internet stumbled on a juror posting while sitting as a juror. In another case, a juror had been excused but his postings continued with fictitious details about jury deliberations. In a pending high profile case, several jurors were caught texting about the case during voir dire despite multiple strict admonitions. More than one had to be escorted out and confronted, only to return to the assembly room and continue the surreptitious texting. In another, a judge thought to Google a defendant ready to begin a complex criminal case, and found that the second Google entry on the first page was the defendant's prior record and the third entry was his registration as a sex offender. In a civil case of elder abuse, it came to the court's attention as jurors were being selected that the plaintiff had posted several videos and entries on YouTube, dramatizing the alleged abuses by the defendant convalescent home.

### Justice and the Internet

Is this a problem? If I was about to start a trial tomorrow and "justice" was in the hands of 12 strangers, I would be shaking. And it is not limited to Millennials.

The underlying dynamic that leads to jurors exploring the Internet despite explicit admonitions, threats and explanations, seems to consist of a general distrust of authority, the increasing ease of focused research available, the accessibility of different forms of technology (expanding by the minute), and growing psychological expectation of immediate answers.

The various ways in which this dynamic impacts the operations of a trial are fourfold, at least as of this count. These include not only direct actions by jurors themselves, but actions that are designed to influence jurors. They appear with problems of communication and expressions by jurors themselves (tweeting, texting, posting, blogging comments and observations about their jury experiences or the trial). Secondly, they involve the problem of jurors actively researching their case (looking up words, researching issues, Googling the parties, the experts, the judge, the witnesses or the lawyers). Thirdly, courts are seeing inevitable problems with jurors sensitive to media attention from high profile cases (generating a stake in the outcome). Finally, there are examples of manipulations of the Internet to potentially influence jurors (posting alleged confessions of a party while the party is on trial; posting inflammatory videos on YouTube.)

### The biggest danger

A nonexhaustive search of the Internet found references to a number of studies and statistics, most likely outdated as of this writing. An English study from February 2010 found that five percent of jurors admitted looking up items on the Internet during trial

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while 15 percent admitted looking in a high profile case. Sixty-eight percent of those who searched the Internet were over 30. An October 2010 U.S. report found that 4.1 billion text messages were sent daily in the United States (amounting to an average of 12 texts per day for every man, woman and child.) A more recent Nielsen poll in October 2010 found that the average teen sends out 3,339 texts per month. An August 2009 report found that 22 percent of teens checked their social sites ten times daily. An August 2010 study found that Web users spent 41.1 million minutes on Facebook.

An Alabama lawyer in a litigation firm I spoke to said that his firm would switch Web sites whenever one of their lawyers was in jury trial. Jury consultants caution their clients who have Web sites that promote heavy marketing.

### How Facebook impacts decisions

Social networking is habit-forming and life-integrating. The Los Angeles Met News in January 2011 referenced a finding that 10 percent of college students think it is ok to text during sex. A 19-year-old Pennsylvania teenager got caught when he was texting in the midst of committing a burglary. In North Carolina, a judge and lawyer friended each other while engaged in a family law case (the judge was removed from the case and reprimanded by the local judicial commission.) A doctor in a medical-malpractice case, calling himself "FLEA" blogged about his trial, commenting on strategy, his observations and other ruminations about the ongoing trial. He was caught on cross examination as he had to concede he was indeed "Flea." A San Diego juror, not disclosing that he was an attorney, blogged throughout his trial in 2006. The conviction on the trial he was serving on was overturned; he was found in contempt, suspended from the bar and hit with substantial legal fees. An Arkansas juror twittered that he gave away $12 million of someone else's money.

The problems with expression and communication by jurors during trials are problematic enough, but the aspect of researching while on jury service is more than unsettling.

An English juror polled her followers on Facebook asking them to weigh in on what they thought she should vote on a verdict. A Florida juror in a manslaughter case in 2010 looked up the meaning of "prudent" on her iPhone. A Nevada foreman in 2010 searched online for types of injuries to child sexual assault victims. A juror in a capital case researched the backgrounds of other defendants on death row. In another capital case, a juror in a shaken baby case researched issues of retinal detachment. In other criminal cases, jurors looked up the definitions of reasonable doubt and rigor mortis. An award for $104 million was challenged when it was determined that jurors had researched groundwater contamination issues online.

New trial motions have abounded, some granted and some denied. Some judges find the transgressions simply bad taste. Convictions have been overturned. Twitter postings in post-trial motions have been provided with time stamps indicating exactly when the tweets were sent. Jurors have been fined; others ordered to write essays. In another state, a juror was fined substantially for the costs of a mistrial, though that consequence resulted in a scathing editorial in the local paper the next day. One pending matter currently involves a fight now before the California Supreme Court regarding a trial court order to turn over Facebook postings. In that particular case, the errant juror is refusing, claiming that access would expose his children and family to danger from the gang defendants whose rights were allegedly violated by online postings.

These transgressions in the face of admonitions are ubiquitous.

### Why jurors persist in using high-tech during a trial

Jurors say they thought they were told not to blog but the judge never said they could not tweet. They claim they are curious and are determined to be the best juror possible. One blogged that "any responsible and rational juror would seek additional information on their own…the object of any court proceeding is to use all facts obtainable by any means….if I ever sit on a jury, you better believe I will do whatever research is required to unravel the case using due diligence." Jurors believe facts are suppressed to exclude evidence "inconvenient" to the judge and lawyers. Some feel they know they are being Googled so of course they can Google as well. Others don't see going online as doing "research" and don't see such efforts as "discussing" the case.

Meanwhile, the power of the Internet in "exposing the truth," whether one is viewing Arab Spring or China or Africa, is regularly on the big screen on a daily basis.

And what can jurors do with net access? Crime or accident scenes can be viewed. Google maps can be used to check travel times and compare these with alibis. Technology can be checked on Wikipedia regarding patent claims. Definitions of technical terms can be found. Witness backgrounds and CVs can be compared. Expert qualifications can be plumbed in more depth. Sentences for crimes can be determined. A defendant's prior record can be viewed. Court filings and attorneys' motions on various pieces of evidence can be accessed. Sex offender registration can be retrieved. Jurors can also videotape a trial, a witness or other jurors on their smartphones. Jurors can achieve instant stardom by texting or tweeting during a trial, high profile or otherwise. Jurors

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can even post inflammatory items on their own Facebook pages in order to manipulate the parties in order to avoid jury service. Videos on jury nullification can easily be found. Jurors can find planted YouTube videos or other facts about a case.

### So...what is there to do?

Google yourself, your witnesses, your clients, and issues in the case to be alert to potential danger. Courts can consider giving better and more frequent admonitions. Cell phones can be confiscated during sessions. One attorney had jurors sign a statement under penalty of perjury before and after a trial that there was no Internet use connected with the trial. Jurors could be given a snitch instruction to advise the court if any other juror violates the rules. Online IDs or passwords of jurors could be collected during the trial. Jurors can be sequestered. Perhaps the most radical response is to embrace the new technology.

None of these solutions is particularly foolproof and some are simply not palatable. Jurors can always look up something once they get their cell phones back. They can go further underground in their efforts. Certainly better questions during voir dire can be designed to ferret out those who simply cannot forego the constant connection with the net.

An effective question during jurors' first appearance in court would be to have the judge ask how many jurors have already posted, texted, tweeted or blogged about their jury duty. In voir dire itself, jurors might be asked how many texts are sent and/or received in a normal day, how they get information, whether they have ever posted a YouTube video, and how comfortable they are completely cutting off Internet access with respect to any connection with their jury service and trial. These questions may disclose those who may be the most likely offenders. Certainly, the first admonition must be given before jurors are excused for the first recess.

A review of a party's entire trial strategy is highly recommended. Allowing jurors to ask questions should be absolutely mandatory. Giving them a glossary of terms used in the trial is very helpful. Paring the trial to avoid repetition and avoiding consuming time with undisputed matters and keeping the trial as short as possible will keep jurors engaged. Expedited jury trials are an option where the issues are limited. Letting jurors know they can be tracked is something to consider. While the court cannot track jurors, many of the transgressions have in fact been "outed" by journalists and public readers of the postings. Jurors should be advised of the consequences of misconduct, though there are no real penalties to the jurors other than to be excused.

The most effective technique available appears to be an explanation of the costs and reasons Internet access relating to a trial is prohibited. Convincing jurors why this is important is a more effective technique than threatening with empty threats. A proposed judicial instruction might be:

*Ladies and gentlemen, we are going to start the process of choosing jurors. You will be the judges of the evidence in this trial. In getting this case ready for you today, each side has had the opportunity over the last several months to make sure that only legally admissible evidence is given to you and that any evidence offered to you as judges is done with both sides having had the chance to challenge or support it. It is and has been my role, as the judge of the law, to make decisions on what evidence is admissible and can be presented to you, and what cannot.*

*The reason I am telling you this is because it means that while serving, you cannot, you may not and you must not use any form of electronic communication or research on your own. It includes looking up information, even the definition of a word used, as well as simply talking about the case before it is over.*

*There are very good and powerful reasons our courts are set up in this way and the Constitution guarantees this protection. Before you came into this courtroom, evidence that either side wanted to present could be tested. It could be shown to be right or wrong. It could be investigated, questioned, contradicted or supported. Just as neither side is allowed to "sandbag" the other with secret or surprise evidence, neither can jurors "sandbag" the people who have come into court seeking justice. Having even one juror make a decision from information gathered in secret violates the rights of both sides, and undermines the public process guaranteed by our Constitution.*

*A violation of this order can result in an unjust verdict or a mistrial, causing everyone to start the trial again from the beginning. This is not just. It can also be very expensive financially and emotionally for the parties and for the taxpayers, namely you and your neighbors. It can also lead to a finding of contempt of court.*

*Besides being a violation of important guarantees of our Constitution, it would be completely and terribly unfair to the very people coming to our courts for justice.*

*I need to emphasize that this restriction not to look things up or talk about the case, is not limited to face to face conversations, written dialogues or even monologues. It includes every form of electronic communication. While you are here as a potential or selected juror, do not use any electronic device, or media, including cell phones, Internet chatrooms, blogs or Web sites, any social networking sites or online diaries, to send, post, text, twitter or receive any information about this case to or from anyone. This includes an order not to go to Internet maps or mapping programs or any other way to search for or view places discussed in the trial. It also includes an order not to photograph or videotape any person or events involved in this trial, in the courtroom or outside hallways.*

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*As all of you already know, some of what is available on the Internet is inaccurate, misleading or presented in unrelated contexts. Information, even if accurate, can be inflammatory, prejudicial or unrelated to the issues you are here to decide as neutral, dispassionate judges. Also, some information may simply not be legally permitted on the issues you will be deciding. It is simply not fair to the parties and to the system, to have even one juror making a decision based on something discovered or communicated outside of this courtroom that the parties never even knew was deciding or influencing the fate of their case.*

*I realize, especially for some of you who have grown up with the Internet, that searching the Internet and doing instant research is easy and as routine as breathing. This jury service may be the only place and time in your lives when you must not access the net while you are doing something. It is available when you are in schools, businesses, social occasions…anywhere and everywhere. I also know from many years on the bench that jurors are more determined than I have ever seen before, to make sure that they get it right. The right thing in this courtroom is to make sure that all jurors see and hear all the evidence, at the same time. This is the way to keep this trial fair.*

*I also am guessing that a number of you have already posted something on the net about being here on jury service today. That must be your last posting or comment until you are released from this trial.*

*Does anyone have any questions about this?*

A compelling judicial admonition is available online at http://www.ncsc.org /topics/jury/jury-selection-trial-and-deliberations/resource-guide.aspx. Scrolling down this Web site to jury instructions provides a link to a video of Judge Shelton speaking to jurors in a convincing and persuasive manner.

This is a new world. Not being prepared can be fatal.


Connor

*Jacqueline Connor, a USC graduate, was first appointed to the bench in 1986 and is currently assigned to civil trials in the West District. A successful mediator as well as an expert in jury management, she has taught audiences nationally and consulted internationally. She was named Judge of the Year in 2000 by the LA County Bar (Criminal Section) as well as the Century City Bar, 2006 Outstanding Jurist of the Year by the LA County Bar, and was listed in* Lawdragon's Leading 500 Judges Nationwide *and the* Daily Journal's Top 100 Lawyers in California in 2007. *She has settled hundreds of cases and published in journals, newspapers and news magazines locally and nationally.*

## Endnote

[1] "Generation Gap in the Legal Profession" Wendy Behan Los Angeles Daily Journal Perspectives May 2, 2011

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