



Jury News

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Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards

In the past few months, we have heard numerous stories about mistrials and appeals from jury verdicts that resulted because one or more jurors used the Internet to obtain ex parte information or to communicate with outsiders. In Miami, for example, a juror sent a number of “tweets” describing his deliberation experiences, including one that boasted of “giving away \$12 million of someone else’s money.” In another case, the trial judge was told that one of the jurors had used his BlackBerry to look up information about the criminal defendant, including previous criminal records and media reports about the case. When the judge questioned the jurors about the impact that this information might have had on the jury, he discovered that eight of the other jurors had also engaged in their own Internet research despite an explicit admonition not to do so. Examples of juror misconduct via technology have become so widespread and alarming that a new expression has developed to describe the problem: Google mistrials.

Concerns about this latest variation on juror misconduct are two-fold: jurors may use the Internet to obtain ex parte information about the case without the knowledge of the court or trial counsel, and jurors may violate the privacy of jury deliberations by communicating with outsiders. Both of these concerns are as old as jury trials themselves, but the ubiquitous nature of modern Internet technologies seems to give the problem a more ominous cast of rampant juror disregard for basic rules of trial conduct. Proposals to prevent these problems run the gamut from better instructions to confiscating juror technologies at the courthouse door to complete juror sequestration. Before looking at the merits of any of these proposals, it is useful to first pinpoint the nature of the problem. Is it the technologies themselves? Intentional

recalcitrance by tech-savvy jurors? Or is it some combination of the two that contributes to the apparent refusal of jurors to follow a few simple rules?

With respect to jurors’ communication with outsiders, a useful place to start is to ask whether the communication would constitute juror misconduct had it been done using non-technological means. For example, if a juror “tweets” about the conditions of the jury assembly room, the long wait with no seeming court activity taking place, and other frequent (and too often legitimate) complaints of jurors, why should we be any more alarmed than if he or she simply complains to their fellow juror sitting in the adjacent seat or to their spouse or family members when they return home at the end of the day? The communication does not jeopardize the juror’s impartiality or communicate case-specific information. Similarly, if a juror blogs about the jury service experience, including reflections about the trial and jury deliberations, after the trial is over, is this any different from the juror writing a newspaper editorial or even a full-length book about their experience?

Juror research about case facts is a more troublesome issue because, by definition, it is case-specific and can introduce inaccurate or prejudicial information to jury deliberations that have been intentionally shielded from jurors for legitimate reasons. Jurors want to do their best to render fair and accurate verdicts, but their frustration with evidentiary restrictions on information can sometimes lead them to inappropriate activities. The convenience of Internet technologies to engage in those activities — Google Earth that permits jurors to view the traffic intersection where an accident took place or www.dictionary.com to look up the definition of an unfamiliar term in the jury instructions — makes it much more difficult for courts to police juror behavior during trial and deliberations.

Like the Luddites of old, however, it is deceptively easy — and incorrect — to believe that simply barring these technologies at the courthouse door is sufficient to prevent incidents of juror misconduct. Overreaction to the potential risks of juror access to technologies fails both to recognize and take advantage of the self-policing behaviors of trial jurors while punishing jurors who rely on these technologies for legitimate purposes. These technologies should routinely be permitted to jurors in the jury assembly room. They allow jurors to work productively and offer harmless ways to relieve the boredom and anxiety that often accompanies jury service. Any constraints on juror access to these technologies should only apply to jurors during jury selection, trial, and deliberations. And, to use a legal term of art, those constraints should be the least restrictive available to prevent jurors from accessing ex parte information or communicating with non-jurors during trial and deliberations.

Better Solutions

A key characteristic of American culture is the extraordinarily high regard for personal freedom. Americans have never been wont to acquiesce blindly to arbitrary rules, particularly those imposed by government. Members of the Gen X and Gen Y generations are even less likely to do so than their parents. So although jurors are remarkably good about following instructions, and making sure their fellow jurors do likewise, they do require a clear and persuasive explanation for the rules themselves. This is particularly important with respect to modern communication technologies, which have become so second nature that many individuals do not fully appreciate their social meaning. For some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication. Juror education at every stage of jury service should be the first and foremost preventative measure against Google mistrials.

Juror Orientation

Every court should have a clear and consistent policy on juror access to communication technologies, and information about that policy should begin with juror orientation and then be repeated frequently throughout each juror's experience. Most juror orientation videos and DVDs predate the Internet age, so information about communications technologies must be provided orally by jury staff during the morning orientation session as well as in pamphlets, brochures, and booklets about jury service. If the policy permits jurors to use these technologies in the jury assembly, tell them so, but be sure to also explain any policies related to juror use of these technologies during jury selection and trial. Consider, for example, the following statement, which includes both the policy and the justification for the policy:

All cellular telephones, PDAs, BlackBerries, laptop computers, and other communication technologies **MUST** be **TURNED OFF** when you are in the courtroom for jury selection. The judges need to have your full attention so that you don't miss important information about the case or distract others from hearing that information.

Jurors should be reminded of the policy and given an opportunity to turn off these devices before leaving the jury assembly room for jury selection.

Voir Dire

Once the jury panel has arrived in the courtroom for voir dire, either the judge, the lawyers, or both should use the jury questioning process to identify tech-savvy jurors and to educate and raise awareness of the circumstances under which use of these technologies is inappropriate. For example, the judge or lawyers might ask the following of prospective jurors:

- Do any of you routinely use any of the following communication devices: cellular telephone, PDA or other BlackBerry device, or laptop computer?

- Do you have an email account?
- Do any of you have a Facebook, MySpace, LinkedIn, Twitter, or similar social networking account?

It should go without saying that the judge and lawyers should know what these technologies are and how they are used, particularly insofar that new variants on these technologies are being developed almost daily! It is very difficult to frame intelligible questions for jurors if the questioner does not fully understand what he or she is asking about or, for that matter, the responses of individual jurors to those questions.

In response to affirmative answers from jurors, the judge or lawyer should then explain that the individuals who are selected as trial jurors in the case will not be permitted to use these types of communication technologies either to conduct their own investigations or to inform others about the case. The explanation should also provide the reasons for the prohibition — namely, that if the juror uses these technologies to do their own research about the case, they might run across information that is inaccurate or highly prejudicial to the litigants; the judge and lawyers would have no way to know that this has happened nor have the ability to correct it. Similarly, jurors cannot talk with others until after the verdict has been delivered to prevent them from hearing opinions of family, friends, or blog lurkers that might influence their verdict. The judge or lawyer should then ask each juror whether they will be able to abide by those rules. This dialogue with prospective jurors makes them aware of the legitimate reasons behind these rules and provides other jurors with persuasive arguments with which to police each other and, in the worst case scenario, to ignore “information” provided by a misbehaving juror.

Jury Instructions

After the jury has been selected and sworn, the jurors should be admonished about all restrictions on their activities during trial and deliberations, including a repetition of the admonition about using communication technologies. The New York Committee on Criminal Jury Instructions has proposed the following instruction, which I recommend to you as a model:

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.
2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.
3. You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.
4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use Internet maps, or Google Earth, or any other program or device to search for and view any location discussed in the testimony.
5. Do not read, view, or listen to any accounts or discussions of the case reported by newspapers, television, radio, the Internet, or any other news media.
6. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or source.

In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, Internet chat or chat rooms, blogs, or social Web sites such as Facebook, MySpace, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case, on any device or Internet site, including blogs, chat rooms, social Web sites, or any other means.

You also must not Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair, and only you have promised to be fair; no one else has been so qualified.

Our law also does not permit jurors to converse among themselves about the case until the court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place

is in the same condition as it was on the day in question.

Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Finally, our law requires that you not read or listen to any news accounts of the case and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

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