

SOCIAL MEDIA IN THE JURY ROOM 2009

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I particularly liked the line in the recent “chic” flick – *He’s Just Not That Into You* – when Drew Barrymore’s character laments that between email, cell phones, texting, Facebook and other hallmarks of today’s world of technology, she could be dumped at least eleven different ways.

No one needs to be reminded of the stressful number of emails, voice mails, texts, and other “messages” which await them each day in their office in the practice of law. But how is this translating to jurors in the trial arena?

Some of you have read stories of jurors “blogging” and what an uproar this has caused Courts in the face of motions for mistrials, new trials, curative instructions and other sanctions.

It seems as if 2009 has caught up to Courts and Judges, and the usual “do not discuss the case among you” is grossly insufficient. It also seems that prudence mandates that lawyers take to heart the extent at which these jurors use the Internet and file what I have designated as the “Motion for the Court to Further Issue Preliminary Instruction to Jurors.” Of course, when the jury is impaneled, the Judge will tell the jurors not to discuss the case among them or others or read any media, listen to television about the case, visit the scene of the incident, begin deliberations and other preliminary cautionary instructions. I suggest that a Motion needs to be submitted to the Court to instruct the jurors with the following mandates:

You may not receive information about this case from any other source other than what you are presented in this Courtroom concerning the case. That means do not “google” any party or lawyer or court personnel in this case; do not conduct any research whatsoever on the Internet about this case or the parties or facts involved in it; you may not “blog” about the case or events surrounding the case or your jury service; you may not “tweet” about anything to do with the parties, events or facts in this case or your jury service on this case. Do not send any email to anyone conveying your jury experience or information about this case. In the jury room, you are not to use your cell phone at recesses or lunch to call anyone to ask questions about issues in this case or to report facts about this case. You may not use Facebook, YouTube or any other “social” network on the Internet to discuss your jury service or issues in this case or people involved in the case, including the lawyers. Do not attempt to recreate by experiment at home any evidence which you hear as testimony in this Courtroom. Failure to abide by these instructions could result in your being found in contempt of court, or cause the trial to end.

A summary of this instruction should be given to the jurors at each recess and lunch, and perhaps even the entire instruction be reread to the jurors at the beginning and end of each day.

If seemingly drastic steps such as this are not taken by the Court, more instances such as the Motion for New Trial filed in Pennsylvania involving State Senator Vincent Fumo's trial will be on the rise. In that case, a Motion for Mistrial was made alleging that one of the juror's had posted on Twitter and Facebook, telling readers about a "big announcement" that was forthcoming and the length of the jury deliberations, among other details. After Fumo's conviction, the defense announced they plan to appeal based on this juror's actions.

Similarly, in Arkansas, a Court has been asked to overturn a 12.6 million dollar judgment alleging that a juror used Twitter during and after the trial, demonstrating his bias and belief that the defendant had not been given a "fair shake." One juror in England even held a "poll" on her Facebook page to help her with her deliberation when she was undecided.

The *New York Times* reports that recently a juror in a federal drug conspiracy trial in the state of Florida admitted to researching the issue on the Internet and sharing his findings with other jurors in the case who had also been doing the same thing. Obviously the use of computers, iphones and blackberries is stirring up the Court system and frustrating Judges. Some Courts, such as the U.S. District Court in the Western District of Louisiana, are even being called on to ban cell phones completely in courthouses to prevent this conduct. Signs are being placed outside jury deliberation rooms to the effect that phones, pagers and PDA's or any wireless communication device are not allowed in jury deliberation rooms. Phones are being confiscated and jurors are being called on to appear before Judges to answer for their conduct. Of course, unless sequestered, this does not tell us what the jurors are doing after they leave the courthouse.

Jurors must understand that they may think they are helping, but they are hurting the case and our system of juror conduct when they try to determine distances on Google maps or research a medical condition alleged in a malpractice case or any number of instances found in Courts around the country recently.

In fulfilling jury service, jurors must base their decision on only the evidence presented them in Court – not from extraneous material. When jurors blog, also, they often opine as to one side or the other making one of the parties subject to prejudice. See *United States v. O'Brien*, 972 F2d 12 (1992).

It is common that counsel in a trial are on the Internet just looking for these juror blogs or "tweets," and the issue continues to surface as one with potential prejudice, and one disruptive of the Court proceeding.

Attorneys are charged with maintaining the appearance of impartiality, as are judges. It is mandatory, therefore, that judges pay attention to the actions of these jurors, anticipate

what could happen after they go to their homes and instruct the jurors properly before rights are diminished and cases are won or lost based on facts not properly in evidence.

The Supreme Court in Missouri has sanctioned such an instruction as is discussed, and other Courts are beginning to institute similar expanded cautions to the jurors.

Often, Judges do not sometimes use the social networking sites - they do not "tweet," text, or have a site on MySpace. It is incumbent upon the lawyer to try to keep the jurors focused on only evidence presented during the trial of the case. But one will always wonder as you look at the twelve (or six) sometimes blank faces of your jurors: Is technology just too tempting?