

Social Media and Trial by Jury: Identifying Problems, Designing Solutions

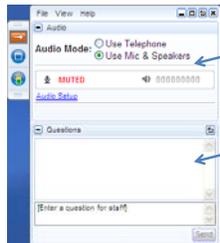
The Hon. Gregory E. Mize
The Hon. Dennis Sweeney
Prof. Caren Myers Morrison



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Social Media and Trial by Jury

Identifying Problems
Designing Solutions



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Background: The Adversarial Model of Trial by Jury

In both civil and criminal cases:

- Parties control the presentation of evidence
- Long-established rules of evidence govern its presentation
 - Admissibility is determined by the judge
 - The jury is not to consider any extraneous information
- Jurors withhold judgment until the end of the case
- Jury deliberations are secret and sacrosanct.



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Introduction

Internet surfing is pervasive these days, at work, at home, at play—and at the courthouse. But our obsession with hand-held devices presents challenges for the management of jury trials.

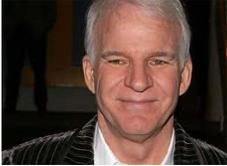


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Steve Martin on Twitter

- On December 20, 2010, Steve Martin, the comedian, was called for jury duty. Here are some of his tweets from that day:
- 12:10 p.m. “REPORT FROM JURY DUTY: defendant looks like a murderer. GUILTY. Waiting for opening remarks.”





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Steve Martin on Twitter

- 12:15 p.m. “REPORT FROM JURY DUTY: guy I thought was up for murder turns out to be defense attorney. I bet he murdered someone anyway.”
- 12:41 p.m. “REPORT FROM JURY DUTY: Prosecuting attorney. Don’t like his accent. Serbian? Going with INNOCENT. We’re five minutes in.”
- Turns out Martin wrote the tweets while waiting to be selected, not from any courtroom.

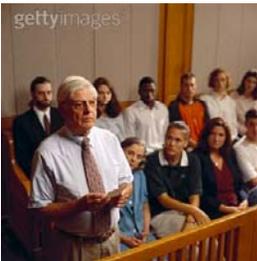




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Questions posed



- What can bench and bar do to deal with this brave new world of social media communication?
- Can we accommodate the proper use of texting, tweeting, and online research during jury trials?



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Two primary issues with juror internet use

- Information coming into the jury box
 - Sharp rise in unauthorized juror research, particularly online
 - Jurors now have instantaneous access to information that might have been barred from trial as irrelevant or unfairly prejudicial
- Information coming out of the jury box
 - In recent cases, jurors have been conveying information about their service through blogging, tweeting, and posting updates on Facebook.



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Social Media vs. Constitutional Guarantees

- The problem is particularly acute in criminal cases.
- The Sixth Amendment provides that in “all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”
- How can a defendant confront information that the juror obtains over the Internet rather than in open court?



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Social Media vs. Constitutional Guarantees

- The Sixth Amendment provides that in all criminal prosecutions, “the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”
- An impartial juror is one who has not prejudged the case.
- Impartiality may be tainted by erroneous information, or by information that, while true, has been ruled unfairly prejudicial.
 - The information online may or may not be true.
 - It may affect a juror’s view of the case and compromise her impartiality.



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What Motivates Juror Research?



- Jurors often want to reach the “right” result
- Jurors may feel that they are not getting the whole picture
 - Rules of evidence often keep out even evidence that is relevant
- Jurors may not trust the legal system; feel as if lawyers and judges are part of a club that excludes them.



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Calibrating the Appropriate Response

Courts have responded in a variety of ways, including:

- Jury instructions
 - Most jurisdictions have issued updated instructions which specifically forbid online research and comment during the trial
- Declaring a mistrial
 - An expensive and time-consuming option, applicable only once the damage is done
- Holding the misbehaving juror in contempt
 - Sends a strong signal, but might be overkill
- Sequestering jurors
 - Expensive and impractical



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Confiscating jurors’ smartphones

- Forbidding the use of handheld technology in the courthouse is not likely to be effective, since few trials are completed in a single day.
- It does nothing to prevent jurors from going online once they get home



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Why taking away their phones won't work

- Preventing prospective jurors from having access to the outside world while waiting to be called to a panel will only contribute to the shortage of willing jurors in most districts.
 - Prospective jurors need to stay in touch with work and family
 - There are no payphones left in courthouses anyway



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Lawyers investigating jurors

- Going beyond *voir dire*: When does investigation become intrusion?
- How should we resolve the tension between a lawyer's obligation of zealous representation and the juror's right to privacy?



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Investigating jurors during voir dire

- Some lawyers are coming to court with their laptops, so they can run jurors' name through online databases in real time.
- With a few clicks, they can see family photos, political contributions, and the price the juror paid for their house.
- Attorneys, for the most part, take care not to alert the jurors that they are being investigated.



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Towards Some Possible Solutions

- With three distinct problems, solutions need to be geared to different issues:
- (1) Unauthorized online research by jurors during trial
- (2) Jurors disseminating information about the trial during the trial
- (3) Possible invasion of juror privacy by attorneys


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Addressing Unauthorized Juror Research

- One of the most helpful things would be to help jurors understand why they should be limited to evidence in open court
 - Explaining why some evidence is excluded
 - Explaining defendants' rights to confront evidence against them
- Clear and persuasive instructions to jurors throughout the trial process
- Identify sound ways for judge to improve the educational components of trial by jury


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Addressing Unauthorized Juror Research

- Enhancing juror participation in the trial may help curb the impulse to go online
- Devising a procedure to allow jurors to ask questions of witnesses (through the judge)
- Improving lawyer training on evidentiary presentation




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Addressing Jurors Conveying Information

- Impress upon jurors necessity of not prejudging the case
- Possibly allowing jurors to discuss the case amongst themselves during trial, with guidelines



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Minimizing Invasion of Jurors' Privacy

- Use anonymous juries—this would effectively prevent lawyers from conducting online snooping of venire members
- Develop ethical codes and practices (for lawyers and journalists) to ensure proper background investigations of venire members
- Inform jurors, at a minimum, that the lawyers will be conducting Internet research on them.



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Future Research Needs

- Empirical study of what triggers juror desire to conduct Internet inquiries
- Empirical study of how jurors feel about being investigated online by lawyers and journalists
- Collect data on curative measures taken by courts to address these problems; measure effectiveness thereof



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Further reading

- American Bar Association, PRINCIPLES FOR JURIES & JURY TRIALS (2005), available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf
- Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. ___ (forthcoming July 2011), available at <http://ssrn.com/abstract=1669637>
- Dennis Sweeney, *Social Media and Jurors*, 43 MD. B.J. 44 (Nov. 2010), available at <http://juries.typepad.com/files/social-media-and-jurors.pdf>
- Cheryl Thomas, *Are Juries Fair?* Ministry of Justice (UK). Research Series (Feb. 2010). <http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf>



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Yet further reading

- Susan MacPherson & Beth Bonora, *The Wired Juror, Unplugged*, TRIAL, 40-45 (Nov. 2010).
- New Media Committee of the Conference of Court Public Information Officers, *New Media and the Courts: The Current Status and a Look at the Future*, available at <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf>
- Gregory E. Mize, *Thinking Outside the Jury Box: The D.C. Circuit Needs to Embrace Common Sense*, 20 WASH. LAWYER (Nov. 2005), available at www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/index.cfm



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Still further reading

- Shari Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1887-1905 (2001).
- Paula Hannaford-Agor et al., *Inside the Jury Room: Evaluating Juror Discussions During Trial*, 87 JUDICATURE, 54-58 (Sept.-Oct. 2003).
- Paula Hannaford-Agor et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUMAN BEHAVIOR, 359-381 (2000).
- For up-to-the-minute information on juror issues of all kinds, see Professor Thaddeus Hoffmeister's blog JURIES, <http://www.juries.typepad.com/>



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Further Viewing

- For a good example of jury instructions that make clear to jurors why they should not use the Internet during trial, see the instructions of Judge Donald Shelton, Ann Arbor, Michigan, on <http://www.ncsc.org/topics/jury/jury-selection-trial-and-deliberations/resource-guide.aspx>. Scroll approximately one third of the way down the page to the heading "Jury Instructions," and click on the video link.

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