

July 2009

Jurors Who Tweet, Blog, & Surf – Deciding and Discussing Your Case

By James A. Edwards
jedwards@rumberger.com

I. Overview of problem: Using a variety of devices, jurors are accessing the internet to gather information about the cases they are deciding. Sometimes, it is a single curious juror; other times the internet sleuthing takes on more importance than the evidence presented in court. Jurors are also sharing their current jury experiences in real time in almost a “play by play” manner. There have even been instances of jurors polling their fellow internet users on how they should vote. Any chance that those jurors who tweet, blog and surf could be causing problems in jury trials?

A. Civil cases: In Arkansas, a jury trial resulted in a \$12.6 million judgment against Stoam Holdings, a building products company. It quickly came to light that a juror, Johnathan Powell, had been posting Twitter messages, known as “tweets,” regarding the trial as the case proceeded. The defendant requested a mistrial, pointing to a few particularly troublesome tweets: “oh and nobody buy Stoam. Its bad mojo and they’ll probably cease to exist, now that their wallet is 12m lighter.” And, “So, Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else’s money.”

B. Criminal cases: After 8 weeks of a federal prosecution for alleged irregularities in internet pharmacy sales, the court learned one juror was conducting independent internet research. It seemed to Judge William Zloch that he could solve the problem easily by dismissing the offending juror. However, when the panel was questioned, it turned out that eight more jurors were also engaged in surfing the web using their handheld phones, Blackberrys, or i-Phones. A mistrial was declared. Imagine the public and private resources wasted. Imagine the unacceptable and unreasonable prejudice to these parties and the rest of those whose trials were in line to be tried later. United States vs. Hernandez et al, (Southern District of Florida Case No. 06-600027 (March 2009).

C. What were you thinking? Who me? Recent occurrences suggest that jurors and potential jurors who are really into social networking, blogging and surfing the web have no concept that they are doing anything wrong when they gather and share information via the internet. In May of this year, Al Roker, the NBC Today Show weatherman, was called for jury duty and began sending out a stream of tweets that started the night before he was to report for jury duty and continued while he was in the jury assembly room. His tweets included photos of his fellow potential jurors. When some of his “followers” saw what he was doing, they told him directly that he shouldn’t be doing it. His initial response was that he was doing nothing wrong, and that he had been told only that he couldn’t take photos in the courtroom. Roker later realized the errors of his tweeting, apologized on Twitter and on the Today Show. The twitpicking (photos) were unposted.

D. Jurors confused about legal instructions? In Washington County, Oregon, the trial judge received a note from the jury foreman, advising that one of the jurors had used his home computer overnight to get clarification on what the legal meaning really was of “implied consent” and “beyond reasonable doubt.” Another juror in the same trial looked up the accuracy and validity of field sobriety testing. Rather than requesting a mistrial, the defendant asked the judge to decide the case himself, resulting in an acquittal, followed by a stern lecture to the jury. One jury consultant noted that the jurors probably thought they were being helpful; they were stuck on an issue, they did what came naturally – looked it up on the internet, and then shared the information with their fellow jurors.

E. Basic premise of our legal system: The jury’s decision must be based only upon a controlled, limited set of facts presented in court weighed against specific legal standards provided by the jury instructions.

F. Fair trial concerns. Are these tech-savvy jurors threatening the fundamental right to a fair trial by their independent internet activities? Is their over-sharing overstepping the boundaries of proper conduct?

II. Gathering information: Web accessible information related to litigation.

A. Google, MSN or AOL search engines that can lead to specific articles, information on experts, law firm or company web pages, and other sources of information.

B. General encyclopedic sites to gather basic to advanced information.

C. Governmental or quasi-governmental sources of information

1. Corporate information – who owns which and how many companies; how is the company doing?
2. Criminal or police information
3. Court information about current or prior litigation
4. Tax or property appraisals and wealth

D. WebMD

1. Medical information on injury, disease, treatment
2. Medical information on testing

E. Legal research sites

1. Substitute for jury instructions

F. Google Earth and MapQuest

1. Conducting ex parte scene investigation
2. Viewing property related to parties, attorneys
3. Using MapQuest directions to evaluate speed, routes, and points of interest that may or may not relate to why the defendant was at a certain location, etc.

G. News reports or stories regarding subject matter on newspaper, television, radio and pure web-based media web pages or sites. Regardless of when the report was first released, it often becomes “permanent” if it remains available forever on the web.

1. Reports close in time to events, prior to time to really gather facts – accuracy questionable?
2. Reports close in time to events that contain incorrect facts that remain uncorrected.
3. Reports regardless of time that refer to matters excluded from trial based on our rules of evidence.

4. Reports regardless of time that describe importance of case and thus create the opportunity for Fifteen Minutes of Fame.

III. Wikipedia an informational stew with entries that can be created, edited and criticized by anybody. Its accuracy and currency are openly questioned, yet it is frequently consulted as authoritative by hundreds of thousands, if not millions daily. It contains thousands of entries that could relate to a case being tried by any member of the audience from medical treatment to estimation of speed through the analysis of skid marks.

IV. Social networking and blogging defined. How they differ from traditional web sites and from e-mail.

A. Traditional web pages or sites apparently created by authoritative sources.

B. E-mail as a mode of communicating to what is intended to be a limited audience. E-discovery has opened our eyes to the relative permanence of e-mail.

C. MySpace - Begun in 2003. Each subscriber gets a discreet page or site, with its own URL (www.myspace.com/bigfishlaw) where he or she can post an almost endless variety of personal information and pictures which can be “shared” or viewed by others. The MySpace web site is searchable to find specific people or those with specific topical posts. The subscriber can employ different security levels to screen who may view posted information. Current “members” estimated at 150 million. MySpace.com.

D. Facebook – Begun in 2004 for use by students at Harvard. Using a free subscription, a user sets up a home page or “wall” which includes chosen information about the user. Others can ask to be treated as the user’s “friend” and if the request is granted, the posts made by the “friend” on the friend’s web site are automatically added to the first user’s “wall.” Users post an avatar or image of themselves which may be actual photographs or cartoons, drawings or stock clip art. Thus, by accessing a person’s Facebook page, you can track not only what the user is discussing, often short messages about daily events from going to a ball game to getting really drunk, but also whatever the “friends” are

posting. Photographs are often shared. Incredibly personal information is often posted for the “friends” to see. Access to a person’s Facebook wall is controllable by the user choosing various levels of security or clearance for different “friends.” Ask any mother whether she has full access to her daughter’s Facebook, then ask the daughter. Surprisingly often, users allows total strangers to become friends and share information freely. It is a very convenient way to let your friends or family know that you are on vacation and having a good time. Or to tell everybody that your baby has just been born, and it is a boy. To tell your world of friends takes only a few seconds and replaces the need to make multiple individual phones calls or individual text messages. All your friends get the news as soon as you post it, both on your “wall” and on their own “wall.” Which means everything you share with your “friends” is then shared with their “friends” and so on. Personal information can be shared far beyond belief. Current frequent or active Facebook users are estimated at 170 million.

E. Twitter - According to its website, “Twitter is a service for friends, family and co-workers to communicate and stay connected through the exchange of quick, frequent answers to one simple question: **What are you doing?**” The user creates a personal account and profile. Once signed in, you tell the world what you are doing, but your response is limited to 140 characters. Your message is referred to as a “tweet.” Others on Twitter “follow” you and you can “follow” them. You can block others or be blocked from “following.” However, it is a new age status symbol to have a large number of “followers,” and reaching the milestone of 100 or 1,000 “followers” is noteworthy for individuals in Twitterdom. Celebrities such as Al Roker or Ellen DeGeneres have tens or hundreds of thousands of “followers.” Twitter seems to be a favorite mode of jurors to communicate in real time what is going on during their jury service. Photographs can be posted along with comments. Those following a user can also be directed with a link to other websites with more related content from the same user, such as video posted on YouTube.

F. YouTube – This site’s trademarked catch phrase is “Broadcast Yourself,” and accurately describes what the site is about. Anybody can shoot video, upload it to YouTube, describe it and make it available to the world. Those interested in a certain topic simply enter search terms in the ever present search box, and then choose which videos to view. To help the user, others have “voted” on the video, which may indicate its quality or the frequency with which it has been viewed. Entering a variety of terms related to “jury service,” “jury duty,” and “jury verdict,” returned more than a thousand results ranging from “I have jury duty tomorrow” to “I am on jury duty” to “Jury returns verdict

against Westboro Baptist Church.” And of course, some lawyers are kind enough to share their own triumphs on YouTube. These “jury duty” videos range from documentaries to music videos, news format to comedic. Millions of people worldwide visit YouTube daily to view a variety of content from current news of varying geographic or topical importance to entertainment. Is there something on YouTube about your trial?

G. Blogs - There are several varieties of “blogs.” Originally the term “blog” referred to the online equivalent of a single author’s journal in which he or she wrote regarding something of interest to the author. Those blogs can be about certain topics, such as matters of law, cycling, medicine, the author’s fascinating or boring life, etc. Reportedly, a Boston physician being sued for malpractice was a frequent blogger, who decided to blog before trial about defense strategies, his lawyer’s advice, tips from his jury consultant on how to testify and continued his blogging during trial about the plaintiffs’ lawyer and even members of the jury. How fun was that when it turned out Plaintiffs’ counsel had been following the blogs and got to question the blogging baby doctor, in court? (*From lawbooks to Facebook: What you need to know about using social networking sites.* J.G. Browning, *Voir Dire* Vol. 16, Issue 1, Spring 2009) Another type of blog is collection of public opinions which are posted following news stories posted on a newspaper or television web site. For example, each Casey Anthony story on Orlandosentiennel.com is usually followed by a number of comments from readers who express their own take on the story, Casey’s innocence or guilt, and so forth. A third type of blog is essentially an open forum on particular topics, where the public can ask for advice or comment concerning news, medicine, legal questions, current or recent trials, and one or more contributors or random members of the public either answer questions, provide information or offer comments of their own.

V. Problems that have happened or could arise in your next trial

A. Prior to presentation of evidence

1. Jury pool, jury selection process. *Roker admits mistake, keeps Tweeting.* Gothamist.com. J. Carlson, posted May 29, 2009. **WHAT A TWIT:** *Al Roker Sorry for Twittering Pictures of Manhattan Jurors,* NewYorkPost.com, May29, 2009.

2. Intentionally putting information out to jury pool. **KevinMD.com** suggested in his August 2, 2007 blog that “Someone is

posting deposition videos on YouTube in an attempt to sway potential jurors in [a particular] malpractice case.”

B. During presentation of evidence

1. On line research or investigation of facts, people, science, scenes. *Mistrial in U.S. v. Hernandez Federal Internet Pharmacy Trial*, InternetDrugLaw.com, posted March 25, 2009. *Mistrial by iPhone: Juries' Web Research Upends Trials*, J. Schwartz, NewYorkTimes.com, posted March 18, 2009

2. Writing messages, blogs, and/or tweets may encourage formulating opinions prior to completion of trial, contrary to typical instructions. Mistrial requested, but denied in federal corruption trial of former Pennsylvania state senator Vincent Fumo. *Mistrial by iPhone*, supra. A Ventura County, California jury foreman was held in contempt of court for blogging during a 19 day long trial about the case facts, the judge and posting photographs of the murder weapon on line. The convicted defendant included the blogging as an appellate issue. *Juror held in contempt for blog of murder trial*, R. Hernandez, VenturaCountyStar.com, posted January 23, 2008.

C. During deliberation phase of case

1. Seeking factual information. For example might a juror use GoogleEarth.com to get a real life, detailed satellite photo of the accident or crime scene? *How can courts keep jurors from using Twitter, Google?* themorningcall.com, R. Yates and K. Amerman, posted March 30, 2009.

2. Obtaining opinion/community sentiment information. One twitter tweeted, “Be Carona’s judge, what should ex-sheriff get?”

3. Seeking legal information or advice in lieu of jury instructions or questions to the court. Jurors going on line to look up “implied consent” and “beyond a reasonable doubt.” *Juries raise a digital ruckus*, OregonLive.com, posted January 13, 2008.

4. Simultaneous blogs, tweets, YouTube, MySpace or email detailing what is taking place during the current trial. Another tweet, “I’ll be twittering Mike Carona’s sentencing from the courtroom on Monday,

so log on.” One blogger reportedly wrote, “Hey guys! I know jurors aren’t supposed to talk about their trial, but nobody said they couldn’t LIVE-BLOG it, right? Am I right or am I right?!” *Watch Out for Blogging Jurors*, T. Renaud, law.com, posted February 17, 2009.

5. Jury polls of web readers on how to vote. A juror serving on a criminal trial involving charges of sexual assault was unsure how to vote during deliberations. She posted a message on her Facebook wall, describing the case and conducting a poll on how the case should be decided. Before the deliberations ended, somebody alerted the court to her poll and she was excused. *British Juror Axed for Disclosure on Facebook*, news.cnet.com, posted November 25, 2008.

D. Post trial disclosures and postings by jurors

1. Invasion of fellow jurors’ privacy and the secret nature of jury deliberations.

2. Information provided which may be grounds for invalidating jury’s verdict.

a. The jury foreman in a New Jersey slip and fall case was a law professor whose post-trial article formed the basis of charges of the professor unduly pressuring his fellow jurors to reach a certain decision. The \$876,000 verdict was reversed by the court of appeal. *Lawyer-Juror’s Article leads to Reversal of Judgment*, Lawprofessors.typepad.com, posted March 19, 2009.

b. *Appeals panel voids conviction because of juror’s blog*, Northcountytimes.com, posted June 15, 2007. A California court of appeals reversed a burglary conviction where a juror bragged in his blog that he misled the lawyers and court about his profession, hiding the fact that he was a lawyer and instead claiming to work for a tech company.

c. *Murder verdict appealed blogging juror*, J. Reinitz, WCFCourier.com, posted March 18, 2009. A defendant convicted of murder during a drug related robbery sought an appeal based on the fact that an alternate juror blogged that she thought the

defendant was a killer as long as two years before reporting to jury duty.

V. Interaction between litigation sterility and jurors that tweet, blog and surf

A. Balance legitimate communication needs against litigation fairness

B. Jury instructions

1. Current instructions.

a. *Florida Standard Criminal Jury Instruction 2.1*

“During these recesses you will not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case.” “The case must be tried by you only on the evidence presented during the trial in your presence and in the presence of the defendant, the attorneys and the judge. Jurors must not conduct any investigation of their own. Accordingly, you must not visit any of the places described in the evidence, and you must not read nor listen to any reports about the case. Further, you must not discuss this case with any person and you must not speak with the attorneys, the witnesses or the defendant about any subject until your deliberations are finished.”

b. *Florida Standard Civil Jury Instruction 1.1.*

“Consider Only The Evidence. *** The law tells us that a juror can consider only the testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and lawyers. Doing anything else is wrong and is against the law. That means that you cannot do any homework or investigation of your own. You cannot obtain on your own any information about the case or about anyone involved in the case, from any source whatsoever, *INCLUDING THE INTERNET* (emphasis added), and you cannot visit places mentioned in the trial.

2. Committees at Work. Consideration of new standard instructions to specifically address internet gathering and sharing of information. The Florida Bar’s Civil Jury Instruction Committee is taking

this up in Miami at its July 2009 meeting. Meanwhile the Idaho Supreme court's criminal jury instruction committee is discussing new guidelines. (*Twittering or Facebooking on an Idaho jury? Not so fast...* KBTV.com, posted March 28, 2009). Wisconsin state officials are considering how to draft jury instructions aimed at keeping the internet out of the jury room. (*The move to silence juror Twittering*, wislawjournal.com posted April 20, 2009). Mississippi, Kansas, Pennsylvania and many other states are addressing the need for specific jury instructions.

3. New or Proposed instructions. You should consider offering your own instruction when you serve your requested jury instructions.

4. Michigan Jury Instruction: Adopted June 2009, to be used commencing September 2009

MCR 2.511 Impaneling the Jury

(A)-(G) [Unchanged.]

(H) Oath of Jurors; Instruction regarding prohibited actions.

(1) The jury must be sworn by the clerk substantially as follows:

"Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless

you are discharged by the court from further deliberation, you will render a

true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you

God."

(2) The court shall instruct the jurors that until their jury service is concluded, they shall not

(a) discuss the case with others, including other jurors, except as otherwise authorized by the court;

(b) read or listen to any news reports about the case;

(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose

information prohibited in subsection (d) below;
(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:

- (i) information about a party, witness, attorney, or court officer;
- (ii) news accounts of the case;
- (iii) information collected through juror research on any topics raised or testimony offered by any witness;
- (iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case.

C. Dealing with devices, access and activity

1. **At the courthouse.** Federal courts in Florida routinely prohibit cell phones, PDAs, Blackberrys, laptops, etc. any way. Based upon an informal survey and personal experience, many judges in Florida tell jurors not to use their devices during trial and many take them away during the actual deliberation phase of the trial. That trend is being followed around the country.

2. **Away from the courthouse.** All that can really be done is to instruct against it and question or confirm that there have been no violations of that rule.

James A. Edwards is a partner in the Orlando office of Rumberger, Kirk & Caldwell and is a Board Certified Civil Trial Lawyer and a Certified Mediator.

Rumberger, Kirk & Caldwell provides litigation and counseling services in a wide range of civil practice areas including product liability, commercial litigation, construction, intellectual property litigation, environmental, labor and employment law, insurance coverage, professional liability and administrative law. Offices are located in Orlando, Tampa, Miami, Tallahassee and Birmingham, Alabama. For more information, please visit www.rumberger.com.

Copyright 2009 James A. Edwards, All Rights Reserved

Copyrighted Article with all rights reserved to the author other than use by FLABOTA, please contact the author regarding reprints or other use. ©

Google, Twitter, YouTube, MySpace, WebMD, Wikipedia, MSN, AOL etc. are trade names, trademarks, service marks or otherwise the property of their owners.