

MICHIGAN LAWYERS WEEKLY

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Tuesday, July 7, 2009

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July 6, 2009

Michigan Lawyers Weekly



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Article of the week from *Michigan Lawyers Weekly*:

Juries all a-Twitter

Electronic information, messaging causes problems in trials; MSC changes rule to address the issue

By Gary Gosselin

Technology

Instant-access social media like Twitter and Facebook are here to stay, and attorneys and courts are grappling with how to deal with jurors who can't resist using the devices while on duty.

In response, the Michigan Supreme Court amended rule 2.516 of the Michigan Court Rules to jury instructions on June 30.

The changes require jury instructions once the jury is empanelled, and they prohibit use of computers, cellular phones or other electronic devices during the trial to obtain information about the case. They also tell jurors not to do research either.

The change makes the instructions mandatory rather than discretionary, as they used to be. The order takes effect Sept. 1.

Cases are being thrown out all over the country because curious jurors are researching defendants, witnesses and testimony and shouting their opinions from the Twitter-tops -- in real time.

Take, for instance, a federal drug trial in Florida that was derailed after a juror admitted to researching the case over the Internet -- and eight more were found to be doing the same thing,

"Everyone has access to electronic media, and the question is how you can stop it; we've always operated on this premise that we trust juries not to discuss or research, but now it's so easy for them to do these things," said Nicole C. Wipp, a Milford-based family law and criminal defense attorney who also offers small business services including instruction on Web and social network marketing.

"Should we continue to trust them?" she asked.

"Like everything else, it works on the honor system," said Daniel Cherrin, member of the State Bar of Michigan Technology Committee, managing member of Cherrin Law Group and president of North Coast Strategies.

"The judge has the right to sequester a jury, and, at the same time, take away any kind of communication ..." Cherrin said, noting that rarely happens. "You have to take their word that they took an oath and will adhere to that oath."

Most agree with MSC rules changes

The Michigan District Judges Association and the Michigan Judges Association agree with the MSC rules changes, but both suggested the instructions be discretionary with the court, rather than mandatory as proposed by the amendment.

"It's a problem across the country," said Susan Moiseev, senior judge of the 46th District Court in Southfield and president of the Michigan District Judges Association. "Even without the rule, as I send jurors to deliberations or even on recess, I already tell them don't do research, don't call anybody."

The Representative Assembly of the State Bar of Michigan also weighed in, and suggested several changes that would clarify the changes and make them clearer for jurors.

Citing concern about potential heavy-handed enforcement, perhaps against a mother talking to her child's day care center on lunch break, the Criminal Defense Attorneys of Michigan urged appropriate, common-sense discretion.

Millions 'keeping in touch' with tweets

It used to be someone had to go out of their way to visit a crime scene or do research at the library, and even the phone was a unitasker in communicating with others. Now, Wipp said, with the ability to tweet a message or post a comment on Facebook has instant opportunity to reach potentially thousands.

The Twitter phenomenon is the best current specimen of how fast the new technology develops and comes into the hands of potential jurors.

Twitter was created in 2006 and operates as a free social networking and micro-blogging service. It allows its users to send and receive "tweets," text-based posts of up to 140 characters that are displayed in the user's profile page and immediately delivered to other users. Senders can restrict access or allow anyone to access their tweets.

Indeed, basketball star Shaquille O'Neal has a following of more than 400,000 Twitter registrants who want to read his daily thoughts.

Twitter is estimated to have roughly 8 million users and a year-over-year growth rate of 1,841 percent. The Twitter home page (twitter.com) says its purpose is to allow people to "communicate and stay connected through the exchange of quick, frequent answers to one simple question: 'What are you doing?'"

Due diligence a factor?

With throngs now sharing their every personal moment with the public at large, there becomes the question for attorneys to perform due diligence to be sure to root out those transgressions or face penalties.

"If you are a lawyer and are not addressing all of the issues out in cyberspace, are you setting yourself up for malpractice?" Wipp asked. "If you weren't doing some kind of due diligence in what damage might be done on blogs or Twitter, if you didn't mitigate that harm ... [y]ou have to have responsibility; you can't put your head in the sand and say this is new tech and say, 'Oh, I can't be responsible for that.'"

Attorneys have to prepare for and anticipate jurors going outside the courtroom, Cherrin said. And they must monitor electronic media for instances of abuse.

"There's a lot of vulnerability out there, and the Internet is a big, untapped area for providing due diligence for your clients," he said. "I know of cases where suits have been settled because of postings on Facebook pages.

"There are a lot of mechanisms [to monitor]. ... They can set up Google alerts, set up RSS feeds, search a number of blogs including industry blogs or 'I hate ...' blogs to go that that extra step in advocating for their clients."

Not only are jurors wandering outside their defined role, but others are using the Internet as a forum to spin or potentially sway opinion in a certain direction.

"The Internet is a whole new realm for people to make their case outside the courtroom; it used to be you'd go to the news media to state your case, and now they are going to the Internet," Cherrin said.

That's part of the reason he's doing well in his public relations business, because clients want to stop the spin or rumor or whatever is out there, or at least mitigate the problem with their own message.

"Trials are already difficult, time-consuming, costly things, but sometimes a trial is the only way for someone to

get justice," Wipp said. "I don't trust the system enough to say, 'Let's do without trials'; they are the only way to hold attorneys and other parties accountable.

"Can we stop [the electronic communications]? No. Should they do something? Yes. Do I have the answers? No."

If you would like to comment on this story contact Gary Gosselin at 248-865-3103 or gary.gosselinmi.lawyersweekly.com.

Lawyers USA contributed to this report. Lawyers USA, like Michigan Lawyers Weekly, is a Dolan Media Co. newspaper.

Electronic communications cause mischief all over

Instances of juries using electronic communications for a variety of forbidden reasons are popping up across the country and even Europe, causing mistrials and other problems.

* According to a *New York Times* article, a major federal drug trial in Florida was derailed after eight weeks when a juror admitted to researching the case over the Internet. When the judge questioned the other jurors, he found eight more who had been getting similar information about the case outside the courtroom. A mistrial was declared.

* In a four-month political corruption trial in federal court in Philadelphia, defense counsel discovered that a deliberating juror was regularly posting comments on Facebook. According to *The Philadelphia Inquirer*, the juror posted progress reports such as, "[T]oday was much better than expected and tomorrow looks promising too," and, "Stay in touch for a big announcement on Monday everyone." Over the defendant's objections, the judge allowed deliberations to continue, and the defendant, a former state senator, was convicted.

* In a state-court trial in Arkansas, a \$12.6 million verdict in favor of investors against a building material company is being attacked because the defendant alleges a juror sent eight Twitter messages, or "tweets," via his cellular phone. According to the Arkansas Online news site, one of the tweets read: "[O]h and nobody buy Stoam [the building material at issue]. Its bad mojo and they'll probably cease to exist, now that their wallet is 12m lighter."

The tweeting juror, a 29-year-old man, when interviewed by the Associated Press, professed to be surprised at the reaction to his staying in touch during the trial, saying: "I didn't really do anything wrong, so it's kind of crazy that they're trying to use this to get the case thrown out. ...They're just grasping at straws at this point."

* In England, a juror was dismissed from a child abduction and sexual assault trial after she posted details of the case on her Facebook page, telling those with access to the page: "I don't know which way to go, so I'm holding a poll." Luckily, her actions were reported to the court before deliberations began, and she was dismissed as a juror.

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