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# **HEADLINE:** Facebooking in Court: Coping With Socially Networked Jurors

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**BODY:**

Constant thought-sharing defines our Information Age.

At the office, in the car or anywhere else, we share every detail of our daily existence in real time on Facebook. Most of the time, this is acceptable and constitutionally protected behavior. But what happens in the courtroom when jurors post their opinions about a case online during trial?

Last month, one Michigan juror found out. Before the case was over, this juror posted on Facebook how it was "gonna be fun to tell the defendant they're GUILTY." Alert defense counsel saw the posting, and the trial judge dismissed the juror, fined her $250 and ordered her to write a five-page essay about the constitutional right to a fair trial.

This is the new courtroom reality, one that offers courts less control over what information flows in and out of the jury box. The problem is that, over the centuries, our legal system developed rules designed to ensure that the facts presented to a jury are scrutinized and challenged by both sides. Jurors were asked to hear all the evidence, refrain from sharing opinions and ultimately deliberate in secret. But modern, socially networked jurors accustomed to accessing and sharing information are colliding with this fishbowl experience and disrupting trials in ways few know how to address.

## SOCIALLY NETWORKED JURORS

Several recent examples illustrate the challenges. During a February 2010 criminal trial, a New York juror sent a key witness a Facebook friend request. The judge found that the juror's communication was "unquestionably a serious breach of her obligations as a juror and a clear violation of the court's instructions."

In March 2009, after eight weeks of trial in a drug case, a Florida juror admitted to the judge that he had conducted Internet research. When the judge questioned other jurors, he found that eight others had been doing the same thing. The judge declared a mistrial.

In February 2009, an Arkansas juror used his mobile device to post eight messages on Twitter during court proceedings. Among the messages: "I just gave away TWELVE MILLION DOLLARS of somebody else's money." The judge denied defense counsel's motion for a new trial.

In 2008, a juror posted online a photograph he took of the murder weapon, a 15-inch, double-edged, saw-tooth knife. The judge held the juror in contempt of court, but denied motion for mistrial.

In 2006, the New Hampshire Supreme Court rejected a motion to overturn a murder conviction based on pre-trial comments a juror made on his blog. The juror's posts included: "now I get to listen to the local riff-raff try and convince me of their innocence."

## PRESUMPTION OF JUROR PREJUDICE

Judges have traditionally instructed jurors to avoid discussing the case until the jury is discharged. The concern is that when jurors communicate prematurely outside the courtroom about a case, it brings juror impartiality into question. And that invites claims of potential Sixth Amendment violations for appeal. The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...."

Courts have outlined scenarios that disturb juror impartiality. In **U.S. v. O'Brien,** the 1st U.S. Circuit Court of Appeals explained that a presumption of prejudice arises if a juror communicates (about any topic) with "any person who is associated with the case or who has an interest in the outcome of the case." It also found that the same is true when a juror speaks with a third party about the case on which the juror is sitting.

In **Patterson v. Colorado**, Justice Oliver Wendell Holmes explained the logic behind this presumption: "The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

**NEW MODEL JURY INSTRUCTIONS**

Federal and state courts are hoping to thwart juror use of social networks with more detailed jury instructions. Earlier this year, the Judicial Conference of the United States endorsed new model jury instructions, which said: "You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube."

Last year, New York's Office of Court Administration's Committee on Criminal Jury Instructions also amended its recommended "jury admonitions" to include even more specific wording: "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 websites, such as facebook, myspace or twitter."

But, even with more detailed wording, jury instructions alone will not solve the problem. It's practically impossible to shield jurors from every contact or influence that might theoretically affect their vote, especially in our socially networked world. In fact, a recent study found that the time web users now spend on Facebook activities rivals just about anything else they do online. In August 2010, web users spent 41.1 million minutes on Facebook, surpassing the 39.8 million minutes users spend on other websites like Google and Yahoo.

**ADAPTING TO SOCIALLY NETWORKED JURORS**

Instead, trial courts must adapt -- adapt to jurors hopelessly dependent on information. Of course, sequestering the jury remains an option. According to the American Bar Association's Standards Relating to Juror Use and Management, "A jury should be sequestered only for the purpose of insulating its members from improper information or influences." But the associated costs and inconveniences means that, in practice, juries are seldom sequestered.

A more viable option is for courts to better determine the effect that a prejudicial extrinsic web post could have on a case. One federal district court, in concluding that a juror's blog didn't present a prejudicial communication, compared the juror's web log to a mere personal journal, "albeit one that the author publishes to the Web and permits others to read." (**Goupil v. Cattell**, 2008 WL 544863)

By the same token, enforcing court rules on the way jurors behave during trial goes beyond what formal jury instructions can do. Trial judges, counsel and even fellow jurors have a role to play. Here are a few suggestions that lawyers should consider incorporating into modern-day trial practice:

**Probe** jurors during voir dire on Facebook and Twitter use. Establish frequency of use and a juror's ability to refrain from using social networking tools during trial.

**Monitor** juror Facebook and Twitter activity during trial. Tools like Social Mention allow you to search blogs, microblogs, networks, videos and much more. This engine also allows you to create alerts for your search terms that you can have e-mailed to you daily.

**Ask** the trial judge to remind jurors that they may come forward to report a fellow juror's misconduct. The judge should also remind jurors about the fines and other potential consequences for failing to follow the court's ban on communicating with others about the case.

**Warn** jurors before and after every jury break about the court's ban on communicating with others about the case during trial, including the use of Facebook, Twitter and other web-based tools.

**Explain** the logic behind the presumption of juror prejudice. Jurors today may be more receptive to complying with court-ordered bans on communicating with others during trial if they understand the logic behind the ban.

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**Editor's note: For more on this topic, see a related Special to Law.com column,**"Should Twittering Jurors Know Better?"**by Joel Cohen and Katherine A. Helm.**

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