Bloomberg BNA

Social Media Law & Policy Report™



# Jury Instructions on Electronic Media: What Message Are We Sending Jurors?

By Thomas A. Harvey
and L. Christopher Vejnoska

There is no shortage of attention on the ways in which electronic media is affecting trial practice nationally. In the last few years, news stories have continued to multiply about instances where a juror's use of electronic media has called into question the integrity of trial proceedings. In December 2011, the Arkansas Supreme Court reversed a murder conviction due to the Twitter posts of a juror.[1] Last February, a Florida juror was jailed for contempt after he sent the defendant a Facebook friend request during trial and then bragged about the fact that he was dismissed from the jury as a result.[2] In April, the U.S. Court of Appeals for the Fourth Circuit reversed a conviction based on a juror's research using Wikipedia.[3] Currently, in Washington State, a juror's Twitter postings have jeopardized another murder conviction, this one in a high profile celebrity case.[4]

**"As technology becomes only more integrated into our lives, the opportunities for sitting jurors to misuse it, whether deliberately or otherwise, will become more pervasive. As they do, the integrity of still more trial proceedings likely will be put at risk."**

Although courts continue to admonish jurors regarding their obligations to refrain from electronic research or communication regarding a trial, the problem may only be growing. A 2010 Reuters Legal survey found that from 1999 to 2010, at least 90 verdicts were subject to challenge because of alleged internet-related juror misconduct, with more than half occurring in 2009 and 2010.[5] As technology becomes only more integrated into our lives, the opportunities for sitting jurors to misuse it, whether deliberately or otherwise, will become more pervasive. As they do, the integrity of still more trial proceedings likely will be put at risk.

[1] *Dimas-Martinez v. Arkansas*, 2011 Ark. 515 (2011).

*Thomas A. Harvey, a senior associate in Orrick's San Francisco office, focuses on products liability, intellectual property, and complex commercial litigation. Harvey has represented clients in numerous trials, on appeal, and in arbitration. In 2012, he also served the County of San Francisco as an assistant district attorney.*

*L. Christopher Vejnoska, a partner in Orrick's San Francisco office, is a trial lawyer with over 25 years' experience handling precedent-setting trials. He focuses on complex commercial, product liability, class action, mass tort, and insurance coverage litigation. He typically works on an average of six to eight trials per year.*

[2] Robert Eckhart, ''Juror Jailed Over Facebook Friend Request,'' (Feb. 16, 2012) (*available at* http://www.heraldtribune.com/article/20120216/ARTICLE/120219626).

[3] *United States v. Lawson*, 677 F.3d 629 (4th Cir. 2012).

[4] Rick Anderson, ''Michiel Oakes Twitter Defense'' (May 16, 2012) (*available at* http://www.seattleweekly.com/2012-05-16/news/michiel-oakes-twitter-defense/).

[5] Brian Grow, ''As jurors go online, U.S. trials go off track'' (Dec. 8, 2010) (*available at* http://www.reuters.com/article/2010/12/08/internet-jurors-idUSN0816547120101208).

 ISSN

## What Can Courts Do?

Certainly trial courts are aware of the issue, and are trying to educate and instruct jurors. They should be applauded for doing so. But as usually happens when tradition-bound institutions try to react to sudden and rapid change, the courts have been forced to play catch up, with sometimes awkward results.

**Model Jury Instructions.** One obstacle seems to be that the courts still do not really understand the technologies that they are addressing. This past summer, a committee of the Judicial Conference of the United States updated its model jury instructions explaining limitations on electronic research and communication in trials. This update came in response to a survey of federal judges, who reported overwhelmingly that they already were warning jurors not to use electronic media in trial but agreed that more emphasis and consistency on the issue was needed. Bear in mind that because the U.S. Judicial Conference is an administrator and policymaker for the entire federal court system, its instructions are the model for hundreds of courtrooms.

**''[A]s usually happens when tradition-bound institutions try to react to sudden and rapid change, the courts have been forced to play catch up, with sometimes awkward results.''**

The committee's resulting proposed model instruction is titled ''The Use of Electronic Technology to Conduct Research on or Communicate about a Case.'' It does indeed highlight and emphasize the growing problem. But, at least to some observers, it also conveys an unintended message that the court system is not particularly educated about social media and the concerns regarding its use in the courtroom. For example, the instruction's paragraph describing electronic devices begins as follows:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology.

Consider the message that this initial statement sends. Mobile phones have seen widespread use since the mid-1990s. Blackberry mobile devices, once popular, now represent a tiny fraction of the market. And the internet? Yes, it's true: many of us have used it before. Indeed, to begin by suggesting that only ''many'' people use at least one of these items, in a world where grade schoolers often have cell phones, grandparents use the internet, and the whole world texts, perhaps starts us off on the wrong foot. As an introduction to the issue of misusing electronic devices, then, this sentence does not fill one with confidence. It casts the court as time traveler observing modern life: it has heard tell of the technologies young people are using these days, and now reluctantly it must consider them.

The instruction later goes on to attempt to catalog forms of technology that could be misused:

> 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, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here.

**What's a Juror to Do?** What is an actual juror, sitting in an actual jury trial, to make of this sentence? Ignore its confusing lack of grammatical parallelism. The real concern is that it telegraphs a misunderstanding of the very technology it attempts to describe. First, it is already outdated. Myspace? Who uses Myspace anymore? (And by the way, Myspace is one word, not two.) Second, it confuses basic technological concepts and conflates them into a single notion. This list is a hodge-podge of communication formats, services, technologies, and brand names. Blackberry and iPhone are brands of mobile devices. Email and text are messaging formats. Facebook and Google+ are social networks. But here they are all jumbled together. Third, it inaccurately categorizes the items it describes. It suggests, for example, all the technologies described are some form of ''social media.'' It also suggests that Facebook is simply a ''blog or website,'' when in fact the network can be accessed in many ways, including through desktop programs, mobile apps, and even operating systems. Facebook's evolving nature actually is representative of the very nature of technology: it evolves at a rapid pace, faster than it can be described in a fixed jury instruction. Cataloging particular iterations of technology, or trying to characterize their role or function, is an exercise in obsolescence. Reading through a laundry list like this, one is left with the impression that it was drafted by soon-to-retire authority figures who have never used the things they describe. Indeed, there is at least a whiff of the late Sen. Ted Stevens here, with his infamous description of the internet as ''a series of tubes.''

An approach like this is more than simply ineffective. It telegraphs a troubling notion to jurors: that when it comes to technology, courts do not actually understand what they are talking about. Particularly in a jurisdiction such as California, where technology is regarded as something approaching a lifestyle, that message can be destructive. It perpetuates a vision of the courts as backwards, out of touch, and unaware of what is going on around them. Worse, it emboldens jurors to discount the court's ability to actually police its rules on electronic media. A juror could reasonably ask: if the court does not actually understand what I am doing in the electronic space, how will they be able to catch me?

**Keeping Current.** There are no easy solutions to this problem. On the one hand, there is merit to crafting instructions that speak directly to jurors and convey rules in plain and familiar language. That means not only identifying the broad rule on electronic media, but also providing concrete, current examples to jurors about what that means in practice. Jurors need to hear, for example, that yes, they are really prohibited from posting status updates about the case, texting with friends about the attorneys, or conducting research on the internet to some extent, that requires identifying specific current technologies—including the latest hardware or software—that are bound to evolve over time and render the instructions outdated. On the other hand, it is critically important to make sure that the message is consistently accurate. If courts are going to provide concrete examples of the risks posed by electronic media, they cannot simply rattle off a list of technology

  ISSN

buzzwords. They must speak to jurors in language that conveys familiarity with the issues they are addressing. And they must be prepared to regularly update that language to keep the message current.

The first step in making effective instructions on the use of technology is to involve people who are truly familiar with technology. Judges certainly know the law, but they are not especially well positioned to understand the evolving nature of, say, how jurors use social networks or mobile devices. Indeed, their very job—which at times requires a level of studied isolation—may put them at a distinct disadvantage in that arena. It is unfair to expect them and fellow committee members to draft accurate instructions without technological input. Specialists should be involved in the drafting, and they should retain involvement in regular updates as technology changes. Although these efforts will not ensure successful instructions, they are an important first step.

A second step is to focus the message on what realistically can and must be accomplished. It is unreasonable to expect that no one will post or email regarding his or her location or daily activities. Just like all other forms of communication, electronic communication does not necessarily offend court rules. Surely we don't care if a juror notifies others that he or she is ''in court today,'' or ''serving as a juror.'' And equally surely, we want to teach jurors to draw the same line with electronic communications that we have instructed them for ages to draw in all other conversations. Better to say that, then.

The problem of jurors' use of electronic media in trial is here to stay, and only growing. Increasingly, it risks the integrity of jury verdicts, and risks wasting the tremendous resources used to reach those verdicts. If we are earnestly interested in reducing that risk through jury instructions, we need to approach the problem in a disciplined way, applying the same level of accuracy and attention to detail that is required in every other aspect of the law. In short, we must apply a lesson that every lawyer who stands up in court knows well. One cannot speak with authority until one has actual command of the issues.