

Avoiding Tweeting Troubles, Facebook Fiascos and Internet Imbroglíos

Adapting jury instructions for the age of social media

By Jeannine Turgeon

It is now a common practice for nearly everyone to reach for one's cellphone at all times.

As technology advances, the courts are faced with the increased use of the Internet and social media and their potential impact on litigants' rights to a fair jury trial. Recent jury misconduct, including independent research on the Internet, tweeting and posting on Facebook during trials, has influenced the current national movement to overhaul jury instructions.

In addition to hundreds of anecdotal accounts, numerous documented cases have surfaced in which jurors violated the rules against communicating with others during a trial or performing research about a case, including the following:

- In Pennsylvania, concerns about substantial prejudice arose during the Vince Fumo trial after a juror posted information about the hearing on Facebook and Twitter.
- In Florida, several mistrials occurred because jurors used their cellphones to research cases and posted updates about their activities on social-media websites.
- In Washington state, the presiding juror conducted extrinsic research and

learned of the potential sentence for a conviction of first-degree rape.

- In Arkansas, a death row inmate's murder conviction was overturned after a juror tweeted, "It's all over" — before the verdict was announced.
- In Missouri, during a wrongful-death trial, the presiding juror made Facebook posts bragging about the verdict being delivered in such a short period of time.
- In Massachusetts, a juror was removed from trial after it was discovered that he was using social media from the jury box.
- In California, an appellate court held that a trial court did not abuse its discretion in denying a motion for a new trial after a juror used the Internet to research mathematical calculations.

These cases illustrate the potential problems that use of the Internet and social media cause in the courtroom, despite judges cautioning jurors to refrain from conducting additional investigation and research about the case and forbidding jurors from communicating about the trial.



Effective jury instructions are critical to addressing the growing concern of Internet- and social-media-related jury misconduct.

It is now a common practice for nearly everyone to reach for one's cellphone at all times, even during a formal dinner at a restaurant or in a courthouse hallway, to research a word, topic, map, directions or even a person.

In 2011, after an increase in the reports of juror social-media misconduct, U.S. District Court Judge Amy St. Eve of the Northern District of Illinois conducted an informal survey of federal jurors. The survey asked jurors "whether they had been tempted to communicate about the case through social media, and, if so, what prevented them from doing so." The data from the survey supported the consensus that judges should instruct jurors to refrain from using social media in the courtroom. A more extensive survey of federal and state jurors was conducted in 2012. The results from the 2012 survey were consistent with the 2011 survey, concluding that the judge's instruction was the reason for jurors abstaining from communicating about the case on social media.

Effective jury instructions are critical to addressing the growing concern of Internet- and social-media-related jury misconduct. Most jury instructions were written decades ago, long before the Internet dominated our lives. Therefore, the Pennsylvania Supreme Court Suggested Standard Civil Jury Instructions Committee recently revised the standard instruction admonishing jurors from performing extrinsic research and communicating with anyone about a case. The instruction cautions jurors about tweeting, posting on Facebook or performing Internet research and follows the latest professional and academic literature, which advises that to be most effective such jury instructions must embody four criteria.

Explain the Rationale for Social-Media Restrictions

The research suggests that jurors who are provided with the underlying rationale and importance of social-media restrictions imposed upon them during the trial are more likely to accept the importance of these restrictions and abide by the judge's directives. Including the directives and the rationale at various points throughout the trial assists in highlighting the importance of the restrictions.

Our revised Suggested Jury Instruction 1.180 clearly emphasizes this rationale. It provides in pertinent part as follows:

- Relying on any information you obtain outside the courtroom is not only in violation of these rules, it is unfair because the parties would not have the opportunity to refute it, explain it or correct it.
- While these rules may seem unduly restrictive, you must carefully follow them. The reason is simple — the law requires it and the parties depend on you to fairly and impartially consider only the evidence admitted during the trial.
- To do otherwise — to allow yourself to be distracted or to allow outside information to affect your judgment — would be unfair and prejudicial to the parties. In court, the role of jurors is to make important decisions that have consequences for the parties, and the decisions must be based on the evidence that you hear in this courtroom, not on anything else.
- The whole point of a trial is to ensure that the facts on which jurors base their decisions have been fully and carefully tested by opposing parties, so limiting the evidence you consider in reaching a verdict to what they have been allowed to test and debate in this courtroom is the only way you can protect their right to receive a fair trial.

Editor's note: The full text of revised Suggested Jury Instruction 1.180 discussed in this article is available on the PBA website along with the contents of this issue of the magazine, posted for members-only access at www.pabar.org/members/lawyer/home.asp.

- This allows everyone in our community, as well as the parties in this case, to know the evidence on which your verdict was based. Using information gathered in secret and discussed only by the jurors behind closed doors undermines the public process and violates the rights of the parties.

Give Specific Examples of Prohibited Social-Media Conduct

Jurors commonly misunderstand the term “research” contained in jury instructions aimed at preventing all research, including use of the Internet and social media. To help alleviate common misunderstandings, recent academic research suggests instructions should include more specific descriptions and examples of what is prohibited.

Our suggested Pennsylvania jury instruction includes this recommended specificity as follows:

- Do not read books, magazines, Internet sites or other reference works for additional information. I am well aware that in daily life many of you regularly use the Internet to obtain all types of information.



Numerous documented cases have surfaced in which jurors violated the rules against communicating with others during the trial or performing research about the case.

Jurors who are provided with the underlying rationale and importance of social-media restrictions imposed upon them . . . are more likely to accept . . . these restrictions and abide by the judge's directives.

- Do not look up any legal terms or any other words you do not understand. I will explain all of them to you. If you do not understand, please just ask me to re-explain it in a better way.

- I want to be clear that this rule prohibiting any independent research applies to every kind of research — including asking someone a question related to the issues in the trial, discussing the trial with anyone outside of deliberations and using electronic research tools as well as dictionaries, encyclopedias and any other outside sources.

Providing specific examples of prohibited social media conduct will not only further the jurors' understanding of what is expected of them but will also specify that it is considered juror misconduct.

Use Plain Language and Social-Media Terminology

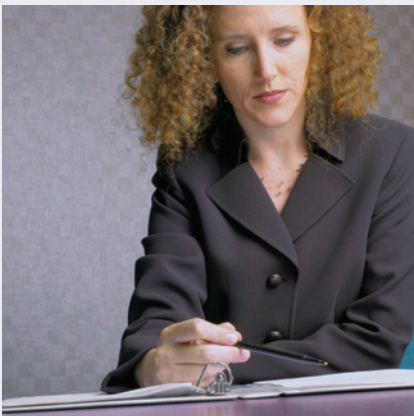
Clarifying jury instructions by including plain language and correct social-media terminology is important to prevent social-media-related jury misconduct. Jurors may misunderstand that prohibited “communi-



cations” or “discussions” include blog entries or Facebook updates. The current literature suggests that specifically stating that “discussion” means no texting, emailing, tweeting or posting is more effective in preventing jury misconduct. The research also recommends that a jury instruction include a blank line to add any recent developments in social media.

Our new jury instruction includes these terms, among others. It provides, in pertinent part, as follows:

- I am well aware that in daily life you may regularly communicate with friends and family through text messaging, email, Twitter, social-networking websites, chat rooms, Facebook, MySpace, LinkedIn,



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YouTube, blogs or other websites [insert any new social-media examples]. Remember — you must not communicate about this case in any way, even electronically (no texting, emailing, tweeting or posting).

Describe the Consequences of Violating Social-Media Restrictions

Courts should impress upon the jurors not only the importance of social-media restrictions but also the consequences that will follow for an individual engaging in this type of activity. As demonstrated below, our instruction emphasizes that engaging in prohibited social-media activities has severe consequences:

- If you disobey these rules, you will directly violate the oath you have taken as a juror.
- If you break any of these rules, I may need to order an entirely new trial before another jury that would cost the parties and the court system a lot of time and money, as well as cause embarrassment to

you. (It could result in [insert contempt, costs, fines deemed appropriate by the court].)

The instruction provides a judge the option to insert any possible ramifications, such as contempt, costs of a new trial or fines, as the judge deems appropriate. Some judges have taken further steps, including requiring jurors to sign an affidavit agreeing to abide by their instruction and confiscating jurors' telephones and tablets. Recently, to prevent juror access, the Allegheny County court directed the Department of Court Records to block the electronic record temporarily during jury selection and trial for every case being litigated.

The revised jury instruction is intended to improve our jury system, along with continuing efforts in other areas by the Pennsylvania Supreme Court Proposed Standard Civil Jury Instructions Subcommittee. (See the related article titled "Crafting Model Jury Instructions for Evaluating Eyewitness Testimony" in this issue of the magazine.)

Copies of written jury instructions may now be distributed to jurors. It is also suggested that judges provide a written copy of the instructions to all jurors at the beginning of the trial, in addition to reciting the instructions to provide further clarification.

Providing effective jury instructions is the first step in preventing Internet- and social-media-related jury misconduct. Efforts to help improve our jury system by revising the model jury instructions not only benefit the jurors but also provide benefits for the lawyers, judges and litigants. ¶

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Jeannine Turgeon is a judge on the Dauphin County Court of Common Pleas and vice chair of the Pennsylvania Supreme Court Suggested Standard Civil Jury Instructions Committee.

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