



A Fair Trial: Jurors Use of Electronic Devices & the Internet

A Best Practices Paper prepared by the American Bar Association Judicial Division National Conference of State Trial Judges

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ISBN 978-1-61632-092-8

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INTRODUCTION

The promise of the American Judicial System is that parties will receive a fair and impartial trial, based on the evidence presented in open court.

“The theory of our [legal] system is that the 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.” *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

Today, courts see more problems than the switchblade that Henry Fonda brought into jury deliberations in the movie “Twelve Angry Men”. Lawyers, witnesses, spectators, and jurors regularly use cell phones, Smart phones, PDAs, laptops, and other electronic devices before, during, and after trial. Jurors’ use of such devices can lead to serious misconduct, which can require extreme remedies such as mistrials. Or even worse if not detected, it can deprive parties of “their day in court.”

The problems created by jurors misuse of electronic devices is occurring across the country, for example, as reported by the Associated Press in a March 7, 2010 article *New Rules Designed to Keep Jurors Offline*. “Last year, a San Francisco Superior Court judge dismissed 600 potential jurors after several acknowledged going online to research the criminal case before them. Baltimore Mayor Sheila Dixon challenged her misdemeanor embezzlement conviction after discovering five jurors ‘friended’ one another on Facebook during the trial. And a federal judge in Florida declared a mistrial after eight jurors admitted Web surfing about a drug case.

Jury misconduct regarding the use of technology has become so widespread that a new term “Google mistrial” has resulted.¹

Recently, during July 2010, in the Superior Court of Arizona in Maricopa County, in a three part death penalty case, after the jury unanimously found the defendant guilty and that aggravated circumstances existed, they hung eleven for death and one for life in prison. The holdout juror later admitted that he went on the DOC Web site and looked at the background of each prisoner on death row. He then did his own “proportionality review” and found that the defendant was not as bad as those prisoners, so he held out. The result was a mistrial of the third phase, and the state allowed a plea to life without parole. The frightening thought is what if it were the other way around and the juror had obtained information that the defendant was worse than the other prisoners and used that to convince the other jurors to vote for death. If that fact did not come to light in time, the defendant would have been wrongfully executed.

The jury misconduct occurred in the Arizona trial despite the fact that the court gave the jurors a special preliminary instruction precluding the use of the Internet for any purpose relating to the case.²

Thus as Judges we are faced with the daunting problem of how we can continue to insure that litigants receive a fair trial – one which is based solely on the evidence presented in the courtroom and maintain the privacy of jury deliberations – in light of the proliferation of

¹ Court Manager, June 2009. *Jury News: Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technical Hazards* by Paula Hannaford-Agor. See also:

http://www.abanet.org/litigation/litigationnews/practice_areas/minority-jury-social-media.html

² This is an anecdotal report from the trial Judge who presided. See Footnote 13 for references to cautionary instructions regarding electronic devices, etc. including the Arizona instruction used in this case.

information available electronically in the world today.

The main focus of this Best Practice memo will be on activities of jurors.

We will consider jurors obtaining outside information and sending out information by electronic devices, and the use of such devices through social networking sites. We will cover such juror activities before the trial, during the jury trial, and after the completion of jury service. We will then discuss possible solutions to help avoid these problems and how to address these problems when they arise.

Pre-Trial Juror Activities

In South Dakota in 2007 a juror was summoned for jury duty. His summons apprised him of the title of the case. Prior to appearing for duty, the juror conducted two separate online “Google” searches of the defendant. He did this in violation of the requirement in the summons which read: “Do not seek out evidence regarding this case and do not discuss the case or this questionnaire with anyone.” During jury selection the juror denied ever having heard of the defendant. The trial lasted nineteen (19) days. During deliberations the “Google” search was made known to five other jurors. The jury returned a verdict for the defendant. The trial court thereafter granted a new trial based on juror misconduct. The Supreme Court of South Dakota affirmed.³ Nineteen (19) days of trial were wasted.

Another example involved Al Roker, a television network weatherman and personality who was summoned for jury service. Upon reporting for jury duty, he commenced “twittering” and posting photographs relating to the process. This was all available online to anyone who chose

³ Russo v. Takata Corp., 2009 SD 83, 774 N.W.2d 441

to view it.⁴

Activities During Trial

In an Arkansas case a juror sent “tweets” to various friends about the decision reached by the jury. The losing party claims the “tweets” were sent during trial, while the juror claims they were all sent after the verdict. A new trial was denied by the trial court. The matter is still on appeal.⁵

U.S. v. Bristol-Martir was a federal drug conspiracy case tried in Florida. During deliberations a juror searched the internet for information regarding federal law and definitions. After extensive questioning to determine the extent of the spread of the information, the trial judge replaced the errant juror and the trial continued and resulted in a verdict of guilty. On appeal, the 1st Circuit Court of Appeals reversed:

“[C]rucially, the district court did not inquire, either in a group setting or an individual basis, as to whether jury members had been influenced by the errant juror’s improper research and presentation. In its re-questioning of jury members, the district court made only slight modifications to its generic instructions and made no mention of the errant juror’s improper communications. Our case law has consistently emphasized that the district court, in conducting its investigation,

⁴ http://www.iphonejd.com/iphone_jd/2009/06/al-rokers-iphone-jury-duty-experience.html
http://www.nydailynews.com/gossip/2009/05/29/2009-05-29_als_all_atwitter_roker_gets_ripped_for_snapping_court_pix_during_jury_duty_stint.html

⁵ <http://arstechnica.com/web/news/2009/03/jurors-twitter-posts-cited-in-motion-for-mistrial.ars>

must ensure that jury members can remain impartial when they have been exposed to extrinsic information that is potentially prejudicial.”⁶

It is not only a juror’s use of electronic devices that are causing problems during trials. A Miami-Dade Circuit Court Judge was required to declare a mistrial in a civil fraud case after being informed that a witness in his courtroom was text messaging while the judge held a sidebar conference with the trial attorneys. The witness, who was the COO of the plaintiff corporation, was communicating by text message from the witness stand with the corporation’s CEO, who was at counsel table, regarding the substance of the witness’s testimony.⁷

All judges have observed attorneys, litigants, witnesses and spectators talking on cell phones during court proceedings. Some spectators have even used cell phone cameras to take photographs of witnesses and jurors.⁸

Activities after Completion of Jury Service

There are many activities of jurors, and other trial participants which occur after the completion of the jury trial. For the most part, those activities have little or no effect on the trial which has just occurred. In those jurisdictions which use the “One day, one trial” model, jurors are released from further service after the completion of their one trial. For these jurors, their subsequent activities regarding their jury service are not ordinarily within the scope of the trial court’s concern. In fact, it is common to see articles and

⁶ U.S. v. Bristol-Martir, 570 F.3d 29, 2009 (1st Cir.)

⁷ <http://www.law.com/jsp/article.jsp?id=1202430721257>

⁸ Anecdotal reports from various trial judges including the authors.

blogs detailing a juror's experiences in the process. However, if such blogs or other online postings were to reveal inappropriate jury activity before or during the trial, that activity could conceivably give rise to post trial issues. Such issues would have to be dealt with according to applicable laws and the concept of a fair trial, as opposed to the sanctity of the jury process.

In addition, for jurisdictions whose jurors serve for a defined period of time and who would be available for further service following the completion of the current jury trial, continuing restrictions on the use of electronic devices and the internet could still be appropriate to some extent.

POSSIBLE SOLUTIONS

Trial Judges in this country and throughout the world are now required to deal with the use of electronics that provide information to and from sources outside the trial. It is becoming more common for jurors to use the research facilities of the internet to broaden their knowledge of the subject matter at issue in the trial. They are also interacting with outsiders, through social network sites, concerning their jury service. They may do this by visiting chat rooms, blogs, or websites such as Facebook, MySpace, LinkedIn, YouTube, or Twitter. 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.⁹

⁹ Michigan Lawyers Weekly, July 6, 2009, *Jurors all a-Twitter*, by Gary Gosselen

Such activities can have serious effects on the functioning of the jury system. Judges may be required to remove jurors from the pool, which may result in an insufficient number of jurors being available for the trial. Inappropriate jury communication could conceivably taint the entire pool causing delay and all its attendant costs to the court and the parties who are ready to proceed to trial. Judges may be required to remove jurors who are sitting in a trial. If there are not sufficient alternate jurors, it could result in mistrials. Above all, these problems can deny the litigants a fair and impartial trial, which can call the justice system itself into disrepute.

It is noted also that the problem of use of electronics is compounded by the need to accommodate and make jurors more comfortable when they participate in jury service. To this extent, the courts in San Diego make WiFi available to jurors in the assembly areas. This allows the jurors to access the web while they are awaiting their service.¹⁰ This may send a mixed message to the potential jurors unless they are clearly informed and admonished about the limitations of its use. Also, we should be mindful that jurors need to be able to communicate with the outside world to deal with real issues such as transportation, babysitters, jobs, etc. Therefore, we must provide some means of doing so.

We will discuss some of the possible solutions to reduce the potential problems caused by electronic technology. Whatever solutions are adopted it is important that all courts have a clear policy that addresses the use of electronics by lawyers, litigants, jurors, and

¹⁰ Del Mar Times Jan. 27, 2010

courtroom observers, that is communicated to those participants. Policies can be by statute or court rule, or they can be left up to each local court system.

1. Before Selection Process

The initial summons sent to the potential jurors should admonish the jurors not to discuss or seek information about any pending cases. It should also contain a statement of the court's policy regarding the presence and use of electronic devices while the jurors are in the courthouse. Some courts preclude jurors, attorneys, parties, and spectators from bringing electronic devices into the courthouse; others allow the devices but control their use.¹¹ Whatever the policy is for jurors, they should be advised what they can bring to the court in the jury summons. During the initial orientation of potential jurors, they should be given a complete explanation of the court's policy regarding electronic devices and why they need to comply with it.

2. Jury Selection Process

The trial judge should review, for the benefit of everyone in the courtroom, the court's policies covering electronic devices and their use. The jurors should be questioned during voir dire about their internet usage. If the attorneys do not do it, then the Judge should. Jurors should make the commitment not to use electronic devices to gain or send information about the parties, attorneys, or the case they are being selected for. That includes definitions of unusual words used in the case and the law generally.

¹¹ For an example policy, see Judicial Division Record, Summer 2010, *Trial Judges News*, pg. 14, Chair's Column by Honorable Gary Randall.

3. Preliminary Instructions

The trial judge should give specific, concrete preliminary instructions precluding the use of electronics during the trial. This instruction can be repeated at every break in proceedings, and stressed at the evening recess. As a part of this instruction the trial judge should encourage the jurors to report any questionable activity of this nature by other jurors. If the jurors are given a written copy of the instructions, they would actually see as well as hear these important instructions and would have them to refer to throughout the trial.¹²

4. Final Instructions

The trial judge's final instructions on the law should again include the prohibition of the use of electronic devices.¹³

5. Collection of Devices

All devices which qualify as electronics can be collected by court personnel during the time when the jurors are in court, in deliberation, or both. Collection of such devices has

¹² *Principles for Juries & Jury Trials*, American Bar Association, August 2005, which can be accessed at <http://www.abanet.org/jury>. Principles 6 (C)(2) – Courts should educate jurors regarding the essential aspects of a jury trial, and 14 (B) – The court should instruct the jury in plain and understandable language regarding the applicable law and the conduct of deliberations <http://www.abanet.org/juryprojectstandards/principles.pdf>

¹³ Copies of sample court rules and instructions from various states that have adopted them are available on the website of the National Conference of State Trial Judges, a part of the Judicial Division of the American Bar Association. They include: 1) California Civil Instruction, 2) Michigan A) Michigan Internet, Texting Court Rule, B) Michigan Criminal Jury Instruction, C) Michigan Civil Jury Instruction, 3) New York A) Jury Admonitions in Preliminary Instruction, B) Jury Separation during deliberation, C) Grand Jury Charge, D) New York Civil Charge, 4) Ohio Admonitions, 5) Oregon Precautionary Instruction (Criminal), 6) Tennessee (Tweaked Federal Charge), 7) Utah's Model Instruction, 8) Arizona, 9) A universal example in Court Manager, June 2009, Jury News: Google Mistrials, 10) Committee on Court Administration and Case Management of the Judicial Conference of the United States endorsed proposed instructions which can be found at: <http://www.uscourts.gov/News/Viewer.aspx?doc=/uscourts/News/2010/docs/DIR10-018.pdf>

some inherent problems, e.g. finding secure storage and the possibility of liability for loss or damage. This may be part of the reason some courts do not allow jurors to bring electronic devices into the courthouse. However, jurors will need to make contact with the outside world during their service, so some phones should be made available for such limited purposes.

6. Sequestration

In the rare circumstances that jurors will be sequestered during deliberations, their use of electronic devices should be precluded or controlled.

HOW TO ADDRESS POSSIBLE PROBLEMS

When a trial judge becomes aware of a problem caused by jurors using electronics, it should be dealt with immediately and directly. The exact nature and extent of the problem should be determined. If the juror has not infected the other jurors with the results from using electronics, then the elimination of the juror may suffice. According to a memo to Federal Judges from Chief U.S. District Judge Julie Robinson of Topeka, Kansas, improper use of electronic devices by jurors “has resulted in mistrials, exclusion of jurors, and imposition of fines.”¹⁴ Some action by the court will be appropriate in any event. The proper course for the trial judge will depend on what is found when the problem is fully examined.¹⁵

¹⁴ Associated Press Article by Paul Elias March 7, 2010.

¹⁵ *Principles for Juries and Jury Trials*, American Bar Association, Principle 19 (A) and (B) – Appropriate inquiries into allegations of juror misconduct should be promptly undertaken by the trial court. <http://www.abanet.org/jury>
<http://www.abanet.org/juryprojectstandards/principles.pdf>

When problems arise from others, rather than jurors, the court should address the problem through the inherent contempt power of the court.

CONCLUSION

There is no perfect solution. At the conclusion of each day's proceedings, the jurors will go home to their computers. They will travel with their cell phones and PDAs. They will have unfettered access to the internet and all its available information. As trial judges we strive to impress upon jurors the requirement that the only information they are allowed to consider about the case must come to them in the courtroom while the parties, the attorneys, and the judge all are present. And, we must emphasize that they need to abide by this in the interest of justice and fairness to the parties.

