

# **Jurors' use of the internet and social media during trial**

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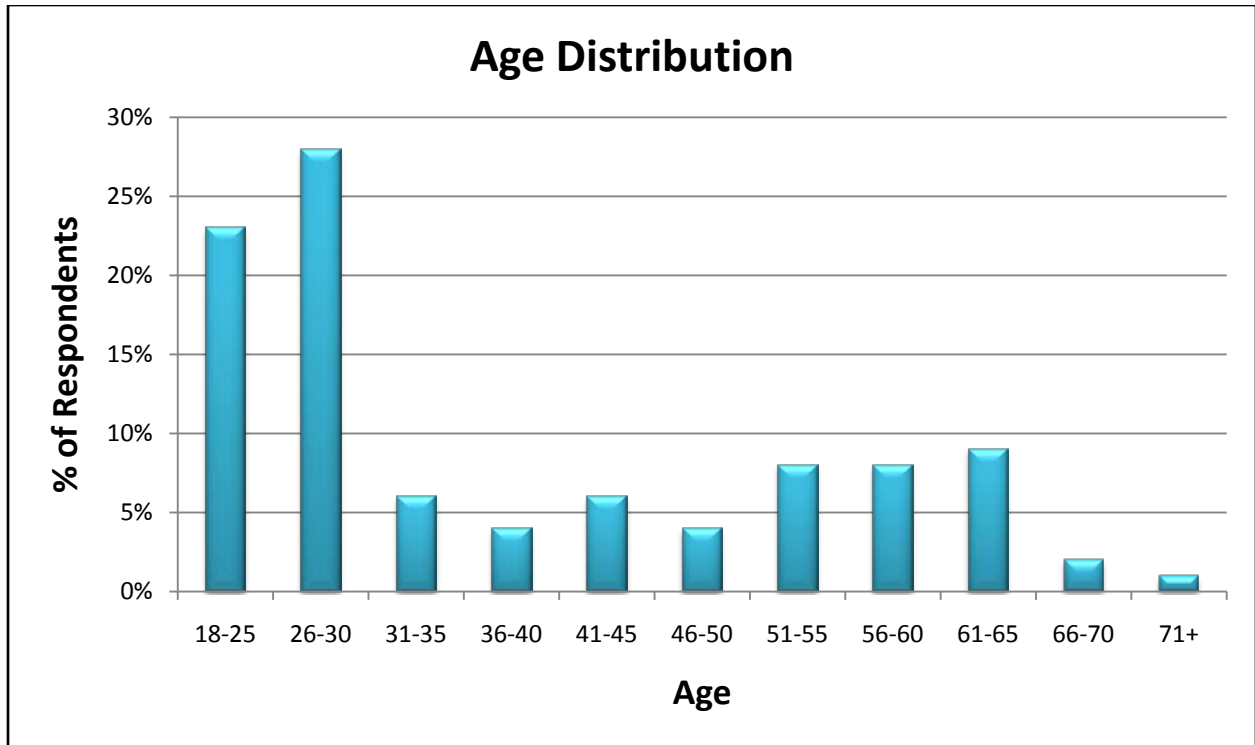
## **Introduction**

Every trial lawyer has heard the common jury instructions, telling jurors not to research the case on their own, not read news stories about the case, and not to watch television coverage of the trial. In the days before the Internet, it was difficult for a juror to research the case on his or her own. A juror would have to go out of his way to look for news stories, find a textbook on point, or travel to the scene to see what it looks like. Today, with the prevalence of the Internet, all the information is just a click away. Jurors can even research cases on their cell phones during breaks in the trial. This paper explores the effect the Internet is having on the jury and what the legal community can do about it.

## **The Problem**

Internet access is nearly ubiquitous today. Millions of Americans own smartphones that allow them Internet access anywhere. These phones make access to the Internet as easy as making a phone call and allow jurors to go online in the short breaks during a day of trial. Nearly every American home has access to the Internet as well. Americans, especially those in the 18-25 age group, are becoming accustomed to using the Internet as part of their daily lives. For many, going online to check Facebook or headline news is just a part of their normal routine, like brushing their teeth. Courts are asking jurors to leave this routine behind when they enter the jury box. However, not surprisingly, jurors are not listening and it is resulting in mistrials.

To gauge the extent of the problem I conducted a survey. The survey asked potential jurors questions regarding their online habits and things they would or would not do if they were a juror on a case. Mostly younger people participated in the survey, as seen in this chart of the age distribution of survey respondents:



The results of this survey likely reflect the bias of the younger generations. For example, nearly 70% of respondents said they would look up a term they found confusing in a dictionary or online, despite a judge’s instructions not to conduct independent research. Another 45% would conduct online research into complicated matters such as testimony regarding medical procedures. Of particular interest is that 31% of respondents either work in the legal field or are current law students. Of those in the legal field, 64% would look up a word online, and 40% would look up complicated matters. This survey is, of course, not scientific. The survey was distributed only online, and thus was taken by those who may feel more comfortable using the Internet. However, it should give a litigator or judge pause that such a high percentage of respondents, even those familiar with the law, are willing to violate a judge’s instructions.

## Background

Internet use, and specifically social media use, is growing every year. Recent estimates say that over 77% of Americans, or roughly 240 million people, are connected to the Internet.<sup>1</sup> The Internet is also becoming more mobile. Roughly, 30% of all cell phones are smartphones with Internet access and that number continues to grow.<sup>2</sup> More and more jurors will have access to the Internet on their phones at the courthouse or on their laptops, tablets, netbooks, or desktop computers at home. Wireless access is available in most coffee shops and many restaurants, meaning jurors can easily have access to it during lunch breaks during the trial. There are too many possible uses of the Internet to cover in one paper, but Facebook, Twitter and Google represent the biggest challenge for courts and litigators.

## Facebook

The power of Facebook is undeniable. Facebook has over 500 million active users, with 50% of those users logging in every single day.<sup>3</sup> To put 500 million users in prospective, that is more than 160% of the entire United States population.<sup>4</sup> The average Facebook user has 130 “friends,” which simply means people they are directly linked to on the site.<sup>5</sup> A user can log on and see what each of their friends has posted for the day, be it what they are currently doing or thinking, news articles, videos, or virtually anything else on the Internet. A user can also post their own comments, thoughts, activities, or stories, and all of their “friends” can comment on that post to share their own views. For a juror, this means they can post a news article about the trial they are on and within minutes, all of their friends can see it and respond with their own

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<sup>1</sup> Top 20 Countries with The Highest Number of Internet Users, Internet World Stats. Mar 26, 2011.  
<http://www.internetworldstats.com/top20.htm/>

<sup>2</sup> Mobile Snapshot: Smartphones Now 28% of U.S. Cellphone Market, Nielsen Wire. Nov 1, 2010.  
[http://blog.nielsen.com/nielsenwire/online\\_mobile/mobile-snapshot-smartphones-now-28-of-u-s-cellphone-market/](http://blog.nielsen.com/nielsenwire/online_mobile/mobile-snapshot-smartphones-now-28-of-u-s-cellphone-market/).

<sup>3</sup> Press Room Statistics, Facebook. <https://www.facebook.com/press/info.php?statistics>.

<sup>4</sup> U.S. & World Population Clocks, U.S. Census Bureau. <http://www.census.gov/main/www/popclock.html>.

<sup>5</sup> Press Room Statistics, Facebook. <https://www.facebook.com/press/info.php?statistics>.

thoughts and opinions. Additionally, jurors can update Facebook with their thoughts or feelings about jury duty or the trial right from the jury box and receive responses from all of their Facebook friends.<sup>6</sup>

This does not sound like much until you observe the full power of Facebook. Recently, Facebook was credited with helping the democratic revolution in Egypt.<sup>7</sup> If Facebook can help start a revolution and overthrow a dictator, what does that mean for our jury trials? Can we truly expect avid Facebook users to forgo using it during a high profile case?

### Twitter

Twitter is the latest big social media tool on the Internet. Currently, Twitter has 175 million users and growing.<sup>8</sup> There are 95 million “tweets,” or messages sent every single day.<sup>9</sup> Each tweet is a 140 or fewer character message that can be read by anyone on the internet.<sup>10</sup> Twitter messages can be sent from a computer or via a text message from a cell phone. This means that a juror would not need Internet access or a smartphone to update their Twitter messages. News agencies such as CNN, Fox News, and MSNBC, use Twitter on a daily basis to

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<sup>6</sup> This is a post from Facebook (blurred for privacy of the poster), that was submitted from the poster’s cell phone. Within 15 minutes, one of the poster’s friends saw the post and “liked” it, expressing agreement. This person could have just as easily commented on the post asking questions about the trial.



<sup>7</sup> Caroline McCarthy, Facebook: Egypt hasn’t blocked us yet, Cnet News. Jan 26, 2011. [http://news.cnet.com/8301-13577\\_3-20029656-36.html](http://news.cnet.com/8301-13577_3-20029656-36.html).

Helen A.S. Popkin, Power of Twitter, Facebook in Egypt crucial, says U.N. rep, MSNBC. Feb 11, 2011. [http://technolog.msnbc.msn.com/\\_news/2011/02/11/6033340-power-of-twitter-facebook-in-egypt-crucial-says-un-rep](http://technolog.msnbc.msn.com/_news/2011/02/11/6033340-power-of-twitter-facebook-in-egypt-crucial-says-un-rep).

Mike Giglio, Inside Egypt’s Facebook Revolt, Newsweek. Jan 27, 2011. <http://www.newsweek.com/2011/01/27/inside-egypt-s-facebook-revolt.html>.

<sup>8</sup> About Twitter, Twitter. <http://twitter.com/about>.

<sup>9</sup> Id.

<sup>10</sup> Depending on security settings. Twitter users can limit who can see their tweets so that their messages are only going to specific users.

post their latest headlines.<sup>11</sup> Twitter was the medium of choice for protestors in Iran over the re-election of Mahmoud Ahmadinejad.<sup>12</sup> Twitter was so important during these protests, the U.S. State Department actually asked Twitter to move a downtime to 1:30am Tehran time so Twitter would not be down while the Iranians were awake.<sup>13</sup>

## Google

Google and other search engines have made it extremely easy to find information online. “Googling” has become synonymous with searching for information or answers online. In just a few seconds, a juror can type what they are looking for into Google and get a response. This can be done at home on a computer or even during a break in the trial from the juror’s smartphone. With billions of pages included in searches, Google has made it extremely easy to look up everything from people to complex medical procedures. With Google jurors can learn about all aspects of your case in just a few minutes.

## Cases

Since 1999, there have been at least 90 challenges to verdicts based at least in part on Internet-related juror misconduct.<sup>14</sup> In the past two years, at least 28 cases have resulted in mistrials due to Internet misconduct.<sup>15</sup> This number is likely to continue to grow as more and more jurors have access to the Internet, and more have access through smartphones. A sampling of cases that illustrate the growing problem of jurors using the Internet during trial follows.

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<sup>11</sup> CNN, Twitter. <http://twitter.com/cnn>. Fox News, Twitter. <http://twitter.com/foxnews>. MSNBC, Twitter. <http://twitter.com/msnbc>.

<sup>12</sup> Lev Grossman, Iran Protests: Twitter, the Medium of the Movement, Time. Jun 17, 2009. <http://www.time.com/time/world/article/0,8599,1905125,00.html>.

<sup>13</sup> *Id.*

<sup>14</sup> Thomas D’Amato and Adam Koss, Please Jurors, Check Your iPhone with the Bailiff, DRI: The Whisper (Feb. 28, 2011)

<sup>15</sup> *Id.*

In a 2009 Arkansas case, a jury entered a \$12.6M verdict against Stoam Holdings and its owner, Russell Wright.<sup>16</sup> After the verdict was announced, defense attorneys discovered that one of the jurors, Johnathan Powell, had sent eight Twitter messages about the case.<sup>17</sup> One of his tweets said “So Johnathan, what did you do today?’ Oh, nothing really. I just gave away TWELVE MILLION DOLLARS of



somebody else's money!"<sup>18</sup>

Another message from Powell stated, "Oh, and nobody buy Stoam. It's bad mojo, and they'll probably cease to exist, now that their wallet is \$12M lighter. http://www.stoam.com/":<sup>19</sup>

When questioned, Powell said he did publish those posts, but he did not see posts or replies from other users.<sup>20</sup> According to Powell, all the Stoam-related tweets were made after the jury had finished deliberating.<sup>21</sup> On appeal, the defense attorneys argued that Powell was biased, engaged in outside research, and that he "was predisposed toward giving a verdict that would impress his audience."<sup>22</sup> However, the defense had to prove that outside information entered the jury room and that the information influenced the verdict.<sup>23</sup> The

<sup>16</sup> Ebony Nicholas, A Practice Framework for Preventing "Mistrial by Twitter," 28 Cardozo Arts & Ent. L.J. 385, 391 (2010).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 392.

Johnathan Powell's Twitter page. Accessed on April 18, 2011. <http://twitter.com/johnathan/status/1255697916>.

<sup>20</sup> A Practice Framework for Preventing "Mistrial by Twitter,"

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*



appeals court held that Powell's actions did not violate the rules and that his Twitter message did not demonstrate bias.<sup>24</sup>

In a federal drug trial in Florida, a juror admitted that he had been doing online research on the case in violation of the judge's instructions.<sup>25</sup> The judge then questioned the rest of the jury and found that eight other jurors had been doing the same thing.<sup>26</sup> After eight weeks of trial, the judge had no choice but to declare a mistrial.<sup>27</sup> The defense lawyer on the case, Peter Raben, commented, "We were stunned ... It's the first time modern technology struck us in that fashion and it hit us right over the head."<sup>28</sup>

Another trial in Florida resulted in a mistrial after a juror used his smartphone to research a case. The question before the jury in the case was whether the defendant acted in a prudent manner.<sup>29</sup> One of the jurors looked up the word "prudent" as used in the judge's jury instructions.<sup>30</sup> After looking up the definition on the website Encarta, the juror shared the definition with the rest of the jury.<sup>31</sup> Under Florida law, once juror misconduct is established, the moving party is entitled to a new trial unless opposing party can demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict.<sup>32</sup> The court stated that at the very least "there is no reasonable possibility that the juror's misconduct, by utilizing the smartphone to retrieve the definition of 'prudence,' did not affect the verdict in this case."<sup>33</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> John Schwartz, As Jurors Turn to Web, Mistrials Are Popping Up, *The New York Times* (Mar. 18, 2009).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Tapanes v. State*, 43 So.3d 159 (Fla. Ct. App. 2010).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 162.

<sup>32</sup> *Id.* at 162.

<sup>33</sup> *Id.* at 163.

In Michigan, a 20-year-old juror, Hadley Jons, expressed her views about a case on Facebook.<sup>34</sup>



Jons wrote “Gonna be fun to tell the defendant they’re [sic] guilty.”<sup>35</sup> <sup>36</sup> However, unlike Powell in the Stoam case, the jury had not reached a decision.<sup>37</sup> In fact, the prosecution had not even finished presenting its case.<sup>38</sup> The Judge’s 17-year-old son who was clerking for his mother, found the post.<sup>39</sup> The Judge removed Jons from the jury, found her in contempt, and fined her \$250.<sup>40</sup>

In the *People v. Rios*, a juror sent a friend request to a witness in the case.<sup>41</sup> During a hearing on the issue of the juror contacting the witness, the juror, Karen Krell, testified that she impulsively searched for the name of the witness at issue as well as a few others whose names she could not recall.<sup>42</sup> She saw a small photo of the witness, but was not certain if it was he.<sup>43</sup> She then sent him a friend request, but did not identify herself.<sup>44</sup> She did not receive a response from the witness.<sup>45</sup> Ms.

<sup>34</sup> Chris Matyszczuk, Judge removes juror after ‘guilt’ Facebook Post, [http://news.cnet.com/8301-17852\\_3-20015175-71.html](http://news.cnet.com/8301-17852_3-20015175-71.html) (Aug. 31, 2010).

<sup>35</sup> *Id.*

<sup>36</sup> James Cook, Facebook post is trouble for juror, *The Macomb Daily*, Aug. 28, 2010.

<http://www.macombdaily.com/articles/2010/08/28/news/doc4c79c743c66e8112001724.txt>

<sup>37</sup> Judge removes juror after ‘guilt’ Facebook Post.

<sup>38</sup> *Id.*

<sup>39</sup> Thomas D’Amato and Adam Koss, Please Jurors, Check Your iPhone with the Bailiff, *DRI: The Whisper* (Feb. 28, 2011).

<sup>40</sup> *Id.*

<sup>41</sup> *People v. Rios*, 907 N.Y.S.2d 440 (2010).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Krell stated that as soon as she sent the friend request she knew it was a mistake and she did not attempt to look up any other information about the case or any other witnesses.<sup>46</sup> The court classified Ms. Krell's conduct as "unquestionably a serious breach of her obligations as a juror and a clear violation of the court's instruction."<sup>47</sup> However, the court found that there was no evidence to show her conduct tainted the outcome of the case and therefore denied a defense motion for a mistrial.<sup>48</sup>

During the course of a 2009 trial of Baltimore's mayor, Sheila Dixon, for embezzlement, five of the jurors became Facebook friends.<sup>49</sup> The judge had instructed the jurors on several occasions not to discuss the case outside of the deliberation room.<sup>50</sup> However, during a break for Thanksgiving, the jurors were discussing the case via Facebook.<sup>51</sup> There was also evidence that at least one of the jurors received outsider online opinions on the case.<sup>52</sup> Following a guilty verdict, the judge sent a letter to the five jurors requesting copies of their Facebook messages made during trial and telling them not discuss the matter with anyone, including their fellow jurors.<sup>53</sup> One of the Jurors then posted on Facebook, "If you see me on the news, remember you don't know me. F\*\*\* the judges and the jury pimpin."<sup>54</sup> Before the Judge could issue a ruling on a motion for mistrial, Mayor Dixon entered a plea.<sup>55</sup>

In *Russo v. Takata*, after a 19-day trial, the plaintiff requested a new trial when it was discovered that one of the jurors had performed Google searches on the defendant.<sup>56</sup> The juror did these searches

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Thomas D'Amato and Adam Koss, Please Jurors, Check Your iPhone with the Bailiff, *DRI: The Whisper* (Feb. 28, 2011).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Lisa Wood, Social Media Use During Trials: Status Updates From the Jury Box, 24-Fall Antitrust 90 (2009), *Russo v. Takata*, 2009 S.D. 83 (2009).

after receiving his summons, but did not disclose the searches during voir dire.<sup>57</sup> The juror had found that the defendant had previously been sued for this very issue, and he revealed this to his fellow jurors during deliberations.<sup>58</sup> The judge granted plaintiff's motion and the Supreme Court of South Dakota affirmed.<sup>59</sup>

## The Solutions

Commentators on this issue have suggested a variety of possible solutions. There is no one solution that will solve the problem of jurors using the Internet during trial. No matter how much we try, jurors will always use the Internet. Our aim should be to reduce the impact of outside sources on the jury. To do that, lawyers and judges should use a combination of the following recommendations.

### Punishment

Some courts and lawyers are considering informing jurors of the penalties for violating the judge's instructions. In San Diego, for example, jurors are asked to sign a declaration under penalty of perjury, both before and after the trial.<sup>60</sup> The declaration states that they will not, and did not, research the case online.<sup>61</sup> Lying on the declaration could result in criminal charges for the jurors.<sup>62</sup> The declaration explicitly includes a prohibition on the use of computers, cell phones and laptops for case research.<sup>63</sup> This type of declaration is probably a bit too harsh. Many people already do not like serving on juries; we do not want them to fear it as well. While the threat of punishment could help ensure that jurors follow the rule, the approach used by Judge Druzinski in the Michigan case (fining the juror \$250) is probably more appropriate. Jurors should know that following the rules is important and failure to

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Lisa Wood, *Social Media Use During Trials: Status Updates From the Jury Box*, 24-Fall Antitrust 90 (2009).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

comply with the rules could result in consequences, but we need not go as far as forcing the jurors to sign a declaration under the penalty of perjury.

## Jury Instructions

Many commentators and scholars have suggested better jury instructions. Courts have already begun using more specific jury instructions to deal with the different methods of access to outside information. In Arizona, for example, the standard jury instructions specifically prohibits using “e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones, I-Touches, Google, Yahoo, or any other Internet search engine, or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case.”<sup>64</sup> This approach tries to make it clear what jury members are not supposed to do, but there is no way to list all possible ways for a jury member to access the Internet. Instead of trying to list all of the prohibited activities, the jury instructions should focus on telling the jurors why they cannot do outside research. We know through social science research that compliance can be increased simply by adding the word “because” and an explanation.<sup>65</sup> Arizona’s jury instructions have attempted to address this issue as well. The Arizona instructions state:

“One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is what is introduced in the courtroom.”<sup>66</sup>

This explanation is not quite correct, though. Jurors are allowed to bring with them into the deliberation room their past experiences. Some jurors are necessarily going to have more knowledge about a particular subject matter than others do, and thus will be basing their decision on more than what was introduced in the courtroom. The better explanation is not just fairness to each side, but also explaining that courts have rules to ensure only reliable information is introduced. The Internet does not

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<sup>64</sup> Arizona Revised Jury Instructions. [http://www.myazbar.org/SecComm/Committees/CRJI/CRJI-PDF/PRELIMINARY\\_CRIMINAL\\_INSTR.pdf](http://www.myazbar.org/SecComm/Committees/CRJI/CRJI-PDF/PRELIMINARY_CRIMINAL_INSTR.pdf)

<sup>65</sup> Susan Macpherson, Beth Bonora, *The Wire Juror*, *Unplugged*, 46-Nov Trial 40 (2010).

<sup>66</sup> Arizona Revised Jury Instructions. [http://www.myazbar.org/SecComm/Committees/CRJI/CRJI-PDF/PRELIMINARY\\_CRIMINAL\\_INSTR.pdf](http://www.myazbar.org/SecComm/Committees/CRJI/CRJI-PDF/PRELIMINARY_CRIMINAL_INSTR.pdf)

have such rules and information found on the Internet may not be of a high enough quality to be considered in a courtroom. One such jury instruction has been proposed.<sup>67</sup>

I want you to understand the reasons for these rules I have given you. I know that, for some of you, it requires a change in the way you are used to communicating and perhaps even in the way you are used to learning.

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. For those of you who are used to looking up information on the Internet, I want you to understand why you are not permitted to do any research on anything having to do with this trial or the parties here.

The evidence that is presented in court is evidence that can be tested; it can be shown to be right or wrong by one side or the other; it can be questioned; and it can be contradicted by other evidence. What you would read or hear on your own could easily be wrong, out of date, or inapplicable to this situation. It is for these reasons that the courts have always limited the evidence to what can be tested here in court.

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.

Another fundamentally important fact for you to bear in mind is that the presentation of evidence and the debate that occurs here in the courtroom about the meaning of the evidence is a public process. 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.

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.

This instruction clearly explains to the jury why it is important for them not to do their own research.

While the instruction is unlikely to stop all jurors from searching the Internet, it may stop some. It may

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<sup>67</sup> Susan Macpherson, Beth Bonora, *The Wire Juror*, *Unplugged*, 46-Nov Trial 40 (2010).

also make it more likely for one juror to inform the court if he finds another juror is researching the case online.

In the survey I conducted, it was clear that explaining the reason behind a rule generates results. When told the reasoning behind that instruction, only 50% of the people would look up a confusing term, a decrease of 20% from the same question that did not include the reasoning. While that may not be a large drop, that is two fewer people on your jury of twelve that may use the Internet. Combine these instructions with some of these techniques, and that number of jurors following the instructions may increase further.

### Juror Questions

Some jurisdictions allow jurors to ask questions of the witnesses.<sup>68</sup> Some attorneys and judges feel uncomfortable about jurors asking questions because they believe they are losing control of the evidence.<sup>69</sup> However, having jurors ask questions helps prevent them from going online to find answers to the questions, where the attorneys will have no control over what the juror finds.<sup>70</sup> Often jury members ask questions about undisputed facts or background information that neither side presented simply because it did not seem important.<sup>71</sup> Further, knowing what jurors are wondering about can help you understand their concerns and present the evidence they want to hear.<sup>72</sup>

Many jurisdictions limit questions from the jury to those of the witness on the stand; however, this practice could be expanded. Let the jurors ask general questions about the case or the law. Maybe the jury wants to see a picture of the scene and neither side has thought to present one yet. Giving them the picture will ensure they do not go online and find what may be an out of date or inaccurate picture. In some cases, the jury may want to know the answer to something that the parties will present

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<sup>68</sup> Gareth Lacy, Should Jurors Use the Internet?, *The National Law Review* (2010).

<sup>69</sup> Susan Macpherson, Beth Bonora, *The Wire Juror, Unplugged*, 46-*Nov Trial* 40 (2010).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

later in trial. Allow the court to tell the jurors that the answer to their question will come in the next few days, and this may eliminate the urge the juror feels to go online to find the answer.

Returning to the survey results, 94% of respondents said they would ask for clarification of confusing testimony. Another 79% said they would ask for the definitions of terms used by witnesses or the court if they did not understand them. These results, combined with the experiences of the attorneys who already practice in jurisdiction that allow juror questions, clearly show that jury members are willing to ask for clarification when they need it. Additionally, only 39% of respondents said they would go online to look up the definition of a word, a drop of 31% from the same question without the ability to ask questions. Combine this technique with others above and the number that goes online may drop even further.

## **Preparation**

Today's trial preparation means more than just knowing the facts of the case and having your examinations and arguments prepared. Attorneys need to research their case online before trial, because jurors will likely be doing it during trial. Lauren Haven and David Ball provide us with numerous examples of juror researching changing the case in their essay "Virtual Reality: How jurors finding information online can swing your case." They give examples of jurors reading comments on news articles, searching for license information on expert witnesses, and reading about medical conditions and care online. In one case revolving around a car accident, a juror read a comment on a news article that said the plaintiff was a drug users and heavy drinker. The plaintiff, who was not a drinker or drug user, had no idea this comment existed or that the juror had read it, lost the case. If he knew this comment existed, the plaintiff easily could have presented evidence to show he was not under the influence at the time of the accident.

To prepare for trial, there are a number of things to research online. Look for Facebook, Twitter, Myspace and blog accounts of all the witnesses in the trial, including your client. Use Google to research



witnesses, locations, companies, and anything else that could be of interest in the case. If the case revolves around an accident or public place, use Google Street View to see what the scene looks like online. Take a close look at yourself and your firm online. Does your online image give off a good impression for the jury, or will they consider you just a hired gun? In medical malpractice cases, research the disease, procedure, or complication online. In high profile cases, read all of the news stories about the event and all of the comments on those articles. Check on expert witnesses by looking at their websites and searching licensing agencies to make sure their licenses are current. By doing a thorough search of what is available online, you will find what the jury could find. If there is something online that can hurt your case, you can try to address it preemptively through witness testimony so jurors either will not look it up, or will not believe it when they read it. Additionally, through the online research you may discover facts useful for your case that did not turn up through discovery.

If you have the list of potential jurors ahead of time, research the jurors online. Social networking sites often contain personal and candid information about the user and can be a good way to learn about the jurors.<sup>73</sup> Sites like Facebook can include information such as favorite movies and TV shows, religious beliefs, friends, and political opinions – all of which could potentially be useful in evaluating that person for the jury. For example, one criminal defense attorney defending a black man charged with sexual assault tried to keep a white female juror who had Facebook photos with black male friends because she might be more sympathetic.<sup>74</sup> One district attorney said he does not like jurors whose TV “likes” on Facebook include shows like “CSI: Crime Scene Investigation” because they may have an unrealistic expectation of DNA evidence.<sup>75</sup> A trial consultant for a corporation in a product-liability case advised against a potential juror who posted one of her heroes was Erin Brockovich.<sup>76</sup>

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<sup>73</sup> Ana Campoy, Ashby Jones, Searching for Details Online, Lawyers Facebook the Jury, The Wall Street Journal (Feb. 22, 2011).

<sup>74</sup> Kashmir Hill, Make Sure Your Lawyer Knows How To Use Facebook, Forbes (Feb. 23, 2011).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

Knowing which potential jurors use sites like Facebook does not just help you learn about their views, but it also can show which jurors will be more likely to use the Internet during trial.

Attorneys can learn about juror online habits during voir dire. Ask the potential jurors if they have a blog, a Facebook page, or a Twitter account. If so, do they use it regularly? Answers of “yes” should alert you that they may use the Internet during trial. You can then use voir dire to try to encourage the jurors to follow the judge’s instructions about not using the Internet. Ask those who do use the Internet regularly how they will handle a temporary change in their habits.<sup>77</sup> Ask those who frequently use social media sites how they will feel about a degree of isolation during the trial.<sup>78</sup> These type of questions will cause potential jurors to think about what they will be required to do during the trial. In rare cases, it may even lead to an admission that the potential juror cannot comply with such requests.<sup>79</sup>

Some courts allow lawyers to bring laptops into the courtroom. This can allow attorneys or paralegals to research the jurors during the voir dire process itself. A New Jersey appeals court ruled that a lower court erred by prohibiting a plaintiff’s attorney from using the Internet in the courtroom.<sup>80</sup> The court stated “The fact that the plaintiff’s lawyer had the foresight to bring his laptop computer to court and defense counsel did not, simple cannot serve as a basis for judicial intervention in the name of fairness or maintain a level playing field.”<sup>81</sup> If the court allows you to use a laptop during voir dire, you should take full advantage of it. You may find something about a juror online during voir dire that the juror is not volunteering in response to questioning.

When researching jurors online, be careful not to communicate with them. Rule 3.5 of the Model Rules of Professional Conduct states in part:

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<sup>77</sup> Lisa Wood, Social Media Use During Trials: Status Updates From the Jury Box, 24-Fall Antitrust 90 (2009).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Ana Campoy, Ashby Jones, Searching for Details Online, Lawyers Facebook the Jury, The Wall Street Journal (Feb. 22, 2011).

<sup>81</sup> *Id.*

A Lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such person during the proceeding unless authorized to do so by law or court order.

Thus, a lawyer should not attempt to “friend” a juror on Facebook, follow them on Twitter, or engage in any other way with the juror. Also, remember that some sites like LinkedIn track who views someone’s page, and depending on privacy settings, may tell the individual that you viewed their page. However, such sites require you to be logged in with your own account to be identified. If you do not have an account or do not log in, you generally cannot be tracked.

### **Follow-up**

After thorough research and voir dire, you should have a good idea of which jurors may use the Internet during trial. Throughout the trial, you should periodically check the jurors’ Facebook pages, Twitter accounts, or blogs to see if they are posting anything about the trial. Social media may make it easier for the jurors to violate the judge’s instructions, but it is also makes it easier for the lawyers to catch. Remember, in nearly all of the above-cited cases someone found that a juror was violating the instructions by researching the case or posting about the case online. In fact, the misconduct of Jonathan Powell and Hadley Jons (above) can be found quite easily. I was able to track down their offending Twitter and Facebook posts with just a few minutes of research. Powell still has an active Twitter account that anyone can see.<sup>82</sup> In a recent six-week trial where I was assisting with research, I was tasked with monitoring all of the jurors for posts about the trial. After a few hours of searching, I determined which jurors had public Facebook, Twitter, and Myspace accounts. Once I found a page belonging to a juror, I bookmarked it for later access. Follow-up each week took no more than minutes because all I needed to do was open the pages I had already saved to see if there were changes. If a juror had posted about the case, we would have found it well before a verdict was delivered. Being

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<sup>82</sup> <http://twitter.com/johnathan>

diligent about checking these sites can help you catch a violation before it creates a mistrial and costs you and your client time and money.

## **Conclusion**

There is no one way to stop the jury from using the Internet. Our legal system has to deal with the fact that internet access is expanding and more and more jurors will be accustomed to using it all the time. However, with a combination of better jury instructions, more participation from the jury, preparation and follow-up, we can curb the influence of the Internet and social media sites on the jury.