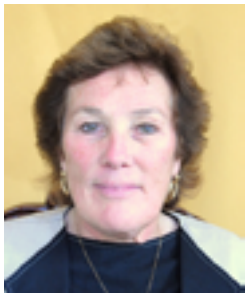
Voice of the Judiciary

Does Justice Go Off Track When Jurors Go Online?

By Judge Linda F. Giles

It has become commonplace for trial judges to issue a pre-charge to newly impaneled jurors, exhorting them, *inter alia*, not to communicate about or research any aspect of the trial before them and not to read, watch, or listen to any account of the case in any news media or any other source. Nevertheless, despite these warnings, a plague of inappropriate information flowing both into and out of the jury box is wreaking havoc around the nation's legal system. Judges across the land are discovering to their dismay that, even in the face of their express cautions, jurors increasingly are using smart phones and other electronic devices to access the Internet in order to talk or learn about their trials. Jurors' seemingly insatiable appetite for nonstop Internet access has begun to trigger so-called "Google" mistrials and other infuriating disruptions.

For example, in March 2009, the Federal judge in a big Florida drug trial had to declare a mistrial when he discovered that nine jurors had conducted their own research about the case on Google, Wikipedia, and other Internet sites, in violation of his explicit instructions. In Arkansas, a building materials company, Stoam Holdings, is appealing a $12.6 million judgment against it on the ground that a juror had tweeted a message, "oh, and nobody buy Stoam. Its [*sic*] bad mojo and they'll probably cease to Exist, now that their wallet is $12m lighter." Right here in Massachusetts, in the case of *Commonwealth* v. *Guisti*, 434 Mass. 245 (2001), the Supreme Judicial Court had to wrestle with the issue of a juror who, during a rape



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trial, had posted a message on an Internet mail service, “Just say he’s guilty and lets [*sic*] get on with our lives!” In a recent Berkshire County Superior Court rape trial, the judge, who had instructed the jurors not to discuss the trial, had to remove a juror for referring to his jury duty on Twitter; he even tweeted, “I’m in contempt of court, de facto if not de jure.”

Given the strict prohibition against outside research and communication by jurors, it may come as a surprise that the contemporary model of jurors as neutral, passive listeners who choose between the parties’ evidence has not always been the case. The origins of the American jury system can be traced to the medieval period in England, especially during the twelfth-century reign of King Henry II, probably the first jury innovator. Unlike a modern jury, however, jurors in Henry’s day were “self-informing,” that is, they were expected to investigate facts and “declare the truth” on the basis of preexisting, personal knowledge of the facts. Blackstone’s Commentaries on the Law 673-77 (Bernard C. Gavit ed. 1941); Daniel Klerman, “*Was the Jury Ever Self-Informing?*,” Southern California Law Review, vol. 77:123 (2003).

By the fifteenth century, however, the idea of a self-informing jury was yielding to a jury that heard evidence presented at trial. Klerman, at 145. By the middle of the sixteenth century and the advent of the adversarial system, the rules of evidence emerged to control how information, and how much, juries received. Lawrence M. Friedman, *A History of American Law* 101 (3rd ed. 2005). By the dawn of the twentieth century, it was established that juries must base their verdicts solely on the evidence presented in open court, and not on private information or knowledge. 3 Wigmore, Evidence § 1364 (2nd ed. 1923).

Our present-day adversarial system is a two-sided structure that is predicated on the attorneys’ ability to scrutinize and challenge all the facts that go before the jury. “That’s the beauty of the adversary system–you lose all that when the jurors go out on their own,” says Professor Olin Guy Wellborn III, a law professor at the University of Texas and co-author of a handbook on evidence law.

What is the answer to this increasing problem of Internet juror misconduct? Confiscating electronic gadgets from non-sequestered jurors will accomplish nothing. At the risk of sounding like a Luddite, it seems to me that

succumbing to the temptation of technology and allowing jurors to go rogue is not the solution either. The cornerstone of our legal system is a complex set of rules of evidence aimed at assuring that the information provided jurors is authentic, reliable, relevant, and not unduly prejudicial. As untrained laypersons, jurors may not appreciate that surfing the Web could lead to impermissible and even unconstitutional distractions, *e.g.*, learning that the defendant in the trial before them has a prior criminal record. A juror's possible frustration at being denied outside research cannot justify the potential violation of a criminal defendant's right to a fair and impartial trial.

The best way to handle this phenomenon, in my opinion, is to educate jurors that information is not evidence and that there is a vast difference between *accepting* data (i.e., information) and *judging* data (i.e., evidence). I recommend that trial judges take the time to issue expanded and modernized jury instructions that not only caution against the use of the Internet and social networking but that also explain *why.* Some of the language suggested last September by the Board of Regents of the American College of Trial Lawyers includes the following:

> "[T]he law requires these restrictions to ensure the parties have a fair trial based on the evidence that each party has had an opportunity to address. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom … You must not engage in any activity, or be exposed to any information, that might unfairly affect the outcome of this case. Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over …"

The Internet can be a powerful tool for self-education, -improvement, and -empowerment. If jurors are going to be asked to sacrifice some of their personal freedom and forego their case-specific e-mailing, texting, blogging, instant messaging, and social networking for the duration of their service, they are entitled to a clear and thoughtful explanation of the reason. ■