Juror Misuse of Social Media:
How Prevalent is the Problem?
New Data from the Federal Judicial Center

It seems like an increasingly common news story – a mistrial resulting from a juror attempting to "friend" a witness on Facebook or tweeting about the case during trial. If at least some jurors are getting caught, it raises the question of how many are going undetected. Perhaps there is no direct way to answer that question. After all, if asked, jurors might be unlikely to admit to doing what they have been instructed not to do. The next best answer might be to ask trial judges about what they have seen. So, the Federal Judicial Center ("FJC") surveyed federal district court judges about how often they have encountered juror misuse of social media. The survey was expressly limited to juror misuse of "social media," meaning Facebook, Twitter, chat rooms, and so forth. It did not address the separate issue of jurors using the Internet to conduct outside research, such as searching Google or reading the litigants' webpages.

The bottom line remains that juror use of social media is a potential problem. Even if the frequency of misuse is low, the consequences are potentially dire.

The FJC's survey results show that, out of the 508 judges who responded, only 30 (6%) indicated that they had experienced one or more instances of a juror using social media to communicate during trial or deliberations. Most often (43% of the time), the judges learned of a jurors' misuse of social media from another juror who reported it.

Ninety-four percent of the surveyed judges said they have taken measures to prevent jurors from misusing social media during trials. Those measures most often include reading the Committee on Court Administration and Case Management's ("CACM") model jury instructions, which were distributed in a memo to all federal district court judges in January 2010. Among other things, the CACM's instructions state: "You may not communicate with anyone about the case on your cell phone, through e-mail, your Blackberry, iPhone, text messaging, on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube."

Fifty-four percent of the judges who had presented the CACM instructions said they believe jurors did not use social media in cases in which the model instructions were given. However, another 45% of the judges admitted that they had no way of knowing. Only 1% indicated jurors had misused social media in a case in which the CACM instruction was given.

The bottom line remains that juror use of social media is a potential problem. Even if the frequency of misuse is low, the consequences are potentially dire. In terms of best practices, trial lawyers should request that the court provide specific instructions prohibiting the use of social media, such as the CACM model instructions. Trial lawyers should also request that the court remind the jury of that prohibition at multiple points throughout the trial, as well as reminding them of the consequences of violating that prohibition. And, importantly, trial lawyers should request that courts instruct jurors that they should report other jurors who they believe have violated the prohibition on social media. Among judges who completed the FJC survey, the most common way they learned of juror misuse of social media was from the reports of other jurors. Finally, to the extent possible and to the extent consistent with applicable ethics rules, trial lawyers are wise to track postings to social media sites for mentions of their ongoing trials.

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