

JUROR MISCONDUCT AND THE INTERNET

BY ANDREW RADDING, ESQ., GEOFFREY W. WASHINGTON, ESQ., AND CHRISTINE R. HOGAN

"A criminal defendant's right to have an impartial jury is one of the most fundamental rights under both the U.S. Constitution and the Maryland Declaration of Rights."

- *Jenkins v. State*, 375 Md. 284 at 299 (2003).

"We have a criminal jury system which is superior to any other in the world; and its efficiency is only marred by the difficulty of finding 12 men everyday who don't know anything and can't read."

-Mark Twain 1873

The Internet is a vital tool for attorneys. We use it to market our professional services, to locate other lawyers, consultants, or experts, and to research an existing or potential client, opposing parties, witnesses, experts, even jurors. With the explosion in popularity of social media websites, blogs, online forums, and sites like Wikipedia, it is increasingly likely that at least one person involved in your case will utilize one of these sites during a trial. Proving that not even judges are above such practices, in *U.S. v. Bari* (599 F.3d 176, (2d Cir. N.Y. 2010), a trial judge Googled images of rain hats to confirm his intuition regarding the variety of available rain hats, which was an issue in the case. Unfortunately, the Internet can be a litigator's worst nightmare when the same information falls into the hands of a juror.

As Internet sites are an increasingly integral part of everyday life, jurors may increasingly believe it acceptable to consult many of the tools which they commonly use in their daily lives, such as, Facebook, MySpace, information-gathering websites like Google and Bing, not to mention encyclopedia sites such as Wikipedia without taking into account the evidentiary prerequisites required for admissibility of potential evidence. The Maryland Court of Appeals addressed the ramifications of these concerns (that someone other than the purported person may have created a Facebook or MySpace page, or that someone other than the purported poster may have posted to the page in question) in *Griffin v. State*, 419 Md. 343, 19 A.3d 415 (2011).

Juror Misconduct

Now that research which once required a trip to the library can be accomplished with a few clicks on a computer or smart phone, there has been a rise in juror misconduct involving the internet. With technological advances constantly making information more easily accessible via the Internet, it will only become easier for a juror to engage in misconduct. Therefore, the problem of juror misconduct via the Internet must be addressed and its harmful effects reversed as soon as

possible to restore the judicial system to its intended purpose: the fair resolution of legal issues.

The potential consequences of juror misconduct are numerous and grave; not only for the parties to the case at issue, but for attorneys, judges, and taxpayers. Information found online may not be accurate or admissible as evidence, either because of hearsay issues or because they do not meet the *Daubert* and *Frye* standards, as well as the threshold issue of authentication. Hearsay objections will surely arise if messages sent between users of Facebook or MySpace, postings on a blog, or on a website are proffered in the courtroom; however, these are likely the very sorts of information that a juror is likely to come across in his or her research on a case. The inability to refute information through cross-examination provides an additional means by which the rules of evidence may be subverted if jurors are presented a one-sided opinion on an issue which they have found on the internet.

The possibility of a juror discovering evidence suppressed at trial because it violates a criminal defendant's constitutional rights is another concern because it precludes the defendant from confronting a witness. With this heightened risk of juror misconduct, the possibility (especially in high profile cases) that parties interested in the outcome of a case will begin to plant misinformation online in an attempt to take advantage of the possibility that a juror may conduct internet research is both real and plausible.

Although dismissal of a juror who has conducted such research is one possible solution, what if there are no alternates left to replace the errant juror? What if the behavior is not discovered until the case has been submitted to the jury for deliberation, vastly increasing the likelihood that the rest of the jury will also be exposed to the information? And how does a judge confirm a suspicion that a juror has conducted inappropriate research without violating the privacy rights of jurors? Does monitoring jurors' social media usage during trial implicate their 1st Amendment rights?

If the juror's impropriety is discovered too late, courts may only be left with the option of reversing a conviction, which might allow a defendant who would have otherwise been found guilty to be set free, or declaring a mistrial, the effects of which are expensive and time consuming. Just as important is the concern that the juror's misconduct might never be discovered.

(continued on Page 10)

JUROR MISCONDUCT...

(continued from page 4)

A recent case in England was the first prosecution of a juror for contempt of court where misconduct involved improper internet use. The case tested the ramifications arising from such misconduct where it was discovered that, despite the judge's admonition against communicating about the case via the internet, a juror had been funneling information about jury deliberations to a defendant who had been dismissed from the case earlier while it had continued as to her former co-defendants; the juror asserted that she was unaware of the identity of the individual with whom she was communicating. The juror also admitted to conducting internet research on the dismissed defendant's boyfriend who was still a defendant in the case. Ultimately, the case, which had previously been delayed twice before, had to be re-tried. The juror and former defendant plead guilty and were sentenced to imprisonment, including an eight month sentence for the juror.

Maryland appellate courts have required new trials whenever juror misconduct suggests "even the hint of possible bias or prejudice." *Wardlaw v. State*, 185 Md. App. 440, 451 (2009). This is the rule even when the case appears to be otherwise error-free and the trial judge made findings that the misconduct was not material to the fairness of the verdict(s) reached. This is a sobering and expensive thought in light of the rise in juror misconduct and the ease of accessibility to outside means of research.

In *Wardlaw*, the appellant was tried before a jury on various charges of sexual offenses deviance, including two counts of incest with his 17 year old daughter. He was convicted of 3 counts of assault in the second degree, the jury deadlocked on the charges of sexual child abuse and incest, and a mistrial was declared on those counts. One of the jurors researched ODD (Oppositional Defiant Disorder) after testimony from appellant's daughter's therapeutic behavioral specialist indicated that appellant's daughter, the alleged victim, was diagnosed with ODD without providing any explanation as to what ODD is. The juror disclosed to his fellow jurors that according to his Internet research, lying was a characteristic of ODD.

Upon discovering the juror's conduct, the trial court refused to declare a mistrial; however, the Court of Special Appeals characterized the juror's research as "egregious misconduct". The appellate court said that upon discovery of the juror's misconduct, the jury should have been voir-dired to determine whether it could still render an impartial verdict based on the evidence presented at trial. Since the jurors were not polled, the court failed to rebut the presumption of prejudice which attaches as a result of egregious misconduct by a juror. The

(continued on Page 11)

JUROR MISCONDUCT...

(continued from page 10)

Court of Special Appeals held that the trial court's failure to voir dire the entire jury was reversible error.

Allan Jake Clark v. State of Maryland, No. 0953/08 (Md. Ct. Special App. Dec. 3, 2009) is an unreported case having bearing on this issue. In this murder case, a bailiff discovered printouts from Wikipedia articles in the jury room. The printouts were entries on "livor mortis" and "algor mortis", and they discussed how time and place of death may be established by analyzing how blood settles in a body; which was an issue in the case. The trial court consulted the jurors and concluded that only one juror had conducted outside research and viewed the articles. The jury convicted Clark of first-degree murder, and the trial judge denied a defense motion for a mistrial. The appellate court reversed in a unanimous decision, holding that an "adverse influence on a single juror compromises the impartiality of the entire jury panel" Judge Moylan, writing for the panel of the Court of Special Appeals which overturned the decision (quoted in *The Baltimore Sun*).

In the 2009 Sheila Dixon trial, five jurors became Facebook friends during the course of the trial and allegedly discussed the case. After conviction, Mayor Dixon filed a motion to set aside the verdict, one of her arguments being that the "Facebook Five's" activities constituted jury misconduct under Maryland law. However, the issue became moot when the Mayor entered into a plea agreement that resolved all of her outstanding legal issues.

A recent Texas case showed the pitfalls of ill-advised Facebook "friend" requests where a juror attempted to "friend" the defendant in a tort action; the defendant alerted her attorneys, who alerted the court. The juror, initially claiming he thought he was sending his request to another person with the same name as the defendant, was removed from the jury immediately and pled guilty to contempt and was sentenced to two days community service. Unfortunately for the juror, Texas recently updated its standard judge's instructions to jurors to include admonitions that social media are as off-limits as personal contact with participants in a case. Several other states have similarly updated their standard juror instructions, thus potentially exposing offending jurors to contempt penalties as well.

Perhaps the standards mandating mistrial or reversal should be reviewed considering the modern realities facing jurors and trial judges. The factors used by the Eighth Circuit in *United States v. Swinton*, 75 F.3d 374, 382 (1996) are:

1. Whether the extrinsic evidence was received by the jury and the manner in which it was received;

2. Whether it was available to the jury for a lengthy period of time
3. Whether it was discussed and considered extensively by the jury
4. Whether it was introduced before a verdict was reached, and if so at what point during the deliberations was it introduced; and
5. Whether it was reasonably likely to affect the verdict, considering the strength of the plaintiff's case and whether it outweighed any possible prejudice caused by the extrinsic evidence.

Although sequestration of the jury might be a possibility, it is expensive, and an even bigger imposition on jurors' lives than jury duty itself. Since it is generally only done during deliberations, the jury would have the opportunity to conduct outside research prior thereto, which renders sequestration essentially ineffective. Sequestration can still provide a strong solution in conjunction with anonymous juries for high profile cases; insulating jurors from people attempting to contact them electronically to influence them.

Prospective jurors should be notified in the first information they receive from the courts prior to reporting to jury duty that they will be limited in accessing online information while serving on the jury. During the jury selection process, a judge may ask potential jurors whether and with what frequency they use the Internet and social media sites in order to ascertain the potential likelihood of the juror conducting outside research. The judge should ask questions that address jurors' actual internet use, and ask whether the jurors would be able to abide by the necessary restrictions during trial. A lengthy or high-profile trial calls for more detailed and circumspect questioning.

In every jury trial, instructions should be given that specifically reference social media websites such as Wikipedia, Facebook and MySpace when a judge is informing the jurors of the rules regarding outside research and contacts. Judges should tell the jury more than just that outside consideration is unfair; they should say WHY it's unfair. Jurors should be reminded of this instruction, most importantly, when the jury separates at the end of the day.

Some believe that the use of such specific instructions will serve only to increase the number of violations by suggesting actions that would not otherwise have occurred to jurors. However, the growing body of case law involving jurors' improper use of technology suggests that use of specific in-

(continued on Page 12)

JUROR MISCONDUCT...

(continued from page 11)

structions, in conjunction with a justification for prohibiting such conduct will at least reduce the number of unintentional violations, and may help to deter jurors who might not understand the harm that can flow from their seemingly harmless actions. The possibility of contempt should also be discussed. MSBA's Maryland Pattern Jury Instruction Committee is currently drafting an instruction on the topic for dissemination to bench and bar which will likely be completed in late 2011.

A potentially positive effect of the potential for juror misconduct is that it can encourage attorneys and judges to fully present information to jurors; it discourages placing information before jurors in an incomplete manner which will tempt conscientious jurors to conduct outside research to complete the puzzle, such as in the *Wardlaw* case. Now, more than ever, counsel should prepare cases to answer obvious (and some not so obvious) questions that will arise.

Further methods to prevent juror misconduct include drafting a written agreement to be signed by each juror which acknowledges the court's instructions. The formality of a written agreement may serve to impress upon jurors the gravity of the court's instructions.

To prevent juror temptation, courthouses offering free WiFi access, could require a password to access WiFi, block certain websites such as Facebook or Wikipedia, or have the bailiff take custody of jurors' electronic devices, not to be returned during breaks; and removing all electronic devices from the jurors' possession during deliberations.

Although removing temptation from the jurors while they are in the courtroom does not mean a juror will not go home and conduct research. Taking precautions during the day can emphasize the importance of refraining from conducting research at home.

Providing opportunities for jurors to bring any question or issue that is of major concern to them to the attention of the court and counsel has been a procedure which has been allowed in other state and federal courts. See *SEC v. Koenig*, 557 F.3d 736, (7th Cir. Ill. 2009).

Many judges are unlikely to impose sanctions upon jurors even when "misconduct" has occurred. The reluctance to punish jurors may have quite a bit to do with the fact that response rates to jury summonses are already barely adequate.

Some believe that the use of specific instructions will serve only to increase the number of violations by suggesting actions that would not otherwise have occurred to jurors.

However, it is apparent that the *status quo* must be modified. In so modifying, we should show respect for jurors in explaining the 'why' of the rules of procedure: Wikipedia entries are not subject cross-examination; evidence must be authenticated on the record; insurance cannot be considered etc. The jury system has withstood many changes; from minorities and women being added to the jury pool, damaging public attention from various media sources like newspapers, radio, and television, and the requirement of the jury to take into account complicated or technological issues. This is yet another to be resolved.
