



Trial by Google: Juror Misconduct in the Age of Social Media

HON. GUSTAVO A. GELPÍ JR. AND VALERIA M. PELET DEL TORO

In today's world of instant communication, courts face great pressure to preserve the sanctity of our jury system. Due to social media networks like Facebook, Twitter, and Instagram, among others, juries now have access to potentially prejudicial information at the swipe of a screen. The internet—social media in particular—though helpful to the legal profession, has also facilitated many instances of juror misconduct.¹ For instance, in a federal drug trial in Florida, nine jurors conducted Google searches on the lawyers, the defendant, articles about the case, definitions on Wikipedia, and evidence that had been purposely excluded by the judge. When questioned by the judge, one juror stated, “Well, I was curious.”²

People's dependence on the internet and social media has only increased over time. As of 2016, 8 in 10 online Americans use Facebook, while 32 percent and 24 percent of online Americans use Instagram and Twitter, respectively.³ Jurors' use of these websites and social media outlets has become especially damaging “where jurors have ... communicated about their jury service through social networking services during trial.”⁴ Because of the pervasiveness of the internet and social media in people's daily lives, judges and counsel must anticipate and identify when jury misconduct might be taking place to respond to this problem effectively.

When Comments Turn Into Misconduct

Before a court can respond to juror misconduct arising from the use of social media, the court must find that a juror's act has substantially prejudiced a party in the litigation. While courts are encouraged to prohibit jurors from commenting about a trial on social media, not

every instance of juror commentary on social media mandates a new trial. For instance, in *United States v. Fumo*, a juror posted the following statements on his Facebook profile during trial: “Today was much better than expected and tomorrow looks promising too!” as well as “Stay tuned for the big announcement on Monday everyone!”⁵ The court decided that the defendant did not suffer any prejudice from those comments. The court reasoned that the juror's “vague” and “virtually meaningless” comments could not have substantially prejudiced the jury against the defendant.⁶

When a court finds prejudicial juror misconduct arising from social media, the court can fashion a suitable remedy, like declaring a mistrial. For example, in *Dimas-Martinez v. State*, a juror tweeted about a death penalty case during deliberations and continued to do so even after the court questioned the juror's actions.⁷ The court determined that the juror's actions constituted juror misconduct and reversed a death sentence. The court reasoned that, in disregarding

the court's specific instructions to refrain from commenting about the case on social media, the juror prejudiced the defendant and deprived him of a fair trial.

Preventing Social Media Misconduct

Judges and attorneys have a responsibility to preserve the right to a fair trial. The American Bar Association and the Judicial Conference Committee on Court Administration and Case Management have proposed useful methods to deter juror social media use.⁸ Some of their recommendations have been endorsed by the Second and Third Circuits.⁹

Attorneys' Role

In order to counter juror misconduct, lawyers should monitor jurors' social media accounts and/or internet footprint. Lawyers can review a juror's public social media posts before and during trial, but they cannot send a "friend" or access request to a juror's social media accounts.¹⁰ Attorneys can also provide prospective jurors with questionnaires about their social media use to screen for potential biases or other potentially prejudicial information. It is up to judges to not only instruct lawyers on the court's expectations regarding social media, but to also establish limits on lawyers' review of juror websites and social media, if necessary.¹¹ In general, periodic, passive review of jurors' public internet profiles is permitted, as long as no unlawful communication takes place between the attorney and the prospective juror during the course of this research.

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Judges' Role

Courts should use jury instructions to let jurors know what is and is not permitted in terms of social media use during trial. Because of how accustomed jurors are to their "always-online lifestyle," jury instructions against social media use should be as specific as possible.¹² In addition, judges should explain the importance of such a restriction—perhaps "in terms of fairness to the parties and the integrity of the trial" so jurors pay closer attention.¹³

If jurors misuse the internet despite detailed instructions, sanctions such as fines and contempt might discourage unwanted social media use. Courts may frame jury instructions in a way that encourages jurors to be their own supervisors and report misconduct, thereby relying on individual jurors to come forward and keep the trial untainted.¹⁴ Further, while potentially overly intrusive, judges might wish to opt for "virtual sequestration."¹⁵ Through this modern interpretation of sequestration, jurors stay in their homes, but agree to have their internet access and certain electronic devices either monitored or blocked. As social media continues to evolve, it is imperative that judges and attorneys respond to the medium's proclivity for enabling juror misconduct. Because there might not be a one-time fix, judges and attorneys must be open to considering creative and adaptable solutions. ©



Hon. Gustavo A. Gelpí Jr. has been a U.S. district judge since 2006. He is a past national president of the FBA. Co-author Valeria M. Pelet del Toro is a J.D. candidate at Yale Law School who received

her B.A. from Harvard College in 2015. She was a student law clerk for Judge Gelpí.

Endnotes

¹See Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 2 (2012); Katie L. Dysart & Camalla M. Kimbrough, *#Justice? Social Media's Impact on the U.S. Jury System*, A.B.A. (Aug. 22, 2013), <http://apps.americanbar.org/litigation/committees/trialevidence/articles/summer2013-0813-justice-social-media-impact-us-jury-system.html>.

²John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES (Mar. 17, 2009), <http://www.nytimes.com/2009/03/18/us/18juries.html>.

³"Online Americans" here refers to the number of people who use the internet. According to the Pew Research Center, 86 percent of Americans use the internet. Shannon Greenwood et al., *Social Media Update 2016*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016>.

⁴St. Eve & Zuckerman, *supra* note 1, at 7.

⁵*United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011). See also *United States v. Feng Ling Liu*, 69 F. Supp. 3d 374, 386 (S.D.N.Y. 2014) (holding that a juror's tweets stating that she was getting "tons" of ideas for her writing and describing the trial as "really interesting" did not amount to juror misconduct); *United States v. Siegelman*, 640 F.3d 1159, 1187 (11th Cir. 2011) (holding that emails allegedly exchanged between jurors during trial and deliberations were not evidence of juror misconduct).

⁶*Fumo*, 655 F.3d at 306.

⁷See *Dimas-Martinez v. State*, 385 S.W.3d 238, 246-47 (Ark. 2011). Other remedies include "dismissing the offending juror and replacing him with an alternate, or in some jurisdictions, allowing the parties to stipulate to a jury of less than 12 individuals." Timothy J. Fallon, *Mistrial in 140 Characters or Less? How the Internet and Social Networking are Undermining the American Jury System and What Can Be Done to Fix It*, 38 HOFSTRA L. REV. 935, 948 (2010).

It is also important to note that mistrials due to this type of juror misconduct are rare because of the Federal Rules of Evidence's focus on finality and limited inquiry into jury verdicts. See FED. R. EVID. 606(b) advisory committee's note; and Fallon, *supra* note 7, at 946.

⁸A recent case comes close to addressing the issue of juror misconduct arising from social media, but it instead focuses on the

potentially prejudicial effect of social media activity by uninvolved third parties. See *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 66-67 (D. Mass. 2016) (holding that social media activity of jurors' friends was not sufficient to sustain a presumption of prejudice); JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION & CASE MANAGEMENT, PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (June 2012), available at <http://www.uscourts.gov/sites/default/files/jury-instructions.pdf>.

⁹The Judicial Conference Committee on Court Administration and Case Management's proposed jury instructions have been used in cases like *United States v. Ganius*, 755 F.3d 125, 132-33 (2d Cir. 2014), and *United States v. Fumo*, 655 F.3d 288, 304-05 (3d Cir. 2011).

¹⁰See Joshua Dubin, *Juror Misconduct in the Age of Social Technology*, CHAMPION (Mar. 2017); Robin H. Jones & Eli Lightner II, *Combating Jurors' Improper Internet Usage and Winning*, A.B.A. (Nov. 3, 2011), <http://apps.americanbar.org/litigation/committees/>

commercial/articles/fall2011-jurors-improper-internet-usage.html; A.B.A. Standing Comm. on Ethics & Prof'l Resp., Formal Op. 466 1, 1 (2014), available at https://americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

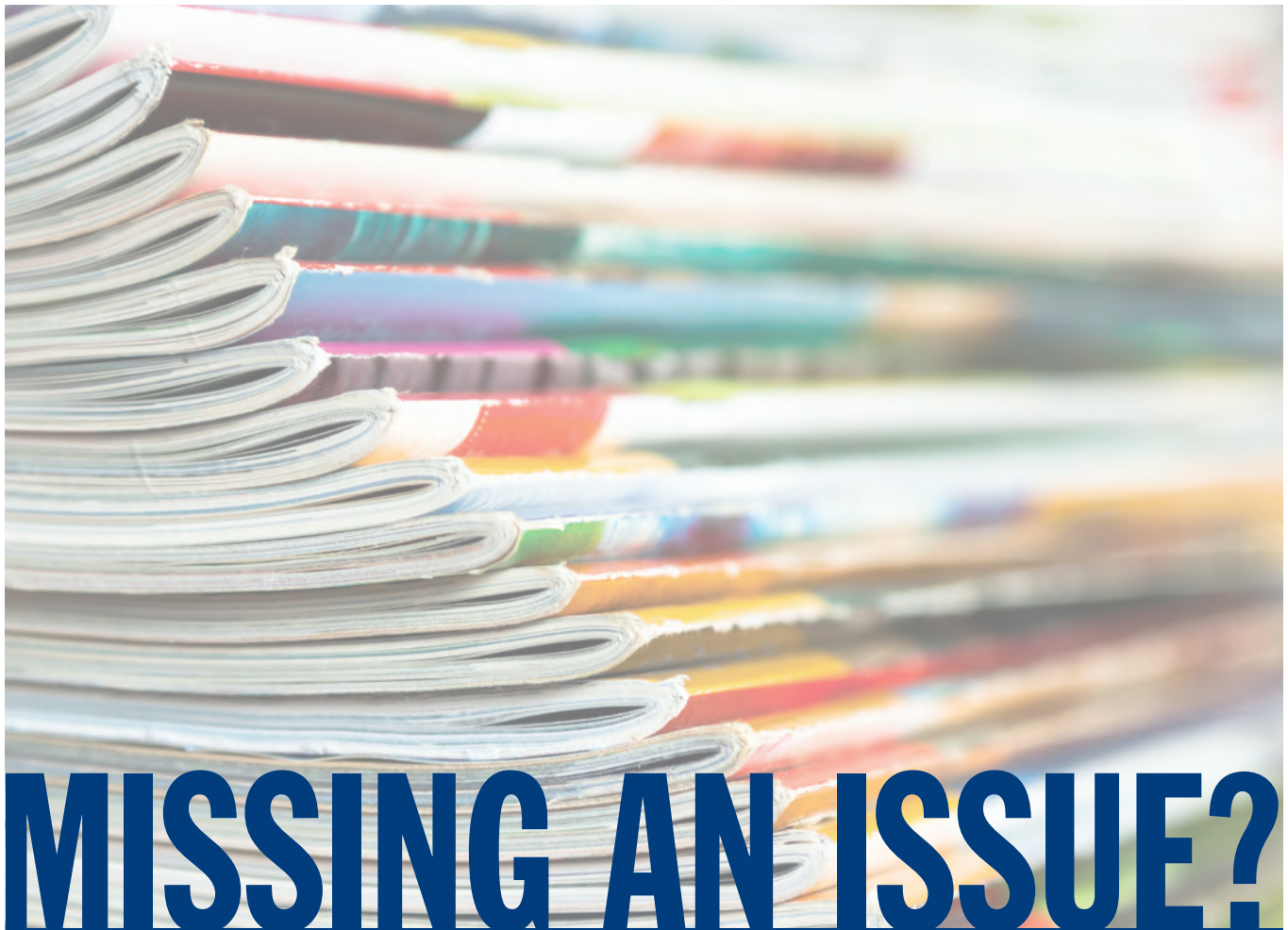
¹¹See A.B.A. Standing Comm. on Ethics & Prof'l Resp., *supra* note 10, at 3.

¹²St. Eve & Zuckerman, *supra* note 1, at 26-27.

¹³Caren Myers Morrison, *Can the Jury Trial Survive Google?*, 25 CRIM. JUST. 1, 9 (2011), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjw11jurytrial_google.authcheckdam.pdf.

¹⁴See Fallon, *supra* note 7, at 964.

¹⁵Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 410, 441-42 (2012). This method of juror social media review has not yet been adopted in any jurisdiction.



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