

The Federal Lawyer in Cyberia

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The Best of Times and the Worst of Times for Trial Lawyers?

Ask trial lawyers and many of them will have horror stories about jurors they have encountered over the years. My all-time favorite juror was a fellow who went through voir dire in a civil case in a state court matter here in California, swearing that he had no reason to believe that he could not be fair.

Two weeks into the trial, another juror passed a note to the bailiff, indicating that she needed to talk to the judge right away. Once the bailiff got that note, everything came to a screeching halt. The judge was informed, and the jury was asked to wait out in the hall. The juror who sent the note was invited into chambers along with the two lawyers and a court reporter. At that

point, all of us were holding our breath. The judge asked the juror why she had sent him the note. She responded that, during the morning break, one of the other jurors had told her that one of the two lawyers had taught a course in commercial real estate at the local community college for the last several years and that juror's wife had been one of the lawyer's favorite students. Inspired by her teacher's brilliance, the juror's wife had made several million dollars leasing and selling office buildings in the Silicon

Valley area of Northern California. The juror confided that he was extremely grateful for the skills that the lawyer had imparted to his wife and indicated that he was a few million dollars richer because of the lawyer and his inspirational teaching.

Well, the brilliant lawyer-teacher was not yours truly but opposing counsel. Of course, because he taught commercial real estate at a community college, he had taught literally hundreds of students over the last several years. He probably would not remember this juror's wife if his life depended on it. And, I later learned, at the time she took the course she was using a different last name than her husband's. Of course, opposing counsel had never laid eyes on his student's husband. In short, there was no way in the world that opposing counsel could have spotted this "stealth juror." He was a very good and very ethical attorney. I think he was more shocked by this revelation than I was—particularly, when he learned that the grateful juror had told his colleague that no matter what the trial evidence showed, he was planning to vote for the client of the attorney who had made him a millionaire.

The trial judge thanked the juror for informing the court and told her that she had done exactly the right thing. He then asked the bailiff to bring the stealth juror into chambers. When confronted, he affirmed the truth of what the other juror had said. I was, quite frankly,

disappointed that the judge did not sanction this miscreant in some way. All the judge did, however, was dismiss him from the jury. The judge indicated that he was treading lightly because he did not want to suggest to future jurors that jury service could be perilous. In any event, an alternate juror was available—thank goodness—and the trial went on for two more weeks. The jury eventually reached a verdict and the case ended.

Had this dishonest man not been foolish enough to have the conversation that he did with another juror, and had that juror not had the courage to come forward immediately with what she had heard, I suspect that the juror in question would not only have cost me one vote in the jury room, but he almost certainly would have been a very vocal supporter of opposing counsel's client. I would never have known why the jury voted the way it did.

I have had jurors fall asleep during the trial. I have had jurors swear up and down that they were not racially motivated, only to make statements during deliberations that revealed serious race bias. However, I still feel that the premeditated action of the stealth juror just described was the worst situation I have ever encountered in more than three decades of trial work.

Today lawyers and judges have a concern that was always latent in the jury process but that is now palpable in every jury trial. That is the problem of jurors who, in this Internet age, despite all admonishments from the bench, still engage in their own factual and legal research online. Such rogue behavior has the potential to be as corrosive as that of my stealth juror.

I recently ran across an article from the *Boston Bar Journal* written by a state court judge, Hon. Linda Giles, entitled "Does Justice Go Off Track When Jurors Go Online?" The article brought back memories of my stealth juror and made me realize that the situation is even more complicated today than it was more than a decade ago when my episode occurred. As Judge Giles points out,

It has become commonplace for trial judges to issue a pre-charge to newly impaneled jurors, exhorting them not to communicate about or research any aspect of the trial 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 our dismay that, even in the face of these express instructions, jurors increasingly use smartphones and other electronic devices to access the Internet to discuss 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.

I couldn’t have said it better. According to a recent article in the *California Lawyer*, the official magazine of the State Bar of California, Reuters Legal “has reported that jurors’ Internet research, blog comments, and ‘tweets’ have called into question at least 90 verdicts since 1999.” Data supplied by Westlaw showed that judges granted new trials or overturned verdicts in 21 of 28 criminal and civil cases in the past two years.

The article goes on to state that, “[a]s part of its investigation, writers monitored postings on Twitter for a three-week period, typing ‘jury duty’ into the site’s search engine. Many of the tweets turned up were from people expressing snap decisions on a defendant’s guilt or innocence.” According to the article, Reuters Legal has reported that, in the last two years, the federal courts and at least eight state courts have rewritten the civil and criminal jury instructions that bar jurors from tweeting, sending text messages, blogging, e-mailing, or researching trial proceedings online. Indeed, last August, the Ninth Circuit Court of Appeals, the appellate court that serves my neighborhood, revised its model jury instructions to account for access to the Internet and other technologies. The new criminal instruction reads in part: “Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any Internet chat room, blog, website or other feature.”

Nicely done, but apparently not as effective as trial lawyers might hope it would be. I’m sure my stealth juror would not have been impressed with the instruction.

It is hard to know what the best solution is, ultimately. Perhaps, as the article in the *California Lawyer* suggests, the solution lies in asking potential jurors what technology they are using—before the jurors are selected to serve. And there is no reason why a judge can’t ask a juror to disclose his or her Twitter name. In addition, the judge can impress upon jurors that their Internet activity will be monitored. (Query whether any juror should be required to give counsel, particularly criminal defense counsel, access to information that could later be used to seek revenge for an unfavorable verdict.)

We may be entering an age where lawyers should be monitoring social networks to see whether jurors are discussing the case outside of court. (As noted, however, this could be a very disconcerting, if not

chilling, thought for jurors who might well be deciding a party’s fate.) Of course, it should be immediately pointed out that no trial lawyer should ever become a “Facebook friend” (or other Cyberian friend or associate) of a prospective juror, an adverse witness, or anyone else connected with a case who could create an ethical issue for the lawyer.

The concerns of trial lawyers, quite frankly, sometimes border on paranoia. However, the statistics are troublesome. And the issues presented are nettlesome. The California Supreme Court has gotten involved in a case in which an attorney tried to force Facebook to disgorge a juror’s postings before and during a trial. The case, entitled *Juror Number One v. Superior Court of Sacramento County* (docket number C067309) has been transferred back to the intermediate court for further disposition. The last docket entry as of this writing was in May of this year. Perhaps eventually this case will give us our next insight into this problem.

Meanwhile, Cyberian lawyers are well advised to think through what they should do within the bounds of ethics in order to ensure that their clients receive a fair trial when a jury is impaneled. (For example, it goes without saying that the use of any subterfuge to obtain access to social media information regarding a prospective juror would be improper.)

I suppose, in fairness, I should indicate that the problem is not one that only lawyers and judges face. Prospective jurors face related issues. During the celebrated trial of baseball star Barry Bonds in federal court in San Francisco, it was reported that the social networking profiles of prospective jurors had been “mined” by lawyers for both sides seeking to get an edge during jury selection. According to the article in the *San Francisco Chronicle* (March 31, 2011) a prospective juror from West Virginia who didn’t disclose that she was a MySpace™ friend of the defendant, a police officer being tried on criminal charges, was impaneled. The investigatory work by the attorneys representing the police officer resulted in an appeal and, according to the *San Francisco Chronicle*, the appellate court ordered a new trial. According to the same article vendors are now offering social media monitoring services to trial lawyers. (The article cites DecisionQuest™ as such a vendor.)

Conclusion

As a writer even more famous than your humble Cyberian columnist once said, these are “the best of times and the worst of times.” Again, I couldn’t have said it better. See you next month in Cyberia. **TFL**

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