Guarding Against the Dreaded Cyberspace Mistrial and Other Internet Trial Torpedoes

By Judge Herbert B. Dixon Jr.

The doomsayers predicted it, the pessimists worried about it, and the naysayers said it would not be a problem. Now it has happened on more than one isolated occasion, and courts, trial lawyers, and judges are devising strategies to combat the problem. What problem? Jurors accessing the Internet before and during trials to learn or talk about the parties, witnesses, and legal issues they are confronting—conduct that violates the universal legal principles that jurors should judge the case on the evidence and law presented in the courtroom and not discuss the case or consult with outsiders until the jury is discharged. Several writers have referred to this phenomenon as mistrial by Google. I call it the Internet trial torpedo, a stealthy cyberspace trial phenomenon that can destroy years of work by lawyers, parties, expert witnesses, and judges.

Nowhere did the destructiveness of this cyberspace phenomenon become more apparent within the last year than in the Southern District of Florida when it came to the attention of the judge presiding over a federal drug case that nine of his jurors had been using the Internet to look up information and research issues in the case in direct defiance of the judge's instructions. The case involved criminal charges that the defendant illegally sold prescription drugs through Internet pharmacies. At the time of the unfortunate events, the evidentiary presentation had been completed, the closing arguments had been made, the judge had completed instructions to the jury, and deliberations had started. That's when a juror reported to the judge that another juror had done outside research on the case over the Internet. After inquiring of the individual jurors about the reported misconduct, the judge learned that at least nine jurors had independently been involved in misconduct that included conducting Google searches on the lawyers and the defendant, looking up news articles about the case, checking definitions on Wikipedia, and searching for evidence that had been excluded from presentation at the trial.[1] After eight weeks of time invested in this trial, the judge had no choice but to declare a mistrial. The *New York Times*, the *Boston Globe*, and other media outlets termed the results "mistrial by Google."

Judge Herbert B. Dixon Jr. is the technology columnist for *The Judges' Journal*. He sits on the Superior Court of the District of Columbia and is a former chair of the National Conference of State Trial Judges. He is chair of the Judicial Division's Court Technology Committee and a member of the Planning Board for ABA TECHSHOW. He can be reached at Herbert.Dixon@dcsc.gov.

Not only can such unauthorized conduct by jurors cause a mistrial, it also can upset the result of completed litigation. Take for example the unanimous reversal of a conviction for first-degree murder and related charges of Allan Jake Clark by the Court of Special Appeals of Maryland.[2] The prosecution alleged that Clark, a homeless man, beat up and robbed another homeless man whom Clark found sleeping in his spot. A crucial issue in the trial was the time of death because the decedent's body was found more than a day after the alleged fight with Clark. The medical examiner testified that the decedent could have sustained the fatal injuries up to 48 hours before he died.

During the course of deliberations, the judge learned from a bailiff about two Wikipedia articles found in the jury room. One of the articles was on the topic of "livor mortis," the process of blood settling in the lower portion of a dead body that can help determine the time and position of a body at the time of death. The second article was on the topic of "algor mortis," the process by which a reduction in body temperature occurs following death and upon which the time of death may be estimated. The appellate court noted that the latter term had never been referred to in the trial.

The trial judge made an inquiry of all jurors and determined during this process that the misconduct was confined to one juror, and further determined that the offending juror had not shared the information with other jurors. As any experienced litigator would have predicted, the defense attorney requested a mistrial. Ultimately, the trial judge permitted the jury to continue its deliberations on the offending juror's promise to decide the case only on the evidence presented at trial and not share his research with other members of the jury. Because of the significance of the time-of-death issue, the appellate court reversed the conviction, concluding that the trial judge's denial of the mistrial motion was in this case an abuse of discretion. Although only one juror had reviewed the unauthorized information, the appellate court relied on precedent that an adverse influence on a single juror compromises the impartiality of the entire jury panel. The court concluded that the unauthorized definitions "could readily have figured significantly

Published in *The Judges' Journal*, Volume 49, Number 1, WInter 2010.

into any theorizing about the answers" to questions that were raised during the trial.

The result in the *Clark* case should not have come as a surprise because the appellate court relied on its own precedent in another case decided about six months earlier. The conviction in that case was reversed because a juror had conducted online research of the term "oppositional defiant disorder" (ODD) from which the juror understood that lying was a part of the illness.[3] In this case, the defendant was charged with rape, incest, and assault of his 17-year-old daughter. During the course of the trial, a therapeutic behavioral specialist testified, without further explanation by anyone, that the complainant-daughter had been diagnosed with several disabilities, including ODD. Although the jury hung on the rape and incest charges and convicted on the assault charges, the appellate court concluded that the symptoms of ODD were likely an important component of the jurors' deliberations.

Inappropriate online communications are a two-way street and not always the result of a single juror's unilateral misconduct. Following a recent criminal conviction, the defense alleged that jurors were communicating among themselves on Facebook during the deliberations interval and that at least one of the jurors received an outsider's online opinion of what the verdict should be.[4]

Although courts have been addressing the problem of inappropriate juror discussions about cases since time immemorial, the problem of cyberspace misconduct adds a new dimension. In 2001, the Supreme Judicial Court of Massachusetts remanded for further hearing a convicted defendant's motion for *voir dire* of a juror who sent an e-mail to a 900-member Listserv complaining that she was "stuck in a 7 day-long Jury Duty rape/assault case . . . missing important time in the gym, working more hours and getting less pay because of it! *Just say he's guilty and lets [sic] get on with our lives!*"[5] Or, consider one juror's pretrial blogging in which the juror wrote about his upcoming jury service, saying "Lucky me, I have Jury Duty! Like my life doesn't already have enough civic participation in it, *now I get to listen to the local riffraff try and convince me of their innocence*."[6] After the juror was selected for a case, he further wrote, "After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc."[7]

Consider one juror's pretrial blogging: "Now I get to listen to the local riffraff try and convince me of their innocence."

Indeed, there are numerous instances in which some jurors, including perhaps some "savvy" jurors intent on being disqualified from service, report to the judge that, prior to their arrival, they looked up information on the court's website about pending cases scheduled for trial and that they even blogged and wrote on social media sites about the upcoming jury service.

Some of the instances of juror cyberspace misconduct defy the imagination. Take, for instance, the one in which a juror in England sitting in a case about child abduction and sexual assault posted on her Facebook page, "I don't know which way to go, so I'm holding a poll."[8] Fortunately, someone with a better understanding of the appropriate role of a juror reported the incident to the court in time for the juror to be dismissed from the case before any harm resulted.

In all respects, it is corrupting to the trial process when a juror discusses a case or obtains unauthorized information from a single person. However, the opportunity for corruption is amplified by the cyberspace connection that jurors have by computers, cell phones, and various mobile devices such as BlackBerries and iPhones (also known as personal digital assistants or PDAs). Researching information on the Internet is now a way of life for a substantial part of our population. Information that previously was nearly inaccessible can now be sought on Google, Wikipedia, Bing, Yahoo!, Ask.com, and other Internet search sites. In addition, there is the possibility that jurors may inappropriately discuss their case on Facebook, MySpace, LinkedIn, Twitter, an e-mail Listserv, or some other community site. No longer may concern be limited to the situation of a juror speaking to someone about the case or physically travelling to the location where the incident occurred. Now courts must be concerned that jurors can use their cell phones to look up the background of a defendant on the Internet or view the street location using Google Maps, or conduct research for further explanation of legal terms such as "proximate cause," "gross negligence," and "beyond a reasonable doubt."

To combat the problem, courts have resorted to proactive measures, some as far-reaching as banning cell phones, computers, and PDAs from the courthouse. Others have taken the approach of instructing the jurors early and often, including during orientation and *voir dire*, that they should not use Internet maps, Google Earth, or any other program or device to search for or view any place discussed during the case, or have any discussions about the case, or make any entry on Facebook, MySpace, LinkedIn or other Internet social media sites—and that includes all other forms of oral, written, and electronic communications, including Twitter, e-mail, blogging, and texting.

Does the latter approach work? From what I have seen, yes. Upon doing my online research for this column, I was pleased to find out that someone in my court had effectively addressed the issue when I saw a tweet from a juror that "DC Superior Court juror instructions now include direction not to use Twitter or Facebook to share details from [the] case. You have been spared."[9]

Buckle-up, my judicial colleagues. This is a battle we can win. ■

Endnotes

1. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. Times, Mar. 17, 2009, *available at* http://www.nytimes.com/2009/03/18/us/18juries.html.

2. Scott Daugherty, *Appeals Court Tosses Murder Conviction*, HometownAnnapolis.com, Dec. 11, 2009, http://www.hometownannapolis.com/news/for/2009/12/11-28/form_weddings.html.

3. Wardlaw v. State, No. 1478, Md. Ct. Spec. App., (filed May 8, 2009), *available at* http://www.courts.state.md.us/opinions/cosa/2009/1478s07.pdf; *Md. Court of Special Appeals*: Wardlaw v. State, The Daily Record, June 1, 2009, http://findarticles.com/p/articles/mi_qn4183/is_20090601/ai_n31935024/.

4. *Easy Juror Access to Cyberspace Leading to Case Dismissals*, The Crime Report, Dec. 12, 2009, http://thecrimereport.org/2009/12/12/easy-juror-access-to-cyberspace-leading-to-case-dismissals/.