

the**digitaledge** — Lawyers Must Manage and Avoid Internet Contamination in Jury Trials

By Douglas L. Keene

We have all heard the media reports of jurors conducting Internet research on the cases they are judging and improperly communicating their impressions about the guilt or innocence of a defendant before the end of jury deliberations. This practice is a growing concern and for good reason.

Of the reported incidents in which mistrials were requested due to juror Internet excursions, the misconduct seemed to fall into two categories. The potential for remedies varies with the juror's motivation and commitment to the rules.

*Category 1: The innocent and oblivious*

Most who do not follow the court admonitions do not realize they are breaking the law. After spending the evening surfing the Internet, such a person might, in good faith, tell the judge "I didn't do research! I haven't been to the library in years!" This group needs to be clearly and fundamentally informed of the ways we all do research, including "just looking stuff up on the Internet." Use common language. Use personal examples. Explain *why* it is important, and don't stop with the simple issuance of behavioral demands. Be specific and be firm. General judicial edicts will not help this group obey the rules.

*Category 2: The angry and defiant*

This second group is more problematic. It includes the subset of Americans who are angry and mistrustful of all branches of government, especially the federal government. The judiciary is not immune from the angry and defiant's anger—there is a great deal of suspicion about the validity of the court's authority, as well as the rules by which the court plays. A member of this group might think, "I hear what you are saying, but I will decide for myself what justice requires!" To solve the challenge of this group, the court has to conduct or otherwise allow meaningful voir dire. Asking rhetorical questions about whether a person such as this will "follow the law as given to them" is not useful; rather, for the angry and defiant juror, it is an example of the problem, not the solution. If a member of this group does not feel that following the rules is an extension of his or her values and beliefs, the person cannot be counted on to abide by the rules or respect the judicial process. Send this person home.

*Improving jury compliance*

What is clear is that instructing jurors to avoid case-related Internet activity is no more effective than a court instruction to be fair-minded. Most jurors follow these instructions; but, as a practical matter, many find it impossible. Instructions are important, but if the issue of Internet contamination is not dealt with in a very pointed and thorough voir dire examination, there are going to be problems. Here are some suggestions for improving compliance:

- Add voir dire questions that address actual juror Internet use (will they be likely to violate the rule and/or have they already done so?).
- Explain the reasons for the Internet blackout. Then ask in voir dire whether jurors would abide by judicial instructions not to do Internet research on the case. If a juror acknowledges he could not abide by that instruction, he is a cause strike. In a Kansas City, Missouri trial, jurors were asked whether they would abide by instructions to not do research on the Internet. Six to ten potential jurors said they could never abide by such instructions.
- Revise jury instructions with specific language about electronic device usage (e.g., iPhones<sup>®</sup>, BlackBerrys<sup>®</sup>, Androids<sup>®</sup>), Internet research (e.g., Google<sup>™</sup>, Yahoo!<sup>™</sup>, and Bing<sup>™</sup>), and social networking applications (e.g., Facebook, Twitter, LinkedIn, and MySpace<sup>™</sup>).
- Give the instructions at the start of the day and repeat them at breaks, all recesses, and the end of the day. Leave the instructions fresh in the minds of jurors.
- Have jurors sign written declarations that they will not research or read about case details on the Internet.
- Make it clear that violation of these rules is a violation of law, for which punishment can be imposed. Make it important, not pro forma, and not merely polite.
- Satisfying the jurors' reasonable "need to know" can gain compliance with the rules.
- Historically, jurors are told what they cannot do or what they cannot know, without explaining why that is the case. Many jurors take the position of "Really? Alright, if you won't tell me I'll find out for myself!" The level of

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information provided by the judge is usually discretionary, and many judges are beginning to explain the reasons for the rules.

- Allow questions by the jury. To the extent that they have reasonable and proper questions for witnesses and the witnesses are able to answer them completely, those jurors are less likely to conduct research on their own. Further, jurors who are allowed to ask questions of witnesses will feel more fully engaged in the process and not like a passive (if not captive) observer.

We cannot expect jurors to stop looking for answers to questions they have during a trial. Any Internet user has felt the pleasure of quick and convincing Internet-based research tools, and many refuse to set them aside. Mock trial work and post-verdict debriefings of jurors teach us again and again that jurors take their work seriously and want to do the right thing. We cannot tell them to “just say no.” We have to take seriously the responsibility of teaching them how to deliberate both effectively and fairly in the twenty-first century.

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