

Confronting the fact that jurors do research

Trial attorneys should assume that, despite judges' instructions, jurors will engage in illicit 'e-discovery.'

BY JEROLD S. SOLOVY AND ROBERT L. BYMAN

A jury," Mark Twain observed, "is comprised of twelve persons of average ignorance chosen to decide who hired the better lawyer." Yes. True. We want our juries to start out ignorant of the facts, so that they will decide the case on the facts actually in evidence, not on facts that they learn from independent research, because "extra-record

influences pose a substantial threat to the fairness of the...proceeding because the extraneous information completely evades the safeguards of the judicial process." *U.S. v. Resko*, 3 F.3d 684, 690 (3d Cir. 1993).

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But how do we ensure that? Our columns on this page during the past 10-plus years have focused on discovery—the discovery we take as lawyers. But at a recent continuing legal education program created by our friend Phil Kessler for the American College of Trial Lawyers, we were hit smack up the side of our face with a troubling thought that had not occurred to us: The lawyers aren't the only ones doing discovery. Jurors have the tools—and they are using them—to discover all sorts of things about us, about our cases, about our witnesses. The information age makes finding those 12 ignorant persons—and keeping them ignorant—a daunting and maybe impossible task.

A juror doing outside research is not a new phenomenon. In *Fitzpatrick v. Allen*, 410 Mass. 791 (1991), the court ordered a new trial when it was learned that a juror had brought a medical reference book into the jury room in a medical malpractice case. In the classic 1957 movie *Twelve Angry Men*, the state had argued—without contrary evidence—that the defendant was known to have owned the relatively unique murder weapon, a switchblade stiletto. Unique? Henry Fonda neatly persuaded his fellow jurors otherwise by reaching into his pocket and plunging an identical knife into the table.

The concept hasn't changed, but, boy, have the times and means. Not so easy to bring a knife into a courthouse anymore. But weapons aside, the access that the average juror has to information may have multiplied beyond our practical ability to prevent. In a mere five minutes of

Internet research, we learned that 74% of Americans use the Internet; 85% of adult Americans own cellphones; on average, we make 204 cellphone calls a month—but we average 357 text messages; and 20% of online Americans twitter, while the rest of us probably will soon, as soon as we figure out what tweeting is.

And here's the thing about the Internet: all those lovely statistics. 74%! 85%! 357 text messages per month! We take these things as facts simply because they are out there. Never mind that these postings may be typos or mistakes or outright lies. Your average juror will take the Internet as gospel.

Welcome to the 21st century. During a break—or even right there in a courtroom where cellphones are allowed—a juror can use her iPhone to learn all sorts of things about you, your witnesses and the case that the judge would never allow in evidence. At home at night, the juror can do more extensive research on her computer.

THE INTERNET, WARTS AND ALL

Go Google yourself. Not out of vanity, but out of caution. And we're not just talking about those of you who have lived really interesting—and incendiary—lives, whose Google searches will reveal adultery, cross-dressing, treason, whatever; no, even those of us whose lives are vanilla



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and mundane have stuff that might rub individual jurors wrongly. Now, we know a lot of judges who won't let us inquire about a juror's politics in *voir dire*, and we understand why. But the jury can *voir dire* you on that subject. If you have ever given money to a candidate, your Google search will have a link to a site where your red-state conservative juror will see that you gave money to Barack Obama and Hillary Clinton, but not a cent to Sarah Palin. Or maybe you gave money to both parties. But a lot of money, maybe more money than your juror earns in a year. Your Web site probably has an extensive marketing bio of you, and you proudly list the civic organizations in which you are involved. You should be proud that you are on the board of the local chapter of Planned Parenthood, or the National Rifle Association, or Alcohol Anonymous, or the Sierra Club. But what buttons might that push for an individual juror?

You may also find to your great pleasure or chagrin that you have been listed on one of the numerous lawyer-rating sites that have popped up, such as www.-avvo.com or www.lawyerratingz.com. Pleasure if the postings are things like "He's the best! I highly recommend him to anyone who's looking for a winner!! He's trustworthy, knowledgeable and cares for his clients." Or chagrin over "He's a terrific attorney—if you like paying in excess of \$500 per hour... and at the end of the day get a plea bargain, after you run out of money, he's your guy."

If you have not lived under a rock, you will find yourself on the Net—and so will your jury. Courts routinely instruct juries that they should not read press accounts or do independent research. That fixes the problem, right? Maybe. Maybe not.

Let's talk human nature. We "crackberry" addicts, we cellphone abusers, we Internet junkies, we believe it is our God-given right to be connected. Can we really expect a person to keep his cellphone and computer turned off because the robe says so? OK, yes, we can and should expect that. But all 12? Twelve addicts, and not one of



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them will give into the urge? Oscar Wilde said it best: "I can resist anything, except temptation." You can expect the entire jury to follow the judge's instruction—but you had better plan for the possibility that they won't. The Arabian proverb says it best: "Trust in Allah, but tie your camel."

So, first, trust Allah, but offer her some guidance. If the judge simply says "I order you not to use your cellphone," you can expect a little mutiny from the jurors. So suggest to the judge that she explain and soothe: "We understand that it will be an imposition to ask you not to use your computer or cellphone during the trial, but we do it to make sure that this trial is fair. You are sworn to decide this case on the evidence that we all hear in the courtroom, not on something that one of you hears or sees outside. And we do that for a very good reason. Evidence in the courtroom is subject to challenge and cross-examination; it is subject to my ability to decide that it is authentic and real. What you see on the Internet cannot be cross-exam-

ined or explained; what you see on the Internet—or what some friend might text or e-mail you—may or may not be true."

Second, find out about your camel. Does the juror have a blog? Does he tweet? If so, do you really expect a person who posts what he thought of his lunch not to post what he is thinking during the trial? Find out the blog site; ask the judge to tell him that he should not blog or tweet, and to instruct that the site is subject to being checked to ensure that the instructions are followed. Third, get ready for the next camel. Check out your Google hits and Web bio; better yet, have someone else do it to objectively point out possible irritants. Sorry, the Internet is forever. But clean up what you can.

Fourth and most important, assume that none of the first three steps will work and plan for that very real possibility. Rethink motions in limine. Back in the day, if there was some irrelevant but annoying fact you didn't want the other side to blurt out, such as, say, that your client is a zillionaire, you would file a motion. But now, you have to plan for the possibility that a juror will find that fact on his own. Or, worse, that another juror will get on Pacer, look at the court file, and report to her fellow jurors that not only is the defendant a zillionaire but his sneaky lawyer filed a motion to keep that fact from the jury. So rethink motions in limine; you may be far better off to forgo the motion and front the issue with the jury. Rethink everything. You are being watched. ■