Legally Speaking

"When All That Twitters Is Not Told: Dangers of the Online Juror"

By John G. Browning

(Part 1)

I was called for jury duty recently, and as I waited patiently with my fellow panelists for the selection process to begin, I couldn't help but marvel at the number of people pounding away at Blackberrys, iPhones, and other web-enabled wireless devices. While most of them were probably sending innocent, mundane messages about running late or having a spouse pick up the kids, it occurred to me that if any of these panelists were actually picked (fortunately, the criminal docket featured all plea bargains, so the entire pool was dismissed), precious little could be done to prevent any of them from accessing the wealth of information at their fingertips. As it turns out, jurors engaging in such digital digging is a growing problem, and the explosive growth in popularity of social networking sites like MySpace (over 150 million users); Facebook (which just passed the 200 million mark worldwide), and Twitter (the third most-used social network) makes it more likely than ever that jurors will leave the privacy of the jury room for cyberspace. Consider the following recent examples:

- In November, 2008, a juror on a child abduction/sexual assault trial in Lancastershire, England was torn about how to vote. So she posted details of the case online for her Facebook "friends" and announced that she would be holding a poll. After the court was tipped off, the woman was dismissed from the jury.

- In March, 2009, an eight-week-long federal drug trial involving Internet pharmacies was disrupted by the revelation that a juror had been doing research online

about the case, including looking into evidence that the court had specifically excluded. When U.S. District Judge William Zloch questioned other members of the jury, he was astonished to learn that eight other jurors had been doing the same thing, including running Google searches on the lawyers and the defendants, reading online media coverage of the case, and consulting Wikipedia for definitions. After the judge declared a mistrial, defense attorney Peter Raben expressed his shock at the jurors' online activities. "We were stunned," he said. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."

- In June, 2007, a California appellate court reversed the burglary conviction of Donald McNeely when it was revealed that the foreman of the jury had committed misconduct and deprived the defendant of a fair trial by discussing deliberations on his blog. The foreman, a lawyer who had identified himself as a project manager for his company because it was "[m]ore neutral than lawyer," blogged about McNeely, his fellow jurors, and their discussions, particularly one juror who was "threatening to torpedo two of the counts in his quest for tyrannical jurisprudence."

- In November, 2007, the Supreme Court of Appeals of West Virginia reversed the conviction of Danny Cecil for felony sexual abuse of two teenage girls. Two members of the jury had looked up the MySpace profile of one of the alleged victims, and shared its contents with other jurors. Even though it found that the online sleuthing had not necessarily revealed anything relevant, the court held that "the mere fact that members of a jury in a serious felony case conducted any extrajudicial investigation on their own is gross juror misconduct which simply cannot be permitted."

As the court further noted, "Any challenge to the lack of the impartiality of a jury assaults the very heart of due process."

Controlling the flow of information into the jury room isn't the only problem. Equally troubling is the flow of information *leaving* the jury box. Building materials company Stoam Holdings and its owner, Russell Wright, recently sought a motion for new trial after an Arkansas jury entered a $12.6 million verdict against them on February 26, 2009. Wright was accused by two investors, Mark Deihl and William Nystrom, of defrauding them; Deihl's lawyer, Greg Brown, described the building materials venture as "nothing more than a Ponzi scheme." Shortly after the verdict, Wright's attorneys found out that a juror, Jonathan Powell, a 29-year old manager at a Wal-Mart photo lab, had posted eight messages, or "tweets," about the case on social networking site Twitter. (Twitter, created in 2006, is a social networking/microblogging service that enables users to not only send updates – text-based posts of up to 140 characters in length – but also follow updates from other users).

Although several of the Twitter messages were sent during voir dire (jury selection), the ones that attracted the most attention were those actually sent shortly before the verdict was announced. In one such "tweet," Powell wrote "Ooh and don't buy Stoam. It's bad mojo and they'll probably cease to exist, now that their wallet is 12m lighter." In another, Powell said "I just gave away TWELVE MILLION DOLLARS of somebody else's money." One of the lawyers for Stoam and Wright maintained that the messages demonstrated not only that this juror was not impartial and had conducted outside research about the issues in the case, but also that Powell "was predisposed toward giving a verdict that would impress his audience." After the trial, Powell

continued his “tweets” and kept his sense of humor. On the day he was supposed to testify about his online activities, Powell posted the message “Well, I’m off to see a judge. Hope they don’t lock me under the jail, and forget about me for four days.”

As it turns out, Powell had nothing to worry about. Noting that Arkansas law requires defendants to prove that outside information found its way *into* the jury room and influenced the verdict, not that information from the jury panel made its way out, the court held in April that the juror’s actions didn’t violate any rules, and that the Twitter messages did not demonstrate any evidence of Powell being partial to either side. After the judge denied the defense’s effort to set aside the verdict, Powell made perhaps his most prescient observation of the trial, warning that "The courts are just going to have to catch up with the technology.”

Should the rules banning jurors from reading about or doing outside research on the case they happen to be hearing be more strictly enforced? Is it really possible to exercise such control in an era in which, with a few keystrokes, a juror can use Wikipedia to better understand the technology underlying a patent claim, go to WebMD to learn more about a medical disorder, or consult Google Maps to find out if a witness’ alibi about the time it takes to drive from one location to another holds water? In an upcoming “Legally Speaking,” we’ll examine the reasons for controlling juror access to information, the pervasiveness of jurors’ online activities, and what judges can do to adapt to the evolving technological landscape.