From Hon. Jacqueline Connor (ret.)

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JUROR NUMBER EIGHT

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There are increasing numbers among us who never saw or no longer remember the classic 1954 teleplay/film/Broadway hit TWELVE ANGRY MEN." (Feeling old yet?) If you are one, you missed a legendary performance by Henry Fonda in the 1957 film version. He was the sole holdout among twelve white male jurors in New York City determining the fate of a young Puerto Rican man from the slums accused of murder. Fonda played Juror Number Eight. He undertook, in his quiet understated way, to research the weapon used by the accused defendant, and purchased the identical knife in a nearby store, throwing doubt into the biased assumptions of the other eleven jurors. He is the unabashed hero of the story, turning the other eleven around with calm persistence and logic as he engaged in combatting the racism underlying the perceptions of the other jurors.

While we applaud the valiance and integrity of Juror Number Eight in forcing the other jurors to really look at the case, he committed classic and unequivocal juror misconduct by searching for support, investigating the crime and bringing evidence into the trial under the noses of the lawyers and judge. What's a body to do?

It is even more problematic when you consider that a juror today could have found the knife in seconds by googling it.

In March 2009, a defendant in a Florida federal case defended against the charge of illegally selling drugs through the internet. One of the jurors contacted the judge when deliberations had started, to let him know that another juror had admitted doing research on the internet. Hoping to resolve the problem by simply kicking the errant juror off, the trial judge was initially concerned only with the issue of whether this information had been communicated to the other panelists. To his and everyone's surprise, he found that in fact eight more of the jurors had also gone online to do research. I would pose the thought that these may well have been the only jurors who admitted their misconduct.

Internet access providing instant information, fact checks and postings have become even more ubiquitous and have almost become part of the air that many of us breathe.

Smartphones and ipads can be seen freely in use at funerals, concerts, airports, movies, dinner tables, restaurants, religious services, weddings, meetings, classrooms, and while driving. The only place where they absolutely cannot be used is in the trial courtroom (and apparently Augusta National Golf Club)….at least with respect to the subject at hand. This makes jury service extremely unattractive to many and impossible for some.

A father wrote in a recent article that he checked into his son's texting habits and found, to his shock, that his teenager sent more than 15,000 texts per month. A survey found that some college students felt it was permissible to text during sex. In an article about young people on a sleepover, the accompanying photo showed all the kids sitting around in a room with each one absorbed on his own smartphone, texting, twittering, gaming, posting or chatting…with other kids.

Ten minutes of research online should be enough to scare any litigator facing jurors in this modern age of instant access to the net.

In Raleigh North Carolina, a judge in a murder trial asked for an investigation by a state bureau, having found texting by a juror to her hairdresser about the progress of the case, as well as finding that another juror had posted that the jury split in a deadlock, 9 to 3 guilty before the verdict was announced.

http://www.newsobserver.com/2012/03/07/1910896/jury-in-young-retrial-is-now-under.html

A new trial was granted by the Vermont Supreme Court when it was discovered that a juror conducted research on the Somali culture and shared it with fellow jurors in a trial alleging child sexual assault against a Somali defendant. The trial

court's refusal to overturn the verdict was reversed by the state supreme court.

http://www.burlingtonfreepress.com/article/20120127/NEWS02/120127025/Supreme-Court-orders-new-trial-man-convicted-sexual-assault-child?odyssey=nav|head

A Florida man was dismissed in a personal injury case for friending an attractive defendant on Facebook. while waiting to be selected. Not upset about being kicked off, the juror was only too happy to have gotten off jury duty. While waiting in the pool of jurors, he admitted that he had used his phone to see if he knew any of the people involved, and claimed to have "accidentally" friended the defendant.

http://www.foxnews.com/us/2011/12/31/florida-juror-dismissed-for-friending-defendant-on-facebook/

A Wilmington, Illinois woman facing charges of child battering, sought to have her conviction in a court trial overturned and the judge recused because his adult children were Facebook friends with members of the victim's family. The judge's adult children had been out of the home for years.

http://heraldnews.suntimes.com/9426713-417/judges-kids-facebook-friends-at-issue-in-bid-for-a-new-trial.html

Two judges from the Los Angeles Superior Court had fairly recent problems with this kind of conduct. In both instances, someone who read the blogs or entries was concerned enough about the misconduct to contact the court. Jury services were able to track down the juror and in each instance, the juror was confronted. Was justice restored? Hmmmmmm.

The impact of this direct attack on the integrity of jury trials is further exacerbated by the economic squeeze and reduced budgets forced on the courts. For example, as the Los Angeles Superior Court looks in every nook and cranny to find ways to save money with current unprecedented budget cuts, one of the more recent changes has been the reduction of summonses by 10,000 jurors per week and a strictly enforced policy of smaller jury panel sizes. Now more than ever, we need jurors more than they need us, and every one of them counts. There may well be no replacements if a panel is exhausted through the use of challenges.

Resistance to new technology is clearly and laughably not a new theme. In the 15th century, Filippo de Stratto, a Dominican friar from San Cipriano on Murano, a part of Venice, descried the invention of printing. He claimed that the world had gotten along perfectly well for 6000 years without printing, and that there was no need to change it "now."

Are we like de Stratto, wailing in the wind, trying to hold back the tsunami? While we always knew that jurors sometimes improperly talked to each other before the trial was over, or discussed their case with family or friends in violation of judicial admonitions, the exponential impact of the information age on the decisions of jurors is virtually impossible to quantify.

The last time I counted popular social networking sites, I ran out of fingers. These have included MySpace, Facebook, Plaxo, Tumblr, Live-Journal, Tagged, Pinterest, Linked in, Twitter, Google Plus, DeviantArt, Orkut, Ning, Bebo, Friendstar, Meetup, Yappd, Foursquare, Zude, Gather, Rabble, Jaiku, Pownce, Six Apart… check back again in fifteen minutes.

Damage from jurors' instant access to information is limited only by our imaginations.

Already, stories abound of jurors googling the attorneys, the parties, the judge, the witnesses and the experts, technical terms, the subject matter of the trial and everything in between. The scene of an incident or accident can be viewed via satellite photos on the net. These internet photos can be current or from a completely different time period than the incident at issue. Information can be obtained regarding drive times between point A and point B to check the veracity of trial testimony. Prior transgressions or lawsuits (or lack thereof) and the litigiousness (or lack thereof) of the plaintiff or defendant can be pulled up. A statement by a medical expert, challenged by a competing claim by the opposition expert, can be checked online.

There is more than just the danger of independent research. There exists the problem of communications and expressions of opinion, or postings of status, with jurors describing their experience on blogs or twittering their thoughts of the presentation, or announcing the pendency of a verdict.

Beyond these are the problems of a drive for fame in situations where awards or verdicts are influenced by taking

politically correct or incorrect positions or inflating awards to improve their media status or increase the numbers of followers.

The impact doesn't stop there.

Public confidence in the integrity of jury verdicts and the justice system as a whole is eroded by stories of irresponsible internet behavior, such as the juror who conducted a survey on Facebook seeking input as to what her verdict should be in a trial she was serving on. Or by the reporting of a juror who tweeted that he just gave away millions of dollars of "someone else's money," warning his followers not to buy defendant's stock. Or where a trial involving toxic leaks revealed that jurors were researching groundwater contamination during the trial.

There are now stories of unidentified persons "planting" false stories in pending trials, ostensibly hoping that jurors might stumble on them. Included have been false confessions or false allegations of misconduct against one of the parties. It has also never been hard to find youtube videos making a case for juror-nullification.

Jurors who think their thoughts/comments/positions might end up on another juror's blog, may also be inhibited in the free flow discussion that is the hallmark of jury deliberations. The chilling effect is something that cannot be measured and should not be discounted.

Multitasking has long been proven in study after study to show that the many tasks being done concurrently are not being done very well. The same applies to jurors. Those who are constantly checking their Facebook pages or other sites, even if unrelated to the trial, are not giving the parties and the attorneys their full attention. It is not uncommon to see heads bob down as jurors quietly check their smartphones low in their laps…or even inside their pockets as their fingers move over the keys sight unseen.

Why are jurors ignoring or skating the increasingly strident admonitions regularly issued by courts? There are many excuses. "Everyone is doing it." "You are googling us, why can't we google you?" "Sorry, just habit." " The judge said no tweeting but never said anything about no blogging." "This is not 'research.'" "I am only announcing, I was not discussing anything." "I was curious." "I am being the best juror possible." "Any responsible and rational juror would seek additional information on their own since the object of any court proceeding is to use all facts obtainable to determine the truth." "You better believe I will do whatever research is required to unravel this case using due diligence." "This was private!"

The truth hurts. Short of surrendering, which is a position advocated by some, there are some things we need to consider doing and doing well.

First and foremost, jurors need to be told at the earliest possible stage that jury service precludes the use of the internet to communicate/collect data or otherwise express anything to do with their service, even monologues. Admonitions can't wait till the jury is picked. It has to happen before the first break, when mischief, albeit innocent, may already be brewing. The admonition should include information about the consequences to the justice system when violations occur, even unintentional violations. These consequences include the cost to taxpayers, the cost to the parties, the difficulties of retrials, lost witnesses and lost evidence as a start.

Violations of admonitions not to consult the internet now constitute a criminal misdemeanor under AB 141, effective this past January, However, this has created a whole new conundrum because jurors theoretically cannot even be questioned about potential transgressions without impacting their 5th amendment rights.

I have come to believe that the most powerful message that has to be conveyed is how absolutely unfair it is for the parties to be blindly sabotaged by information that they never had a chance to explain, refute, deny, concede or correct. They need to understand that internet misconduct strips the parties of their constitutional rights to a fair trial without their consent or knowledge.

Second, jurors should be given information, all the information, that they require to do their job. California court rules already support jurors being allowed to ask questions. This approach should be enthusiastically embraced, as it is far better to have them ask you than someone else. Give jurors the jury instructions up front, all of them (not just the elements of the causes of action), and provide then with their own copies. Give them a copy of the verdict form right at the beginning so they know what their "final exam" is going to look like and they understand why you have to spend time developing evidence on certain subjects that are not otherwise clear. Provide a glossary of all unusual and/or

technical terms and phrases that will show up in the trial.

Third, voir dire needs to address the issue directly. One judge uses a powerful technique by having each juror personally explain why the prohibition is necessary and important. There are also some great questions that can flush out the addicts such as "have you already posted something on the net about your service here?" or "how many texts or tweets do you send daily, "or "how often do you get the latest technical gadgets" or "how often do you blog and do you have a pseudonym" or "have you ever posted a youtube video" or "how often do they check their smartphones?" The most direct question is to ask whether they can cut the cord during trial.

Fourth, trial lawyers should google or research everything they can about their upcoming trial, including themselves, witnesses, experts, technical terms and the subject matter of the dispute. (Some lawyers have completely revised their websites and others change them when their attorneys are in trial.) They might also create twitter or internet alerts when certain terms pop up.

Fifth, have the jury instructions include a "snitch authorization." Jurors should be clearly invited to let the judge know if they become aware of a violation so that the judge can protect the integrity of the trial. It is helpful in the instructions and admonitions for the judge (or the attorneys if the judge doesn't) to give examples of what is prohibited so there can be no misunderstandings. The fine line not to be crossed, however, is to be too specific, setting up the inference that there is something out there that someone doesn't want them to find, a tantalizing challenge that some jurors won't resist.

Sixth, keep the trial on target and don't waste jurors' time. Shorter trials have a smaller likelihood of bored or confused jurors going online to fill the gaps left by the attorneys. Avoid sidebars and keep the momentum of the trial going. Handle procedural issues and other bumps in the road before or after jury time. Keep presentations lean and necessary and cut out the fat.

Some courts have worked with taking away smartphones and ipads. However, jurors have access outside of the court, and while in the courthouse, may need them for work and other legitimate uses. Also, there are virtually no public phones in courthouses anymore. Taking phones and tablets away during deliberations is something that might be considered, but again, they would have to be returned at the end of each day.

Some attorneys have asked that jurors sign statements under penalty of perjury in advance as well as after the trial, regarding the prohibition of internet use. This certainly brings the issue up forcefully but may also cause the unintended result of driving misconduct underground. Jurors may be reluctant to admit having looked online having signed a statement under penalty of perjury.

Some courts have collected online IDs and passwords, and suggested to jurors that attorneys will be checking their sites. Privacy lines may be crossed however and the creation of a hostile environment cannot be truly helpful in the search for justice. There is a pending case involving a gang conviction in which a juror made what appeared to be innocuous postings on Facebook regarding how something in the trial was boring. The juror insisted that this was all that was posted but in a posttrial motion, the defense sought access to his Facebook page and password to confirm no other postings supported an allegation of bias. The juror has been fighting this, alleging that his Facebook pages include photos of his children, family and other personal information that he does not want to fall into the hands of the defendant gang members. The tension between a fair trial and juror privacy is at full confrontation in this matter. As of this writing, this has not been resolved.

Each one of these suggestions can be the subject of an independent lecture or article and there is much that can be explored about all of them.

The point is to start thinking about how to approach the problem, and a big problem it is. For our trial courts, it is our future. Can the integrity of our jury trials be preserved? The jury is out…. Way out

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