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Courts must look at social media policies

Last December, the Arkansas Supreme Court threw out a death row inmate's murder conviction because one juror tweeted throughout the trial and another slept.

In 2009, a San Francisco Superior Court judge dismissed 600 potential jurors in a criminal case after several admitted that they researched the case online.

In England, a juror used her Facebook page to hold a poll to make a decision about the child abduction and sexual assault trial before her.

These are just a few of the trials that have been disturbed by jurors' use of the Internet and social media to research or communicate about cases.

A heavy impact

When jurors use the Internet to communicate with others or seek information about the case before them, they undermine the American judicial system's promise of a fair and impartial trial based only on the evidence permitted by a judge. As the U.S. Supreme Court wrote:

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*. 205 U.S. 454, 462 (1907).

Violating this theory not only threatens the promise of a fair and impartial trial, but also leads to expensive mistrials, juror dismissals and fines. Despite these consequences, jurors have long been reading newspapers about their trials, visiting crime scenes and discussing the circumstances of the case before them. Now, they are doing all of this online.

Reuters Legal research found that at least 90 verdicts have been challenged since 1999 due to alleged Internet-related juror misconduct. Over half of these verdict challenges occurred since January 2009, 21 of

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which were overturned.

When juries become biased due to social influence and independent research, it is up to counsel to not only prove that the breach of jury instructions occurred but also that the breach caused prejudice. Even if counsel is able to prove that the juror misconduct led to prejudice, a mistrial adds time and financial cost to the case.

Solutions

While it has been longstanding practice for judges to admonish jurors not to research or communicate about the case, courts are grappling with how to control jurors' Internet-related misconduct. To fight this issue, judges are debating solutions like updating policies, juror pledges and more extreme ideas like fining or sequestering jurors.

The most extreme solution came from an English court. Last year, one English juror was sentenced to eight months in jail after she contacted a defendant in a drug case on Facebook to discuss the jury's deliberations.

The federal criminal trial of Viktor Bout, an illegal arms dealer, began in October of last year after Judge Shira Scheindlin collected signed pledges from each juror promising not to use the Internet to research Bout or anything related to the trial until it was over. Any juror who broke the pledge would be subject to a perjury charge. The pledges were effective as the trial concluded

on Nov. 2 with no announcements of juror misconduct.

Recently, the American Bar Association's Judicial Division developed "A Fair Trial: Jurors' Use of Electronic Devices & the Internet." The comprehensive best practices paper addresses the threat of juror Internet activity and recommends solutions for courts to preserve fair trials. Overall the paper suggests that "all courts have a clear policy that addresses the use of electronics by lawyers, litigants, jurors and courtroom observers that is communicated to those participants." Specifically, the paper states that jurors should be told at the initial summons not to discuss the case or seek information from outside sources, emphasizing the court's policy regarding use of electronic devices. These instructions should be reinforced throughout the selection process and during all instructions. Judges or attorneys should question jurors about their Internet usage and ask jurors not to use their electronics to find or give information about the case. Judges should give written and oral instructions regarding the prohibition of the use of electronics during the trial. The paper also notes the option of collecting electronic devices during the trial, but this presents issues like secure storage and liability for damaged or lost property.

Despite updated instructions, pledges and more extreme solutions, there is no question that the courts will eventually have to evolve with the Internet and social media and its potential effect on the integrity of the jury process.

In September, author Raymond H. Groble III and associate Brian T. George represented BNSF Railway Co. and Metra in an appeal of a verdict (Eskew and Henderson v. The Burlington Northern and Santa Fe Railroad and Metra) before the Illinois Appellate Court's 1st District. The appeal involved arguments concerning a juror who maintained a blog during the trial.