SOCIAL NETWORKING IN THE COURTROOM:
WHAT YOU NEED TO KNOW

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UNDERSTANDING JURIES:
A MOCK TRIAL AND MORE COURSE
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CHAPTER 4
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SOCIAL NETWORKING IN THE COURTROOM: WHAT YOU NEED TO KNOW

I. INTRODUCTION

Social networking began its dramatic impact on American culture in earnest with the arrival of MySpace in 2003. Since then, there has been an evolving relationship between social networking and many different areas of law, including evidence, electronic discovery, privacy, and ethics. This dramatic change in the legal landscape has captured the media and the legal community's attention, including the Texas Bar, which recently devoted an entire issue to the topic. (Texas Bar Journal, 2010). Gaining knowledge on how to navigate the evolving legal landscape of social networking is no longer an option, but a necessity, as evidenced by statistics indicating the level of social networking use in the U.S.

For an idea about the extent to which social networking has saturated our society, consider the following: the U.S. Census Bureau estimates the current U.S. population at more than 309 million (U.S. Census Bureau, 2010), while the number of Facebook users recently surpassed 500 million. (Fletcher, 2010) Additionally, over 100 million people in the U.S. - almost a third of the United States' entire population - use Facebook applications on their mobile devices. (Facebook, 2010)

Equally impressive are statistics about who is using social networking sites. While teenagers and college students may have been the point of genesis for many forms of social networking, the largest growing demographic of users are women over 55. The presence of social networking is pervasive, with people around the world spending over 500 billion minutes per month on Facebook alone. (Facebook, 2010) In fact, in 2009, time spent on social networking sites surpassed time spent on email.

Finally, social networking is not only prevalent in our society, but the number of users continues to grow exponentially. As of December 2009, the top eight social networks in the U.S. boasted a combined membership of 248 million unique monthly users. This is up 41% from January of 2009, according to a February 2010 report by Mintel, a marketing research firm. (Mintel, 2010)

Social networks, as noted by the 9th Circuit Court in a 2007 opinion, "create new legal problems." (Browning, 2009) The truth in the Court's opinion was aptly illustrated in November 2008, when a juror was in a quandary regarding her vote of guilt or innocence on a child abduction/sexual assault trial in Lancastershire, England. In an "innovative" gesture, the juror decided to post the details of the case online for her Facebook friends and then poll them for a verdict. After the court was tipped off, the woman was dismissed from the jury although not charged with contempt, and a mistrial was not granted. Legal experts in England were stunned, with one stating, "It defies belief. She obviously has no grasp of how the judicial process works in this country." (Patrick, 2008)

Accordingly, social networking has, in a very short time, woven itself into the fabric of our lives and is now having a palpable effect on the judicial system. It would be naïve to assume potential jurors, seated jurors, or attorneys would voluntarily avoid social networking or the use of the internet during a trial without instruction. Whether or not social networking is influencing our judicial system is no longer the question, the question today is how to direct its influence and control its impact. Fortunately, the advent of social networking has both pros and cons.

II. CRIMINAL EVIDENCE: PUT THE FACEBOOK DOWN AND WALK AWAY

According to Times Magazine's Dan Fletcher, “Facebook has changed our social DNA, making us more accustomed to openness.” (Fletcher, 2010) The right to avoid self-incrimination is an important enough legal concept to warrant inclusion in the Fifth Amendment, but the allure of social networking sites have proven to be a Darwinian filter for criminals, to the advantage of law enforcement officials.

In the last few years, the media has abounded with stories of dim-witted criminals bragging about their illegal deeds and providing insight into their states of mind via their favorite social networking site. Consider, for example, Jonathan G. Parker of Fort Loudoun, Pennsylvania, whose addiction to Facebook caused him to pause while burglarizing a house to check his Facebook status. Jonathan was not caught viewing his page or updating his status, but he also never logged out, effectively providing evidence of his identity to authorities that eventually led to his arrest. (Marshall, 2009)

Another example is Joseph Luebke of Romeoville, a suburb of Chicago, who is a convicted burglar. On March 17, 2010, with just months left to serve on his sentence, Luebke decided to make a break for it from his halfway house, which he announced to his 526 Facebook friends just 18 minutes after his fateful decision, posting he was "on da run." Despite pleas from friends and family members to reconsider his decision, Luebke blogged "on da run" for almost 6 hours until he was apprehended at a relative's home. (Kass, 2010)

In another recent example, a gang's Facebook page assisted police in High Point, North Carolina, figure out which local youths belonged to street gangs and which gangs were involved in which types of crimes. Gangbangers had posted pictures of
themselves posing with guns, showing off their gang insignia and bragging about the money they were making. They also posted messages to each other, making it simple for the police to figure out who was associated with whom. (Lexington, 2010)

Finally, one of the best-publicized fugitives in modern days, Craig 'Lazie' Lynch, escaped from prison and then taunted authorities in Britain for almost four months, including posting this comment along with this picture on Christmas Day: "If any of you was doubtin my freedom. Here's proof. How the f--- could i get my hands on a bird like this in jail. ha ha. YES YES i f---- made it to Xmas i beat their f--- system and i love it. (sic)"(Hines, 2010)

Lynch's audacious one-fingered salutes to the authorities drew over 40,000 people to his Facebook page and other fan sites. Journalist Nico Hines stated, "As a low-rent Bonnie and Clyde for the social networking generation, the escapee became known all over the world attracting 40,000 members to his Facebook profile under the name 'Maximus Justice'." Craig was eventually captured after four months on the run.

III. CIVIL AND FAMILY LAW SOCIAL NETWORKING EVIDENCE

The impact of social networking is not limited to criminal cases. In one recent civil case, information from a MySpace page may have cost a plaintiff almost $2 million. California computer animator Eric Sedie described his life as "hell on earth" following an accident with a United States Postal Service truck in 2006. In his personal injury lawsuit, Sedie claimed he could no longer take part in activities he used to enjoy, such as painting or certain outdoor activities. His profile on MySpace painted a different picture.

A June 2007 post from Sedie's MySpace page, in which he complained about his arm hairs being caught in paint while painting, caused U.S. Magistrate Judge Elizabeth D. Laporte to voice doubt with regards to Sedie's disability claims. As a result, the court awarded Sedie $300,000, less than 20% of the $2.5 million he had asked for. (Eric Sedie v. United States of America, 2010)

Regarding family law, the 1st District Court of Appeals in Houston recently upheld a finding terminating the parental rights of a mother who, despite being a minor, had consumed alcohol in violation of the court's order to refrain from criminal activity. The court based its decision in part due to several pictures the appellant had posted on her MySpace page, showing herself drunk with captions such as "At Ashley House Dranking it up (sic)," "Me Helping Ashley Stand Up, Were Both Drunk (sic)," and "Me Dancing My Ass Off, I Can Dance When I Drunk (sic)." (Department of Family and Protective Services, 2009)

IV. EVIDENCE ADMISSIBILITY ISSUES

An ill-considered and condemning Facebook or MySpace entry is not necessarily admissible in court. In a recent trial in Georgia, federal prosecutors offered evidence from suspect Souksakhone Phaknikone's MySpace page showing him in the driver's seat of a car with his left hand hanging out the window, gun in hand. Phaknikone, who called himself "Trigga FullyLoaded," was eventually convicted of 15 armed robberies and sentenced to 167 years in prison.

Despite their refusal to overturn the conviction, the 11th U.S. Circuit Court of Appeals (United States of America v. Souksakhone Phaknikone, 2010) called the use of evidence from social networking sites into question. The three-judge panel ultimately ruled the admissions were harmless error in light of overwhelming evidence of guilt, but the defense attorneys’ argument that there was no certain way to trace the MySpace site back their client garnered the Court’s attention. However, other experts, such as Bob Jarvis of the Nova Southeastern University's Shepard Broad Law Center, disagreed with the Court's ruling, stating social networking sites are fair game. "It's really no different from a 19th century diary. It's a person's thought expressed prior to the time of litigation." (Pacenti, 2010)

In another case, a MySpace page was not found to be admissible because the defendant failed to lay a proper foundation in order to impeach the victim. The former girlfriend's entry contained a different account of the alleged assault, but the Court of Appeals in Michigan found the trial court's decision to exclude the contents of a MySpace entry did not deprive him of the right to present a defense, because no evidence had been produced to verify that the MySpace account belonged to his former girlfriend. (State of Michigan v. Geoffrey Lee Goins, 2010)

While recent appellate court rulings point out that evidence from social networking sites may not always be admissible, social networking sites can potentially provide a treasure trove of evidence to law enforcement officials.

V. SOCIAL NETWORKING AND PRIVACY CONCERNS

The right to privacy is generally associated with Western culture, although it is not guaranteed per se in the Constitution. However, it is a foundational legal concept that extends to many areas of the law. The Supreme Court has, in recent years, consistently upheld a right to privacy flowing from the Fourth and Fourteenth Amendments.

The right to privacy has been a growing concern and hotly debated topic with the advent of technology, but social networking is mitigating the debate. Facebook CEO Mark Zuckerberg has postulated that, "Each year we will share twice as much information
as the year before.” (Fletcher, 2010) If true, people are voluntarily abdicating their right to privacy in favor of increased communication and personal connection. Despite the omnipresence of social networking, the maxim still holds true that one person’s rights ends where another’s begins. Thus, the need for privacy and confidentiality by jurors has not diminished with the increasing presence of social networking.

VI. ETHICAL CONSIDERATIONS

While it is not an ethics violation for attorneys and judges to blog or be engaged in social networking sites, they should do so with extreme caution. There are ethical rules that govern the practice of lawyers that limit what they can say, particularly about court proceedings, and they must be heeded. While lawyers may feel the need to establish an online persona for marketing purposes, they must exercise caution and refrain from commenting on their cases to maintain client privilege and confidentiality. In addition to social networking sites, there are web sites, such as therobingroom.com, which encourage attorneys to rate judges. However, lawyers who post personal comments about judges or blog about their trials are placing their licenses in jeopardy, as attorney Sean Conway discovered.

Conway told the South Florida Sun-Sentinel that he wrote an angry blog post because Judge Cheryl Alemán was giving defense lawyers only one week to prepare for trial. The post criticized Alemán’s “ugly, condescending attitude,” questioned her mental stability and concluded by calling her an “Evil, Unfair Witch.”

As an attorney, Conway is held to different standards than the typical blogger letting off steam, so he found himself hauled up before the Florida bar, which in April issued a reprimand and a fine for his intertemperate blog post. Additionally, despite the fact that Alemán was later reprimanded for her conduct, the Florida Bar has found that Conway may have violated five ethics rules, including a ban on impugning the qualifications or integrity of a judge.

“When you become an officer of the court, you lose the full ability to criticize the court,” said Michael Downey, who teaches legal ethics at the Washington University law school. (Schwartz, 2009)

VII. TWEETING DURING TRIAL

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 Feb. 26, 2009. 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 Twitter. Although several of the Twitter messages were sent during 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. Its bad mojo and they’ll probably cease to exist, now that their wallet is 12m lighter. (sic)” In another, Powell wrote, “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.” The court denied Stoam’s efforts to set aside the verdict, saying that Powell’s actions didn’t violate Arkansas law and that the Twitter messages didn’t demonstrate the juror was partial to either side before the verdict. After the judge denied the defense’s effort to set aside the verdict, Powell aptly noted, “The courts are just going to have to catch up with the technology.” (AP News, 2009)

By contrast, Tweeting during a trial can serve the public’s interests if a judge allows journalists to cover a trial by Tweeting in the courtroom. This practice is very popular with reporters, as they no longer have to run outside, grab a minute on a cell phone and then have to go back through security to return to the courtroom. Some judges see benefits as well.

In one example, in January, Iowa Federal Judge Mark Bennett allowed a Cedar Rapids Gazette reporter to blog from a tax fraud trial, provided that she sit toward the back of the courtroom to avoid distraction. Bennett said transparency is lacking in his branch of government, something he thinks could be remedied, at least in part, by enabling the media to cover court cases differently. (Rushmann, 2009)

VIII. STRATEGIES TO TAME THE EFFECT OF SOCIAL NETWORKING IN THE COURTROOM

The Judicial Conference of the United States, the policy-making body of the federal courts, has endorsed a new set of model jury instructions for district court judges, in an attempt to address the improper use of cell phones, computers, and other communications technologies during jury service.

The model instructions (Appendix A) include the following specific language attending to social networking:

You should not...search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide this case...You may not communicate with anyone about the case on your cell phone, through email, Blackberry,
In the 371st District Court in Tarrant County, jurors are instructed with the following language:

Do not discuss your jury service with anyone whomsoever, including your wife or husband, or allow anyone else to discuss it in your presence until you are discharged as a juror and released from these instructions.

Let me just add that discussing it also includes by technological means. Do not Twitter your jury service. Do not blog it. Do not post anything about it to your Facebook or MySpace page or discuss it by any other means until you are released from these instructions.

Instructing jurors at several times throughout the trial and during deliberations should be helpful in motivating them to uphold the integrity of the judicial process, but educating them about WHY outside research is forbidden might provide to be the best motivation.

The issue of internet research, including consulting others for advice on social networking sites, should be addressed beginning with voir dire. It should be a focal point of the court's attention from the beginning of jury selection until the verdict has been delivered. Also, making it clear that violations of these rules are violations of the law might deter some, but encouraging jurors to report any sign of juror misconduct will deter even more.

Finally, in an effort to preclude the use of the internet or social networking sites to conduct personal research, more and more courts are allowing jurors to ask questions. Being able to ask questions can have the effect of investing jurors in protecting the integrity of the judicial process as their need for information is met. Jurors, despite any initial reluctance to serve, tend to take their jury service very seriously and strive to make the best decision possible. However, in contrast to the world even thirty years ago, people are now more comfortable researching on their own and weighing the credibility of information sources on their own. Doctors have noticed the impact of this phenomenon as patients come prepared to discuss and even debate medical conditions, armed with research, whereas in previous years they would have simply relied on the doctor's knowledge or perhaps sought a second opinion at the most. Knowledge is power and jurors thirst for the knowledge they think they need to make a decision that has the power to change people's lives.

IX. SOCIAL NETWORKING SITES AS LITIGATION TOOLS

Social networking sites can be powerful litigation tools for attorneys and trial consultants. These sites can be used to investigate fact and expert witnesses, opposing counsel, judges and prospective jurors, to prepare for depositions and to tailor trial strategy.

For example, in Fort Lauderdale, Fla., a plaintiff’s attorney and jury consultant did Internet research on prospective jurors for a products liability case involving a maintenance worker injured after having to get inside a tank-like machine to clean it. A search of the jurors yielded the information that one juror belonged to a claustrophobics’ support group. This information led the attorney and consultant to not release the juror during jury selection, and he ended up being the foreman and the plaintiff won a substantial verdict. (Browning, 2009)

Trial consultants and lawyers have found that jurors do not always answer the questions posed on juror questionnaires and during voir dire honestly. Potential jurors are prone to give politically correct answers in an effort to look better with their new peer group of other potential jurors. Potential jurors who are sensitive to authority might also answer in a way that will make them look better to the judge or attorneys. For these reasons, investigating potential jurors online, if there is enough time, can be very enlightening. A quick Google search can yield insights that can help trial consultants and attorneys make the best decisions regarding their peremptory strikes.

Finally, it can be useful to conduct an internet profile of each juror once the trial begins and to monitor each juror's online activity on social networking sites for the duration of the trial. Jurors who are abiding by the rules might not have the opportunity to see evidence of another fellow juror's disregard for the Court's instruction, but an alert trial team could and should.

X. CONCLUSION

Social networking isn't just a deeply ingrained habit, it has become an integral part of our lives and even our identities. Recently Mark D. White, Ph.D., pondered in a Psychology Today blog, whether or not a 24/7 online connectivity and information availability poses a threat to the sanctity of the impartial jury. (White, 2010) White had just returned from a Law and Society Association conference in Chicago, where he heard Caren Myers Morrison, a law professor at
Georgia State University and a former Assistant U.S. Attorney, propose that social networking and information availability may threaten the modern idea of the isolated and controlled jury. Morrison suggested it could be also be considered a return of sorts to the original notion of a jury, in which impartiality only referred to the absence of conflicts of interest, not a complete absence of information outside that provided at trial.

If we are headed to a day in which the judge cannot control what juries do and do not know, will it be against the interests of justice, or just against the interests of justice as we know it? Emerging technology, such as an interactive internet and social networking, may cause profound changes in judicial process in the long run - for better or worse - but its effects must be dealt with today.
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APPENDIX A

Proposed Model Jury Instructions
The Use of Electronic Technology to Conduct Research on
or Communicate about a Case
Prepared by the Judicial Conference Committee on
Court Administration and Case Management
December 2009

Before Trial:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.