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LITIGATION

When warnings don't work: Dealing with independent jury research

By Ben Davidson

In the classic movie “*12 Angry Men*,” the main character played by Henry Fonda persuaded his fellow jurors in a murder case that the defendant wasn’t guilty. In a pivotal scene, Fonda proved that a knife used to commit the murder was not rare, as the prosecutor had claimed — he had purchased an identical knife at a pawn shop during the trial. Perhaps inspired by the movies, jurors in real cases often do their own research, unaware that they are committing misconduct and setting the case on a path toward mistrial.

Last month, in *Atlantic Research Marketing v. Troy*, the Federal Circuit set aside a jury verdict regarding a trade secret on a unique gun clamp. One of the jurors brought in a clamp from his basement, tainting the deliberations. Although such blatant use of extraneous physical evidence is not very common, courts are seeing a rise in more casual research conducted on the Internet. In 2009, a federal judge in Florida declared a mistrial in an eight-week drug trial after he learned that nine of the jurors had been researching the case on the Internet. More recently, on Oct. 11, a trial court in New Jersey declared a mistrial in a sexual assault case after a jury went on Wikipedia to research “recovered memories of sexual abuse.”

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To combat the problem of independent jury research, federal and state judges have implemented model instructions admonishing jurors that they may not go online to do any independent research. Instructions clearly prohibiting use of the Internet for research appear in the 2010 9th Circuit Model Criminal Jury Instruction and in the 2010 California Civil Jury Instructions.



Actor Henry Fonda in 1955.

Associated Press

But jury consultants have found that these warnings often don’t work. Phil K. Anthony, CEO of DecisionQuest, points out that the phenomenon of jurors doing independent research is fairly prevalent, particularly among younger jurors. Especially at the beginning of the trial, before they have been sworn in, younger jurors are likely to have done some research on the case, getting data about the parties and likely reinforcing their preexisting ideas about the trial.

During trial, the research can result from a juror simply letting his friends know through a Twitter or Facebook message that he’s in an interesting case. The juror may get feedback from his friends with links to relevant websites. Anthony advises trial lawyers to embrace the likelihood that jurors will learn about their clients through the Internet and to plan accordingly. For example, if a corporate client’s reputation on the Internet is unfairly tarnished, care should be taken long before trial to address the problem through blogs and websites portraying the client in a more positive light.

For lawyers involved in disputes regarding technology, juror misconduct presents a special challenge. Michael Tiktinski of Trial Behavior Consulting indicates that jurors in patent cases often turn to the Internet to explain something they didn’t understand. This can be especially problematic if information that the jury was not allowed to hear was kept out for a special reason by the trial judge.

Similarly, in trademark infringement cases, the parties may carefully present evidence about infringement and use of the mark on the Internet, unaware that jurors may come away with a different view of the facts based on their own online surfing. One way to mitigate this problem is to take cell phones, iPods, and other such devices away from jurors while court is in session.

A Florida judge did just that recently in order to “remove [the] distraction and temptation” of cell phones. Jurors were told that family members could contact them by calling the court in case of an emergency. A tougher approach to this problem is for judges to require jurors to sign a pledge that they will not research the case on the Internet for the duration of the trial. That is what New York District Court Judge Shira Sheindlin did last September in a gun trafficking trial. Jurors promised to report any violation of the pledge by fellow jurors, and they were warned that violations of the pledge could be punished under penalty of perjury. While such a warning may not have deterred an idealistic juror like Henry Fonda, it should dissuade most jurors from tweeting about the case to their friends and trying to taint other jurors with what they think they learned.



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