

LITIGATION

SUMMER 2010

The 'Crime-Fraud'
of E-Discovery

Evidentiary Rules for
Technology-Based Evidence

Litigating in a World of
Tweets, Blogs and Googling

Getting the Most
Out of Calendaring Software



**Technology in
the Courtroom**

A SUPPLEMENT TO THE
THE RECORDER

An ALM Publication

Litigation

Litigating in a World of Tweets, Blogs & Googling

In a socially networked world, your jurors may know more about you and your client than you know about them

By **Bobbie Wilson**

While preparing for an upcoming trial, I struggled to figure out what to do about a plaintiff who was incredibly sympathetic on paper. So sympathetic, in fact, that a jury at a previous trial found in her favor to the tune of many millions of dollars. She came across as fragile, ill, drawn and weary. As defense counsel in the case, what was I to do? My assistant suggested checking the plaintiff out on Facebook. Lo and behold: There was a wonderful photo of a smiling, tanned and healthy-looking plaintiff. With that, I had my blow-up demonstrative and the answer to what I was going to do with this plaintiff. This started me thinking about what social media meant not only for my own trial practice but for the entire legal system. The full ramifications to the legal system are beyond the scope of this article, but a look at how new technologies such as Facebook, Twitter, Google, blogging, BlackBerrys, and iPhones, are affecting the lives of judges, jurors and lawyers highlights issues facing us now and foretells challenges to come.

Judges normally admonish juries early on that they are not to discuss the case with anyone or each other until deliberation, not to read newspaper articles about the

Bobbie J. Wilson is a partner at Howard Rice Nemerovski Canady Falk & Rabkin who focuses on trials and intellectual property law, including patent and trade secrets litigation.

case and not to do any outside research. The court is the gatekeeper of admissible evidence that jurors must weigh in deciding a verdict. While there are always jurors who read articles about the case or go to the scene of a crime, they have to make an effort to do so. Now, such access is instantaneous and the temptation is irresistible. Jurors are used to "Googling" when they want to know the answer to a question. If the lawyers or witnesses are doing a lousy job setting forth the facts of the case in an articulate, meaningful way, a juror might find a better version online while sitting right there in the courtroom. Unless it's a court like the California Supreme Court where all electronic devices must be checked before entering, it's hard for any court to police the use of electronic devices with a mere admonition.

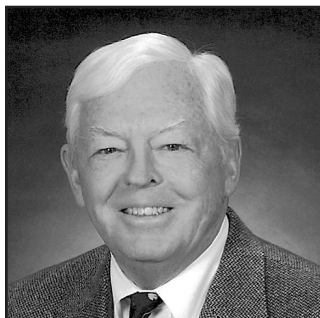
Some courts have started addressing this Herculean task. On the San Francisco Superior Court juror questionnaire form there is an admonition that "[Y]ou may not blog, Tweet, or use the Internet to obtain or share information." (CCP §1209(a)(10)) Other courts require jurors to sign statements of understanding or declarations that they have not done or relied on any outside research. Still others include specific questions in *voir dire* about the use of mobile devices. Jury instructions also often spell out the prohibited uses of electronic devices such as BlackBerrys, iPhones and Treos. They may also prohibit jurors from using specific forms of research before and during trial, including that done using Bing, Google, Facebook

and Twitter.

Judges can also be helpful by explaining the importance for jurors to only consider the evidence heard in court. Letting them know that their extracurricular activities jeopardize the parties' right to a fair trial can go a long way. Courts can also allow jurors to ask questions of the court or the lawyers. A less than ideal solution is to have the jurors check their electronic devices during trial. Many see jury duty as a burden that takes them away from work and their families. Cutting off their access to their social media won't endear them to a judicial system that requires their willing and active participation.

At a recent Northern Judicial Conference, Lauren Gelman, senior fellow at the Center for Internet and Society at Stanford Law School, expressed concern that cutting jurors off from their social media could create a lack of confidence and lack of trust of the judicial system. She explained that people are used to having access to information and become suspicious when they aren't allowed to see information or perceive that information is being kept from them. When asked if she was advocating getting rid of admonitions by courts that jurors should not do any outside research, she stopped short of such a recommendation but warned that there might be no practical way of preventing jurors from ignoring the admonishments. Jurors who have been caught blogging about a case or researching information after being admonished not to always seem to have a

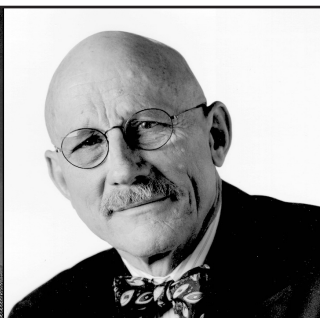
See WILSON page 5



Carl West Anderson

510.420.8642

justicecanderson@sprynet.com



Professor J. Lani Bader

415.386.9241

jbader@ggu.edu



Bruce W. Belding

415.331.1586

belding@aol.com

...

**AAA Large Complex Commercial Case Panelists
Fellows, College of Commercial Arbitrators**

...



Maurice Zilber

415.721.0501

mzee@earthlink.net



David Heilbron

415.393.2177

david.heilbron@comcast.net



Francis O. Spalding

415.392.0177

www.fos-adr.com

**TRAVEL
REDEFINED**

41

400NC

42

400NC



Unexpected discoveries await your arrival at Le Meridien San Francisco. Located next to the dynamic Embarcadero Center, you'll experience the city from a new perspective.

**NEWLY TRANSFORMED GUESTROOMS
CONVENIENT FINANCIAL DISTRICT LOCATION
INVITING PARK GRILL FOR BREAKFAST MEETINGS**

For more information or to make a reservation, please visit lemeridien.com/sanfrancisco or call +415 296 2900

**LE MERIDIEN
SAN FRANCISCO**
N 37° 47' W 122° 24'
T +415 296 2900
lemeridien.com/sanfrancisco

Le **MERIDIEN**

Litigation

WILSON

Continued from page 6

benign reason for doing so: They were curious (see “Juror’s Improper Use of Technology,” Ed Geary’s Legal Blog, Aug. 2, 2009). In other words, they didn’t mean any harm; they weren’t trying to influence the outcome; or they don’t believe “Googling” is really research. What they all fail to consider, either rightly or wrongly, is that their actions can alter the ability of the parties to receive a fair and impartial trial.

Beyond the fairness issue, resisting the temptation to “connect,” “check-in” or ping someone is harder for some than swearing off nicotine, coffee or alcohol. One commentator notes that “[i]f current patterns hold true, we will see increasing numbers of jurors for whom social networking is so habitual and life-integrated, they will be hard-pressed to see the justification for abstaining from ‘updating their status’ during trial.” (See “Online and Wired for Justice: Why Jurors Turn to the Internet,” by Douglas L. Keene and Rita Handrich, *The Jury Expert*, Volume 21, Issue 6, November 2009.)

So, how do you adequately police this behavior? Maybe the entire judicial system

You should assume that while your assistant is researching potential jurors in the venire while you are conducting voir dire, some jurors are searching the web for you, your client, the case and your adversary.

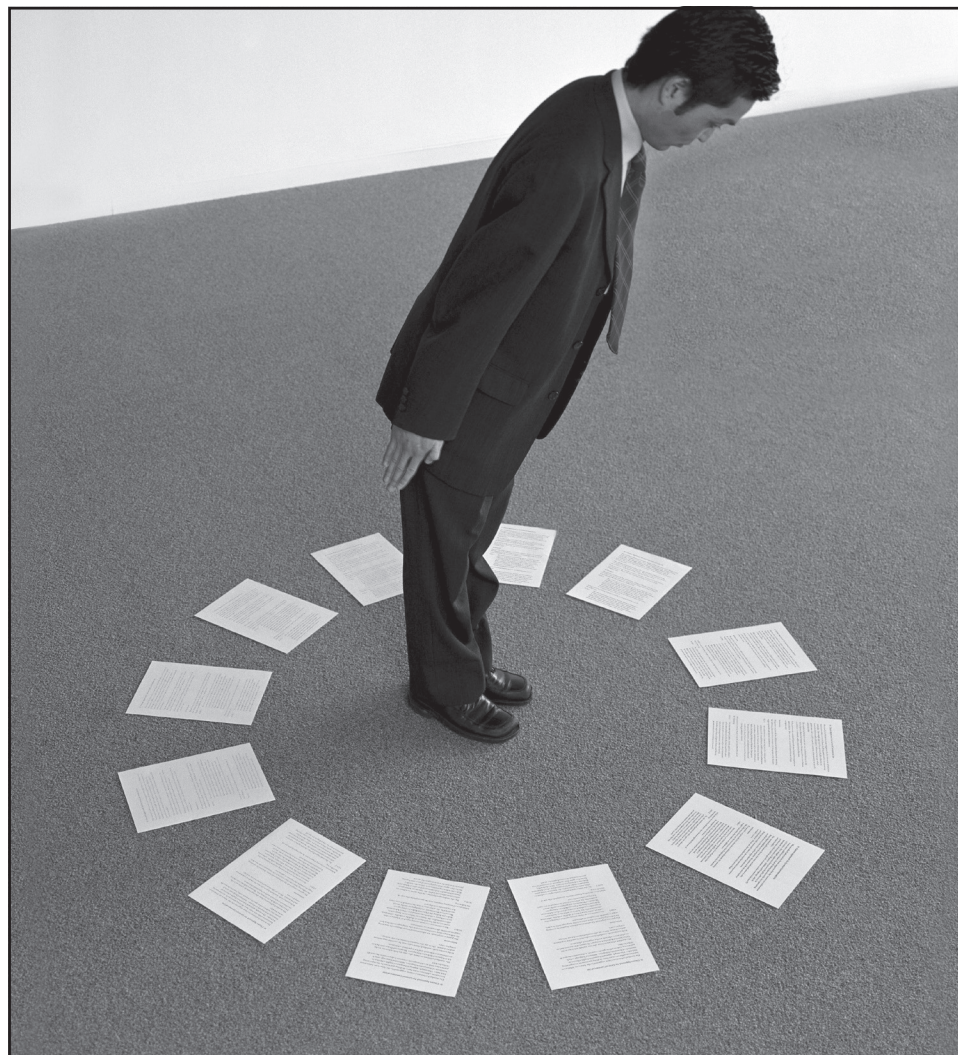
should work to make the jury experience less tedious and boring. In any trial there often appear to be endless delays (conferences out of the presence of the jury, side bars, motions practice, etc.) where the jurors are left out in the halls but they can’t go outside or leave the area. Since the legal system is slow to change, having a more efficient system is unlikely in the near future. That means a greater danger of jurors entertaining themselves by researching your case, your client, the lawyers and even the judge.

There was a time when lawyers would have information on jurors that they collected from jury consultants and jury questionnaires. Now, it’s a two-way street: You should assume that while your assistant is researching potential jurors in the *venire* while you are conducting *voir dire*, some jurors are searching the web for you, your client, the case and your adversary. You need to know what’s out there about your client, your case and you. I was recently researching information about a defendant and found a wealth of information including potential witnesses that I never would have uncovered unless I had hired a private detective. Out of curiosity (and now as part of my due diligence), I also researched my own client to see what potential jurors would find. I was pleased to see that there was nothing to worry about. For another client, I wasn’t as lucky but I was then well-armed and able to deal with the unfavorable information prior to trial. Assume that someone on your jury will uncover information that is out there about your client. Then you can decide how you deal with it in *voir dire* and during trial.

Researching your side is just the tip of the iceberg. The hazards are many when it comes to social media in the courtroom. A colleague told me about the poor lawyer in a trial he was involved in who was unaware that his witness had tweeted at the time of the incident at issue. The witness didn’t tell his lawyer, and the lawyer was caught off guard when that Tweet was used as impeachment evidence during cross-examination of the witness. The lesson here is that in preparing your witnesses for cross-examination, you should not only Google the witness, you should also do a social media (e.g., Facebook, MySpace, Twitter) “background check” as well. In another example, a witness was caught texting his boss while he was on the stand during a side bar. That very same witness had been reprimanded for texting another witness during deposition in the same case months before (see Keene and Handrich, *ibid.*)

All is not bleak but the job of the trial lawyer has become part sleuth. First, be sure that you are up to date on all forms of social media and the devices that make accessing information easy. If you aren’t comfortable with social media, then hire someone who is (or talk to your kids). Second, anticipate, identify and nullify. Anticipate that some jurors will be curious and will ignore admonishments by the court. Identify if there is anything on any social media site about your client. And, to the extent possible with retrial motions and *voir dire*, try to nullify unfavorable information that you learn about your client. Third, don’t overly rely on information that you learn about a juror and let it take the place of your doing a proper *voir dire*. A leading trial consultant I know cautions that what one learns about juries from social sites is information that the juror wants you to learn. That information may identify certain biases but it does not uncover the real danger with jurors: unconscious bias. Lawyers must still rely on their own skills and gut instincts during *voir dire* to unmask that type of bias. Fourth, ask the court (educating the judge pretrial if you must) to instruct the jury early and often, to allow you additional time in *voir dire* to focus on these issues, to allow you specific jury instructions that will ferret out the use of specific electronic devices and social media, to have jurors sign declarations that they will not research the case or parties and include a stern consequence, and to run a more efficient trial so that the jurors have little idle time.

Finally, be a better trial lawyer so that you don’t leave so many unanswered questions. Keep it simple and be plain-spoken, especially in a complex case. Remember who your audience is and that they might know a lot more about you and your case than you realize.



Think Outside the Clause.

Choose an arbitrator from JAMS, no matter which provider is administering your case.

HIGHLY SKILLED JAMS NEUTRALS
frequently sit in arbitrations administered by other providers at the request of both parties or their appointed arbitrators. JAMS neutrals keep you on time and on budget.



THE RESOLUTION EXPERTS®

1.800.352.JAMS

Sacramento • San Francisco • San Jose • Santa Rosa • Walnut Creek

Visit our new, enhanced website for unrestricted access to our national roster of more than 250 neutrals and their bios: www.jamsadr.com