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Jury News

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The Jury System in the Information Age

In our last Jury News column, we focused on how the Internet is changing the way jurors perceive and interpret evidence and the implications for the traditional concept of juror impartiality. For litigants, juror use of the Internet may lead to an unfair verdict if one or more jurors are exposed to prejudicial information online. To the extent that jurors' posts on social network sites are visible to a much wider audience than "old-fashioned" ex parte conversations with friends and family, it also has implications for public perceptions that the litigants received a fair trial. Nevertheless, it is clear from the nearly constant barrage of news stories of Internet-related juror misconduct that current strategies to discourage juror Internet use are becoming increasingly unsuccessful as people become more acclimated to using Internet tools on a routine basis. Ultimately, courts will have to either develop more effective strategies or redefine the concept of juror impartiality to accommodate the increased likelihood that one or more jurors will have visited cyberspace at some point during the trial.

For the past several years, most of our attention has focused on the discrete problem of juror Internet use. Very little attention has been paid to a different and perhaps more difficult problem: the impact of increased Internet use on public perceptions of trials and the jury system. So in Part 2 of this two-part column, we turn to this corollary issue and its implications for the future of the justice system, particularly in the context of high-profile trials.

Impact of New Media on Public Perceptions of the Jury System

Because jurors are drawn from the community at large, they reflect the general social outlook and values of their communities. Indeed, one of the primary roles of the jury is to inject community values into judicial decision making. Although, as designed, the voir dire process identifies and removes jurors who hold such strong opinions about case-specific issues that they could not serve fairly and impartially, those opinions will still be present in the public at large. This is particularly true in high-profile trials that generate

considerable media attention. One of the great ironies of contemporary society is the apparent disconnect between the jurors' trial and the public trial. Trial jurors will largely be isolated from ongoing media coverage of the trial. All the while, public sentiment may become even more inflamed over the course of the trial in reaction to evidence admitted at trial as well as media commentary on that evidence and non-trial information disclosed by the litigants, lawyers, and witnesses. In essence, a high-profile trial is actually two very different trials — one that the sworn trial jurors experience and one that the public observes as quasi-jurors, which can sometimes lead to very different conclusions about the appropriate verdict. Recent examples include O.J. Simpson's acquittal of murder charges, Michael Jackson's acquittal of child molestation charges, life sentences rather than the death penalty for Terry Nichols (co-conspirator in the Oklahoma City bombing) and Zaccarias Moussoui (the alleged 20th hijacker in the September 11th terrorist attacks), and the acquittal of Casey Anthony on charges of murdering her two-year-old daughter.

Different degrees of information presented to the public also result in a blurring of the line between news reporting, education, and entertainment, as well as between fiction and reality. Much of what the public knows about what actually occurs in the courtroom is what the ever-merging news and entertainment outlets portray. While reports on trial events provide a glimpse into how the justice system works or does not work, most people do not have a realistic sense of what it is like to serve as a juror in an actual trial. People routinely report that their primary source of courtroom knowledge comes from television trial shows such as the "People's Court" and crime dramas such as "Law and Order."

The various iterations of entertainment shows and news outlets affect the public's expectation about the justice system and jury verdicts. Law enforcement and forensic-based crime dramas on television (e.g., *CSI* and its numerous iterations) outnumber actual trial drama shows. Yet all of them portray a fast-paced trial that is resolved in an hour or less with justice unequivocally done. Cable television's 24-hour news coverage and shows such as "Court TV" provide what appears to the public as the inside story with all of the facts revealed,

including commentaries by so-called experts. Inherent in most jury trials, however, is the reality that trial evidence is often ambiguous, conflicting, and incomplete; the law articulated in jury instructions sometimes borders on incoherence; jury deliberations can be quite contentious; and jurors may nevertheless harbor some doubts (albeit not reasonable doubts) about a defendant's guilt even after returning a guilty verdict.

When there is public outrage over a perceived injustice, especially in a notorious trial, the courts must work quickly and effectively to counter the public's doubt. The public forum for hearing jury trials, as guaranteed by the Sixth Amendment, was seen by the Founders as a safeguard for the defendant against abuses by the government. Freedom of the press under the First Amendment was intended to protect the people and to be the voice of the community. The tension between the two, spurred along by new media in the Information Age, contributes to a decline in the public's trust and confidence in the jury system. The courts depend on the jurors as representatives of their respective communities to provide legitimacy to the justice system. As such, central to the mission of the courts is a way to maintain the public's trust and confidence in trial by jury as an effective way to resolve disputes.

Courts now use many contemporary communications tools and techniques to make the justice system appear more accessible and more transparent. Some provide online access to court documents, including filings and decisions. Others offer real-time video feeds of court proceedings. Many courts, especially in urban areas, now employ public information officers who are specifically tasked with communicating information about the court's mission and role in contemporary society to the public. Inherent in that task, however, is the paradoxical challenge that the culture of the court is fundamentally at odds with the societal culture that has developed with and in response to these new communication technologies. A recent study entitled "New Media and the Courts: Current Status and a Look at the Future," undertaken by the Conference of Court Public Information Officers, observed that courts rely almost exclusively on textual communication — written opinions and court orders — to speak publicly. This mode of public communication, detailing the proven facts and logic on which court decisions were made, underscored the message that the court's legitimacy rested firmly on the rule of law. Moreover, court communication is primarily hierarchical and unidirectional; opinions and court orders are intended as the final word to be obeyed. They are not intended as an invitation for further discussion except within the highly stylized procedures of a legal challenge to those orders.

In contrast, the Internet is a multimedia environment offering visual and audio formats to communicate, in addition to

traditional text. These technologies also are intended to be interactive and to encourage collective decision making on the largest scale possible. While many court public information officers have made tremendous progress in incorporating some new media tools and strategies, at least to communicate non-case-specific information to the public, it is not clear that they will ever fully harmonize these two incongruous cultures without a radical re-conceptualization of many of the fundamental principles of judicial independence and legitimacy.

New Media and the High-Profile Trial

High-profile trials cause the most difficulty by far for judges and lawyers, mostly due to the impact of pretrial publicity on prospective jurors. Trials can become the focus of intense media attention for a variety of reasons. Sometimes the litigants, witnesses, or victims are celebrities, such as in the O.J. Simpson and Michael Jackson trials. Sometimes the case involves particularly violent or heinous crimes that shock the community, including the Oklahoma City bombing trials, the Unibomber trial, and the Moussaoui terrorism trial. Sometimes the case raises controversial social or political issues, including the California Proposition 8 trial involving the constitutionality of same-sex marriage or the prosecution of financial fraud charges against key executives at Enron and WorldCom. Members of the media themselves sometimes highlight particular cases, such as when Headline News (HLN) anchor Nancy Grace took on the Casey Anthony trial as a personal cause célèbre to see justice done for a murdered child. And sometimes there is no apparent reason other than a slow news day for a case to suddenly attract great media attention.

The key issue for courts concerning both the scope and tone of media treatment of pending cases is the impact that it will have on prospective jurors' judgments of defendant guilt, the conditions under which those effects will most likely occur, and the remedial efforts, if any, that are most likely to minimize those effects. Traditional mechanisms for mitigating the impact of pretrial publicity include trial delay, a change of venue or impaneling an out-of-county jury, and extensive voir dire — including the use of written juror questionnaires. Unfortunately, the approaches to addressing publicity concerns may not be as viable as they once were given the geographic reach and intensity of 24-hour news coverage. Multiple news media, along with the varied reliability of the information source, simply reach more people, often delivered as an unfiltered or even politicized message. Finally, court use of anonymous juries to prevent communication affecting jury decision making, such as that of external jury tampering or intimidation, is also explored as a valid response.

Change of Venue

One response to pretrial publicity is to delay a trial date, as news often migrates “off the front page.” Ironically, that phrase was derived from the traditional print newspaper of the past. In our technology-saturated culture, we might say such a topic is no longer the most popular tweet, or the post no longer appears in the current news feed section. As a result, people forget the details they read initially. While Internet postings are virtually eternal, they migrate to the less-visible archive sections. There is no guarantee, however, that an interested juror would be unable to access the old information quickly if he or she desired. This is in stark contrast to the era of newspapers in which the juror would be required to spend significantly more time to be able to uncover the details of a past news event and would most likely need to physically leave the courtroom to accomplish this task. The loss of control over the flow of information into and out of the courtroom has indeed left some courts unprepared.

Although a change of venue is an option for courts, numerous notorious trials have been successfully tried in the original venue (e.g., nanny trial, and a series of well-known mafia cases), and legitimate concerns about the logistical and financial burdens arise when moving the trial. The proposed venue must also resemble the original community in terms of both demographic and attitudinal characteristics due to the historical importance of public access. The U.S. Supreme Court in *Murphy v. Florida*, 421 US 794 (1975), addressed the level of pretrial publicity that deems one incapable of being impartial. The decision did not require jurors to be completely unaware of publicity but to be able to set aside the information and judge the defendant solely on the information provided in the courtroom. Courts have developed a fairly consistent analytical framework for determining whether the extent and tone of pretrial publicity have so “poisoned” the local jurisdiction that a change of venue is necessary. In *Irvin v. Dowd*, 366 US 723 (1961), the U.S. Supreme Court wrote that if “an appellant can demonstrate that prejudicial, inflammatory publicity about his case so saturated the community from which his jury was drawn as to render it virtually impossible to obtain an impartial jury, then proof of such poisonous publicity raises a presumption that appellant’s jury was prejudiced, relieving him of the obligation to establish actual prejudice by a juror in his case.” The presumption is rebuttable, however; if the government demonstrates that an impartial jury was actually impaneled in the appellant’s case, the conviction will stand despite appellant’s showing of adverse pretrial publicity.

The question for contemporary courts trying the most high-profile cases is whether any venue can satisfy these requirements. Timothy McVeigh’s trial moved from Oklahoma City to Denver, but that was only possible because the trial was held in federal court. State court, by definition, would

be required to maintain jurisdiction and hold the trial within the same state. The Washington, D.C. sniper trial moved from Fairfax, Virginia (a suburb of Washington, D.C.) to the southern Tidewater area of Chesapeake/Virginia Beach, Virginia. Complicating the matter, some news accounts indicated the sniper had been in the Tidewater, possibly seeking additional victims, before capture, raising the possibility that prospective jurors in that venue would be similarly biased. The saturation of national news undermines the widespread effectiveness of granting a change of venue to overcome the challenge of impaneling a fair and impartial jury, for it will be increasingly difficult to locate an alternative venue not equally affected.

The Supreme Court recently revisited this framework in *US v. Jeffrey Skilling*, 130 S. Ct. 2896 (2010), in which the Enron CEO was convicted of multiple counts of securities and wire fraud involving the collapse of the Enron Corporation. The court ultimately held that the amount and tone of pretrial publicity about the Enron collapse was insufficient to establish a presumption that the jury pool was prejudiced, and in any case, the fact that Skilling only challenged one juror for cause and the jury returned acquittals on nine counts of insider trading demonstrated that the impaneled jury was, in fact, impartial.

Intensive Voir Dire

Another traditional mechanism for addressing pretrial publicity is to conduct intensive voir dire. A juror questionnaire is often given to potential jurors to identify potential bias. Although case law varies in state courts concerning the scope of permissible questions, the strength of using such a questionnaire is its ability to elicit truthful information from the potential jurors about bias, including attitudes about the specific case as well as underlying attitudes about relevant case issues (e.g., personal experience with substance abuse). Conducting voir dire through written questionnaires in addition to oral questioning in the courtroom is more likely to uncover sensitive or personal information that may affect the juror’s ability to be fair and impartial.

If these remedies are no longer viable, at least in the most notorious trials, what else can be done? Or do courts simply acknowledge that the traditional view of juror impartiality cannot be achieved under these circumstances? If impartiality is an elusive goal, the courts would have to accept a compromised version of justice, mitigating to the greatest extent possible the problems while hoping for the best outcome.

Anonymous Juries and Jury Sequestration

In recent times, judges have become more likely to use anonymity measures (protecting the juror’s identities). In

the trial of Illinois governor Rod Blagojevich on public corruption charges, Judge James B. Zagel ordered that jurors' names not be disclosed publicly until after the trial ended. He noted that he had personally received dozens of letters, telephone calls, and emails from the public concerning the trial and was concerned that jurors would also be targeted for harassment or intimidation if their names became public. He noted that prohibiting jurors from using email or other Internet technologies to communicate with friends and family about non-trial matters for the duration of the four-month trial would impose an extraordinary burden on them, and other means of screening jurors' personal correspondence, email, and telephone calls would be similarly intrusive. Jury sequestration, which can also be used to insulate jurors from outside influence, is expensive to the court and onerous on the jurors, their families, and the courts. Consequently, it is rarely employed except in the most extreme circumstances. Local and national media outlets challenged the order on First Amendment right to access government proceedings in an interlocutory appeal to the federal Seventh Circuit of Appeal. Historically, anonymous juries were rarely permitted in the federal courts unless the trial judge made specific factual findings concerning the immediate risk of jury tampering or intimidation. The fact that Judge Zabel's order ultimately prevailed illustrates the point that many courts have come to appreciate that contemporary communications technologies pose as great a risk or more to juror impartiality as traditional in-person approaches, in part due to the substantially larger pool of Internet-savvy people who might be inclined to contact jurors in high-profile cases.

Conclusions

The introduction and evolution of Internet technologies that has taken place over the past two decades has introduced a number of challenges to the concept of juror impartiality. In many instances, these challenges are simply extensions of the types of challenges courts have faced in the past — and for which highly effective strategies exist. A thorough voir dire can identify jurors who cannot serve fairly and impartially due to personal knowledge about the case, exposure to pretrial publicity, or preconceived opinions or bias about case-related factors. Very high-profile trials may require additional measures, including anonymous or sequestered juries, to prevent jury tampering or intimidation by electronic means.

Although these are all tried and true techniques that require only a little tweaking to be equally useful for maintaining juror impartiality in the Internet Age, some aspects of modern telecommunications technologies appear to affect jurors and jury trials in a qualitatively different way.

The overwhelming volume of news, its iterative manifestations, and its expanding geographical distribution to all parts

of the globe pose an immense challenge for courts. Even if the tone of media coverage of an upcoming trial is relatively neutral, the sheer level of detail may so saturate the potential jury pool that it becomes increasingly difficult to impanel a fair and impartial jury in that jurisdiction. But it may be equally difficult to locate an alternative jurisdiction where the level of pretrial publicity and community impact is sufficiently less. Even after a fair and impartial jury is impaneled and the trial has commenced, the court faces the ongoing possibility that the public audience watching both the trial proceedings — often in real time — and corresponding news and commentary, will draw very different conclusions about the appropriate outcome of the trial than the impaneled jury would based solely on the evidence and law.

Courts can no longer blandly assume that the public understands their mission and the underlying rationale for trial procedures, and that trial outcomes will be inevitably accepted as valid judgments in the court of public opinion. Ultimately, courts will have to argue more persuasively that the adversary system — with all of its seemingly arcane procedures and evidentiary restrictions — continues to be an important and valid function in the justice system. And courts will have to develop more effective strategies to promulgate those arguments. Courts are institutionally reactive organizations that have been slow to adapt to the implications of new media on court operations generally and in the context of jury trials specifically. New media is affecting changes in both public perceptions about the courts and courts' own perceptions about themselves and their role in contemporary society.

As a final note, it is important to recognize that contemporary technologies are changing very rapidly. Courts have been taken entirely by surprise by many of the communications technologies in widespread use in contemporary society. They are even less aware of and prepared for newer technologies that likely have already been developed and deployed; courts have not begun to imagine the future implications that these technologies will have on court operations. There is a distinct possibility that the issues discussed in this column will shortly become moot by the introduction of newer technologies. At the very least, however, we hope that this column provides an historical glimpse of the issues and problems that courts once confronted.

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