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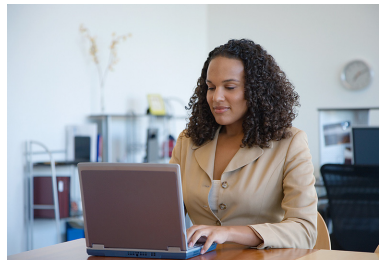
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## The Google Mistrial: Addressing the Challenges of Internet-Era Jurors

**A longer version of this paper was featured in *The Jury Expert*, March 2011**

In recent years, a new term has entered the legal lexicon: The “Google mistrial” was coined to describe the mistrials declared because of jurors’ use of the Internet to conduct research about the case.<sup>i</sup> In a 2009 Federal drug trial in Florida, for example, nine of the 12 jurors admitted to researching the case on the Internet.<sup>ii</sup> In a 2011 murder case in Pennsylvania, a juror researched the injuries suffered by the victim and relied on that information rather than on the medical testimony presented in court.<sup>iii</sup> Both of these cases ended in mistrials. We are also seeing appellate reversals after trial judges deny motions for mistrials due to jurors’ Internet research.



It should come as no surprise that jurors today are researching cases on the Internet. Jurors are not the same as they used to be. The current jury system is premised on a model of jurors as largely passive until the moment of deliberations. They listen in silence to what is presented to them. They cannot ask questions in

real time (and only rarely can they raise questions that the judge might ask at the end of a specified portion of the trial) and are often discouraged by the judge from note-taking. They rely on the information they receive in the courtroom to inform their thinking, and they are wholly dependent on attorneys and judges to determine what information they can and cannot hear.

This centuries-old model may no longer work for today’s jurors, particularly those who have grown up in the era of the Internet. They are used to getting questions answered instantly with a few keystrokes. Information at trial is presented methodically and often slowly and even more often, feels incomplete to jurors. Generations of past jurors simply had to live with that frustration, but today’s jurors do not. They can remedy the situation in mere seconds by opening a search engine and typing in a question, or a few words.

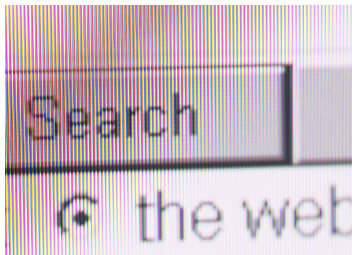
The ease of targeted searching, the accessibility of information via mobile devices, and the psychological expectation that every “itch to know” can be scratched, have combined to create jurors who may not be content to rely on what they hear in the courtroom to make decisions about a case.

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Judicial admonitions notwithstanding, they are taking matters into their own hands and doing research. They are questioning witnesses' assertions, researching unfamiliar terms, and searching for background information to provide a context for what they have heard in the courtroom. While there are currently no data on how often American jurors engage in such research, reports of this kind of activity abound in the media and the Florida case in which nine of 12 jurors admitted to Internet research may reflect the new norm. Clearly, the tide has turned and absent draconian measures that track jurors' Internet use and punish infractions severely, there may be no going back. Jurors' online research may be an inevitable new reality.

As more and more courts have recognized the challenges posed by jurors who engage in online research, they have developed more detailed instructions to forbid such research explicitly. The U.S. Judicial Conference has sent suggested jury instructions to the entire federal judiciary which include admonitions against conducting any independent research using the Internet (or traditional media), and many states reference juror Internet use in at least some of their standard jury instructions.<sup>iv</sup> Thus, jurors who nonetheless conduct Internet research often do so in direct violation of judicial instructions. Jurors have been fined as a result and in some cases, judges have even contemplated charging them with contempt for their trial-related Internet activity.<sup>v</sup>

In one unusual case, a mistrial was declared after a plaintiff's attorney questioned prospective jurors about their Internet search skills and then made reference during his opening statement to the ease with which the history of litigation could be unearthed. Defense counsel argued that the attorney was implicitly encouraging jurors to conduct Internet research on the history of the instant lawsuit which would have yielded highly prejudicial results. The judge blamed himself for failing to be more elaborate during voir dire with regard to the importance of not searching the Internet. In response to a defense motion for a new trial, he held that the way the attorney raised the question of searching was enough to be construed as encouragement to do so. The fact that 19 of the 21 jurors on the panel said that they "Google" regularly highlights the ubiquitous nature of this activity, and attests to the many jurors who could have found information had they chosen to look.<sup>vi</sup>

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As reports of jurors using the Internet come ever more frequently, we must ask: Is it time to go beyond just saying no to juror Internet research? Is it time to acknowledge that the world has irrevocably changed, and that it is no longer feasible to expect jurors to quell their impulses to seek information outside the courtroom?

Should we move the discussion from “just say no” to thinking about whether and how jurors can do online research without compromising the integrity of the trial?

There are good reasons to consider lifting the ban. First, extrinsic material should not be equated with prejudicial material. Much of the information that jurors might seek online would have little or no bearing on their and other jurors’ decisions in the case.<sup>vii</sup> There is a line between prejudicial information and harmless error, and some information falls on the acceptable side of the line.

Second, some argue that the pursuit of extra-courtroom information does not undermine justice, it promotes it. In response to a 2009 New York Times article about a “Google mistrial,” one reader wrote:

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*If evidence and testimony provided to jurors in the courtroom is incomplete, I feel that any rational and responsible juror would seek additional information on their own. The object of any court proceeding is to ascertain the facts and arrive at a fair judgment using ALL facts obtainable by any means available. If I am ever called and sit on a jury, you had better believe that everything said will be recorded and photographed so I can take it home and do whatever research is required to unravel the case using due diligence.<sup>viii</sup>*

Perhaps we need to consider the possibility that the straightest path to justice can no longer be found in the separation of the courtroom from the rest of the world, or in the requirement that jurors cut themselves off from outside information or from their own areas of expertise.<sup>ix</sup> Once, the amount of work required to marshal case-relevant information was formidable and created its own barrier to access. The current reality may be that it is simply not realistic or possible to try to keep jurors off the Internet. All practical barriers to access are gone. And, once there, Internet searching will likely bring relevant information to jurors’ instant attention.

Given the long history of the court’s efforts to require jurors to refrain from

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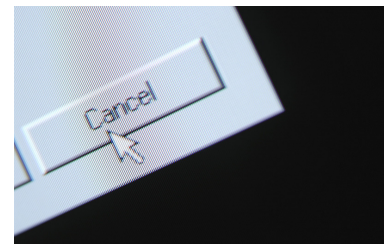
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discussing or investigating anything of relevance to the case, it feels somewhat treasonous even to imagine this new world. Certainly, it feels safer to “just say no.” Providing a place for outside information or sources of influence in the courtroom feels like a violation of long-established rules designed to promote the pursuit of truth and justice. Many years of trial practice have led to the popular belief that fairness can only be found when the courtroom environment is pristine, untouched by outside sources of information or others’ opinions.

There are, of course, risks to changing the status quo. The greatest challenge of allowing jurors to go online and seek extrinsic information is that it circumvents the process of cross-examination at the heart of our country’s adversarial trial system. As we all know, not everything we find online is true,



and without cross-examination the impact of questionable information cannot be mitigated. If jurors acquire information prejudicial to a criminal defendant, the defendant loses his Constitutional right to confront his accusers. Any consideration of loosening the rules about extrinsic information must consider the implications of allowing unchallenged – and unchallengeable – information to enter into jurors’ deliberations.

In fact, the possibility of lifting the ban on juror Internet research raises a number of questions that must be explored. Among them are:

Can jurors be permitted to obtain extrinsic information with the condition that they will always give greater weight to what they learn in the courtroom? Is such a thing even psychologically possible?

Would lifting a ban on Internet research change the pre-trial process for motions *in limine* and judicial rulings on such issues? Does it make sense to fight over excluding information that can then be found online by jurors? Would attorneys opt not to file motions *in limine*, so as to be better positioned to address all issues in the courtroom, rather than having jurors discover this information on their own?

Would lifting the ban on Internet research disproportionately empower younger, more Internet-savvy jurors who will then have access to more and different information than their older and lower-tech peers?

If trials were structured to allow jurors to be more active in the fact-finding process – for example, allowing them to submit questions to the judge

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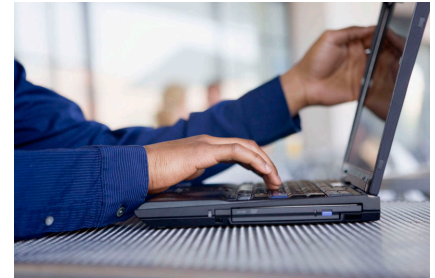
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for witnesses to answer, or putting trial evidence on a website for jurors to peruse – would this be enough to alleviate the natural curiosity and frustration that presumably accounts, at least in part, for jurors taking things into their own hands and conducting Internet searches?

Could we then avoid the need to lift the ban?

The questions listed above are just a beginning. Surely many other questions will emerge if courts, attorneys, trial strategy consultants and others are willing to explore alternatives to the status quo with regard to jurors and online searching. One might say that a minefield of questions must be addressed as we move forward in thinking about how to handle juror Internet use. The increasingly frequent reports of juror Internet research and Google mistrials suggest that the Googling juror is here to stay. We cannot avoid reckoning with this new reality. If we do not rise to meet this challenge, if we bury our heads in the sand, jurors' choices alone will shape the landscape and trials will be modified *ad hoc* and *de facto*.



Serving justice is the ultimate goal and in some ways the Internet may facilitate this goal. That said, it is surely easier to imagine the many ways in which the Internet may subvert it. It is reasonable to believe, though, that the Internet is here to stay. It is time for those of us who make our livings in the well of the courtroom to step up, ask the questions and test the answers that will bring the reality of the Internet-era and trial practice together.

Rather than increasing the threat-level of the court's instructions (something that might well have other unintended consequences in terms of jurors' sense of the government's reach and power in their personal lives), this may be the time to begin the conversation that will seek ways to encourage jurors to put information from the Internet, from the media more broadly, or from others in its proper place.

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<sup>i</sup> John Schwartz, *As Jurors Turn To Web, Mistrials Are Popping Up*, New York Times, 3/17/09.

<sup>ii</sup> See Deirdra Funcheon, *Jurors And Prosecutors Sink A Federal Case Against Internet Pharmacies*, Broward-Palm Beach New Times, April 23, 2009. <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies/2/>.

<sup>iii</sup> Michael R. Sisak, *Judge Dismisses Juror, Declares Mistrial*. Citizensvoice.com, January 14, 2011. <http://citizensvoice.com/news/update-judge-dismisses-juror-declares-mistrial-1.1090158#axzz1DgawoYP1>

<sup>iv</sup> Eric P. Robinson, *Juror Use Of Social Media: A State-By-State Guide*. Blog Law Online, September 13, 2010. <http://bloglawonline.blogspot.com/2010/02/juror-use-of-social-media-state-by.html>.

<sup>v</sup> U.S. Juror Could Face Charges For Online Research. Reuters, January 19, 2011. <http://in.reuters.com/article/2011/01/19/internet-juror-idINN1923805320110119>

<sup>vi</sup> *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696.

<sup>vii</sup> For more on this topic, see Gareth Lacy, *Should Jurors Use the Internet?* The National Law Review, Fall 2010 Student Writing Competition; <http://www.natlawreview.com/article/should-jurors-use-internet>, 1-7.

<sup>viii</sup> New York Times Readers' Comments: *As Jurors Turn to Web, Mistrials Are Popping Up*, March 17, 2009; <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html> (See Keene and Handrich (2009) for more on this comment.).

<sup>ix</sup> See the 2000 decision *People v. Maragh*, 94 N.Y. 2d 569 in which a conviction was overturned because nurses on the jury shared their expertise during deliberations.