

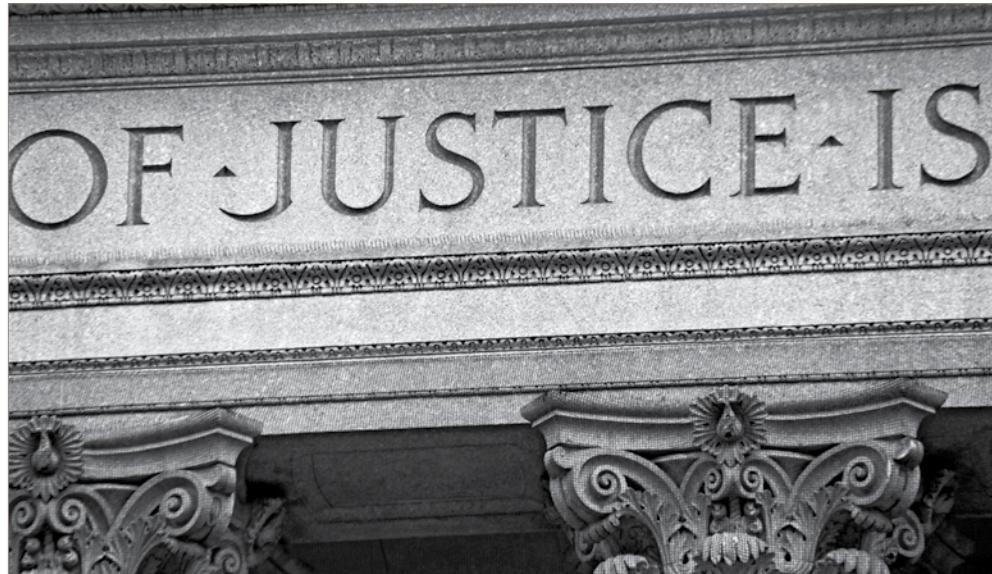
Editorial Introduction

As it says about itself,

"The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States. The many specific statutory duties of the Center and its Board fall into a few broad categories:

- conducting and promoting orientation and continuing education and training for federal judges, court employees, and others;
- developing recommendations about the operation and study of the federal courts;
- conducting and promoting research on federal judicial procedures, court operations, and history.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference. The Board appoints the Center's director and deputy director; the director appoints the Center's staff. Since its founding in 1967, the Center has had ten directors. Judge Jeremy D. Fogel became director in 2011. He was appointed U.S. district judge for the Northern District of California in 1998, but has been resident in Washington, D.C. since becoming director. The deputy director is John S. Cooke."



While it is a key function of the Federal Judicial Center to assist judges in doing their job, the results of the Center's research efforts and subsequent publications can inure to the benefit of anyone who is affected by the judicial system—and who among us is not? Those of us who are called upon to interpret and explain coverage, whether during insurance-related litigation as an expert witness or in another capacity, have a particular reason to familiarize ourselves with their work.

The use of social media is the subject of prolific discussion in the insurance trade press: misuse of such communication channels is not quite so frequently addressed. The following pages from an FJC study are focused on the misuse of social media in courtrooms and strategies

for curbing such unacceptable practices. We have included the list of contents so you can see what we've left out.

The response rate to the survey was considerably higher than that to most surveys (53 percent): then again, given the identify of the surveyors and the target population, we might wonder why the response rate wasn't even higher (no doubt those judges have many things occupying their time).

One quick take-away seems to be that the abuse of social media in courtrooms doesn't seem to be terribly prevalent as observed by judges now, but that abuse can be egregious and is the cause of firm sanctions. Perhaps being asked about it will make judges more alert to possible problems. ■

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Jurors' Use of Social Media During Trials and Deliberations

A Report to the Judicial Conference Committee on Court Administration and Case Management

by Meghan Dunn

Executive Summary

At the request of the Committee on Court Administration and Case Management (CACM), the Federal Judicial Center conducted a survey of district courts to assess the frequency with which jurors use social media to communicate during trials and deliberations, and to identify effective strategies for curbing this behavior. The results, based on the responses of 508 responding judges, indicate that detected social media use by jurors is infrequent, and that most judges have taken steps to ensure jurors do not use social media in the courtroom. The most common strategy is incorporating social media use into jury instructions—either the model jury instructions provided by CACM or judges' own personal jury instructions. Also common are the practice of reminding jurors on a regular basis not to use social media to communicate during trial or deliberations, explaining the reasons behind the ban on social media, and confiscating electronic devices in the courtroom. Judges admit that it is difficult to police jurors. Only 30 judges reported instances of detected social media use by jurors during trials or deliberations.

Jurors' Use of Social Media During Trials and Deliberations

The Judicial Conference Committee on Court Administration and Case Management (CACM) asked the Federal Judicial Center to develop and administer a short survey of district court judges to assess the frequency with which jurors use social media to communicate about cases during trial and deliberation. The survey also sought to identify strategies judges have found to be effective and appropriate in curbing this behavior. This report presents the findings from the survey.

Study Methods and Response Rate

In October 2011, we sent an electronic questionnaire to all active and senior federal district judges. Two weeks later we sent an email reminder to judges who had not yet responded. Of the 952 judges who received the questionnaire, 508 responded, for an overall response rate of 53 percent. The respondents represent all 94 districts and have a mean of 14.6 years on the bench, ranging from a few months to 49 years of service as a federal judge. Appendix A provides a breakdown of responding judges by district.

The computerized questionnaire allowed respondents to be routed automatically around questions that were not relevant to their situations; thus, judges answered different questions depending on their experiences. Because some judges were asked questions that other judges were not (e.g., about previous experience with social media use), and because not all judges responded to every question presented to them, the number of respondents varies across the questions. A copy of the questionnaire can be found in Appendix B.

Please keep in mind that the data from the survey represent judges' reported experiences and perceptions of jurors' use of social media to communicate about proceedings in which they are involved. The data are not actual empirical measures of such behavior.

Incidence of Social Media Use by Jurors During Trials and Deliberations

The use of social media by jurors during trials and deliberations is not a common occurrence. Of the 508 judges who responded to the survey, only 30 judges (6 percent) reported any detected instances of jurors using social media during trial and deliberation, as seen in Table 1.

Of the 30 judges who have detected juror use of social media during trials and deliberations, the majority (28 judges, or 93 percent) have seen social media use by a juror in only one or two trials. The instances of social media use were more commonly reported during trials (23 judges reported at least one instance) than during deliberations (12 judges reported at least one instance), and were more commonly reported during criminal trials (22 judges with experience) than during civil trials (5 judges). Three judges encountered jurors using social media during both criminal and civil trials.

Ways in Which Jurors Use Social Media

The forms of detected social media use by jurors include Facebook (nine responses), and instant messaging services (seven responses). Twitter and internet chat rooms were reported by three judges. Table 2 contains a complete list of the social media forms judges encountered during trials and deliberations.

Table 1
Judges' Experience with Jurors Using Social Media to Communicate During a Trial or Deliberation (n=508)

Have Jurors Used Social Media During This Option Trial or Deliberation?	Judges Selecting This Option Number	Judges Selecting This Option Percentage
Yes	30	5.9%
No	478	94.1%

Of the 17 judges who described the type of social media use jurors engaged in during trials and deliberations, three judges reported that a juror “friended” or attempted to “friend” one or more participants in the case, and three reported that a juror communicated or attempted to communicate directly with participants in the case (see Table 3). While three judges reported that jurors used social media to post information about a deliberation, none of the responding judges reported any instance in which a juror used social media to divulge confidential information about a case. One judge did report, however, that a juror revealed identifying information about other jurors. Judges could select “other” as an option for identifying additional ways in which jurors inappropriately used social media; the eleven who did listed case-related research (five judges), sharing general trial information such as the progress of the case (four judges), allowing another person to listen to live testimony (one judge) and conducting personal business (one judge).

In an open-ended follow-up question, judges could describe more fully the ways in which jurors have used social media during trials and deliberations. Overall, the 13 judges who responded to this question reported that jurors share both case-specific information and more generic information about jury service in general during the progress of the trial. Two judges reported jurors sharing non-confidential information about a case (one in a personal blog), and two judges reported jurors sharing information about their jury service in general. Three judges reported cell-phone use by jurors, but were unsure of the specifics of that use.

Though the incidence appears to be small, the judges’ responses reveal that at least some jurors have revealed case-specific information through social media. Two judges described situations in which a juror contacted a party with case-specific information. In one, the juror contacted the plaintiff’s former employee to reveal

Table 2
Forms of Social Media Used During Trials and Deliberations (n = 30)^a

Social Media Forms	Judges Selecting This Option Number	Judges Selecting This Option Percentage
Facebook	9	30.0%
Google +	9 ^b	30.0%
Instant messaging service (such as AIM)	7	23.3%
Twitter	3	10.0%
Internet chat room	3	10.0%
Internet bulletin board	1	3.3%
MySpace	1	3.3%

- a. Judges could select more than one item; thus, the number of media forms identified is greater than the number of respondents.
- b. The new social media service Google + was included as an option; nine judges indicated that jurors used Google + in their courtroom. Later comments in those responses strongly suggest that the judges were referring to the Internet search engine Google, and not the social networking site Google +.

Table 3
Ways in Which Jurors Used Social Media During a Trial or Deliberation (n = 17)^a

Juror Behavior	Judges Selecting This Option Number	Judges Selecting This Option Percentage
“Friended” or attempted to “friend” participants in the case	3	17.6%
Communicated or attempted to communicate directly with participants in the case	3	17.6%
Revealed aspects of the deliberation process	3	17.6%
Revealed identifying information about other jurors	1	5.9%
Divulged confidential information about the case	0	0.0%
Other	11	64.7%

- a. Judges could select more than one item; thus, the number of juror behaviors selected is greater than the number of respondents.

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Jurors' Use of Social Media During Trials and Deliberations

Continued from page 3

likely verdict; in the other, an "alternate juror contacted an attorney via Facebook during juror deliberations to provide feedback and [the] likely outcome."

Identifying Jurors' Social Media Use During Trials and Deliberations

Judges acknowledge that it is difficult to detect jurors' inappropriate use of social media. Of the 28 judges who indicated how they learned of the incident, most said another juror had reported it (13 judges). Five judges said an attorney had reported it and five said a juror's use of social media came up in post-trial motions or interviews. Three judges indicated that jurors' social media use was reported by court staff or a party. Only two judges reported observing jurors using electronic devices in the courtroom.

When judges have learned of jurors using social media in their courtrooms, reactions have differed. Nine judges (30 percent of the 30 judges with experience) removed the juror from the jury, and eight judges (27 percent) chose to caution the juror but allowed him or her to remain on the jury. Four judges declared a mistrial in cases in which jurors used social media during trials and deliberations.

A few judges reported that they investigated the nature of the communication. In a free response section of the questionnaire, three judges reported that they questioned the juror to ascertain possible damage, and another judge reported holding a hearing to determine the extent of the information that was inappropriately shared.

Strategies for Preventing Jurors' Use of Social Media During Trials and Deliberations

The great majority of judges who responded have taken preventive measures to ensure that jurors do not use social media in their courtrooms (478 judges), with only 6 percent, or 30 judges, indicating that they have not specifically addressed jurors' use of social media.

Use of Model Jury Instructions

In January 2010, the Committee on Court Administration and Case Management distributed model jury instructions regarding the use of electronic technologies to research or communicate about a case. Almost all of the judges who responded to this questionnaire know of the existence of those model jury instructions; only 32 of the 508 responding judges

reported that they were not aware of the model jury instructions regarding social media use. Further, 60 percent (304 judges) have actually used the model jury instructions during a trial.

Most judges (82 percent, or 246 judges) who used the model jury instructions have done so in both civil and criminal trials, and almost two-thirds (65 percent, or 195 judges) have instructed the jury on the issue both before trial begins and again before deliberations, as shown in Tables 5 and 6.

To the extent that the judges who responded could determine, the model jury instructions appear to successfully affect jurors' use of social media during a trial or deliberation. Over half the 303 judges who responded to this question (162 judges) indicated that jurors did not use social media in cases in which the model instructions were read (see Table 7). However, judges acknowledge that it is difficult to assess the success of the instructions: an additional 45 percent said they had no way to know whether jurors were using social media. Only four judges reported that jurors did use social media after being instructed; three of those instances were during deliberations.

Of the 202 judges who have not used the model jury instructions, the majority used a different set of instructions (67 percent), and another 8 percent used a different strategy for preventing jurors from using social media, such as prohibiting electronic devices in the courtroom. Almost 10 percent of judges indicated they have not had a case that required the use of the model instructions. The remainder was unaware of the model jury instructions.

Forty-eight judges elaborated on why they did not use the model jury instructions. Three quarters of those judges (36 of the 48) indicated that they used a different set of instructions, either instructions provided by their circuit (8 judges), their court (1 judge), or instructions they had written themselves (27 judges). The others

Table 4
Actions Taken by Judges When Social Media Use by a Juror Was Discovered (n = 30)

Action Taken	Judges Selecting This Option	
	Number	Percentage
Removed juror from jury	9	30.0%
Cautioned juror, but allowed him or her to remain on jury	8	26.7%
Declared a mistrial	4	13.3%
Held juror in contempt of court	1	3.3%
Fined juror	1	3.3%
Other	7	23.3%

Table 5
Judges' Use of Model Jury Instructions (n = 301)

Trial Type	Judges Selecting This Option	
	Number	Percentage
Civil trials only	20	6.6%
Criminal trials only	35	11.6%
Both civil and criminal trials	246	81.7%

Table 6
Timing of Model Jury Instructions (n = 302)

Point at Which Judge Used Model Jury Instruction	Judges Selecting This Option	
	Number	Percentage
Instructed the jury before the trial	67	22.2%
Instructed the jury before deliberations	6	1.9%
Instructed the jury both before the trial and before deliberations	195	64.6%
Other	34	11.3%

Table 7
Success of Model Jury Instructions (n = 303)

Did Jurors Use Social Media After the Model Jury Instructions	Judges Selecting This Option	
	Number	Percentage
Yes	4	1.3%
No	162	53.5%
I have no way of knowing	137	45.2%

had either not presided over a trial since the introduction of the model instructions (9 judges) or found the model instructions to be too formal (3 judges).

Additional Measures Taken to Prevent Jurors from Using Social Media During Trials and Deliberations

Judges were asked to identify steps they had taken, in addition to or other than use of the model jury instructions, to ensure that jurors did not use social media to communicate about a case. Table 8 shows the responses.

The most common measure used by judges, other than the model jury instructions, was to explain, in plain language, the reason behind the social media ban; 63 percent of the respondents to the survey (or 317 judges) use this approach. The next most common approach, used by 53 percent of the judges (or 271 judges), was to instruct jurors at multiple points throughout the trial (i.e., at the end of each day of testimony). Some judges use their own jury instructions and instruct the jury before trial (45 percent, or 227 judges) and before deliberations (35 percent, or 176 judges). Seven judges provided copies

of their social media jury instructions when they submitted their questionnaires. A compilation of those instructions can be found in Appendices C-I.

An additional 39 percent of judges (199 judges) remind jurors at voir dire to refrain from using social media while serving as a juror, and 20 percent (103 judges) alert the jury about the personal consequences of inappropriate social media use (i.e., personal fines or being held in contempt of court). Approximately one quarter of the responding judges reported confiscating cell phones and other electronic devices, with 22 percent (113 judges) doing so at the start of each day of trial and 29 percent (147 judges) doing so during deliberations. Few judges ask jurors to sign formal statements of compliance; only 3 judges indicated they required jurors to sign a statement of compliance, and 3 indicated they required jurors to sign a written pledge.

Other strategies for preventing jurors' use of social media include administering a separate oath to jurors (5 judges) and posting reminders in jury assembly and deliberation rooms (3 judges).

As Table 9 shows, more than half of the responding judges (239, or 52 percent) reported their actions regarding social media to have been "very successful"; 44 percent said they did not know how successful their preventive measures have been.

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Jurors' Use of Social Media During Trials and Deliberations

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Table 8
Measures Taken, in Addition to or Other Than Use of the Model Jury Instructions, to Ensure Jurors Do Not Use Social Media to Communicate During Trials and Deliberations (n = 508)^a

Preventive Measure	Judges Selecting This Option	
	Number	Percentage
Explained, in plain language, the reason behind the social media ban	317	62.4%
Instructed jurors at multiple points throughout the trial	271	53.3%
Used other jury instructions before trial	227	44.7%
Reminded jurors at voir dire to refrain from using social media while serving as a juror	199	39.2%
Used other jury instructions before deliberation	176	34.6%
Confiscated phones and other electronic devices during deliberation	147	28.9%
Confiscated phones and other electronic devices at the start of each day of trial	113	22.2%
Alerted the jury about the personal consequences	103	20.3%
I have not specifically addressed jurors' use of social media	30 ^b	5.9%
Required jurors to sign a statement of compliance, similar to one suggested by the American College of Trial Lawyers	3	0.6%
Required jurors to sign a written pledge agreeing to refrain from using social media while serving as a juror	3	0.6%

a. Judges could select more than one item; thus, the number of preventive measures identified is greater than the number of respondents.

b. Of the 30 judges who indicated they have not specifically addressed jurors' use of social media, two (or 6.6 percent) reported detected instances of social media use by jurors.

In an open-ended follow-up question that asked judges to explain the success of their preventive measures, the majority of responding judges (79 percent of the 187 judges who answered the question) indicated that they had no way of knowing if jurors have violated the social media prohibition, but assume they had not. Twelve judges highlighted the importance of jurors understanding the reason behind the prohibition, and ten judges stated that jurors take their jobs seriously and comply with the restrictions on social media use. Seven judges conduct post-verdict interviews with jurors to assess, among other things, the extent to which jurors comply with the social media instructions. Six judges reiterated the importance of instructing the jury at multiple points throughout the trial, and five stated that prohibiting electronic devices in the courtroom makes it more difficult for jurors to use social media.

Additional Suggestions Regarding Social Media Use During Trials and Deliberations

The final question of the survey asked judges to suggest any ways in which courts could prevent inappropriate use of social media by jurors during trial and deliberation. The most commonly cited suggestion was to give frequent reminders to jurors throughout the trial, cited by 33.5 percent of the 200 judges who answered this question. There were nearly as many suggestions—31 percent of the 200 responding judges—to give a detailed explanation of how refraining from social media use can promote a fair trial. Other suggestions included explaining the consequences of violations during trial, such as mistrial and wasted time and money (mentioned by 15 percent of judges); using plain English instructions (mentioned by 12 percent of the responding judges); and prohibiting cell phones and other electronic devices in the courtroom (mentioned by 12 percent of responding judges). Twenty-one judges (11 percent of those who responded) specifically

Table 9
Success of Additional Preventive Measures for Social Media Use During Trials and Deliberations (n = 457)

Action Taken	Judges Selecting This Option	
	Number	Percentage
Very successful	239	52.3%
Somewhat successful	16	3.5%
Not at all successful	0	0.0%
I don't know	202	44.2%

mentioned that the model jury instructions provided by CACM were a good idea.

Summary

The detected use of social media by jurors during trials and deliberations is not common, but it does occur. Thirty of the 508 responding judges reported instances in which jurors were detected using social media during trial or deliberation, most often in criminal cases. This social media use most often took the form of posts about the progress of the case or the juror's service in general. There were several instances of jurors attempting to contact participants in the case via social media. When social media use was detected, it was most likely to be reported by a fellow juror.

Although the use of social media is a relatively new phenomenon, judges have responded in timely fashion to address its use in the courtroom. The vast majority of judges (94 percent) say they have taken at least some form of precautionary steps to ensure that jurors do not use social media in their courtrooms. The most common strategy is incorporating social media use into their jury instructions, either by using the model jury instructions provided by CACM or using their own personal jury instructions. Also common are the practice of reminding jurors on a regular basis not to use social media to communicate during trial or deliberations, explaining the reasons behind the ban on social media, and confiscating electronic devices in the courtroom. Judges admit that it is difficult to police jurors, and therefore use of social media is difficult to detect. Only 30 judges reported instances of detected social media use by jurors during trials or deliberations. ■



Attribution

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April 2012

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