

# THE DAILY RECORD

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## LegalCURRENTS

# Mass., Fla. courts chime in on jurors and social media

In November 2011, the Federal Judicial Center issued a report on jurors' use of social media during trials (<http://tinyurl.com/FedSocMedRpt>) and found that only 6 percent of the 508 federal district court judges who responded to the FJC's electronic survey reported encountering instances of jurors using social media during trial or deliberations. Furthermore, of those 6 percent, the vast majority of judges (93 percent) reported having seen jurors use social media on only one or two occasions.

The results of this study seem to suggest that the use of social media by jurors isn't the massive problem that the over-sensationalized media reports of the last year would seem to suggest. Even so, as I've discussed in past columns, judges have gone so far as to fine and even jail jurors who have used social media during trial, and legislators have proposed enacting laws that would criminalize such conduct.

All of this despite the fact that jurors violating the mandate of trial judges is nothing new. It's not the behavior that's changed; it's the medium through which it occurs. But it's change nonetheless, and it's change that can't be ignored. Thus, the legal profession has been forced to awaken from its blissful slumber and is bellowing in fury at this century's newfound Internet-based technologies and their inescapable effect upon the legal process.

Of course, some of the concern is warranted, even though the incidence of mistrials arising from juror misconduct via social media is low. It's indisputable that social media and mobile computing are here to stay and, for that reason, it's significant that the courts are now recognizing this fact and instituting procedures designed to limit the use of social media by jurors during trials.

For example, the Massachusetts Appeals Court issued an opinion earlier this month, *Commonwealth v. Werner*, Docket No.11-P-368, which provides Massachusetts judges with guidance when issuing instructions to jurors about their conduct during trial and the inappropriate use of social media:

"We take this opportunity to comment upon what additional

steps may be necessary to address jurors' inappropriate use of social media such as Facebook and Twitter, a growing problem faced by courts around the country.

"In the instant case, the trial judge had been quite explicit in her instructions ... Apparently, even these instructions were not enough to keep jurors from at least alluding to their jury service on social media websites. More explicit instructions about the use of social media and the Internet may therefore be required ... Instructions not to talk or chat about the case should expressly extend to electronic communications and social media, and discussions about the use of the Internet should expressly go beyond prohibitions on research. Jurors should not research, describe, or discuss the case on- or off-line ... Jurors must separate and insulate their jury service from their digital lives ... The Jury Commissioner also may wish to consider including in the Trial Juror's Handbook, which is distributed to all prospective jurors, an explicit warning about the use of social media during service as a juror."

Similarly, in *In Re: Standard Jury Instructions In Criminal Cases-Report No. 2010-01* And *Standard Jury Instructions In Civil Cases, Report No. 2010-01.*, the Florida Supreme Court issued a decision last week that adopted an updated version of the Standard Jury Instructions to include a section admonishing jurors to refrain from using social media and mobile devices during the trial. For example, the newly adopted instructions include the following admonition:

"In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, emailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages, including email and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case."

These decisions are signs that the legal profession is, at long

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last, acknowledging the massive societal change that has occurred because of the widescale adoption of social media. While it's taken longer than I would have hoped, at least there is acceptance and steps are being taken to understand and address the issues presented by Internet-based technologies and mobile computing. They're baby steps — and belated steps. But they're better than nothing.

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