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Social media, Facebook and juries, oh my!

In June I wrote about *People v. Rios*, 26 Misc.3d 1225(A), 2010 WL 625221 (N.Y. Sup. Ct. 2010), a negligent homicide trial that never should have been prosecuted in the first instance.

The victims in *Rios* were firefighters who died while responding to a fire in an apartment building owned and managed by the defendants. Following the fire, an investigation revealed modifications made by lessees to apartments in the building may have caused the firefighters' deaths.

By NICOLE BLACK
Daily Record Columnist

On appeal, the convictions against the defendants were rightly set aside on the ground that the evidence did not support the prosecution's theory that the defendants had actual knowledge of the conditions in the fires that resulted in the deaths.

In addition to the substantive issues in the case, a procedural issue raised on appeal caught my eye as well, that is whether juror misconduct occurred when a juror sent a Facebook "friend" request to a firefighter witness while the trial was pending.

The juror, Karen Krell, sent a Facebook "friend" request to one of the firefighter witnesses, Brendan Cawley, on the evening after jury deliberations began. She wasn't entirely sure whether the person she "friended" in fact was the same person who had testified at the trial. She did not include a personal message, indicating how she knew him or why she was contacting him with the request, but rather left that field blank.

Cawley later testified that he had no idea who she was and he ignored her request. After the jury rendered its verdict, Krell sent a message to Cawley, in which she identified herself as a juror in the case. He then accepted her "friend" request and the two exchanged a few e-mails.

The appeals court acknowledged that by sending a "friend" request while the trial was pending Krell breached her obligations as a juror. The court noted, however, that juror misconduct alone is insufficient to rise to the level of juror misconduct; rather, the misconduct must prejudice the defendants' substantial rights.

The court concluded — correctly, in my opinion — that no prejudice occurred: "Although [the] defendants argue that Ms. Krell's 'feelings' toward Firefighter Cawley 'necessarily tainted' the outcome of the case, there is absolutely no evidence in the hearing record to support this assertion. Three days into deliberations any juror would be expected to have a feeling or opinion about the evidence at trial. [The d]efendants failed to elicit any testimony to establish what exactly Ms. Krell's 'feelings' were or how any 'feelings' implicit in her friend request affected the jury's deliberations in any way. Accordingly, [the] defendants failed to meet their burden of establishing that the juror's misconduct prejudiced a substantial right of the defendants."

Taken to its logical conclusion, Krell's attempt to contact the firefighter was akin to her greeting him in an elevator in the courthouse. In that scenario, the proper response on his part would have been to ignore her, which is exactly what he did when she contacted him via Facebook. In this case, no harm, no foul.

That's not always the case, however. Social media are a relatively new phenomena and the courts continue to struggle with appropriate ways to address the issue of jurors using social media tools improperly during trials.

Over the last year, numerous cases have addressed the issue and many verdicts have been overturned due to improper use of social media by jurors, including the use of smart phones to Google information during a trial, attempts to contact witnesses or defendants and posting to social networking sites about the trial as it occurs. Social media use shows no signs of abating, so we can only expect the frequency of such incidents to increase.

Courts should attempt to nip the issues in the bud by proactively advising jurors that using computers and smart phones to access or broadcast information and/or contact trial participants is unacceptable. Likewise, when improper activity occurs, it is important to extend the same rationale applied to offline conduct to online conduct, rather than engaging in a knee-jerk reaction to a new and misunderstood technology.

The appellate court did just that in *Rios*, focusing instead on the troubling substantive issues, as it should have. Justice was achieved, and on the appropriate grounds.

Nicole Black is of counsel to Fiandach & Fiandach in Rochester. She co-authors the ABA book Social Media for Lawyers: the Next Frontier, co-authors Criminal Law in New York, a West-Thomson treatise, and is currently writing a book about cloud computing for lawyers that will be published by the ABA in early 2011. She is the founder of lawtechTalk.com and speaks regularly at conferences regarding the intersection of law and technology. She publishes four legal blogs and can be reached at nblack@nicoleblackesq.com.