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Query or Question: Does Allowing Jurors to Ask Questions Impact Their Online Behavior?

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Not surprisingly, jurors utilize a story model when filtering through evidence in a case. As they hear testimony they try to put together a story of what they think happened. Inevitably there are holes in the story, either because there is evidence that is deemed inadmissible by the judge, or information either wasn't presented or just doesn't exist. When conducting mock trials, we often observe jurors trying to fill those holes by trying to think of what is plausible, which often leads to inaccurate and misleading speculation and conjecture. Furthermore, we sometimes hear jurors make up information to fill in the holes, which often leads to distortion of evidence so that it all "makes sense." Attorneys are often shocked when they hear it. Jurors don't like feeling that information is being hidden from them, particularly when they believe such information would help them have a better understanding of what happened in the case and be important in rendering a fair verdict. Allowing jurors to ask questions during the course of a trial can help plug those holes and prevent the likelihood that jurors will turn to other sources to fill these gaps.

Jurors' use of the internet has become a major concern in recent years and has created a great deal of controversy. As a result, cases involving juror misconduct because of online searches have become more numerous. Now that we have the ability to get the answer to any question we have immediately on our smartphones and computers at any time, it is not surprising that jurors have resorted to this medium in an attempt to fill some of these gaps on their own. At the same time, the jury trial innovation of allowing jurors to ask questions of witnesses has been gaining popularity. These are often viewed as separate issues; however, allowing jurors to ask questions arguably will have an impact on the extent to which jurors will choose to try to find answers online to the questions that are nagging them (e.g. see MacPhearson & Bonora¹). We will provide an overview of each of these issues in this article, and discuss how recently improved jury instructions may reduce the extent to which jurors seek out information from inappropriate sources during the course of a trial.

By way of clarification and disclaimer, this article does not address the use of social media by jurors to discuss and report aspects of their participation in a case, such as tweeting or posting Facebook status updates about what is going on at trial. Instead, this article focuses on jurors' use of the internet to search for information relevant to the case through search engines such as Google or Yahoo!, news websites, blogs, websites affiliated with the parties, Wikipedia or other reference sources, etc. Jurors may use such sites to look up a plethora of case-related information, such as information about witnesses, definitions of legal or case-related terms, information about processes or technologies at issue in the case which may be confusing to jurors, etc. As such, we do not believe that allowing jurors to ask questions of witnesses will have a demonstrable impact on their decision to discuss the case on social media, but will have an impact in reducing the extent to which jurors will turn to the internet to clear up confusion or curiosity.

In one of the most extensive studies to date on this issue, the Seventh Circuit Jury Project² found that jurors' primary purposes for asking questions was to get additional information and to clarify information

already presented at trial. Similarly, a survey of potential jurors conducted by Brian Chase³ showed that 79% of the respondents indicate they would look up definitions online and 94% indicate they would want to look up information that was confusing to them. Clearly jurors come up with questions, and there is often information they feel they need to receive to make the judgments they believe are important. Jurors don't often have a clear understanding of what judgments they are going to be asked to make until they are instructed by the judge at the end of trial. Because information at trial isn't necessarily provided in chronological order or organized by subject matter, jurors often suffer from confusion or lack of understanding until they have all the information.

Looking up information online has become the norm these days, and with the boom of smartphones, people don't have to wait until they are in front of their computers to find the answer to practically any question they can envision. Not surprisingly, it is natural that jurors who have questions would turn to the tools they use in their daily lives to try to find the answers.

In some jurisdictions jurors have had the opportunity to ask questions of witnesses in civil trials for quite a while now. Both attorneys and researchers have posed several potential benefits and drawbacks to allowing jurors to ask questions of witnesses (see Krebel, A.⁴ for a summary). One potential drawback noted by detractors has been the added time it would take for jurors to ask questions during trial. Another potential drawback noted by attorneys is the perceived lack of control over their case if a juror were to ask a question they either don't want to answer, doesn't fit into their case story, or are afraid the response would contain information that shouldn't be introduced. Similarly, some fear jurors will ask questions of experts that go beyond the scope of the opinions in their reports. Along those same lines, some fear jurors will feel offended if their questions aren't asked by the judge.

Most research has found, however, that these fears are largely unfounded. Several studies have shown that trials do not take appreciably longer when jurors ask questions, and they don't ask questions of every witness⁵. Generally, research has found that jurors do not have a negative reaction when their questions aren't asked, especially when judges pre-instruct in such a way that it is clear to jurors why some questions might be asked and others not.

There are a variety of types of information about which jurors would have questions. Jurors may want additional information about the parties, particularly if they feel there is some sort of background information about a party to a suit that might help them make their judgments about the case. Such information could include previous litigation history, information that might reveal a party's credibility or likelihood they are telling the truth, etc. For example, does the defendant have a history of similar behavior? Jurors may want more information about witnesses to help them judge the witnesses' credibility or expertise. Similarly, they may want to seek out information that could help them judge the credibility of two opposing experts.

In terms of clarifying information, jurors are often novices when it comes to the subject matter involved in complicated litigation. In fact, if jurors have too much knowledge of the issues involved in a case they are likely to be struck from the jury. Thus, jurors have a heavy cognitive load at trial. They are trying to understand terminology and nomenclature, concepts, technology, legal issues and definitions that are new to them. This attempt to integrate so much new information can, and often does, lead to confusion.

Allowing jurors to ask questions of witnesses often provides jurors with the information they are seeking, and ameliorates the extent to which they will seek out the answers to these questions elsewhere, particularly on the internet. Moreover, if a juror is confused about a definition or doesn't understand any aspect of a witness's testimony, allowing jurors to ask the witness for clarification or explanation has two benefits. First, jurors will be less confused as the trial proceeds, helping them understand and judge other related information brought out throughout the course of the trial. Secondly, if their questions get answered, they will not have the propensity to seek out the answers elsewhere.

More importantly, by allowing jurors to ask questions ensures that the information that is deemed important by jurors but otherwise not deemed relevant to the attorneys is examined by both sides and is

deemed admissible by the judge. Understandably, the fear that jurors who use the internet will find incorrect information that has not been examined by the judge or either party is of paramount concern because it is not available for cross examination and can exert undue and prejudicial influence on the decision making process.

One of the perennial problems underlying the lack of efficacy in discouraging jurors from using the internet is that people generally don't like prohibitions. As novices with the legal system, jurors don't always understand why some information might not be admissible, and why they can't just look up any information they want – even something as simple as the definition of negligence for example. As mentioned previously, they want the whole picture, and don't appreciate feeling like something is being hidden from them, particularly if they think it's important to their decision. When no reasonable explanation is given why they can't get the information they want, jurors can get angry, and either forget about the admonition not to look anything up, or outright defy it on purpose. They also don't like being told they can't do something if they don't understand why they can't do it. Harken back to our childhood days and angst of adolescence – children often will do something their parents tell them not to do just to do it.

This is where the use of instructions can be very important. We believe it is particularly effective when judges expand their instructions to not only explain the means that are prohibited, but also explaining why. Some jurisdictions have started doing this (see Aaronson & Patterson⁶ for a full discussion). One proposed instruction on juror internet usage contained in the Aaronson & Patterson article gives such a reasonable explanation:

Looking for outside information is unfair because the parties do not have the opportunity to refute, explain or correct what you have discovered. The trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find.

This instruction does an excellent job of not only stating that outside searches are unfair, but why they are unfair. Most people believe they are fair people, and believe they can be fair in most circumstances. It's the second sentence here that we believe is very important as it is an empowerment to jurors to do the right thing. Because jurors have limited experiences in the legal community, they may not understand why having all the information they want is unfair. On the contrary – they find the fact that they can't have all the information itself to be unfair. Jurors aren't likely to consider, on their own, the need for the parties to cross-examine or refute information they find.

Another reason why the proposed instruction is beneficial is that, while it forbids jurors to take certain actions, it also empowers them. It empowers them to be fair. To that end, the more the instructions can be written from a proactive point of view – emphasizing to jurors that this will help them judge the case in a fair manner – as opposed to a prohibitive point of view makes the jurors feel like they are being allowed to be fair, as opposed to just being told they can't do something.

These instructions are similar to the instructions that many judges use to explain why they may not ask every question posed by a juror because it gives jurors a complete understanding as to why the process is the way it is instead of just telling them how it is. Jurors receive the instruction that there may be reasons why their questions may not be asked, or may have to be rephrased, and not to take any offense because they understand why they are being asked to do this. Research has shown that jurors do not take offense or get angry when their questions aren't asked; therefore, jurors will be less likely to feel like they are being duped or having the wool pulled over their eyes if they are told not to look at outside sources for information.

Arguably, jurors are unlikely to take offense to being told there is some information they can't get and they shouldn't investigate if they are told about the harm that could occur if they do their own independent research and/or investigation. Providing jurors with the opportunity to ask questions with a reasonable explanation as to why some questions can't be asked and/or why some information can't be presented will substantially ameliorate the likelihood of jurors going online to seek out information

In summary, while each of these factors (asking questions and instructions that specifically address internet usage) in and of themselves can improve the fairness of juror verdicts and reduce the probability of juror misconduct, using them in concert with one another will have a larger combined impact than the contribution of each individually. Using these factors in concert with one another allows jurors to receive and clarify information in an appropriate manner, controlled by counsel and the judge, while at the same time having a better understating of the inherent unfairness of using the internet to find information pertinent to the case.

¹ MacPhearson, S. & Bonora, B. (2010). The Wired Juror, Unplugged. Retrieved from <http://juries.typepad.com/files/wired-juror.pdf>.

² Seventh Circuit Bar Association American Jury Project Commission (2008). *Seventh Circuit American Jury Project, final report*. Chicago, IL: Seventh Circuit Bar Association.

³ Chase, B. (2011). Jurors' use of the internet and social media during trial. Retrieved from <http://www.jdsupra.com/legalnews/jurors-use-of-the-internet-and-social-m-34963/>

⁴ Krebel, A. (2012). Juror Questions: Why Attorneys Should Embrace Allowing Jurors to Ask Questions of Witnesses. *The Jury Expert*, 24 (3).

⁵ Krebel, A. (2012). Juror Questions: Why Attorneys Should Embrace Allowing Jurors to Ask Questions of Witnesses. *The Jury Expert*, 24 (3).

⁶ David Aaronson and Sydney Patterson, Modernizing Jury Instructions in the Age of Social Media, 27 ABA Criminal Justice 4 (Winter, 2013).

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