





Get Smart

How cellphones and social media are impacting the law—from jurors tweeting during trial to prosecutors texting judges.

BY **CARSON R. GUY**

Smartphones have enabled a level of communication that has been unrivaled in its instantaneous delivery. And people love it. Almost everyone has a smartphone, or knows someone who does, and a social media account is the next step. Facebook, Twitter, or LinkedIn—it doesn't matter. People want constant access, and companies give it to them. Most smartphones come armed with text messages, email, integrated Twitter accounts, Facebook apps, and everything else under the sun. People from all walks of life and various professions connect with others and post updates about their lives—anytime and anywhere, from the corner office to the swimming pool to the prison cell. Lawyers are no different. But sometimes, tweeting and texting can spell trouble. The following list provides examples of recent legal cases and controversies that were affected by social media, sometimes dramatically.

On Aug. 8, 2012, Polk County joined the ranks of jurisdictions all over the country that have unwillingly attracted attention to themselves through a technology mishap. A district court judge, sympathetic to the prosecution, allegedly texted a prosecutor in the gallery during a trial when she was not impressed with how a witness was being questioned. She reportedly told the prosecutor she texted to tell the prosecutor trying the case to ask different questions that might yield more success in the case. Ultimately, the defendant was acquitted, and the texter and textee were reported to the authorities. Stay tuned for disciplinary proceedings.¹

Florida, like any jurisdiction in this country inundated with smartphones, has not been without its woes. On June 20, 2013, the Florida Supreme Court issued an opinion upholding the findings of a referee in an ethics-sanction matter. But the Florida Supreme Court did not agree with the referee about everything; it disagreed with the referee's disciplinary recommendation. The referee sought to have the lawyer's bar card suspended for a year, but the Florida Supreme Court thought that two years was a more appropriate punishment. What was the crime? Over the course of a five-month period, while serving as the lead prosecutor in a capital case in which the death penalty was assessed, the

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A death-row inmate in Arkansas has Twitter to thank for a new trial in his case. During his trial, one juror could not miss an opportunity to muse about the contradictory and adversarial nature of the criminal justice system in the United States. This juror tweeted throughout the proceedings, and after finding the defendant guilty, the juror tweeted, "Choices to be made. Hearts to be broken. We each define the great line." Defense attorneys notified the judge, and he spoke with the juror, who admitted to the tweeting. But a reprimand by a judge was not enough to stop this eager juror who continued to tweet while deliberating on the defendant's sentence. Ultimately, the defendant got a new trial from the Supreme Court of Arkansas, which concluded the defendant's right to a fair trial had been compromised by the juror's failure to follow the law.²

In 2008, Christopher Shane Dellinger of West Virginia stood charged with four felonies. He was convicted of each count. He appealed, arguing that "a complete lack of candor from a juror during voir dire regarding her connections to Dellinger and other witnesses rendered his trial unfair." Approximately a week before trial, the juror in question "friended" Dellinger on MySpace and sent him a message with some advice and musings. She explained to him that God had a plan for him, but when asked at voir dire if she knew the defendant, she remained silent. When asked why she didn't speak up, the venireperson said she blamed "bad judgment," claiming that although they were MySpace friends, she didn't know him "in her heart." For the juror's dishonesty, Dellinger was awarded a new trial.³

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Sometimes social media works to the benefit of victims. Justice Brown, of the 14th District Court of Appeals in Houston, wrote an opinion in an appeal about a robbery that involved social media. He said that the way the perpetrators were identified in that case was "on the frontier of a largely unexplored legal wilderness: the role of social media in criminal prosecutions."⁵ How were these robbers snared by the long arm of the law? Via Facebook. The victim found out the names of the perpetrators and looked up the brothers' Facebook pages. On one of the pages, the victim found pictures one brother posted of himself posing with guns he stole from the victim in the robbery. Using that information, the victim was able to contact the lead detective, and the brothers were arrested.

The impact of social media has not been limited to state courts, and the consequences have not always been so dire. In a federal case in the Southern District of Texas, an inmate complained that he was wrongfully punished in an administrative disciplinary proceeding within the prison. The inmate was upset that he was randomly, and suddenly, drug tested after guards became aware of certain content on his Facebook page. The inmate tested positive, but he claimed it was a false positive because of medication he

was on, although none was not noted on his medical chart. The judge held that any monitoring of social media sites by prison officials is a reasonable measure and dismissed the inmate's suit as frivolous. He concluded that prison officials' monitoring of social media was based on that specific inmate's criminal history and was also rooted in "the intractable problem of controlled substances in the prisons."⁶

Social media was even reported to have an effect on the George Zimmerman, Casey Anthony, and Jodi Arias trials. As to Zimmerman, social media was an issue before trial and continued to present a problem during the proceedings. Before the trial, Zimmerman used various social media outlets to raise money for his defense, and during voir dire, venirepeople were "grilled about their postings and whom they follow [on Twitter]." At trial, witnesses would tweet about their testimony to the world, including people also under "the rule" outside of the courtroom and people in the courtroom with Internet access.⁷ In Anthony's trial, photographs posted on social media accounts surfaced showing her partying during the days leading up to her daughter's death. The photographs even became a point of dispute at the trial. In Arias's trial, her attorneys asked the trial judge to order jurors during the punishment phase to "turn over Twitter account information so it can be monitored." Her lawyers claimed that they needed the information to ensure that jurors at the punishment phase did not communicate or receive information about the case from social media sites. The fear of the lawyers was based on the fact that an alternate juror during the guilt-innocence phase of the trial communicated with a journalist through Twitter and another person on Facebook. This took place even though the trial judge administered a social media admonishment to the jury.⁸

In Collin County, a person on probation pled true to the allegations against him, and his probation was revoked. The judge in the case sentenced him to eight years' confinement, and he appealed. On appeal, the appellant argued that the trial judge was biased because he was "friends" with the father of the girlfriend of the appellant. It turned out that the presiding judge and the girlfriend's father knew each other through the "election cycle." The reviewing court concluded that "[m]erely designating someone as a 'friend' on Facebook does not show the degree or intensity of a judge's relationship with a person[,] and that the record in this case did not support the appellant's claim that the judge was biased."⁹

The Supreme Court of Texas has seen the damage that can be caused by social media used the wrong way in courtrooms, and it has issued plain-language jury instructions to explain the repercussions of a person's actions that could compromise the integrity of a case. For example, one instruction says, "[d]o not discuss this case with

anyone ... by any other means including by phone, text message, email message, chat room, blog, or social networking sites such as Facebook, Twitter, or MySpace." The court warns that discussing the case with others by any means, including social media, may result in new trials and the expense of more money to try the case again.¹⁰

As is often the case, with new technology comes growing pains. And in this case, those growing pains can be seen and heard in the form of ringtones and text messages or incriminating and embarrassing posts online. No one is innocent—jurors, spectators, attorneys, judges, or court personnel. However, before the law can conquer the smartphone and social media, we have to understand more than how to physically operate our phones and social media accounts. We must also learn how our use of those devices and accounts affects us and those around us. **TBJ**

NOTES

1. Vanesa Brashier, Cleveland Advocate, *State Leader Calling for 258th District Judge Coker's Impeachment* (July 18, 2013).
2. Suzi Parker, Reuters, *Arkansas Death Row Inmate Gets New Trial Because of Tweets* (Dec. 8, 2011).
3. *State v. Dellinger*, 696 S.E.2d 38 (W. Va. 2010).
4. *Florida Bar v. Scheinberg*, No. SC11—1865, 2013 WL 3064825 (Fla. June 20, 2013).
5. *Bradley v. State*, 359 S.W.3d 912, 918 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd).
6. *McNickles v. Amaral*, No. H—12—3692, 2013 WL 2295407 (S.D. Tex. May 23, 2013) (mem. op.).
7. Mike Schnieder, Associated Press, *Social Media Infiltrates Zimmerman Trial* (July 7, 2013).
8. Associated Press, *Jodi Arias Lawyers Want to Monitor Twitter Accounts of Jurors to be Seated in Penalty Phase* (Aug. 21, 2013).
9. *Youkers v. State*, 400 S.W.3d 200 (Tex. App.—Dallas 2013, no pet.).
10. Supreme Court of Texas, Amendments to Texas Rules of Civil Procedure 281 and 284 and to the Jury Instructions Under Texas Rule of Civil Procedure 226A, Misc. Docket No. 10-9210 (Tex. Dec. 13, 2010).



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