

PRIORITY

Criminal Justice NEEDS INITIATIVE

A project of the **RAND Corporation**,
the **Police Executive Research Forum**,
RTI International, and the **University of Denver**

Strategies to Mitigate the Impact of Electronic Communication and Electronic Devices on the Right to a Fair Trial

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Key Findings

- Panelists generally agreed that while legislation may help mitigate some of the problems introduced by electronic communication, judges should also have the authority to use their own discretion in finding solutions in their own courtrooms.
- Electronic device bans in the courtroom were viewed as effective in mitigating witness intimidation.
- The panel recommended more public education on the importance of due process and how electronic communication, including social media use, has the potential to violate the Constitutional rights of defendants and other parties to a case.
- The panel also recommended continuing education for the judiciary and court practitioners on evolving modes of electronic communication.
- Panelists identified the need for judges and attorneys to have flexibility in engaging with jurors, recognizing that jurors are used to communicating electronically throughout the day, yet still needing to set limits on electronic communication during trial proceedings.
- Jury sequestration to minimize or eliminate misconduct with electronic communication was considered to be generally impractical and counterproductive.

SUMMARY ■ The proliferation of electronic communication and electronic devices throughout modern society presents new challenges to the judicial system in protecting the right to a fair trial. Electronic communication, including texts, emails, blogs, social network posts, and other information accessed through the internet, provides opportunities to expose confidential witnesses or informants, intimidate witnesses and victims from testifying, and bias jurors. Electronic devices include any internet-enabled devices but are more often small, hand-held devices. These devices include functions to record and transmit pictures, video, and audio files and instantly access information and communicate with individuals and networks. Such devices can be used to record an image of a witness, identify that witness and expose him or her on the internet, or communicate with a juror in an attempt to influence the outcome of a case. Jurors may also compromise their own independence by using electronic devices to access or share information about trial proceedings before the case is resolved. Court practices to protect the right to a fair trial have not kept pace with rapidly evolving electronic communication and devices, and traditional approaches to identify and protect against witness intimidation and to preserve juror impartiality are likely insufficient in the face of their near universal use, which facilitates access to information about nearly anything and anyone.

On behalf of the National Institute of Justice, the Priority Criminal Justice Needs Initiative convened a panel to identify ways that electronic communication can impact the right to a fair trial and to recommend strategies to protect witnesses from intimidation and jurors from compromising their independence. The panel included judges, lawyers, educators, and other experts who have conducted research or had direct experience addressing the impact of electronic communication and electronic devices on court proceedings. Panel members each presented their perspectives on the scope of the problem and proposed solutions, and then engaged in a dialogue to identify promising practices to protect witnesses, jurors, and the right to a fair trial against threats that may be posed through electronic communication and devices. The panel proceedings and recommendations are presented in this report.

INTRODUCTION

In this report, *electronic communication* is defined to include texts, emails, blogs, social network posts, and other information accessed through the internet. References to *electronic devices* are meant to include any internet-enabled devices, but more often small, handheld devices that include functions to record and transmit pictures, video, and audio files, instantly access information, and communicate with individuals and networks. While these are separate entities, it can be difficult at times for uses of the terms to distinguish between a communication and the devices used to carry out the communication. To avoid confusion, this report will use the abbreviation *ECD*, or electronic communication and devices, to refer to the two terms jointly where it is appropriate.

The rapid increase in the prevalence and modes of ECD presents new challenges to judges and the criminal justice system in identifying and addressing witness intimidation, jury tampering, and juror misconduct. For example, a drug trafficking defendant in Pennsylvania reviewed grand jury testimony with his attorney but then instructed his girlfriend to post the witness' identities and statements on Facebook (Staas, 2013). In a Louisiana case, defendants used Instagram to threaten bodily injury to a witness who testified in a federal trial (United States Department of Justice, 2014), and friends and family of defendants used smartphones to record the faces of jurors at a murder trial in Ohio (Robinson, 2010). Judges regularly encounter instances of jurors using smartphones to conduct their own research, sometimes resulting in a mistrial (Toohey, 2013).

The Digital Divide

The enormous impact of technology on U.S. culture was a constant focus throughout the panel discussions, particularly with regard to generational gaps in use and understanding of technology. Panelists noted that younger generations have become connected to technology in a way that older generations find difficult to comprehend.

Panelists discussed the need to communicate court procedure and issues related to due process differently to “digital immigrants” as opposed to “digital natives” (Prensky, 2001). Digital natives, the first generation to have grown up surrounded by digital technology, are used to receiving information immediately and from multiple sources and are more likely to multitask and network. Digital immigrants, on the other hand, adapt to this new environment but do not share the same learning style, habits, or expectations as a native who has always had access to the digital technology that surrounds us now. Panelists discussed how judges, as digital immigrants, needed to adapt the instructions they provide to jurors and adapt their expectations for behavior in the courtroom to the expectations of digital natives, who expect on-demand access to information and social networks.

In each of these examples, use of ECD—particularly social media—can threaten the safety of witnesses, jurors, and other parties to a case, as well as threaten the right to a fair trial. The internet has put a wealth of information at our fingertips and transformed what were once one-on-one conversations into communications that can reach thousands or more, challenging the court also to transform its approach to protecting the right to a fair trial. The right to a trial by an impartial jury is protected by the Sixth Amendment to the United States Constitution and has been a part of the American justice system since its founding. While issues of witness intimidation and juror misconduct are not new, the proliferation of ECD presents new and increasing obstacles to ensuring the right to a fair trial. As part of the National Institute of Justice's Criminal Justice Priority Needs Initiative, RTI International and the RAND Corporation convened a panel of judges, legal practitioners, and academics to review and recommend solutions to minimize the impact of ECD on case outcomes. The panel on the *Potential Impact of Electronic Media Use on the Right to a Fair Trial*, held in February 2017, was designed to further explore this issue, which was identified by an earlier panel convened by the Crim-

inal Justice Priority Needs Initiative. That earlier panel, held in June 2016, examined how technological advances used both by society at large and to facilitate court processes, in particular, can affect due process rights now and in the future.

The findings from the June 2016 expert panel were released in a report titled *Future-Proofing Justice* (Jackson et al., 2017). The report recommended fundamental research on topics such as how the exploding volume of electronic data could affect the protection of rights. The report further identified the need to

- develop methods to better assess the effect on the judicial process of jurors’ “outside research” during trials
- identify approaches to (1) limit juror use of mobile devices and other new capabilities to do “outside research” during trials and (2) educate jurors on this issue
- develop methods to monitor juror and defendant social media activity, given concerns about use of social media to influence judicial processes.

The panel on the *Potential Impact of Electronic Media Use on the Right to a Fair Trial*, which was designed to further explore those needs, is the focus of this report.

RTI and RAND conducted case reviews and examined literature to identify persons with significant experience identifying and addressing the impact of ECD on the right to a fair trial. Based on this research, two main topics of presentation and subsequent discussion were identified for the panel: (1) the use of ECD by parties to the defense to intimidate witnesses and jury members and (2) juror use of ECD that may compromise independence and impartiality. This background research also identified individuals with expertise and experience handling cases and conducting research in these two areas. These experts, including judges, researchers, and practitioners of the law, were invited to participate on the panel.

Each panel member was asked to present information and case examples on issues related to the problems and on any rules, policies, or practices designed to protect the right to a fair trial by restricting ECD. Panel members also participated in a discussion to identify best practices, lessons learned, and policy implications of various approaches to minimize the impact of inappropriate ECD use during the course of a trial. After each presentation, panel members also considered possible approaches to managing the challenges of these technologies during court proceedings. Findings from the panel are described hereafter, first addressing strategies to limit ECD used to intimidate or influence witnesses, victims, or jury mem-

Expert Panel Members

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bers, followed by strategies to limit inappropriate juror use of ECD that may compromise impartiality.

USE OF ECD TO INTIMIDATE WITNESSES

Background: The Scope of Witness Intimidation with ECD

Accurate statistics on witness intimidation are hard to come by, in part due to the difficulty of identifying and interviewing those witnesses subject to intimidation in response to specific events and/or ongoing, community-based threats. Successful intimidation often occurs beyond the notice of authorities unless actual physical harm is carried out against the witness. Police and prosecutors frequently identify witness intimidation, or witness reluctance or refusal to cooperate, as a significant problem in successful prosecution of crimes, particularly those involving domestic violence or gang-related violence (Garvey, 2013). Indeed, it is a significant problem in gang-related cases, whether these occur in urban or rural areas. The 2000 National Youth Gang Survey reported that 66 percent of those surveyed in more rural areas and 83 percent of those in more urban areas experienced gang-related witness intimidation (Egley and Ritz, 2002). Prosecutors have also estimated that witness intimidation may be involved in up to 75 percent of the violent crimes committed in some gang-dominated neighborhoods (Healey, 1995). It is also a particular concern in domestic violence cases, as battered partners are persuaded by their abusers to keep silent after reporting a crime to ensure their own safety or salvage a relationship (Dedel, 2006).

While witness intimidation is not limited to these two categories, it can be difficult to quantify generally, except in noting anecdotal difficulties and regionally specific studies. The Philadelphia District Attorney's office, for example, has described the problem of witness intimidation as being at a "near epidemic" level (McCorry, 2013). Jurisdiction-specific studies have provided somewhat more general estimates of the scope of the problem. For example, a study conducted with witnesses in Bronx County, New York, found that 36 percent of those witnesses had been directly threatened (Davis, Smith, and Henley, 1990). Another study conducted in the United Kingdom found that about 25 percent of witnesses felt intimidated by an individual and 17 percent of cases were not prosecuted

because witnesses refused to provide evidence or attend court (Reeves, 2003).

Witness, including victim, intimidation not only affects the outcome of the case a witness is involved in but can also reduce the likelihood of citizens engaging with the criminal justice system at all, including reporting crimes to the police, cooperating with investigations, and pursuing legal action as victims of crime. When the public does not have trust in the justice system, police expend more resources investigating a crime, as witnesses are reluctant to come forward.

Panel Presentations: Emerging Intimidation Techniques

Although many of the "traditional" ways of interfering with the thoughts and actions of witnesses and other parties to criminal cases persist in court proceedings today—such as verbal or written threats—" . . . it is possible the continual progression of electronic communication technologies and social media have made witness intimidation a more insidious problem than ever" (panelist). The sometimes public or widely shared nature of social media posts often makes intimidation easier to identify because the information is out in the public domain for anyone to see. At the same time, though, the vast amount of social media use can also present a needle in a haystack problem. Twitter users send an estimated 6,000 tweets per second, and on Facebook there are 510 comments, 2,930,000 statuses, and 1,360,000 photos posted every 60 seconds (Social Pilot, 2017). With this volume of information, it is difficult to identify specific threats without some advance knowledge of the source and/or target of a threat posted online. Furthermore, the use of emojis, memes, and text shortcuts can make the true meaning of the communication difficult to prove. For example, it is easy to declare an act intimidation if a literal gun is being held to another's head, but far more difficult to determine the legal significance of a text that reads, "I'm going to kill you" followed by an emoji of a smiling, winking face with its tongue sticking out.

Threats through social media have the potential for an even greater impact than more traditional modes of communication, as the threat reaches a much wider audience of individuals who might also retaliate against a witness. Panel members discussed a number of recent cases that involved witness intimidation through social media, many of which led to multiyear prison sentences upon conviction. One such case involved Facebook posts of memes that illustrated violent acts against "snitches,"

“Facebook is more powerful than television. It’s more powerful than radio. You put it out there for the whole world to see.”

which led to a 37-month sentence even though the defendant never stated explicitly that he would inflict violence on the witness (Keeley, 2016). Another example occurred in Montgomery County, Pennsylvania, in 2012, when the girlfriend of a murder suspect was found to have posted the name, address, age, phone number, and statement of an eyewitness to the crime on Facebook (Hessler, 2012). Phone recordings between the suspect, in jail at the time of the postings, and his girlfriend revealed the intent to post the information where “everybody can see it.” By sentencing the girlfriend to two to five years in prison, Montgomery County Judge Steven T. O’Neill underscored the greater threat involved in intimidation through social media: “Facebook is more powerful than television. It’s more powerful than radio. You put it out there for the whole world to see.”

There have also been several recent instances where specific social media sites or internet pages have exposed large numbers of witnesses. The website whosarat.com claimed to identify more than 5,000 undercover officers, informants, and witnesses before it was shut down in 2007. The site posted names, pictures, statements, and the results of plea bargains where informants provided information that led to the conviction of others. Similarly, an Instagram account operating under the handle Rats215 provided the identities of undercover agents and informants in the Philadelphia area, including full names, addresses, and pictures of their faces (Chuck, 2013); copsr corrupt.com offered a free service in which users could click on a state and city to find pictures and information on police cooperators; and The Snitch List on Facebook was designed for people to call out snitches, stating, “Feel free to post accounts, phone numbers and any other info about snitches, rats, narcs and confidential informants” (“The Snitch List,” 2017).

Much of this information aggregated on these sites is readily available from files posted on the internet, and many legal scholars agree that the content and intent of the sites are protected as free speech under the First Amendment. For example, a federal judge in the middle district of Alabama refused to shut down a site that allegedly posted “[s]tatements concerning the identity, testimony or credibility of prospective witnesses, including informants,” based on protections provided

in the First, Fifth, and Sixth Amendments to the Constitution (United States v. Carmichael, 326 F. Supp 2d 1303 [M.D. Ala. 2004]). Court rulings have also protected unpopular speech, such as a 2014 ruling dropping witness intimidation charges against a 20-year-old man who had posted the pictures of two witnesses in an ongoing murder trial on his personal Instagram account, calling them “snitches” (Browning, 2014). The judge in this case defended his decision, saying, “Even mean-spirited and despicable speech is protected.”

In addition to witnesses, prosecutors, judges, and jurors are also subject to online threats and being photographed during court proceedings. After learning that jurors had been filmed with a smartphone by a friend of the defendant in a murder trial, Judge Nancy Margaret Russo declared a mistrial and held the defendant’s friend in contempt for intimidating and frightening the jury. A rape case involving high school football players in Ohio involved not only online threats to the victim but also threats to prosecutors and law enforcement investigating the crime. These threats resulted not only in a guilty plea by two teenage girls who threatened harm to the victim via Twitter, but also in the creation of a website to counter false claims about the case (“Threats, Silent Witnesses Plague Case of Rape of 16-Year-Old Ohio Girl,” 2013).

As lives become more integrated with ECD, such as emojis, shorthand text communications, and “likes,” it can become more difficult to ascertain the intended meaning of such communications. This often leads to arguments of free speech, which in turn lead judges to vast differences in interpretation. Court procedures may be emerging to convey the intent of visual communications that rely on text shorthand, emojis, or graphics instead of verbal or written communications.

Panel Discussion and Recommendations to Reduce, Identify, and Respond to the Use of ECD to Intimidate Witnesses and Jurors

Panel members identified a number of challenges faced by the courts today related to witness and jury intimidation, based on their experience presiding over criminal cases and relevant case

law. In response to each of these challenges, the group discussed the existing and emerging solutions to address those challenges, in terms of the practicality of proposed solutions and their ability to mitigate or prevent witness and juror intimidation.

While defendants have the right to know and confront all of the evidence against them, disclosing witness identities and statements outside of the case-related boundaries presents an opportunity for online harassment and intimidation. One potential solution is legislation that limits disclosure of witness identities. Such legislation is constantly being updated, such as the 2014 changes to Title 11 of the Delaware Crimes and Criminal Procedure (Delaware Code, Title 11, Chapter 35), which defines class B and D felonies for threats against a witness giving testimony at any trial, proceeding, or inquiry. This update makes no mention of the use of social media but is broad enough to cover emerging ECD that may facilitate harassment now and in the future. Some jurisdictions have developed legislation that provides for additional protections for witnesses in this era of rapidly evolving ECD. For example, a federal court in Miami adopted recommendations from the U.S. Department of Justice to remove plea agreements from publicly available electronic files, as such information provided content to whosarat.com and other websites designed to disclose the identity of informants. Recent state legislation has also incorporated additional protections for witnesses. For example, a 2013 Louisiana law (Louisiana Code Crim Pro 729.7) prevents disclosure of witness identity if there is reason to believe that the witnesses' safety may be compromised, and the Florida legislature exempted murder witnesses from having their identities exposed in public records for two years following the crime (Florida Statutes, Title XLVII, Chapter 914.27, 2017).

Such legislation may grant judges—in very specific situations—the opportunity to instruct the prosecution to prevent disclosure of witness information from a defendant to protect the witnesses up until the time of trial. However, withholding information from the defense prior to a criminal trial can also deny access to potentially exculpatory information, thereby compromising the defendant's right to a fair trial. As one panelist noted, "There is always a problem when the legislature is allowed to dictate what can and cannot go on in a courthouse. They are led by fear and often react to issues they do not totally understand." Jurisdictions have therefore largely developed legislation that restricts plea agreement disclosure through public records available on the internet on a case-by-case basis, including most of the 94 federal judicial districts. Here, defense attorneys can move to have plea agreements

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sealed if the agreement is based on cooperation from the defendant and could lead to harm to that cooperating defendant. Three federal judicial districts have adopted policies to remove all plea agreements from online public access. In the Northern District of California, the Eastern District of North Carolina, and the Southern District of Ohio, the public can access this information directly only from the clerk's office at the courthouse (Westley, 2010).

Panel members discussed other options to protect the identities of witnesses, including use of witness protection programs. The panel concluded that witness protection services are a very expensive option and so are very rarely utilized. The cost of witness protection is further difficult to justify given that new names and identities might not be protectable with the advent of sophisticated facial recognition and biometric software. If the person had an online presence in the past (e.g., a tagged online post from Facebook, Instagram, or other social network media), they could be located again with this new technology (O'Brien, 2015). With the advent of new technologies and the willingness of people to place their entire lives on social media, it is becoming increasingly difficult to protect witnesses, even with new identities.

Another challenge discussed by the panel is when the defendant, or their friends and family members, photograph witnesses and jury members during jury selection, pretrial hearings, or trials and subsequently use this information to intimidate jurors. One of the most common solutions to this challenge is a ban on electronic devices in the courtroom. Cook

County, Illinois, enacted such a ban in 2013 in response to growing witness threats, deaths, and violence in and outside the courthouses. Chief Judge Timothy C. Evans stated the ban is intended “to provide safety within the courts, prevent pictures from being taken with electronic devices and help to protect innocent individuals and those testifying in court” (Davis, 2013).

According to the National Center for State Courts, 31 states, Washington, D.C., and Guam all have at least one judicial district that has banned or set limits on the use of electronic devices in the courthouse (National Center for State Courts, undated). With electronic device bans in place across the country, the panel recognized that preventing cell phones from being used in the courthouse is currently the most popular solution to ensure that courthouse visitors will not take pictures and pass on information on witnesses, cooperators, and undercover agents. Citizens have argued against electronic device bans, however, claiming that the bans infringe on constitutionally protected rights (*McKay v. Federspiel*, 2016). While such arguments have been largely unsuccessful, questions remain about the consequences of banning electronic devices, particularly for self-represented litigants (Smith, 2016). Electronic device bans may limit juror or witness intimidation, as well as juror misconduct, but the panel noted that these bans often focus on the technology itself, not on how technology is used. That is, the bans limit which electronic devices are allowed in the courtroom but rely on judges to interpret the ban and rule on appropriate use of those devices that are allowed in (e.g., laptops). To rule appropriately, judges therefore need current and comprehensive understanding of ECD and how their use may bias court proceedings.

The panel further recognized a lack of understanding by the general public of what constitutes unlawful behavior and what to do when potentially inappropriate communications occur. The panel concurred that the most feasible and effective solution for preventing witness intimidation is an awareness campaign to educate the public on what witness intimidation is and what to do if it occurs. Here, the public may be in the best position to report online harassment or intimidation when they see it, as opposed to judicial staff monitoring the social networking sites of the defendant and/or the defendant’s associates.

A main concern voiced by the panel relates to the judiciary’s lack of general knowledge of and experience with social media platforms and the fast pace with which technology evolves. This lack of knowledge presents one of the greatest challenges to preventing intimidation via ECD. As one panel-

ist noted, “technology changes quickly; the ‘Millennials’ have adapted to this technology and judges have not.”¹ The panel recommended yearly training to improve judicial understanding, heighten awareness, and introduce new technologies. Such training and education can enable judges to further their knowledge and gain a better understanding of technology and how it is utilized in modern society.

Table 1, on the following page, summarizes the panel’s discussion related to challenges faced, different types of solutions, and the lessons learned as described by the panelists. The panel concluded with a clear consensus that judicial education and knowledge are critical to identify and prevent witness intimidation through social media and other ECD. The panel recognized that with education and understanding, the judges themselves could better control the courthouses. Judicial education may help not only to protect witnesses and juries, but also to allow the public access to needed information. The panel further recognized that until judges could come up with a better solution, a courtroom cell phone ban also offers a promising approach to ensure witness and juror safety.

JUROR USE OF ECD TO COMPROMISE A FAIR AND IMPARTIAL JURY

On-demand access to information in our modern society and the proliferation of electronic devices have real implications for ensuring juror impartiality. Confidence in the judicial system can be further eroded if a defendant’s right to a fair trial is threatened by juror misconduct. In July 1971, a prison guard was stabbed to death at the San Quentin, California, prison hospital. Inmates were later convicted of the guard’s murder based in part on evidence related to blood types and testimony from someone receiving the drug morphine for pain. Upon appeal, however, the suspects were granted a new trial based on two jurors’ consultation of encyclopedias during deliberations. The jurors had consulted the encyclopedias to obtain more information on the rarity of “AB” blood types and the physiological effects of morphine (*Gibson v. Clanon*, 1980). More recently, an undercover investigation conducted by the South Carolina Department of Natural Resources uncovered evidence of two cockfighting derbies held in 2008 and 2009, in violation of the Animal Welfare Act. After jury deliberations, defendants were found guilty on all counts. However, several days after the verdict, it came to light that one of the jurors had used Wikipedia to research one of the legal terms used in the

Table 1. Panel Findings Related to Witness Intimidation

Challenge	Potential Solution	Panel Discussion Points
Witnesses need protection from defendants and their associates due to credible threats to the witnesses' lives.	Strengthen witness protection/relocation programs.	<ul style="list-style-type: none"> • Prohibitively high cost of the witness protection program • Photos of witnesses are extremely easy to locate with modern technology. • Witnesses, despite warnings, continue to post photos online with new identity and are located.
During trials, defendants or their family and friends become online friends with the members of the jury panel.	Heighten social media monitoring by the court and cooperation from social networking sites themselves.	<ul style="list-style-type: none"> • Jurors would need to give permission and access to their online media accounts to judges or staff during trial. • Courts likely not to have the capacity or resources required to monitor online presence of parties to the case • Social networking sites likely to be unwilling to cooperate
Witnesses who may otherwise be unknown to the defendant are identified prior to trial on witness lists, exposing identity.	Withhold witness lists until the time of trial.	<ul style="list-style-type: none"> • Legalized in very few jurisdictions • May impair the defendant's right to a fair trial by not allowing the defendant time to prepare an adequate defense
The legislature is behind when it comes to social media and other ECD platforms.	Participate in legislative efforts to address witness intimidation through social media and other ECD platforms.	<ul style="list-style-type: none"> • Legislation should provide the flexibility for judges to make their own courthouse rules. • Legislation should cover not only the types of technologies that can bias a case outcome, but also how those technologies are used.
Defendant, family, or friends take pictures of undercover officers, informants, and other witnesses, sometimes publishing these photos on ECD.	Ban electronic devices in the courtroom.	<ul style="list-style-type: none"> • Currently the most common solution in courts throughout the United States • Alleged to have greatly inconvenienced the public, as many people keep their most important information on their cell phones and need them when conducting other business inside the courthouse
Members of the public may or may not be aware of the crime of witness intimidation or what to do if it occurs.	Educate the public by increasing awareness of the laws against witness intimidation.	<ul style="list-style-type: none"> • Provide public education on the importance of due process and how certain ECD may violate the Constitutional rights of the defendant and other parties to a case. • Promote awareness and effectiveness of legislation designed to stop intimidation through ECD use. • May increase reports of inappropriate ECD use
Judiciary has a general lack of knowledge of and experience with ECD and the fast pace with which technology evolves.	Educate the judiciary.	<ul style="list-style-type: none"> • Teach judiciary what types of technology exist and how they are used. • Conduct yearly to keep pace with emerging technologies and changes in how technology is used.

Less-promising solutions

More-promising solutions

case and attempted to discuss it with other jurors. As a result of this misconduct, one of the defendants was granted a new trial based on violation of his right to a fair trial (*United States v. Lawson*, 2012).

The cases described highlight the negative consequences juror misconduct can have on the justice system. Together, they also demonstrate that the problem of juror misconduct is not a new phenomenon—it is a problem whether jurors pick up and read an encyclopedia or have a digital encyclopedia at their fingertips, whether they have inappropriate discussions in person or on social media, and in any other of the known examples of juror misconduct with unique manifestations in the digital age. That being said, the digital age has introduced new challenges to this old problem, just as it has with witness intimidation. Juror misconduct may take many forms (Morrisson, 2011), including but not limited to searching for additional factual information outside the courtroom and discussion of court proceedings with others while the trial is ongoing.

Technology may not have changed the nature of juror misconduct, but it has made it easier to do. With the increased availability of knowledge and information through electronic searches, jurors, now more than ever, have opportunity to research case issues, ask questions, and find answers that may be in direct conflict with trial court rules. The ability to widely share opinions or information about a case while it is ongoing existed before, but the ease, frequency, and ubiquity of such sharing have expanded with the advent of social media (Marder, 2014). As such, the misuse of ECD by jurors has become a growing concern, which will be explored in more detail next.

Background: The Scope of Juror Misconduct with ECD

Estimates vary on the prevalence of juror misconduct with ECD in and outside the courtroom. Much of the available information is based on anecdotal data, as few systematic studies on the subject have been conducted. Furthermore, reports of juror misconduct vary based on reporting method, severity, consequence (e.g., incidentally seeing versus actively seeking out information on ECD), and trial type. Despite this, there are several ways that estimates of its prevalence have been made.

Surveys are regularly performed to gather data on misconduct prevalence in courtrooms from courtroom personnel. In 2014, the Federal Judicial Center surveyed nearly 500 district judges on juror misconduct with ECD in their courtrooms

during the previous two years. Slightly less than 7 percent of respondents, or 33 judges, responded that they had observed juror use of social media in the courtroom (Dunn, 2014). Informal surveys have also been used by judges to query the jurors in their own courtrooms. In one such survey, jurors were asked only if they were “tempted to communicate about the case through social media,” to which approximately 8 percent of the jurors answered in the affirmative (St. Eve, Burnes, and Zuckerman, 2014). These surveys have limitations, most notably that they are self-reported data, but they offer a useful point of comparison relative to other estimates.

Reports of mistrials due to juror misconduct will also appear frequently in news reports and case law. Collections of efforts to quantify recent juror misconduct with ECD typically place the frequency of misconduct somewhere between 5 and 10 percent of jurors involved in trials (Hannaford-Agor, Rottman, and Waters, 2012). A helpful collection of more systematic studies and their limitations was also included in a comprehensive publication on jurors and social media by Marder in 2014 (Marder, 2014). Together, these data on the prevalence of juror misconduct with ECD illustrate that, while it is hard to quantify definitively, juror misconduct with ECD is a significant problem in the modern court system that warrants consideration and strategies for improvement.

Panel Presentations: Judicial Control of the Trial and Juror Perspectives

Based on their experience conducting numerous trials, panelists reflected on the differing roles and perspectives of judges and jurors. The practice of establishing and maintaining an impartial jury and a fair trial for defendants requires careful vetting of jurors and strict adherence to evidentiary rules. The judge is in charge of controlling the judicial process and responsible for guiding the flow of the trial, determining the legality of each step or action, and maintaining overall order and control in the courtroom. As one panelist described the judge’s role, judges attempt to put up “walls around the process” in the courtroom to maintain impartiality, assure a fair trial for the defendant, and allow jurors to deliberate on legitimate evidence.

This process begins with *voir dire*, or the practice of calling a panel of prospective jurors into a room and examining their qualifications prior to jury selection and trial. *Voir dire* is used to vet the potential jurors and discover whether they have personal interests in the case, preexisting biases related to the case, prior knowledge of details of the case, or other character-

“We often see abuse of authority and hear stories of how a person was recently released from prison after serving a lengthy sentence for a crime that technology has shown they did not commit. This has led the youngest generation to become skeptical and wary of any information provided to them with ‘rules.’”

—Panelist

istics that could affect their ability to render a fair verdict. In addition to overseeing this selection of an impartial jury, judges provide instructions to jurors and strive to keep tight control of the presentation of evidence to help ensure that jurors make decisions based on the facts of the case and thus protect the defendant’s right to a fair trial. All evidence presented to jurors is vetted and introduced item by item. Expert witnesses’ credentials are queried in front of the judge before their testimony is allowed. No evidence may be considered without an opportunity for the defense to confront or counter it, and some evidence may be suppressed if it is not judged by the court to meet legal requirements for consideration. In short, after the jury is selected, it is told what the law is, what evidence it may consider, and who the experts are. Jurors are instructed that they may not consider anything outside these bounds.

The legal model is based on the notion that jurors are capable of suspending judgment until all evidence is presented. As described earlier, the jury system depends on the impartiality of jurors: “Impartial jurors are those who are willing and able to consider the evidence presented at trial without preconceived opinions about the defendant’s guilt or innocence, to apply the governing law as instructed by the trial judge, and to deliberate in good faith to render a legally and factually justifiable verdict” (Waters and Hannaford-Agor, 2014).

In contrast, panelists reflected on the passive role of the juror and how jurors may perceive the experience. The jurors are required to sit through days or weeks of listening to disjointed testimony (Futterman, 2016). They are presented with “ambiguous, conflicting, and incomplete” evidence and told they can consider only that information when making a decision. Court communications are mainly hierarchical and unidirectional and, unlike social media, not intended to be interactive and encourage further discussion (Waters and

Hannaford-Agor, 2014). Panelists described how the evidence presented to jurors has been curated by judges and lawyers and deemed to meet strict rules of evidence (Sweeney, 2010). No opinions are allowed except from people who the judge and lawyers determine are experts. In many states and federal circuits, jurors are told not to ask questions during the trial, and jurors are forbidden from finding out information on their own. Consequently, jurors are likely aware that information is being kept from them and they are only getting part of the story (Futterman, 2016).

For example, when juries are empaneled, they are given a set of standard jury instructions to follow. The jury members are instructed to listen and adhere to the testimony given and the evidence provided *only* in court. Jurors are told not to go outside the courtroom to search for evidence or to elicit opinions or discuss the facts of the case with anyone else during trial. During trial, attorneys present evidence that is either admissible or inadmissible for reasons that are not shared with the jury.

While there are many reasons these evidentiary rules are in place from a judicial perspective, they may not sit well with “digital native” jurors accustomed to having ready access to a vast wealth of information and curating it on their own in their daily lives. There are several options that have been employed to ensure that jurors follow the court rules, including criminal penalties, sanctions, restrictions on access to information or devices, and sequestration (Hoffmeister, 2015), though many of these “enforcement” measures may tend to increase a sense of opposition in jurors unaccustomed to court rules. As one panelist noted, “I can’t think of two things that are more in opposition than our rules of judicial procedure and the modern internet society.” With the rise of ECD, jurors have the ability to look up information that they may not understand

in an attempt to learn more about issues related to the case. The internet provides a means for jurors to instantaneously access unlimited information, conduct their own research, and communicate with people via tweets, blogs, Facebook posts, texts, email, and other forms of ECD. Digital natives are used to having information readily available at their fingertips and also tend to verify or supplement initial impressions with other sources found online (Macpherson and Bonora, 2010). In addition to being able to seek out information online, digital natives are also accustomed to receiving unsolicited updates in the form of emails, texts, tweets, and social media posts. This access to outside information challenges the traditional passive role of the juror (Sweeney, 2010).

As a result of this clash of perspectives, multiple cases of juror misconduct with ECD have been observed in recent years. In some cases, it has merely been a result of jurors not understanding how actions that seem so routine and benign to them, such as keeping in touch with one another on social media, could potentially be troublesome for the court. One such case involved the 2009 trial of Baltimore Mayor Sheila Dixon for political corruption. During the trial a group of five jurors, known after the event as the “Facebook Five,” “friended” each other on Facebook during the trial and communicated with one another over a long recess during deliberations. When this came to light after the mayor’s conviction, defense counsel requested a new trial, accusing the jurors of misconduct, and an evidentiary hearing was held with the jurors. While a new trial was rendered unnecessary when Mayor Dixon accepted a plea during the hearing, the case is an example of the challenge caused by the clash of evidentiary rules with the modern habits surrounding social media and internet use (Sweeney, 2010).

In other cases, juror misconduct came about because jurors disregarded the rules in an effort to obtain a better understanding of the case or get the “right” answer. In one case, a jury convicted a man of possession of various drugs with intent to distribute. The defendant’s recorded statement, in which he referred to slang names for drugs in his possession and discussed prices he sold them for, was used as evidence in the trial. It came to light after the trial that one juror was confused by the slang terms used in the trial, and the juror used a cell phone to look up their meaning, in spite of instructions forbidding such activity. The judge ultimately accepted affidavits from the jurors asserting that this did not affect their verdict and did not grant a request for a new trial, despite the misconduct (Woodruff v. State of Ohio, 2016).

Another case involved the trial of a woman who stole clothing from a store, then struck and killed a man with a vehicle while fleeing the scene. During deliberations, the jury asked the court to define the word “perverse” as it had been used in the case, but the court did not respond. That evening a juror went home after recess and looked up the term, as well as the definition of *involuntary manslaughter*, and brought printouts of each back the next day. When this activity was discovered and the juror was questioned by the judge on her motivation for her misconduct, the juror’s response was, “I just wanted to have it clear in my own head.” This ultimately resulted in a mistrial (State of Ohio v. Gunnell, 2012).

Panel Discussion and Recommendations to Minimize Inappropriate Juror Use of ECD

Throughout the panel, panelists discussed ways to address the problem of juror misconduct with ECD. Among the potential solutions, the panelists identified two options as impractical and therefore unlikely to have an effect on juror misconduct: sequestration of juries and a complete ban on electronic devices. While sequestration of juries during trial or deliberation is an option for courts to implement, it is rarely used, even in high-profile cases. Panelists noted that sequestration, in particular, suggests hostility to the jury and a lack of trust and so feeds the conflict in perspectives. As such, sequestration is not recommended for the purpose of addressing misconduct with ECD.

Despite its potential usefulness in preventing witness intimidation, banning devices may be counterproductive when attempting to mitigate juror misconduct. While banning electronic devices within the courthouse would stop jurors from communicating via smartphones, laptops, or other electronic devices while in the courthouse, there is no way to prevent them from using such devices in the car at lunch or to look up information at home. A ban may cause an undue burden on jurors when other modes of communication, such as pay-phones, may no longer be available near the courthouse, and this burden may create an incentive for jurors to circumvent the ban. Furthermore, devices are proliferating in type, functionality, and quantity (e.g., consider watches, eyewear, or implants with internet access), and any policy banning specific devices will likely always be a step behind the most recent technological innovations. Panelists acknowledged the need to recognize that jurors will use the internet and social media, whatever their instructions may be. The internet holds too integral a place in most jurors’ everyday lives to realistically expect otherwise.

The challenges unique to a younger generation entering the courtroom were a frequent topic of discussion over the course of the panel.

Panelists had mixed views on the effectiveness of juror sanctions for misconduct. Some suggested that the fear of consequences was an essential tool in diminishing potential juror misconduct. Other panelists suggested that sanctions should be an option but should be used only after a juror has been adequately instructed and warned against misconduct. Still others strongly eschewed juror sanctions as generally inappropriate and ineffective in most cases. Most of the panelists, however, agreed that legislatively mandated sanctions on juror misconduct, such as California's 2011 law criminalizing improper use of ECD, were inappropriate, and they preferred judicial discretion (California Code, Penal Code Part 2, Title 7, Chapter 2, § 1122[a], amended 2011; Part 1, Title 7, Chapter 7, § 166[a], amended 2016). Panelists were further concerned that the threat of sanctions may stifle juror honesty when questioned.

One option to help ensure that jurors make decisions based on the facts of the case and protect the defendant's right to a fair trial is through better jury education. Panelists suggested providing jurors with detailed instructions early, often, and in plain language. Instructions during voir dire should explain that the only evidence that can be considered is the evidence presented in the courtroom, and that the ways that jurors may acquire information in their daily lives will have to be suspended if they are chosen to serve as a jury member. Panelists also noted that there are predrafted instructional messages to prospective jurors that can be used in jury summonses or on the court's website.

Panelists advocated for flexibility in judicial practices, in interactions with the jurors, and with the court process itself to adapt to a changing culture around the use of ECD. One panelist noted that ours is a system predicated on faith in the juror avoiding prejudicial information; we should try to strengthen and protect that faith, rather than try to police jurors' activ-

ity. One panelist asked, "Why trust jurors to make decisions about someone's guilt if we can't trust them with their own cell phone?" While some noted that judges may be hesitant to question the jury about what information they were exposed to after returning from a recess, because they "don't want to know what they don't want to know," panelists widely supported the practice of asking the jury at the start of each day if anything happened over the recess that the judge should know about.

Panelists discussed ways to encourage jurors to be more invested in the process, which could be as simple as ensuring events occur on time to minimize time jurors spend idle in the courtroom. Multiple suggestions were given on ways to allow jurors to obtain information by legitimate means that they might otherwise seek out on their own, such as giving them an opportunity to ask vetted clarifying questions of the court or allowing juror access to vetted tools to aid in recalling or processing information. Finally, the panelists highlighted the difference between evidence admissible to the court and explicitly necessary to determine the case and the small details about people or events we all see and incorporate into our decision-making. Efforts to wall jurors off from considering those small details—"small 'e' evidence"—may, in addition to likely being impractical, be counterproductive. The panelists concurred that efforts to convince the jury of the importance of the rules of evidence and the credibility of the process were often more important than efforts to provide evidence within bounds of court rules, especially with a younger generation that may be especially suspicious of hypocrisy or information being deliberately hidden from them.

The challenges unique to a younger generation entering the courtroom were a frequent topic of discussion over the course of the panel. As one panelist succinctly put their perspective, "We try to give instructions, to put up walls around the process, and the younger generation will bypass it at every point if they think it means getting the 'right' result." In a recent multistate survey of judges and jurors in civil and criminal cases, older jurors or those with previous jury experience expressed greater willingness and ability to comply with court instructions on internet use than younger jurors, and many younger jurors indicated a desire to use the internet to obtain information on the trial. The report on this study further anticipated that as more young jurors enter the pool, this phenomenon is likely to become more frequent (Hannaford-Agor, Rottman, and Waters, 2012). The growing gap between older and younger generations, both in knowledge of new technology and in how people relate to their devices, was a point of concern among panelists. Panelists noted that more

and more, our electronic devices are viewed as extensions of ourselves, especially by a younger generation. Attempting to ban devices may be indicative to a younger generation of hostility to technology or even hostility to jurors themselves. Adding further difficulty to a likely generational gap, one panelist noted that the younger generation may not receive aural information as well as visual, suggesting the study team update recommendations on how information is presented in the courtroom. Finally, several panelists suggested new modes of instilling the responsibility of their task in new jurors—the idea of giving jurors a “noble purpose” or explaining why and how the evidentiary rules are meant to ensure fairness in the trial—in the expectation that this may resonate more with a younger generation and cultivate their faith and participation in the system. Other remarks similarly noted that jurors generally wish to be fair and do “the right thing” in the courtroom (Holderman, 2015), reiterating this perspective.

Panelists reached a general consensus on which methods to limit juror use of ECD in the courtroom should be reconsidered in light of more promising practices. Points of panel consensus are summarized in Table 2.

CONCLUSION

Judges and attorneys have long encountered and addressed witness tampering, juror misconduct, and other potential violations of the right to a fair and impartial trial. Technology has not introduced these problems but may have made them more pervasive. Furthermore, technology has fundamentally changed the way individuals communicate and interact with each other, creating new challenges for the court to ensure due process in an ever-evolving environment.

Overall, the panelists identified some key lessons learned as well as promising practices that courts may adopt to prevent, identify, and address inappropriate ECD use that may compromise the right to a fair trial. The panel found that increased reliance on witness protection programs or blanket surveillance of social media platforms and other ECD were impractical solutions, as each requires a tremendous amount of resources.

Table 2. Panel Findings Related to Juror Misconduct with ECD

	Proposed Solutions	Panel Determinations
More-promising solutions ----->	Sequestration of juries	<ul style="list-style-type: none"> • Not to be used at all to prevent misconduct with ECD • Too costly and shows a lack of trust
	Banning devices	<ul style="list-style-type: none"> • Jurors will use cell phones in other places. • Shows distrust of jurors • May be indicative to younger jurors of judicial hostility toward them or toward technology in general
	Juror sanctions for misconduct	<ul style="list-style-type: none"> • Should only be at judge’s discretion, not mandated • Holds jurors responsible and deters misconduct • May stifle juror honesty when questioned about potential misconduct
	Better jury education and instilling responsibility in the juror	<ul style="list-style-type: none"> • Help establish trust with jurors • Jurors may better understand court rules and regulations. • Give jurors a “noble purpose” • Explain why and how the evidentiary rules apply to give a sense of a fair trial
Less-promising solutions ----->	Juror engagement <ul style="list-style-type: none"> • Speak with the jury about information they may have learned overnight • Minimize juror time idle in the courtroom • Allow jurors to obtain information through legitimate means by asking vetted questions 	<ul style="list-style-type: none"> • Allows the juror to feel more involved and to have more understanding of the trial process • Recognizes the importance of the juror as a person • Update recommendations on courtroom information presentation to accommodate the younger generation’s preference for visual information

The panel found that a complete ban on juror use of ECD during the course of a trial was ineffective, given the proliferation of ECD in our daily lives. Instead, the panel recommended alternative approaches to allow the jurors to ask questions and have better tools for processing the information being presented to them. The panel also concurred that judicial flexibility and consideration tailored to specific aspects of a case or use of ECD represents a more promising avenue to limit juror misconduct than concrete rules applied the same way in every circumstance. With regard to witness or juror intimidation, the panel determined electronic device bans in the courtroom provided a temporary solution to minimize due process violations. However, this approach is likely to become ineffective as technology continues to evolve and the public becomes more and more reliant on these devices to conduct ever-increasing aspects of their daily lives.

The panel concluded that judicial education is essential to understanding current technology and how it may affect due process rights, expectations for appropriate use, and limiting inappropriate use during a trial. Suggestions for improved judicial education included disseminating recommendations, guidance, or curricula on social media and other ECD in pamphlets or similar communications to each district judge and organizations aiding in judicial education. Panelists also suggested communication from the bar on best practices. Finally, other suggestions included identifying those judges in each district who may be most interested in these issues to target specifically for outreach. Such education can also be applied to aid decisionmaking on what behaviors are acceptable in the courtroom and what behaviors—while technically outside the instructions provided to the jury—may not have had an impact on the outcome of the deliberations.

Similarly, public education is important so that witnesses, jurors, other parties to a case, and the general public know what constitutes inappropriate ECD use and how it can compromise the right to a fair trial. Given the limited resources of the courts, and the vast amount of information that is available through social media posts and other ECD, the public may be in the best position to prevent and/or identify and report ECD that may unduly impact the outcome of a case.

Throughout the panel discussions, examples of specific cases or anecdotal findings were generally used to describe the impact of social media on witness intimidation or jury research that ultimately biased case outcomes. Inappropriate social media use has the potential to harm witnesses, compromise a defendant's right to a fair trial, heighten public mistrust in

the criminal justice system, and require considerable court resources to monitor social media use and retry cases when a mistrial is declared. Despite these serious implications, there are few systematic studies that provide credible information on the overall prevalence of witness intimidation through social media or juror misconduct resulting from external online research on the case. To develop promising solutions to these problems, the field needs a more accurate understanding of the overall scope of the issue and the forms of ECD that can most commonly be used to bias a trial outcome.

Future research is needed to test the viability and impact of the more-promising approaches identified by the expert panel, such as the practicality of cell phone and other electronic device bans in the courtroom. Studies should also track the implementation of and challenges to legislation that restricts disclosure of witness identities until the trial begins. Education of judges was a key promising approach identified by the panel with regard to preventing witness intimidation and juror misconduct. Here, a centralized repository that includes information on the latest case law and technological advances would be helpful to inform judicial training. A centralized information system could also provide examples for judges to use when instructing prospective jurors and parties to a case about appropriate social media and other ECD use and the potential for inappropriate use to undermine the right to a fair trial.

The ever-evolving nature of technology, more ready access to information, and wider communication networks will continue to impact court proceedings. Education and judicial flexibility hold promise to protect the right to a fair trial while also providing practical courtroom solutions in the current environment, where technology is becoming more and more integrated with all aspects of our daily lives.

Endnote

¹ While the Millennial generation is the specific example given in this case, this is not the only generation whose communication style has been changing rapidly with technology. As technology changes the way individuals communicate, judges will need to keep up.

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Acknowledgments

The authors would like to acknowledge the participation and assistance of the members of the panel on the *Potential Impact of Electronic Media Use on the Right to a Fair Trial* listed in the body of the report. This effort would not have been possible without their generous willingness to spend their time participating in the effort. We would also like to acknowledge the contributions of Martin Novak and Steve Schuetz of the National Institute of Justice. The authors also acknowledge the valuable contributions of the peer reviewers of the report, Nancy S. Marder and Nicholas M. Pace of RAND, and the anonymous Department of Justice reviewers.

The RAND Justice Policy Program

The research reported here was conducted in the RAND Justice Policy Program, which spans both criminal and civil justice system issues with such topics as public safety, effective policing, police-community relations, drug policy and enforcement, corrections policy, use of technology in law enforcement, tort reform, catastrophe and mass-injury compensation, court resourcing, and insurance regulation. Program research is supported by government agencies, foundations, and the private sector.

This program is part of RAND Justice, Infrastructure, and Environment, a division of the RAND Corporation dedicated to improving policy- and decisionmaking in a wide range of policy domains, including civil and criminal justice, infrastructure protection and homeland security, transportation and energy policy, and environmental and natural resource policy.

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About This Report

On behalf of the U.S. Department of Justice, National Institute of Justice (NIJ), the RAND Corporation, in partnership with the Police Executive Research Forum (PERF), RTI International, and the University of Denver, is carrying out a research effort to assess and prioritize technology and related needs across the criminal justice community. This initiative is a component of the National Law Enforcement and Corrections Technology Center (NLECTC) System and is intended to support innovation within the criminal justice enterprise. For more information about the NLECTC Priority Criminal Justice Technology Needs Initiative, see www.rand.org/jie/justice-policy/projects/priority-criminal-justice-needs.

This report is one product of that effort. It presents the results of the *Potential Impact of Electronic Media Use on the Right to a Fair Trial* panel, held in February 2017. The panel was convened to identify issues related to the use of ECD in the courtroom as it pertains to witness intimidation and juror misconduct. This report and the results it presents should be of interest to planners from law enforcement departments, corrections agencies, and courts; research and operational criminal justice agencies at the federal level; private-sector technology providers; and policymakers active in the criminal justice field.



This publication was made possible by Award Number 2013-MU-CX-K003, awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect those of the Department of Justice.

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