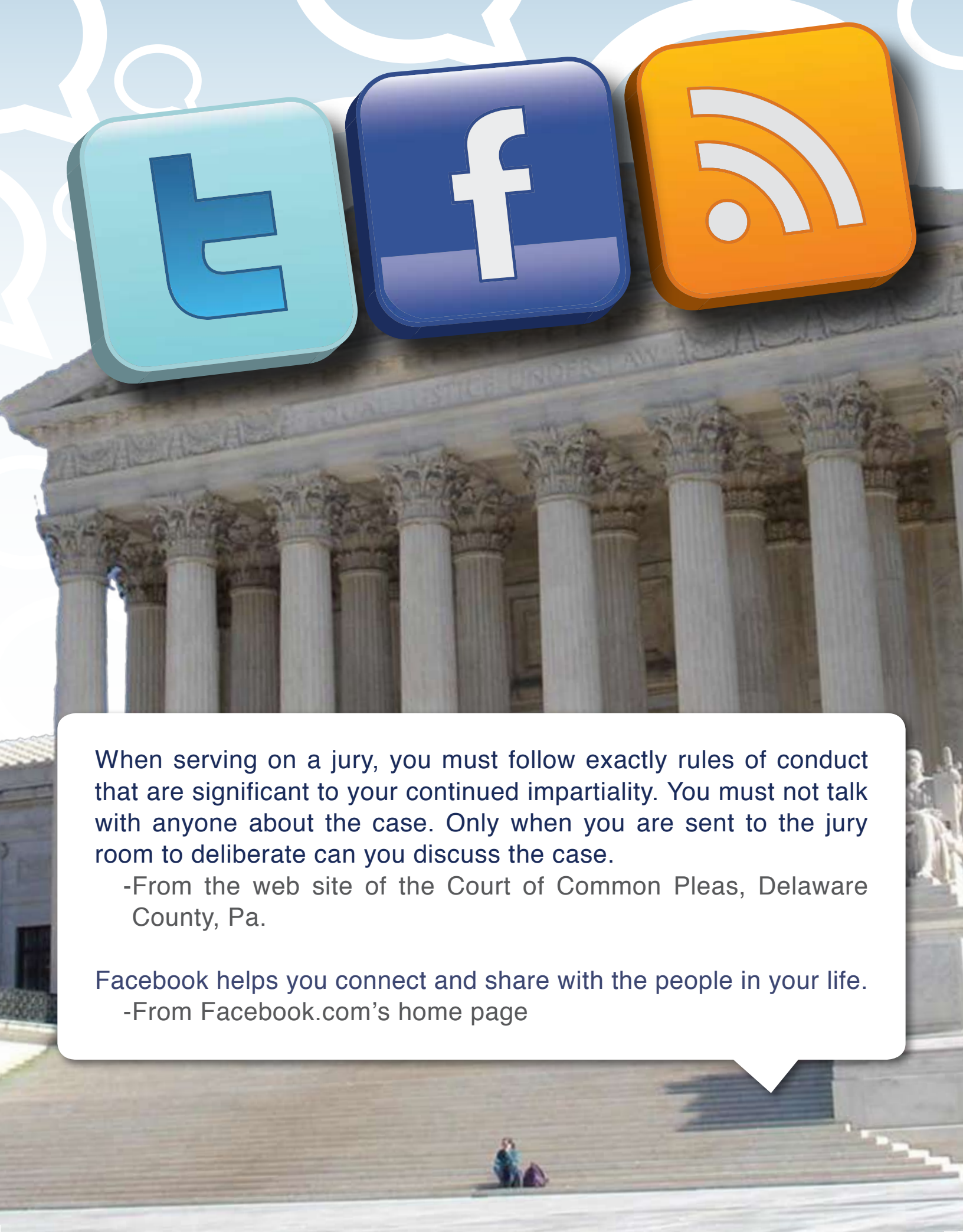
TWEETING AND TEXTING DURING TRIAL: SOCIAL MEDIA'S SIEGE ON THE COURTS

by Michael Petitti



When serving on a jury, you must follow exactly rules of conduct that are significant to your continued impartiality. You must not talk with anyone about the case. Only when you are sent to the jury room to deliberate can you discuss the case.

-From the web site of the Court of Common Pleas, Delaware County, Pa.

Facebook helps you connect and share with the people in your life.

-From Facebook.com's home page

WHEN MARK ZUCKERBERG founded Facebook® from his Harvard dorm room in February 2004, he couldn't have predicted how immense his social networking web site would become. Once limited to college students, Facebook recently announced it has more than 350 million members.

While not as pervasive, other social networking sites like MySpace®, Habbo® and Friendster® still boast more than 100 million users each. Twitter® already reports 25 million users. On Wikipedia®, a user-generated online encyclopedia, a search for "social networking web sites" produces more than 150, most with tens of millions of members. And don't forget the 133 million blogs out there.

To put these figures in perspective, the entire U.S. population is about 307 million.

With this many users and these many web sites, it's safe to assume every person living in an advanced society either belongs to a social networking site or soon will. This amounts to an unprecedented level of information sharing. It also amounts to an unprecedented problem for America's legal system.

THIS PAST MARCH, Eric Wuest logged on to his Facebook account. Like most members of the site, Eric used his personal "page" to record what was going on in his life. These posts, called "status updates," are essentially online journal entries that can be read by any "friend" the poster lets view his or her page. On this occasion, Eric informed his friends that "a big announcement" would be coming the following Monday.

In most instances, this wouldn't elicit much of a reaction. But Wuest wasn't talking about the results of a job interview. When he posted this update, he was one of 12 jurors deciding whether former Pennsylvania state Sen. Vincent Fumo was guilty of federal corruption. His message was posted days before a verdict was to be handed down.

When this development came to light, Fumo's attorneys claimed Wuest's actions violated centuries-old jury rules and demanded a mistrial. To support their case, the defense said Wuest had also posted a Twitter message, or "tweet," that read "This is it...no looking back now!" and other updates about the jury's deliberations. All in all, at least 93 "friends" of Wuest's Facebook page and five "followers" of his Twitter messages had access to these posts.

In a 45-minute hearing in his chambers, U.S. District Judge Ronald Buckwalter denied the defense's mistrial request. He found Wuest credible when the juror said he did not talk with anyone about the trial.

"What were my postings but announcements?" Wuest asked. "I wasn't discussing the case – I was discussing that we were done."

Fumo's attorneys, who plan to appeal, see it differently.

"There's a presumption that the [legal] process has been tainted," said Peter Goldberger, who is handling appellate issues in the case.

However the case proceeds, the larger issue is not going away. Wuest's actions did not happen in a vacuum. As far back as 2005, during jury selection in a New Hampshire sexual assault case, a prospective juror wrote in his blog that he would have to "listen to the local riff-raff try and convince me of their innocence." Once he was seated, he recorded his surprise that he was chosen given his "strong beliefs" about God and the police. When the defendant was found guilty and the posts came to light, the defense claimed juror bias and demanded a new trial. The judge upheld the verdict.

In 2006, defense counsel for an Ohio man convicted of drunk driving and police intimidation discovered a juror had been writing about the proceedings on his blog. An appeal filed for a new trial was likewise denied.

Just one week before Wuest posted his "announcement," a building products company asked an Arkansas court to overturn a $12 million judgment against it after a juror used Twitter to post updates during trial. The month before, a federal drug trial

in Florida was derailed by the Internet when a juror admitted he had been using Google to research the case. A larger investigation uncovered eight other jurors having done the same. In this instance, the judge had no choice but to declare a mistrial, wasting eight weeks of work by prosecutors and defense attorneys.

And finally, in late May, "Today" weatherman Al Roker was reprimanded by a chief jury clerk for taking pictures of jurors waiting to be called in a Manhattan assembly room and posting them to his Twitter page – all while on jury duty himself.

"I'm not breaking laws," Roker wrote on his page, "Just trying to share the experience of jury duty." (Never mind a sign that "strictly prohibited" taking pictures anywhere in the courthouse.)

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HOW DID THIS widespread threat to juror impartiality and courtroom integrity come about? It starts with the quotes that begin this article.

For the millions of members of social networking sites, the rules they must follow if called to jury duty are the exact opposite of those they follow every day on Facebook or Twitter. As a social media user, they engage in complete transparency. As a juror, they must maintain utmost secrecy. In essence, being a juror requires social-media users to abandon a major aspect of their daily lives (sharing its details with others) for the complete opposite (sharing nothing).

Are any two roles in life more diametrically opposed?

This becomes even more difficult considering that before called to serve, social-networking jurors routinely updated their "status" with fairly mundane information: "Going to the mall;" "Had Wendy's for lunch." In a jury box, however, they can now entertain hundreds of "friends" with inside stories about extraordinary circumstances. Serving on a jury provides people the opportunity to differentiate themselves from the millions of other social media users, a temptation difficult to resist.

Equally important to consider are the precedents that have shaped juror's views of technology in the courtroom. When O.J. Simpson was tried for two counts of murder in 1994, it wasn't the first time news outlets had covered criminal proceedings. In 1970, Richard Nixon famously decried the

media's glamorization of Charles Manson, prompting Manson, sitting in court, to flash the jury a copy of *The Los Angeles Times* with a cover reading "Manson Guilty, Nixon Declares." Courtroom coverage became so widespread that in 1991, the cable station Court TV was launched, featuring continuous live trial coverage.

But the former NFL star's double-murder trial brought technology into the courtroom like never before. On every TV channel and in every newspaper, for months and months, readers and viewers were bombarded with legal commentary and live coverage of actual court proceedings. This casual and constant attention helped turn a murder trial into a primetime TV show. When viewed on television and dissected by countless talking heads, what happened in the courthouse was no longer private but an event to be shared. Even the courtroom where Simpson was tried shattered an illusion: it looked more like a cheap law school's practice facility than the majestic place where one of football's greatest running backs would meet his fate.

Experiencing this demystification of the legal system altered its view in the minds of future jurors. Highly publicized trials that followed only compounded this perception.

Fifteen years and countless trials later, the accumulated indifference for the sanctity of legal system and the dichotomy between being a juror and a social media user has created a whole class of citizens that view jury duty as a community experience. What is ironic about this progression, however, is that the pervasiveness of social media was needed to bring this behavior to light.

SO WHAT CAN the courts do about it?

After the Fumo Facebook controversy, Temple University Beasley School of Law Prof. Edward Ohlbaum said language should be added to jury instructions that ban the use of social media to discuss courtroom activities. This suggestion echoes that of St. Louis District Judge Ed Sweeney, who proposed similar action to the Missouri Supreme Court, and was already implemented by a California court in September. Jurors hearing a high-profile wrongful death case there were required to sign declarations that they would not use "personal electronic or media devices" to research or communicate any aspect of the trial. Violating the oath could mean fines or jail time. The move is believed to be the first of its kind in the state.

Philadelphia Court of Common Pleas President Judge Pamela Pryor Dembe also recognized the threat of social media on jurors during the State of the Courts address at October's Bench Bar Conference and Annual Meeting, saying: "I don't think it's very realistic anymore to have jurors who are packed away in cotton balls and [assuming] they take in no information except that which we choose to give them. We are going to have to come up with responses other than putting out thumb in the hole in the dyke."

Recently, the Philadelphia Bar Association's Professional Guidance Committee weighed in on a social media issue when it was asked to advise on whether or not an attorney involved in litigation can ask a third party to send a Facebook "friend request" to a witness for the opposing party so that the requesting attorney could gain access to the witness' views. The Committee found this behavior would be unethical and violate the Rules of Professional Conduct. (See adjacent page for more on this decision.)

Finally, judges in Colorado and Kansas, recognizing the overwhelming presence of social media in the courtroom, met the issue head on and permitted journalists to use Twitter and blogs to cover their respective criminal cases.

The latter two examples don't involve controlling jurors' use of social media, but they do illustrate the forward-thinking approach needed to address the issue. It is an overwhelming battle: all those millions of social networking users and all the mobile devices providing instant account accessibility make jury contamination seem inevitable. But all battles have to start somewhere.

First, taking a page from California and explicitly prohibiting jurors from using social media to discuss or research a case is a step that could be implemented rather quickly. If a sworn oath is too rash, a specific document for jurors like Prof. Ohlbaum suggested could be created that explains why online posting of trial-sensitive information and "Googling" does a disservice to the country's storied justice system. Judges could bolster the message by reminding jurors of their integral role in this system often during the trial, an act that would also help reverse the perception of jury duty.

It may seem intrusive to require jurors to permit the presiding judge access to their social networking accounts (even if they can easily be "defriended" once the trial is over), but ensuring all attorneys make it a point to learn a prospective juror's social media habits is basic due diligence. As Fort Lauderdale trial attorney Bob Kelley said, "Any lawyer who does not inquire during jury selection about a juror's Internet presence – whether it be a Web site, a blog, an account on MySpace or an account on Match.com – hasn't done their job."

Finally, the courts should take a page out of technology's book and undertake a broad media campaign – both on TV, online and on social media sites – to re-establish the public's view of the legal system as a sacred institution – one of the oldest, most respected and most influential in our nation's history.

It is a story that got lost along the way. With millions of people now paying attention, it is one that deserves retelling. ■

Michael Petitti (mpetitti@philabar.org) is the communications manager for the Philadelphia Bar Association.

Philadelphia Bar Association Professional Guidance Committee Weighs in on Social Media Issue

Composed of 30 Philadelphia Bar Association members and active since the 1930s, the Professional Guidance Committee advises members on the propriety of any action proposed to be taken by them in a professional matter or transaction. The Committee, chaired by Kimberly S. Ingersoll of Abrams and Ingersoll LLP and Hope Ann Comisky of Pepper Hamilton LLP, meets once a month and has the authority to give advice concerning the interpretation, application and observance of the Code of Professional Responsibility and the Canons of Judicial Ethics.

According to Paul Kazaras, assistant executive director of the Philadelphia Bar Association, the ethics opinion rendered by the Committee in March 2009 was one of the first on social media issued by any Bar Association. The inquirer (an attorney) came before the Committee questioning the propriety of him requesting a third party to "friend" a witness on Facebook who was testifying against his client for the purpose of gaining information that could possibly impeach the witness' testimony. The attorney learned of the witness' Facebook page during deposition, but was denied access to the information contained therein unless permitted access by the witness. The attorney was under the impression that the witness allowed access to anyone who asked, regardless of familiarity, but was reluctant to ask himself. The third party, who the witness also did not know, would state only truthful information to the witness but would not reveal he or she was affiliated with the attorney or the true reason why he or she sought access.

The Committee opined that the inquirer's proposed action would violate several Rules of Professional Conduct, namely Rule 5.3. (Responsibilities Regarding Nonlawyer Assistants); Rule 8.4. (Misconduct); and Rule 4.1. (Truthfulness in Statements to Others).

Regarding Rule 5.3, the Committee wrote: "[Inquirer] is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule." Regarding Rule 8.4, the Committee wrote: "Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived." Regarding Rule 4.1, the Committee wrote that the proposed conduct "constitutes the making of a false statement of material fact to the witness."

The Committee also cited several precedents for its opinion. In *People v. Pautler* (2002), the Colorado Supreme Court endorsed an absolute reach of Rule 8.4, noting "... members of our profession must adhere to the highest moral and ethical standards." In *In Re Gatti* (2000), the Oregon Supreme Court wrote: "Faithful adherence to the wording of [the analog of Pennsylvania's Rule 8.4]… does not permit recognition of an exception for any lawyer to engage in dishonestly … deceit, misrepresentation, or false statements."

Kazaras said: "The Rules of Professional Conduct, while contemplating the Internet (in that it does talk about real time communications) when last comprehensively revised several years ago, did not contemplate (nor did any attorney over the age of 30) the advent of Twitter, MySpace, Facebook and LinkedIn. These sites raise a panoply of ethical issues that need to be addressed. I'm sure five years from now, the rules will indeed address them, but we will then be dealing with the latest methods of communication about which now we have no idea."

For more on this opinion, search for "Opinion 2009-2" at www.philadelphiabar.org ■

— *Michael Petitti*