

Outside Counsel

Court of Appeals Issues Stern Warning About Jury Misconduct

In what can only be called a highly significant decision, New York's top court issued a stark reminder about the fundamental fairness of trials. But in this case, the Court of Appeals did not overturn a criminal conviction because of a trial judge's erroneous legal instructions or because of a prosecutor's prejudicial statements in summation. Rather, the court aimed this warning shot at a group of trial participants who are pivotal to a criminal defendant's Sixth Amendment right to fair and impartial fact-finders—jurors.

On Oct. 22, 2019, the New York Court of Appeals issued its unanimous opinion in *People v. Neulander*, 1207 KA 16-02210, __ N.Y. __ (Oct. 22, 2019). In *Neulander*, the court affirmed the Appellate Division's decision that set aside the defendant's convictions for murdering his wife and tampering with physical evidence, based on blatant juror misconduct. Noting that Juror 12 had sent and received "hundreds of text messages about the case" throughout the trial and had then lied about having done so to cover up her conduct, the court wrote that "the extensiveness and egregiousness of the disregard, deception, and



By
**Jason P.W.
Halperin**



And
**Amanda B.
Asaro**

dissembling occurring here leave us no alternative but to reverse the judgment of conviction and remit for a new trial . . ." *Id.* at 3. In a gut-check wake-up call for all future jurors—and for all trial judges to take claims of juror misconduct highly seriously—the court announced that the facts of this case "compel us to affirm publicly the importance of juror honesty." *Id.*

In the digital age, we are now subject to a world of extraneous influences. And we are subject to them almost instantly, where a swipe of a finger or a scan of a face grants access to a plethora of news outlets, blog posts, Tweets, photos, and status updates. Indeed, the rise in social media has given family, friends, and even strangers an easy opportunity to give their opinions when they are not in the courtroom, when they have not seen the actual evidence, when they may have seen evidence that the trial court precluded the actual jury from seeing, and when they have not seen the witnesses in court and thus cannot judge their credibility.

For jurors, social media presents ever-increasing opportunities to engage in activity that may constitute serious juror misconduct. For criminal defendants, it is a very real obstacle to their fundamental right to be judged by an impartial jury. For trial attorneys, it means that one dishonest juror can upset months of work and resources in preparing for and conducting the trial. And for busy judges, having to re-do any trial puts a strain on an already heavy workload.

The rise in social media has given family, friends, and even strangers an easy opportunity to give their opinions when they are not in the courtroom, when they have not seen the actual evidence, when they may have seen evidence that the trial court precluded the actual jury from seeing, and when they have not seen the witnesses in court and thus cannot judge their credibility.

Courts try to guard against such risks by reminding jurors of their responsibility to maintain impartiality, as outlined in various instructions read to the impaneled jury throughout trial. Among other instructions, jurors are routinely told to "not converse, either among yourselves or with

JASON P.W. HALPERIN is a member of Mintz's white-collar defense and government investigations group, and is a former federal prosecutor from the U.S. Attorney's Office for the Southern District of New York. AMANDA B. ASARO is a litigation associate at Mintz.

anyone else, about anything related to the case”; to “not read, view, or listen to any accounts or discussions of the case reported by newspapers, television, radio, the internet, or any other news media”; and to “not attempt to research any fact, issue, or law related to this case[.]” See Jury Admonitions in Preliminary Instructions (revised May 2009 and February 2016). Moreover, courts specifically address a juror’s use of social media: “In addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, internet chat or chat rooms, blogs, or social media sites, such as Facebook or Twitter.” *Id.* Jurors are told to promptly report to the court if they learn about any improper attempt to influence any jury member (as are attorneys, who also must promptly bring to the court’s attention any instance of possible juror misconduct, including activity on social media sites, which attorneys can monitor as long as they do not try to contact the juror).

The same standard jury instruction is used in federal criminal trials. See, e.g., *United States v. Annabi*, 10 Cr. 007 (S.D.N.Y. Feb. 16, 2012) (Tr. at 318:16-19, 323:25-324:7) (Chief Judge Colleen McMahon instructing the jury that: “it’s your function to decide the issues of fact in the case and your decision on the issues of fact is to be based solely on the evidence you hear in this courtroom”; and instructing jurors not to “discuss” the case with anyone and that “discuss” has “the broadest meaning that we can possibly assign to it and it covers every form of communication that human beings have ever devised, sign language, smoke signals, tweets ... and anything else that you can do over a computer, talking, e-mailing, ... you can’t communicate about

the case with anyone. We really, really, really are counting on you and *trusting you* to do that” (emphasis added)). (Indeed, in some instances, jurors who fail to abide by these instructions may be held in contempt of court, subject to fines, and even face prosecution.)

Even those penalties, however, are not sufficient to deter some jurors. One juror’s failure to follow these instructions is what led to the Court of Appeals decision in the high-profile *Neulander* case. In that case, the Court

It is imperative that jurors understand and recognize their critical role in preserving the fairness of trials—even if it may be harder to do so in the era of social media and smart phones.

of Appeals unanimously decided that one juror’s actions, which included sending and receiving more than 7,000 text messages and accessing media sites covering the trial during the trial, were improper. Taken collectively, the court held that the juror’s actions created a significant risk that the defendant’s right to a fair trial was prejudiced, leading the court to set aside the verdict.

Neulander follows longstanding New York precedent about the bedrock principle of a fair and impartial jury. As the Court of Appeals stated four decades ago, “Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury. The presumption of innocence, the prosecutor’s heavy burden of proving guilt beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant’s guilt or innocence are free of bias.” *People v. Branch*, 46 N.Y.2d 645, 652 (1979) (emphasis

added). In a similar vein about the solemn obligation of jury duty, at the end of every criminal trial, U.S. District Judge Kenneth M. Karas of the Southern District of New York thanks jurors and tells them that after military service, performing jury service is the most important public service that U.S. citizens can do.

In spite of these instructions and reminders to juries, there are a number of instances in the last decade where juror misconduct—namely inappropriate use of the Internet and social media—has led courts to reverse judgments. *Neulander* presented a particularly egregious set of circumstances. Juror 12 engaged in regular text message exchanges about the trial while it was ongoing, including with her father (who sent her a message to “make sure he’s guilty!”) and with a friend (who said that her “mind [was] blown” that the defendant’s daughter was not a suspect). Dr. Neulander moved to set aside the verdict after another juror informed defense counsel that Juror 12 had engaged in prohibited communications during the trial. In preparing its opposition to the defendant’s motion, the prosecution met with Juror 12, who, rather than disclose the communications, submitted an affidavit with doctored text messages, suggesting that the exchanges were innocuous. But when Juror 12 was ordered to submit her phone for a forensic examination, the extent of her deception became clearer.

As the Appellate Division explained, she “had selectively deleted scores of messages or parts thereof,” and “deleted her entire web browsing history.” *People v. Neulander*, 162 A.D.3d 1763, 1766-67 (4th Dep’t 2018). Due to her repeated disregard for the court’s instructions and her active

concealment of her misconduct, the Appellate Division reversed the judgment, noting that Juror 12's "substantial misconduct" created a real risk of prejudice to the defendant. *Id.* at 1768.

The Court of Appeals affirmed the Appellate Division's decision, noting that "the cumulative effect of Juror 12's misconduct, deceit, and destruction of evidence ... compels us to agree with the Appellate Division" *Neulander*, at 5. In its ruling, the high court quoted favorably from the Appellate Division's decision stating that, "every defendant has a right to be tried by jurors who follow the court's instructions, do not lie in sworn affidavits about their misconduct during the trial, and do not make substantial efforts to conceal and erase their misconduct when the court conducts an inquiry with respect thereto." *Id.* at 3. The Court of Appeals noted that this case was "not a case of stray texts." *Id.* Pointing to Juror 12's "extraordinary and dishonest behavior," the Court of Appeals explained that jurors "must be expected, at the very minimum, to obey the admonishments of the trial court, report attempts by others trying to influence their oath to be objective, and to be forthcoming during court inquiries into their conduct as a juror." *Id.* at 4-5. In concluding, the court rejected the government's argument that the evidence was overwhelming by stating that the right to a fair trial was "self-standing" and that "[a]ffirming a conviction where a juror engaged in dishonesty of this magnitude would not discharge our 'overriding responsibility' to ensure the public's confidence in the fairness of trials." *Id.* at 5.

Other courts have faced similar issues in the face of growing Internet and social media use. For example, in *Ditmas-Martinez v. State*, the Arkansas Supreme Court reversed a death sentence after concluding that a juror's

"Twittering" compromised the defendant's right to a fair trial. The circuit court had repeatedly told the jurors to refrain from social media use, but during deliberations, a juror inappropriately tweeted, "Choices to be made. Hearts to be broken. We each define the great line." Defense counsel learned of the tweet and informed the court. After questioning the juror about his Twitter usage and reminding him not to tweet during the trial, the juror nevertheless tweeted again during sentencing deliberations. As the Arkansas Supreme Court concluded, due to the nature of online social media sites, tweets are "very much public discussions," and "it is in no way appropriate for a juror to state musings, thoughts, or other information about a case in such a public fashion." 385 S.W.3d 238, 248 (Ark. 2011).

Social media and Internet usage can also impede a trial in its early stages. In February 2019, Justice Ozzi of the New York Supreme Court (Richmond County) had to dismiss a 23-person group of prospective jurors while the prosecution and defense were choosing two alternate jurors for a murder trial. Despite Justice Ozzi's admonition to the potential jurors not to conduct any Internet research or do social media searches, one of the 23 potential jurors searched the Internet on his cell phone for information about the defendant's criminal history and the current case, and shared the information with the group. Frank Donnelly, *Juror Candidate Learns What Happens When You Research, Discuss Case*, Staten Island Live (March 6, 2019).

And about a year ago, a Texas state court was forced to declare a mistrial in the case of a defendant facing, among other counts, five counts of aggravated sexual assault of a child, because a potential juror had improperly researched the defendant

and discussed his findings within earshot of a juror. In that case, the juror reported to the court that she had heard a potential juror talking about the case and discussing information about the defendant that he had pulled up on his cell phone during a jury selection break, and said she could not be impartial given what she had heard. At that point, the defendant had been in jail for 998 days awaiting trial. See Tommy Witherspoon, *McClennan County Justice Delayed in Two Trials*, THE WACO TRIBUNE (Nov. 28, 2018). As the court aptly stated, "The Internet has curses and blessings. This is one of the curses."

In sum, the message from the Court of Appeals in *Neulander* is clear: It is imperative that jurors understand and recognize their critical role in preserving the fairness of trials—even if it may be harder to do so in the era of social media and smart phones. Otherwise, courts, lawyers, taxpayers, and criminal defendants will be the ones cursed by the misbehavior of jurors.