

H Helping Juries to Better Reach Untainted Verdicts



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Helping Juries to Better Reach Untainted Verdicts

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Joel Cohen
Criminal defense lawyer

It's a civil case. Voir dire, questioning of jury for selection purposes, after lunch. Question: no matter what can you be fair to both sides? - Claire McCaskill (@clairecmc) January 25, 2016

Claire McCaskill is a respected United States Senator from Missouri - actually a former prosecutor in Kansas City and now, among her other senatorial assignments, a senior member of the Armed Services Committee of the U.S. Senate. A person - ostensibly, at least - of consummate probity. But several weeks ago she was called to jury duty - she was just like any other citizen paying her dues as such.

So let's see what she felt the need to do during off moments while paying those dues. Yes, Senator McCaskill decided to tweet 33 - yes, 33 - times to her more than 110,000 followers <http://www.businessinsider.com/claire-mccaskill-hilariously-live-tweets-jury-duty-2016-1> about her jury duty (and not about the importance of doing her civic duty just like everyone else). Instead, she made sure, among other things, in separate and successive tweets, that they knew she would sit near an electric outlet, that others were knitting and reading, that she loved Perry Mason, that the jurors were watching Comedy Central, that she did not want to be responsible for the remote and, ultimately, that she couldn't talk about the case and would stop tweeting while sitting. As a U.S. Senator, one would expect nothing less, and precisely because she is a United States Senator, we take her at her word.



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But that last tweet - that she would “turn off” while sitting (“HOLY X@*! I am on the jury. Then have to go social media silent re that. Don't worry. I'll share after verdict”) - is the point. Can we take everyone at their word that they will be radio silent during the case? Or not look at media reports if so instructed by the Court? And by the way, what does it say about the sanctity of jury deliberation that Senator McCaskill, a former prosecutor, is comfortable “sharing” with her followers after the verdict, as she did - explaining by twitter how she was able, during deliberations, to show lend her personal expertise to her fellow jurors in terms of their deliberations?

In fact, a New York State Bar Association committee <http://www.nysba.org/socialmediaguidelines/> has just proposed a regularized, sterner series of instructions to jurors to warn them against social media interactions during trial. Still, the increasing instances of breaks in the wall that should stand firmly between the media and jurors while seated on cases - highlighted by the fact that even a United States senator can't seem to contain her enthusiasm for using her own jury service to promote herself - it is truly time for the System to take the bull by the horns.

Let's look at the jury and the media. The jury system in America is built on an irrefutable fiction - that juries directed to follow a judge's instructions actually do so. And the instruction on which the justice system must rely the most is that which directs jurors to pay no attention whatsoever to outside influences about the case - in particular, albeit only in some cases, the media. Of course, there have always been sensational trials; trials where the media reported anything and everything it could. But today is different. The tabloid press can make any case front page news merely because it is sufficiently salacious (and, maybe, it's a slow news day). Cellphones, laptops in court - everything is in real time. Social media posts go “viral.” And not only do we have a 24-hour news cycle, how many channels are devoted solely to presenting the news. And if there is no news, the commentators can literally spend hours dissecting every syllable uttered in an on-going case.

Do we really believe that jurors can be so sanitized as to ignore what is right in front of them merely because a judge tells them not to look? Forget tweets. Forget Facebook or Instagram. How about where the front page boldly editorializes that the defendant is guilty as hell. Or perhaps worse, the 48-point-font front page is screaming details of a confession that a judge has ruled inadmissible and that the jury should never hear.

Here is how it works now. Before being selected for service, jurors are typically questioned, at least somewhat, about what they have seen and read in the press. They are sworn in before the trial begins because we have come to believe or at least come to accept, rightly or wrongly, that that oath of good citizenship will carry the day - that it will encourage

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jurors to adhere strictly to the judge's instructions. Jurors are told, on the first day of trial and often afterwards, that they are not to discuss the case with anyone - including, by the way, each other - until both sides conclude their presentations; that they are not to read about the case; and that they are not to watch or listen to anything about the case. During the trial, the judge may ask the jurors, collectively while they sit in the jury box, if they have adhered to these instructions. The response is murmurs of "yes, your honor" coupled with heads nodding. Given this fairly standard protocol, does a juror's oath *before the trial begins* really have the same *gravitas* we like to believe it does? Particularly when jurors are thereafter "questioned" *en masse*?

So what about this instead, or in addition: rather than merely instructing jurors each evening to avoid news reports and conversations about the case, let's bring the solemnity of jurors' obligations - and their oath - to the forefront. What if, instead of a global "And remember, don't read [talk] about the case," the parties, particularly the defense in a criminal case, consent to a more elaborate procedure. We suggest consent because, for sure, we don't want a situation where a party is concerned that jurors who never thought about media coverage now, because the judge will have highlighted the problem, wonder if they *should* pay attention.

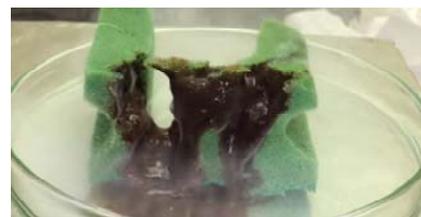
What if a judge were to begin each day by putting *each juror, separately*, under oath in open court? The juror would be subject to the same oath as any witness - Do you swear or affirm to tell the truth? A court reporter would transcribe the questions and answers. The courtroom would be solemn and quiet and all attention paid to the juror/witness. Each individual juror will be very briefly questioned by the judge: Did you discuss the case with *anyone*? Did you read any articles? Watch the news?

To be certain, no one doubts that a judge must handle these types of questions with great sensitivity lest there be a wedge driven between judge and jury. At the same time, the judge and the System must recognize that, in directing jurors to essentially remain purists over their contacts and the media coverage of a case, the judge is asking jurors to do something totally counterintuitive to human experience. These are both very legitimate issues and thoughtful commentators can certainly improve on the suggestion made here. Maybe, to ingrain the protocol, the procedure should be used in every case tried. Or maybe it should only be used in those high-profile, media-charged cases where the risk of a verdict tainted by external considerations is high.

And sure, what I am suggesting will cause trials to take somewhat longer, although not by much, and it may make jurors a tad uncomfortable when the entire courtroom is focused on them. More to the point, there is no question that this procedure would not be a guarantee. But a personalized question and answer session under oath might well have an impact on jurors; perhaps when a juror knows from

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the outset that every day of the trial he or she will have a mirror held up to them, the path of least resistance will likely be to, in fact, adhere to the obligations of good citizenship that the daily oath demands.

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I had the great pleasure, over the years, of trying cases before the late Judge Eugene H. Nickerson of the Federal District Court in Brooklyn, New York. When you walked into his courtroom, like so many others, you knew you were walking into a place where justice would be dispensed. It reflected the gravity of the decisions that would be made. When Judge Nickerson in particular would swear in a trial witness, imposing a school marm's disciplining manner, not one person in the courtroom was out of their seat. No one would speak, even in a whisper. There was no bustling about with documents, no lawyer talking to his client or co-counsel; had they been available at the time, there would have been no looking at texts or emails, tweets or posts, all as you often see in courtrooms today. Judge Nickerson would not tolerate even the smallest sign of disrespect for the solemn oath being administered.

Jurors are the backbone of the System, and requiring them to be sworn and briefly asked a few questions each day may actually cause them to be better jurors - to more effectively appreciate the oath taken by trial witnesses. When you balance it all - the privilege, yet burden, of serving; the freedom of the press; and - singularly, the most important factor - the criminal defendant's constitutional right to a fair trial, isn't taking the time to make sure each juror has followed (and will follow) the judge's instructions the best option? Indeed, isn't making trials as fair as possible what the System is about?

There can be no question Judge Nickerson had it right when it came to witnesses. Why can't we impose the same oath, the same significance, the same obligation on jurors to make sure the demands of Due Process are met? And what I mean is, imposing such obligations whether or not the juror is a United States senator; because when they sit in a jury box every single juror is far more important than a United States senator - at least to the person(s) on trial.

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