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PERSPECTIVE

Addressing social media's influence on jurors

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America loves watching a trainwreck!

That's why, two years ago, when we had the chance to peer into the private lives of Johnny Depp and Amber Heard, we chewed on that defamation trial like a dog with a bone. Social media lit up with postings and stories, conjectures and opinions. The public verdict? Depp was a monster who physically abused Amber and Amber was a vicious vixen intent on destroying Depp. We loved it.

The online stories grew ever bloodier and more lurid each day. Meanwhile, back in the real world, two people were engaged in a protracted legal battle attempting to focus on the facts of the case. But, as the New York Times reported, the case ultimately "rested less on facts than on sympathies."

The Depp/Heard case put blood in the water and when it ended, the sharks of social media were hungry for more. Which is why this year, when Karen Read was charged with murdering her law enforcement boyfriend by running him over in a snow-packed yard in Massachusetts, the online excitement spun up again. Immediately, there was a glut of online outrage, speculation and conspiracy theories over what had *really* occurred. The lust of distrust took over. Forget the media, the police or the witnesses. Facebook and Instagram had all the answers. Anyone and everyone who could weigh in did so with unbounded enthusiasm.

The result in the real world? A



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hung jury. Justice remained unsatisfied. The social media people? They got bored and moved on.

The social media universe

We live in a new world where high-profile cases are guaranteed to attract a universe of followers, readers, and conspiracy addicts eager to drink and share the Kool-Aid. Social media is ubiquitous and fickle: untrustworthy, the end of truth. But it's also fun and exciting, which keeps both the bad and the good among us coming back for more.

Alas, the followers, readers and believers are also the people who will be chosen to serve on juries. While they say they can be im-

partial and can leave that world and those voices outside the jury room, can they really? How much do online voices affect jurors who will be tasked with evaluating these cases? How much do bloggers, vloggers and influencers shape their judgments? Most importantly, how can attorneys identify and address these influences before juries are empaneled and even after they have been seated?

This is a new reality that has been thrust upon our modern legal system and bears close attention.

The impact of social media on jurors' minds

There's little doubt that social me-

dia can critically shape the way prospective jurors think about cases. When those views and opinions are brought into the courtroom, they can and will significantly shift the way jurors receive and perceive information during the trial.

Anyone who is exposed to opinions and theories through social media – especially from voices they follow and trust – is “primed” to weigh information that fits their model of the world over alternative information. In the Depp/Heard case, those who tended to see men as the aggressors and women as the victims were already primed to look for content that reinforced those beliefs. Social media apps track the types of stories people read, and they funnel targeted stories to their feeds.

Readers and followers become super-fueled with biases, even when they are unaware of them. Those biases will naturally alter how jurors listen to and take in facts presented during a trial. They can also impact jury deliberations by influencing the way others judge and interpret the facts of a case.

Humans, as social animals, are highly susceptible to the overarching opinions of the majority. Studies show that juries also tend to engage in this “group think” mentality. They reach higher verdicts together than when they consider the same matters individually. The “Persuasive Arguments Theory” suggests that when jurors share their arguments with each other they move others to more extreme positions, resulting in polarization.

Jurors, like all people, are in-

clined to seek out information that confirms preexisting beliefs. They watch news programs that conform to their own philosophies and biases. They are inclined to magnify the information that tracks with their beliefs and to discount information that doesn't align with their views. Those who have followed and liked certain online voices prior to trial are likely to carry those beliefs into the courtroom. They may then exhibit "confirmation bias," according greater weight to certain witnesses and evidence over others.

Identifying jurors influenced by social media

We don't have to wonder if potential jurors will come into a high-profile case with their minds already made up: They will. Their judgment will be pre-clouded with emotional appeals from online voices. They may have already decided who is at fault, who committed the crime, who should pay the price. If we do nothing to move them out of that mind-frame, those jurors will be incapable of critically evaluating evidence.

The good news is that all is not lost. There are ways to overcome the effects of online influence on jurors. The bad news is that it requires more effort from counsel on both sides. That work starts with doing background research on prospective jurors to learn about their potential biases.

It is counsels' job to identify jurors who are incapable of impartiality and to address any biases, prejudices and preconceptions that they bring with them into the courtroom. The investigation should start before the jury is empaneled, with probing questions that can reveal jurors' thoughts and biases.

A supplemental jury questionnaire may be the first step. Such a questionnaire can uncover juror

information that might otherwise not come through during live questioning. It can provide a sense of privacy and anonymity that allows jurors to be more truthful and candid than they would be during live questioning. Counsel on both sides should agree upon the questions to be included in the questionnaire, ensuring that it is not slanted toward one side. Once they have reviewed jurors' answers, attorneys should be better prepared to ask meaningful questions during voir dire.

A questionnaire can help counsel predict, prior to voir dire, how jurors are likely to answer questions live and in the moment. How will they manage the discomfort of speaking their truth in front of others? By framing questions thoughtfully at voir dire – "Most people say that...do you agree?" – counsel can then explore whether a juror agrees or disagrees with a particular statement. With the insights obtained from both the questionnaire and the responses provided in live questioning, counsel on both sides should have a much better grasp on the influence social media might play in a juror's consideration of evidence.

Counteracting juror bias during trial

Before trial begins, attorneys should be up-to-speed on what is being posted online. The more they know about what is being written and how stories are being played, the better prepared they can be to counteract those voices. A test run before a mock jury can help evaluate the effectiveness of different approaches and allow counsel to tailor the narrative in a way that resonates with jurors and diminishes the power of social media.

Once trial commences, counsel should regularly remind jurors of their obligation of impartiality.

While acknowledging that they may have learned of the case from dubious sources, attorneys should present jurors with evidence that is fact-based, credible and compelling, that offers a strong counterpoint to the faceless/nameless/credential-less online community. When evidence is presented in a way that evokes emotion and humanizes the parties, jurors are more likely to discount biased and negative reports they may have seen online.

Especially in high-profile cases, expert testimony on the impact of social media can further educate jurors about the intrinsic dangers posed by online voices. Such testimony may contextualize the issue so that jurors can step back and more rationally view what they've been told and how seeds of bias may have been planted.

Courts can significantly bolster attorneys' efforts to counteract social media's influence on juries. Upon request, judges in high-profile cases should limit media coverage of trials. They should approve jury instructions that are clearly drafted to reinforce the importance of impartiality when reviewing evidence, as well as the imperative to disregard and avoid outside influences, including social media. In 2020, a federal judiciary committee issued a new set of model jury instructions that federal judges may use to deter jurors from using social media to research or communicate about cases.

Conclusion

To ensure that jurors are capable of rendering thoughtful and fair decisions – even when they have followed social media – attorneys must manage, identify and address hidden biases. They must sensitize jurors to the hidden impacts of social media.

This can be done before and during voir dire, by providing a

written questionnaire and asking thoughtful questions that uncover latent biases. Jurors who are made aware of the pervasiveness and power of bloggers and influencers may be more willing to acknowledge their biases and more willing to consider other points of view.

With blinders removed, most jurors should be better positioned to evaluate evidence objectively. If, however, careful questioning reveals that a juror is incapable of letting go of deeply entrenched biases, counsel should be prepared to make a voir dire challenge.

During trial, counsel should regularly remind jurors of their duty to remain impartial and to evaluate evidence fairly and objectively. Judges should reinforce this message through clear and unequivocal instructions.

Jeffrey Kravitz is a neutral with Alternative Resolution Centers with broad experience in entertainment, intellectual property, business, and insurance matters. As an entertainment litigator for more than 20 years, he represented production companies, studios, insurers, and policyholders concerning copyright infringement, invasion of privacy and coverage questions. He has mediated and arbitrated a diverse range of cases in both federal and state courts.

