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Courts

New York Considering Changes to Social Media Jury Instructions

New York, already ahead of the curve with its pattern jury instructions on the use of social media and the Internet, is considering revisions to the model instructions to reflect changes in social media and electronic devices.

The state's Office of Court Administration is expected to publish the revisions no later than December and will take into account the recommendations recently made by the New York State Bar Association, according to Lucien Chalfen, an OCA spokesman.

The instructions are continually amended, he told Bloomberg BNA. "It's a constantly evolving process, sometimes it's nominal and other times there's a substantive change."

The state's model instructions were updated in 2009 to include social media, but a report from the Bar's Commercial and Federal Litigation Section has shed light on additional points that should be added to the model.

James M. Wicks, chairman of the Section and an attorney at Farrell Fritz PC, told Bloomberg BNA the report will be discussed at the Section's May meeting in Cooperstown, N.Y. A number of other bar associations are also looking at the report, he said.

"The purpose is to update current jury instructions and to address the new world of social media to sensitive judges and lawyers, particularly social media posts that may be monitored during voir dire, trial or deliberations," Wicks said. "Posts aren't as private as people think."

The changes are designed to allow judges and lawyers to tailor the instructions as needed to fit particular cases, Wicks said.

Monitoring Jurors. The report said New York's instructions would become one of the first in the country to explicitly advise jurors that their social media activity may be viewed and monitored by attorneys in the case.

The Section hasn't taken a position on the issue, according to the report. The report did, however, recommend that judges discuss the issue with attorneys prior to the start of trials and prior to the jury being charged.

The report contained model language, should the state choose to include it in its pattern instructions. "Be advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case," the model instructions said.

Eric P. Robinson, co-director of the Press Law & Democracy Project at Louisiana State University'sanship School of Mass Communication, told Bloomberg BNA that New York's jury instructions were significant because, unlike those in some other states, they include references to specific websites and explain the rationale for the rules.

Robinson, who conducted a study in 2013 on cases in which jurors were found to have done research online, said he agreed with the NYSBA recommendations on attorney monitoring of jurors' online activities. The study found that "in the cases in which juror research was discovered, the most common resolution was declaration of a mistrial or vacation of a verdict," he said.

Greg Hurley, a senior analyst at the National Center for State Courts, told Bloomberg BNA that "the report is "extremely well done." He said the New York state judiciary could benefit from considering its recommendations.

Other states have a great deal of interest in the report, Hurley said. Although some recommendations are state-specific, many of its findings are generally applicable nation-wide, he added.

"At this point, most judges nationally are providing jurors with admonishment instructions regarding the use of social media and the Internet during the course of a jury trial," Hurley said. "However, those instructions may not be as artfully drafted as the NYSBA recommended instructions and they may not be given as frequently during the trial as they should be."

Internet Research. One of the report's key recommendations involves banning the use of the Internet and social media by jurors to conduct research or communicate with others about a case.

"This prohibition is not limited to face-to-face conversations," the recommended revision said. "It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror."

The report also recommended that the instructions be revised to include specific devices and websites by name so jurors have a clear understanding of the restrictions. For example, the revisions name LinkedIn, Instagram, YouTube and Snapchat and devices such as iPads, iPhones, Android-based devices and wearable electronic devices.

The report recommended that the prohibition against visiting the scene of a crime or event covered by the case include conducting research on the location over the Internet or social media.

Judges should explain to jurors why they shouldn't access social media, according to the report. It recommended judges tell jurors that "there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case."

Consequences. New York's Criminal Procedure Law requires that judges provide certain admonitions to juries as part of the court's preliminary instructions. The report recommended that judges include more specific

instructions and an explanation for the consequences of improper behavior.

"In recent years, because of the growth in electronic communications, an increasing number of cases have had to be retried, at great expense, because of juror misconduct in obtaining outside information from the Internet, blogs, e-mail, electronic messaging, social networking sites, and other sources," the recommended revision said. "I need to be assured that each of you will do everything you can to prevent such an unfortunate outcome from happening in this case."

The report recommended that judges instruct jurors who use social media to post a message saying: "I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it."

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