

CHAMBERS

Volume 36, Number 3

Summer, 2009

Jurors online?

CAUTION CAUTION CAUTION CAUTION

About Social Media...

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Linked in facebook.

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This is the printable version of *In Chambers* online, the official publication of Texas Center for the Judiciary. The magazine is published four times a year and funded in part by a grant from the Texas Court of Criminal Appeals. *In Chambers* strives to provide the most current information about national and local judicial educational issues and course opportunities available for Texas judges. We keep the Texas Center’s mission of “Judicial Excellence Through Education” as our guiding premise.

Readers are encouraged to write letters to the editor and submit questions, comments, or story ideas for *In Chambers*. To do so, please contact Kimber Cockrill, Publications Coordinator, at 512.482.8986 or toll free at 800.252.9232, or via email at kimberc@yourhonor.com.

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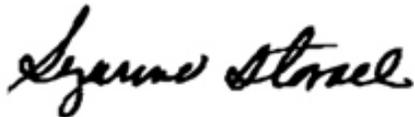
*L*etter from the Chair *The Honorable Suzanne Stovall*

Dear Judges,

I am coming to the end of my term with mixed emotions. It has been a great experience to work with the diverse personalities and viewpoints of those in leadership roles with a view to reaching consensus. I will also be greatly relieved to turn over the honor and responsibility of being chair of our judicial organizations to the most capable Chair-elect, David Garcia. I know the Texas Center will be well served!

In the 20-odd years since I took the bench there have been amazing changes in how we as judges perceive our role and the types of information we are presented with in the courtroom. When I started the big topic was, "Who should control the docket, judges or lawyers?" Since then we have come to automatic docket control orders, mediation, e-filing, e-mail, Facebook disclosures and YouTube videos. Through all of this the Texas Center for the Judiciary has continuously presented cutting edge education on the hot issues of the day. This excellence can be attributed to many: The Texas Center staff, curriculum committees of the Center, The Texas Center Boards and the many judges who have given of their time and expertise to Center programs. I salute you all!

I am looking forward to seeing you all in Grapevine at the Annual Judicial Education Conference.



Hon. Suzanne Stovall

HONORS & Achievements

Congratulations to the DWI Grant Project!

Because of its significant contributions in assisting in preventing drunken driving deaths and injuries in Texas, the Texas Center for the Judiciary received the 2009 Jacqueline Saburido Award at this year's Save a Life Summit in San Antonio. This award is presented each year by the Texas Department of Transportation to a non-law enforcement individual or organization that has made significant contributions to assist in preventing drunk driving deaths and injuries in Texas. The Texas Center qualified for this award because its outstanding TxDOT-funded grant programs such as DWI Court Team Training, Texas Judicial College for the Study of Alcohol and other Drugs (DWI College), Ignition Interlock Education programs and plenary breakout sessions at other TCJ judicial education programs, regularly provide Texas judges with latest trends and issues in impaired driving, SFST, DRE, and alcohol and other drugs countermeasures.



Jacqui Saburido presents the award to Research and Grant Program Manager Ann Blankenship, left, and Judicial Resource Liaison David Hodges.

The award honors Jacqueline Saburido who was severely disfigured in a drunken driving crash nearly ten years ago. Despite her disfigurement, Jacqui courageously lent her story and her face to a statewide anti-DWI campaign in Texas in hopes that her experience would deter people from drinking and driving. Jacqui put a face on the problem of drunk driving - a haunting face with no nose, no hair, and no ears. Jacqui's ordeal, details of her story, and her continuing efforts to stop impaired driving are available at www.helpjacqui.com.

Through the Jacqueline Saburido Award, Texas continues to honor Jacqui's courage and dedication and the Texas Center for the Judiciary is honored and proud to be the 2009 recipient of this award.

New Administrators of Justice

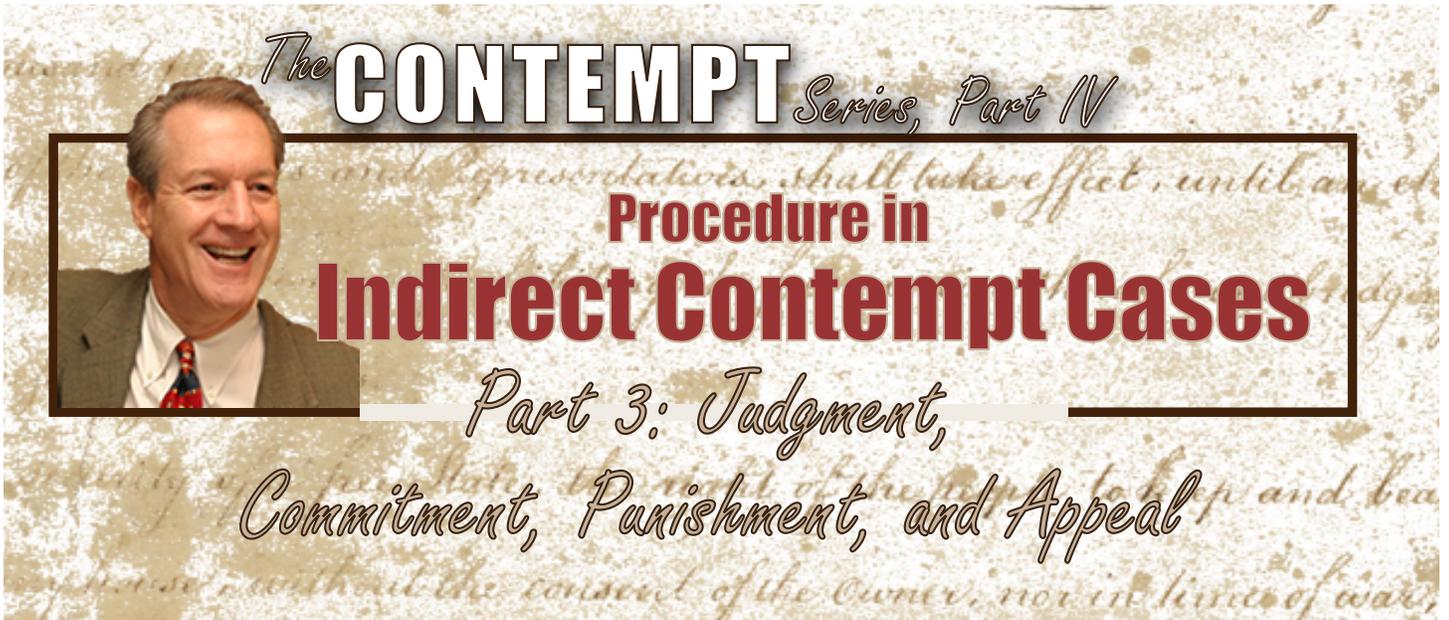
As of July 15, 2009

Robert M. Fillmore
Justice, 5th Court of Appeals
Plano

Michael C. Massengale
Justice, 1st Court of Appeals
Houston

James M. Stanton
Judge, 134th Judicial District Court
Dallas





By Judge Paul Davis

In Part III of this series on contempt of court, we explored various due process obligations in the contempt hearing, including the right to counsel and jury trial, the burden of proof, defenses, and attorneys fees. In this Part IV, we will take a look at the requirements for the written judgment and the commitment order. Additionally, we will explore probation (community supervision) and appeal.

It is 6:00. On Friday evening. You've been in Court all day long on a very contentious contempt matter. You have found the Respondent in contempt and assessed his punishment as 60 days in jail and to remain in jail until he has fully complied with the existing order by paying the full arrearage. He has been remanded to the sheriff, who has taken him into custody. You can surely go home now, and sign the necessary papers on Monday, right? WRONG! Don't even think about heading home until you have signed the contempt judgment and the commitment order. Otherwise, all your hard work will be for naught.

The Contempt Judgment And Commitment Order

The contempt judgment must find that the contemnor has contumaciously refused to obey a lawful order of the court and identify the particular order violated. The judgment may assess separate punishments for multiple violations and may assess separate punishment for each separate violation. A written order of commitment is made for the purpose of enforcing a contempt judgment by directing imprisonment of the contemnor. One order combining the contempt judgment and commitment order may be used if it contains the necessary findings and conforms to the other requirements of the law.[1]

The Contempt Judgment Must be Signed Quickly

The contempt order must be signed within a "short and reasonable time" after the contempt finding.[2] Thirty days is too long.[3]

Specific Findings Required

The order should clearly state in what respect the court's previous order has been violated. If the order involves civil contempt, it must spell out exactly what must be done to purge the contempt. [4] It must contain specific findings so that the contemnor will be fully appraised of the alleged act of misconduct and overcome by proof, if any is available, the presumption of the validity of the order.[5] The order, however, will not fail unless "its interpretation requires inferences or conclusions about which reasonable persons might differ".[6]

Section 157.166, Texas Family Code, sets out the specific findings required in the contempt order. If incarceration or a fine is imposed, the order must state the "date of each occasion" of noncompliance. An order merely stating the total amount of arrears is insufficient. [7]

Punishment Should Be Assessed as to Each Violation, Even if Running Concurrently

"If one punishment is assessed for multiple acts of contempt, and one of those acts is not punishable by contempt, the entire judgment is void." [8]

(Continued next page)

Contempt (continued)

Void Portion Can Be Severed From Valid Portion

If the order contains separate findings of contempt and separate punishments for each, the void portions can be severed and the valid portions retained.[9]

Review of Judgment

A contempt judgment is reviewable only via a petition for writ of habeas corpus (if contemnor is confined) or petition for writ of mandamus (if no confinement).[10]

The Commitment Order

A commitment is a warrant, order or process by which a court directs an officer to take a person to jail or to prison and to detain him or her there. A written order of commitment is an essential prerequisite to the imprisonment of a person for contempt, when the contemptuous act is committed outside the presence of the court.[11]

The contemnor may be detained by the sheriff or other peace officer for the short period of time it takes to prepare the judgment of contempt and order of commitment.[12] But be aware that a “short period of time” means very short.

It has been held that four days is too long to wait for a written order.[13] Moreover, the Texas Supreme Court has twice released a contemnor who was held in contempt on a Friday and the written order signed on Monday.[14] However, in another case, the Amarillo Court of Appeals held that a one-day delay for a written order while respondent was retained in custody under a verbal commitment order was both short and reasonable.[15]

What if you want to give the Respondent a chance to work himself out of the hole he has dug for himself, while at the same time lighting a fire under him to encourage him to comply? Can you suspend the punishment?

Suspension of Punishment

Family Law Cases

Pursuant to section 157.165 of the Family Code, the court may place the respondent on community supervision and suspend commitment if the court finds that the respondent is in contempt of court for failure or refusal to obey an order.

Conditions of Community Supervision

Pursuant to section 157.211 of the Family Code, the court may order the following conditions of community supervision:

1. report to community supervision officer;
2. permit community supervision officer to visit respondent’s home or elsewhere;
3. obtain counseling on financial planning, budget management, conflict resolution, parenting skills, alcohol or drug abuse, or other matters causing the respondent to fail to obey the order;
4. pay required child support and any arrearages;
5. pay court costs and attorney’s fees ordered by the court;
6. seek employment assistance services offered by the Texas Workforce Commission; and
7. participate in mediation or other services to alleviate conditions that prevent the respondent from obeying the court’s order.

Maximum Term

A community supervision period may not exceed 10 years.[16]

Motion to Revoke

A written verified motion alleging the specific conduct that constitutes a violation of the terms and conditions of community supervision must be filed.[17]

Arrest and Hearing

On the filing of the motion to revoke community supervision, the court may order a respondent’s arrest if the motion alleges a prima facie case of a violation.[18] If arrested, the court shall hold a hearing without a jury on or before the third working day after the date the respondent is arrested. If the court is unavailable for a hearing on that date, the hearing shall be held not later than the third working day after the date the court becomes available, but not later than the seventh working day after the date of arrest.[19]

No subsequent commitment may be ordered without a hearing to determine if a breach of the conditions of probation has occurred. [20]

There are a couple of last contempt issues that should be mentioned.

Where must the contempt proceeding be initiated?

Family Law

The proceeding must be commenced in the court with continuing, exclusive jurisdiction.[21] In a county that operates under a centralized, rotating docket system, any judge is authorized to act on behalf of the other courts in that county.[22]

General

Only the original court entering an order can enforce such order by contempt.[23] A transferee court or a newly created court may enforce by contempt when the transferor court or prior court has ceased to exist, e.g., a new family district court may enforce the orders of the replaced domestic relations court.[24]

What if the case is on appeal or has been removed to federal court?
Do you have any power to enforce your order?

Contempt Power During Appeal or After Removal

General Rule

In 2004 the Texas Supreme Court clarified the law on whether a trial court's contempt powers are affected by an appeal. When a final judgment has not been stayed or superseded and no statute or rule of procedure removes the trial court authority, then either the trial court or the appellate court may entertain a motion for contempt.[25]

Family Law Cases

Even before this 2004 Texas Supreme Court case, in family law case a trial court could entertain a motion for contempt while an appeal was pending.[26] The exception for family law cases has now become the general rule.

By statute, however, the pendency of an appeal of a property division in a divorce deprives the trial court of jurisdiction to enforce the terms of the property division.[27]

Temporary Orders Pending Appeal

Section 6.709 of the Texas Family Code gives the trial court the jurisdiction to enter and enforce certain temporary orders pending appeal unless the appellate court supersedes the orders.[28] Although there is no absolute duty on the part of the trial court to enforce such orders, the failure to hold a hearing in response to a motion for contempt is an abuse of discretion.[29]

Removal to Federal Court

There is one case which holds that the trial court does retain jurisdiction to enforce its orders even if the underlying cause has been removed to federal court.[30]

This is everything I know about contempt law where the conduct occurs outside the presence of the court. In the next issue of In Chambers, we will look at direct contempt.

Previous articles in this series:

Contempt, Part I - Contempt: Maintaining Order in the Court

Contempt, Part II - Procedure in Indirect Contempt Cases; Part I: Due Process, Notice and Hearings

Contempt, Part III - Procedure in Indirect Contempt Cases; Part II: Contempt of Court; Appearance, Counsel, Records, Proof and Compliance

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Endnotes

[1] See *Ex parte Bagwell*, 754 S.W.2d 490 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding); *Ex parte Sinclair*, 746 S.W.2d 956 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding); *Ex parte Linder*, 783 S.W.2d 754 (Tex. App.—Dallas 1990, orig. proceeding).

[2] *Ex parte Amaya*, 748 S.W.2d 224,225 (Tex. 1988).

[3] *Ex parte Whitehead*, 908 S.W.2d 68 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding).

[4] *Ex parte Proctor*, 398 S.W.2d 917 (Tex. 1966); *Ex parte Durham*, 921 S.W.2d 482 (Tex. App.—Corpus Christi 1996, orig. proceeding).

[5] *Ex parte Davis*, 344 S.W.2d 153 (Tex. 1961).

[6] *Ex parte Chambers*, 898 S.W.2d 257 (Tex. 1995).

[7] Tex. Fam. Code § 157.166; *Ex parte Boykins*, 764 S.W.2d 590 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding).

[8] *Ex parte Davila*, 718 S.W.2d 281 (Tex. 1986); see also *In Re Paul Wendy* 154 SW 3d 594 (Tex. 2005).

[9] *Ex parte Linder*, 783 S.W.2d 754 (Tex. App.—Dallas 1990, orig. proceeding); *Ex parte Arnold*, 926 S.W.2d 622 (Tex. App.—Beaumont 1996, orig. proceeding).

[10] *Adams v. Bell*, 94 S.W.3d 759 (Tex. App.—Eastland 2002, no pet.).

[11] *Ex parte Calvillo Amaya*, 748 S.W.2d 224 (Tex. 1988); *Ex parte Martinez*, 331 S.W.2d 209 (Tex. 1960).

[12] *Ex parte Spencer*, 508 S.W.2d 698 (Tex. Civ. App.—Texarkana 1974, orig. proceeding); *Ex parte Brooks*, 604 S.W.2d 463 (Tex. Civ. App.—Tyler 1980, orig. proceeding).

[13] *Ex parte Jacobs*, 636 S.W.2d 20 (Tex. App.—Austin 1982, orig. proceeding)

[14] *Ex parte Amaya*, 748 S.W.2d 224 (Tex. 1988); *Ex parte Jordan*, 865 S.W.2d 459 (Tex. 1993).

[15] *In re Brown*, 114 S.W.3d 7 (Tex. App.—Amarillo 2003, orig. proceeding)

[16] Tex. Fam. Code § 157.212.

[17] Tex. Fam. Code § 157.214.

[18] Tex. Fam. Code § 157.215.

[19] Tex. Fam. Code § 157.216

[20] *Ex parte Mackie*, 727 S.W.2d 129 (Tex. App.—San Antonio 1987, orig. proceeding).

[21] Tex. Fam. Code § 157.001(d).

[22] See *In re Garza*, 981 S.W.2d 438 (Tex. App.—San Antonio 1998, orig. proceeding).

[23] *Ex parte Gonzalez*, 238 S.W.2d 635 (Tex. 1922).

[24] See *Ex parte West*, 559 S.W.2d 674 (Tex. Civ. App.—Dallas 1979, orig. proceeding).

[25] *In re Sheshtawny*, 154 S.W.3d 114 (Tex. 2004) *abrogating Ex parte Boniface*, 650 S.W.2d 776 (Tex. 1983) and *Schultz v. Fifth Judicial District Court of Appeal*, 810 S.W.2d 738 (Tex. 1991).

[26] See e.g., *Ex parte Boniface*, 650 S.W.2d 776 (Tex. 1983) and *Schultz v. Fifth Judicial District Court of Appeal*, 810 S.W.2d 738 (Tex. 1991) versus *Bivins v. Bivins*, 709 S.W.2d 374 (Tex. App.—Amarillo 1986, no writ); *Sullivan v. Sullivan*, 719 S.W.2d 239 (Tex. App.—Dallas 1986, writ denied).

[27] Tex. Fam. Code § 9.007; *In re Fischer-Stoker*, 174 SW3d 268 (Tex. App. – Houston [1st Dist.] 2005, pet. denied).

[28] Tex. Fam. Code § 6.709(b).

[29] *Chiles v. Schuble*, 788 S.W.2d 205 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding).

[30] *Stewart Title Co. v. Street*, 731 S.W.2d 737 (Tex. App.—Fort Worth 1987, orig. proceeding).



Editor's Note: The Texas Center website recently ran a three-part series on Social Media. We are reprinting it here.

PART ONE - Social Networks **By Christie L. Smith**

You may have heard the phrase “social media”, especially in recent months as news reports focused on its effectiveness in the national elections. But you may still not know exactly what social media is. It’s a brave, new internet world out there, and apart from what might seem to be some pitfalls of social media (think MySpace stalking cases), there are some great advantages to not only knowing what it is, but how to use it. This is the first of a three-part web-only series on social media and the judiciary.

First up: social networking sites. In some ways the top three, MySpace, Facebook and LinkedIn are similar, but the audience and usages they attract differ widely. All of them give the user an ability to set up a profile and then invite other users to become part of their network, or “friends.” Perhaps the best known of social networking sites is MySpace, and while certainly there are adults populating its ranks, it’s more well-known among the school set.

Of more value, and certainly more respected among professionals, is Facebook. Facebook allows you to connect with old friends and make new ones. Says Elisabeth Earle, a judge at County Court at Law #7, “I use Facebook as a tool to connect with members of the bar and the community, as well as stay up to date on what people are doing.”

One of the most valuable features of social networking sites, Earle says, is the ability to keep up with people as they change jobs

without investing a lot of time. Each social networking site will send out notifications to a user’s network when information about that user changes. So when a user updates his profile information with a job change, or any other change for that matter, his whole network gets notified via email.

The most widely used site for professional networking is LinkedIn. LinkedIn allows you to post past work history and skills, gives you options on how you want to be contacted and for what reasons, and allows you to recommend people with whom you have had good work experiences with. It also allows people to recommend you.



Woodie Jones, recently elected as judge to the 3rd Court of Appeals, used both LinkedIn and Facebook in his election outreach efforts. He says, “I joined LinkedIn solely because of my recent campaign. Every judicial candidate is looking for ways to spread the word to non-lawyers about his or her candidacy, because so few non-lawyers are informed about judicial races. As the election neared, I contacted my LinkedIn connections and asked them to contact their LinkedIn connections about my race. Overall, I think it had limited value because LinkedIn will only let you send a message to ten of your connections at a time. I was willing to send 20 messages to my 200 connections, but I doubt that any of my connections were willing to send to more than the initial ten. It probably had some value, though, so I would recommend it for judicial candidates

who have a contested race.”

Besides being able to use social networking sites in contested elections, you can take advantage of them to do research on campaign workers or employees. LinkedIn will allow you to search a user’s employment history and see who else might be sharing any of their employers. You can then contact that other person for what might be a more accurate reference than you might otherwise get.

PART TWO - Websites and Blogs

By Christie L. Smith

The second article in this three-part series is about websites and blogging. Websites have become such a part of everyday life that people now ask, “What’s your web address?” instead of, “do you have a website?” As a judge your court probably has a website, but what about you? Do you have a website? Or a blog? Or maybe you’re wondering, “blog...website....what’s the difference?”

Actually there’s a pretty big difference between blogs and websites, although at first glance you may not notice. The difference mainly occurs in functionality, customization, and freshness of material.

You can think of a website as being somewhat similar to a brochure. Brochures tend to remain static, perhaps being freshened or redesigned every couple of years or whenever it’s time for a new printing. A standard website is much the same way. Typically a website may have a few things updated regularly (like a calendar of events for instance), but the site probably won’t change substantially from day to day.

A blog, on the other hand, is designed to change on a regular, often daily, basis. The term “blog” is a made-up word derived from the words “web log”, meaning an online diary. No knowledge of website coding is required. In the early years, blogs were used chiefly as personal diaries. Over time blogs have evolved into more accessible friendly versions of a website with a highly conversational tone, although still with a dated, diary format. Blogs are now sometimes used as marketing tools for companies who are looking to put a personal face to their products.

Blogs can be used for news updates. Both the Supreme Court of Texas and the Court of Criminal Appeals have blogs – albeit not written by anyone who sits on either of these courts. The attorneys who write these blogs post about the latest cases of each these courts. This differs from simple news reporting, however, because it is assumed that a blog will have some sort of ‘slant’ or personal opinion on everything that appears on it.

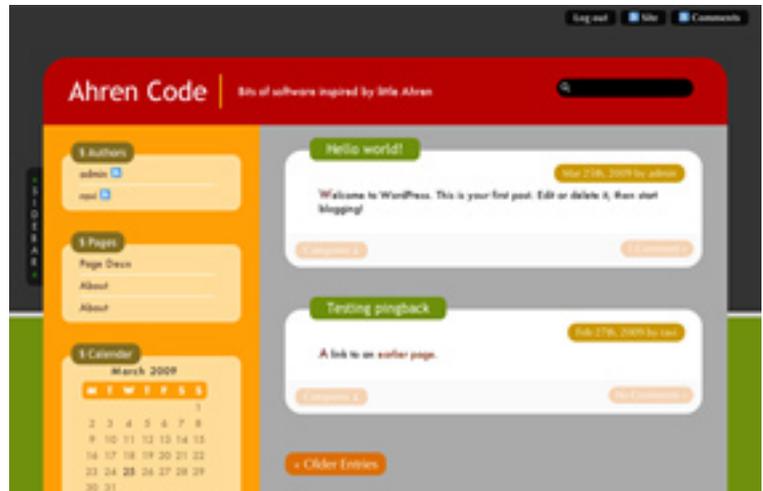
There are dozens of providers offering free blog sites. Posting is fairly intuitive on each site, and the learning curve on the majority of blog sites is short. You can spend a lot of time learning about blogs, but you don’t have to. You can post as often as you like and be done with it.

Some blogger providers allow you to customize your domain name (usually for a fee). Here’s a quick run-down of the most popular:

Blogger – Blogger has been around for a while and was purchased a few years ago by Google. If you know absolutely nothing about web design and have no interest in customizing your blog, this is the way to go. You can actually get a blog live in less than 10 minutes. You have the option of purchasing a custom domain name

or choosing a domain name from ones available through Blogger. These domains will have ‘blogspot’ in their URL name (example. blogspot.com). Blogger is free unless you choose to purchase a custom domain name.

Wordpress – There are actually two Wordpress entities. The .com version is a free service, very similar to Blogger. The .org version



WordPress Theme Screenshot

is a free, open source blogging software download. If you use the .org version, you’ll have to have a little more knowledge about how websites work and how to upload files, because the software must be installed on your own hosted web account in order to work. Once it’s installed, posting is easy. This option is great to use if you have an existing website, and want to add a blog page.

Typepad – Typepad does not offer any free services. Various plans are available, starting at \$4.95 per month. Typepad has a reputation for very good customer support, which can be helpful to a neophyte blogger.

LiveJournal – LiveJournal is sort of a throw-back to the heyday of blogs, when they were only used as personal journals. One advantage that users enjoy is its integration of social networking. Users can form communities based on areas of interest. LiveJournal is free with advanced features available for a fee.

Besides typical postings on a blog, you can add “widgets” or “plugins”. These are simple programs that add more functionality to your blog, such as being able to notify a mailing list when you’ve posted a new entry or tracking where visitors to your blog come from.

PART THREE - Atwitter about Twitter By Christie L. Smith

By now you've probably heard about this thing called "Twitter," and maybe you're wondering what it is. In the third of this three-part series on social media, we'll try to take a little bit of the mystery out of "twittering" for you.

The short explanation is that Twitter is considered a micro-blog that asks users the question, "What are you doing?" Answers are limited to 140 characters or less. Some people take the question literally, and detail minutia about their everyday lives that no one but their mothers may find interesting. Others use the limitation of space to construct pithy replies or observations. These messages are called "tweets." The more interesting people find your "tweets," the more they become interested in "following" you. To "follow" someone is similar to "friending" them on Facebook. They become part of your network, and their tweets show up on your home page.

There's even a Mr. Tweet – an application within Twitter that takes note of who you're following and recommends other people that you may enjoy following. People can also follow you. The more followers, the larger your network, and consequently the more popular your tweets are assumed to be. Actor Ashton Kutcher recently made headlines when he challenged CNN in a race to see who could top one million followers first. He won. Five weeks later his followers doubled to two million.

Currently there are more than 14 million users of Twitter – and it's not all teenagers. According to UK Global Mail, the average



Twitterer is 31. Twitter was introduced at South by Southwest (SXSW) in Austin in March 2007. In that short time, the appeal has grown so widely and the uses have broadened so much that this past legislative session members of the Texas Legislature were tweeting from the floor. All the major TV networks send out regular tweets as do many companies who use tweets as a way to announce special deals or updates on products.

How it works

First sign up for an account (www.twitter.com). You choose a username, answer a few simple questions, and then you can start commenting. To reply directly to someone requires the use of the @ sign. Because of the limitation on space, users who wish to direct attention to a news article or a page on the web typically shorten the URL by using tinyurl.com or snipurl.com. If you have an iPhone, you can use Tweetie, which is the adaptive Twitter app for that phone. Mac users can purchase a third-party app called Twitterrific that allows them to view Twitter feeds and post tweets from their desktop rather than signing in to the website. Twhirl is a desktop app available for both PC and Mac computers which notifies you of new messages, connects to multiple Twitter accounts, allows you to search for direct replies to you, allows you to shorten long URLs, lets you update photos via Tweetpic, and more.

Tweetdeck is a Twitter client that organizes your Twitter and Facebook networks. You can tweet directly from Tweetdeck or use it to shorten URLs and upload Tweetpics.

Passing fad?

It's possible that Twitter is a passing fad, but so far the growth continues to be the fastest among all social networks. Zappos' employees are using it to communicate with each other, celebrities (and politicians) are using it to communicate with their fans, and in May the first "TwitterCon" (TWTRCON SF 09) took place in San Francisco to discuss how to create a Twitter business strategy. So for the time being at least, Twitter is here to stay.



DOES THE TEXAS CENTER FOR THE JUDICIARY HAVE YOUR CURRENT EMAIL ADDRESS?

The Texas Center frequently sends out important information via email. To ensure you receive this information in a timely manner, please keep your email address current with us. To submit or update your email information, please contact Michele Mund, Registrar, at (512) 482-8986, or michelem@yourhonor.com.



By John G. Browning

I was called for jury duty recently, and as I waited patiently with my fellow panelists for the selection process to begin, I couldn't help but marvel at the number of people pounding away at Blackberrys, iPhones and other web-enabled wireless devices. While most of them were probably sending innocent, mundane messages about running late or having a spouse pick up the kids, it occurred to me that if any of these panelists were actually picked (fortunately, the criminal docket featured all plea bargains, so the entire pool was dismissed), precious little could be done to prevent any of them from accessing the wealth of information at their fingertips.

As it turns out, jurors engaging in such digital digging is a growing problem, and the explosive growth in popularity of social networking sites like MySpace (over 150 million users); Facebook (which just passed the 200 million mark worldwide), and Twitter (the third most-used social network) makes it more likely than ever that jurors will leave the privacy of the jury room for cyberspace.

Consider the following recent examples:

- In November 2008, a juror on a child abduction/sexual assault trial in Lancastershire, England, was torn about how to vote. So she posted details of the case online for her Facebook "friends" and announced that she would be holding a poll. After the court was tipped off, the woman was dismissed from the jury.
- In March, 2009, an eight-week-long federal drug trial involving Internet pharmacies was disrupted by the revelation that a juror had been doing research online about the case, including looking into evidence that the court had specifically excluded. When U.S. District Judge William Zloch questioned other members of the jury, he was astonished to learn that eight other jurors had been doing the same thing, including running Google searches on the lawyers and the defendants, reading online media coverage of the case and consulting Wikipedia for definitions. After the judge declared a mistrial, defense attorney Peter Raben expressed his shock at the jurors' online activities. "We were stunned," he said. "It's the first time modern technology struck us in that fashion, and it hit us right over the head". [1]
- In June 2007, a California appellate court reversed the burglary conviction of Donald McNeely when it was revealed that the

foreman of the jury had committed misconduct and deprived the defendant of a fair trial by discussing deliberations on his blog. The foreman, a lawyer who had identified himself as a project manager for his company because it was "[m]ore neutral than lawyer," blogged about McNeely, his fellow jurors and their discussions, particularly one juror who was "threatening to torpedo two of the counts in his quest for tyrannical jurisprudence."

- In November 2007, the Supreme Court of Appeals of West Virginia reversed the conviction of Danny Cecil for felony sexual abuse of two teenage girls. Two members of the jury had looked up the MySpace profile of one of the alleged victims, and shared its contents with other jurors. Even though it found that the online sleuthing had not necessarily revealed anything relevant, the court held that "the mere fact that members of a jury in a serious felony case conducted any extrajudicial investigation on their own is gross juror misconduct which simply cannot be permitted." As the court further noted, "Any challenge to the lack of the impartiality of a jury assaults the very heart of due process."
- In the May 2009 case of *Zarzine Wardlaw v. State of Maryland*, Maryland's Special Court of Appeals looked at the circumstances behind the conviction of a man charged with rape, child sexual abuse and incest involving his 17-year-old daughter. During the trial, a therapeutic behavioral specialist had testified about working with the victim on behavioral issues such as anger management and had opined that the girl suffered from several psychological disorders, including ODD (oppositional defiant disorder). A juror took it upon herself to research ODD online, discovered that lying was a trait associated with the illness, and apparently shared this knowledge with the other jurors. Another member of the jury sent a note informing the judge about this development. After reading the note to counsel for both sides, the judge denied a defense motion for a mistrial and simply reminded the entire jury of his instructions not to research or investigate the case on their own "whether it's on the Internet or in any other way." The appellate court found that this was not enough, and that since the victim's credibility was a crucial issue, the juror's Internet research and reporting her findings to the rest of the jury "constituted egregious misconduct" that could well have been "an undue influence on the rest of the jurors." [2] As a result, the trial judge was reversed and a mistrial was granted.

Dangers

(continued)

Meanwhile, the South Dakota Supreme Court is wrestling with the issue of whether or not a new trial is warranted in a case where a potential juror “Googled” the defendants in a product liability trial – before the trial ever began.

In *Shawn Russo, et al. v. Takata Corporation* (a Japanese seat belt manufacturer), and *TK Holdings* (its American subsidiary), the plaintiffs claimed that Takata’s seat belts were defective and had unlatched during a rollover accident. When one of the would-be jurors received his jury duty summons, he did a Google search for Takata and TK Holdings, examining the web pages for the two companies that were previously unknown to him. During jury selection, the panel member was never directly asked if he’d heard of either company, and he didn’t volunteer information about his online searching. He wound up serving on the jury. Several hours into deliberations, he responded to another juror’s question about whether Takata had notice of prior malfunctioning seat belts claims by disclosing his earlier Google searches, and stating that his cybersleuthing hadn’t turned up any other lawsuits. At least five other jurors either heard his comments directly, or were made aware of them during the rest of the deliberations.

After the jury returned a verdict in favor of Takata and TK Holdings, plaintiffs’ counsel sought a new trial, arguing that the juror’s information should not have been brought into deliberations. The trial judge agreed, and granted the motion. The defendants appealed to South Dakota’s highest court, arguing in part that the fact the information was obtained before trial even began, and that this could have been discovered during voir dire, prevents it from being prejudicial. At press time, the South Dakota Supreme Court had yet to rule. [3]

Controlling the flow of information into the jury room isn’t the only problem. Equally troubling is the flow of information leaving the jury box. In March 2009, during the federal corruption trial of former Pennsylvania state senator Vincent Fumo, a juror posted updates on the case on Twitter and Facebook, even hinting to readers of a “big announcement” before the verdict was issued. The judge denied the defendant’s motion for a mistrial, but after a guilty verdict was returned, Fumo’s lawyers announced plans to use the Internet postings as a basis for appeal.

Building materials company Stoam Holdings and its owner, Russell Wright, recently sought a motion for a new trial after an Arkansas jury entered a \$12.6 million verdict against them February 26, 2009. Wright was accused by two investors, Mark Deihl and William Nystrom, of defrauding them; Deihl’s lawyer, Greg Brown, described the building materials venture as “nothing more than a Ponzi scheme.”

Shortly after the verdict, Wright’s attorneys found out that a juror, Jonathan Powell, a 29-year-old manager at a Wal-Mart photo lab, had posted eight messages, or “tweets,” about the case on the social networking site Twitter. (Twitter, created in 2006, is a social

networking/microblogging service that enables users to not only send updates – text-based posts of up to 140 characters in length – but also follow updates from other users). Although several of the Twitter messages were sent during voir dire (jury selection), the ones that attracted the most attention were those actually sent shortly before the verdict was announced.

In one such “tweet,” Powell wrote “Ooh and don’t buy Stoam. Its bad mojo and they’ll probably cease to exist, now that their wallet is 12m lighter.” In another, Powell said “I just gave away TWELVE MILLION DOLLARS of somebody else’s money.” [4] One of the lawyers for Stoam and Wright maintained that the messages demonstrated not only that this juror was not impartial and had conducted outside research about the issues in the case, but also that Powell “was predisposed toward giving a verdict that would impress his audience.” After the trial, Powell continued his “tweets” and kept his sense of humor. On the day he was supposed to testify about his online activities, Powell posted the message “Well, I’m off to see a judge. Hope they don’t lock me under the jail, and forget about me for four days.”

As it turns out, Powell had nothing to worry about. Noting that Arkansas law requires defendants to prove that outside information found its way into the jury room and influenced the verdict, not that information from the jury panel made its way out, the court held in April that the juror’s actions didn’t violate any rules, and that the Twitter messages did not demonstrate any evident of Powell being partial to either side. After the judge denied the defense’s effort to set aside the verdict, Powell made perhaps his most prescient observation of the trial, warning that, “The courts are just going to have to catch up with the technology.”

In an era in which nearly 60% of American Internet users have a profile on a social networking site, and where researching a patent claim or a medical disorder can be accomplished with a few keystrokes, what can judges do to adapt to the evolving legal landscape and combat the dangers of the online juror? One possible approach, advocated by a growing number of Texas judges, is to go beyond the current boilerplate instructions and specifically include references to the Internet and social media as part of the standard admonitions to jurors not to read about or do any outside research on the case they happen to be hearing. Faced with a situation in which technology has far outpaced the court rules, a number of states have actually changed their rules to address the problem of the online juror. Following a recent ruling by the Michigan Supreme Court, effective September 1, 2009, Michigan judges will be required for the first time to instruct jurors not to use any handheld device, such as iPhones or Blackberrys, while in the jury box or during deliberations. All electronic communications by jurors during trial – “tweets” on Twitter, text messages, Googling, etc. – will be banned. [5]

As we survey the mistrials and overturned verdicts dotting the legal landscape due to jurors’ online activities, it becomes painfully evident that the easy access and global reach of wireless technology is in danger of transforming the jury box into Pandora’s box. John Adams once wrote that it is “not only [the juror’s] right, but his duty, in that case, to find the verdict according to his best

Dangers

(continued)

understanding, judgment, and conscience.” If the conscience of the jury is to remain the yardstick of justice in our information-driven 21st century, in which people blog, “tweet,” text, and otherwise share their experiences with extended social networks, then courts must do a better job of instructing jurors about the “off limits” nature of such electronic communications. In an age in which digital intimacy is rapidly becoming the social norm and where the sanctity of the jury room can be violated at the speed of a search engine, jurors need to know not only that courts remain the last bastion of controlling access to information – they also need to know why. For our system of justice to function, an individual’s constitutional rights to due process, to a jury trial, and to confront the witnesses and evidence against him must be zealously protected. Allowing jurors to consider Internet “evidence” that hasn’t been subjected to scrutiny by both sides to a case, or to be influenced by the postings of Facebook “friends” or Twitter “followers,” undermines this protection.

Social networking, the Internet, and the iPhone or Blackberry may have altered our daily lives with their innovations, but they shouldn’t alter our principles.

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[1] Paul Sussman, “Curious Jurors Google a Mistrial,” *The Connecticut Law Tribune*, March 25, 2009 .

[2] *Wardlaw v. Maryland*, __ Md. App. __ at pp. 10-11 (May 8, 2009)

[3] <http://www.sdjudicial.com> (last visited July 31, 2009); Case No. 24726

[4] Jon Gambrell, “Appeal Says Juror Sent ‘Tweets’ During 12.6M Case,” *Associated Press* (March 13, 2009)

[5] Tresa Baldas, “For Jurors in Michigan, No Tweeting (or texting, or Googling) Allowed,” *The National Law Journal*, July 1, 2009.

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**Our hearts go out to the families of those honorable souls who
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