

Jurors Need to Be Warned About Using Social Media, Report Says

[Joel Stashenko](#), *New York Law Journal*

Jurors should be warned more often and more explicitly about their use of social media during trials, [according to a report](#) by a committee of the New York State Bar Association.

The study, which will be among the topics of Wednesday's Presidential Summit at the state bar's annual meeting in Manhattan, urges that changes be made to the Pattern Jury Instructions to reflect the pitfalls to the fair trial process posed by social media.

The Commercial and Federal Litigation Section report will be presented by Mark Berman, co-chair of the section's Social Media Committee, during a discussion of social media, trials and the legal profession at the state bar's meeting at the New York Hilton Midtown.

"The section believes that the increasing pervasive usage of social media by jurors requires affirmative and proactive intervention by reminding jurors not to engage

in improper electronic communications," the report said. "Without such proactive intervention, social media usage will threaten the integrity of the jury system."

Among issues that most jurors do not comprehend is that their posts on Facebook, Twitter, blogs and other outlets make their lives during trial an open book and the posts are likely to be reviewed by counsel.

The committee noted that the American Bar Association's Standing Committee on Ethics and Responsibility has told judges that they should advise jurors during the orientation process that their public postings are likely to be reviewed by the trial attorneys. The state bar committee said research is not complete on whether potential jurors are dissuaded from serving by such scrutiny.

"However, the section believes that these issues should at least be addressed with counsel at the beginning of the trial and prior to the jury being charged," the report concluded.

The section proposed revisions to New York's Pattern Jury Instructions that would "better inform jurors about the dangers of discussing the trial on social media and to remove social media influences from deliberations."

They include warnings to jurors that the social media communications they view as "private" can be viewed publicly. The revisions would also warn prospective jurors that trial lawyers "may conduct research on or monitor you" from public sites and that "there is nothing at all improper" about attorneys doing so, the committee said.

The report also recommends that courts require the display of a poster warning jurors of the consequences, such as being sanctioned by the court, of improper social media communications, the panel said.

Berman, a partner with Ganfer & Shore, said in an interview Tuesday that the report is aimed at two audiences: judges and trial attorneys.

The judge has a good book of jury instructions that can be tinkered with, and the report gives attorneys concepts they may want to raise when they go into the charging conferences, he said.

Ignatius Grande, senior discovery attorney at Hughes Hubbard & Reed, is co-chairman of the Commercial and Federal Litigation Section's social media committee.

The committee said it used as a basis of its report a survey of its members in 2014 and 2015 about their experiences with social media use at trial. It said it also found influential a 2014 report by the Federal Judicial Center titled "[Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations.](#)"

Berman's committee was also responsible for the guidelines, outlined in 2014 and expanded in 2015, on the ethical use of social media by attorneys in New York ([NY LJ, June 19, 2015](#)). Among that report's recommendations was for the state's Rules of Professional Conduct to adopt a lawyer's knowledge about social media as a core skill for practitioners.

Berman said that both issues—the ethical guidelines and instructing jurors about social media—are fluid because of the continuing development of communications technology and how it is used. He said both reports should be updated every few years.

Joining Berman on the panel Wednesday will be Rochester attorney Nicole Black and Big Law Business writer Casey Sullivan. The panel will be moderated by Ari Kaplan, legal industry analyst and consultant.

The 139th annual meeting runs through Friday ([NYLJ, Jan. 25](#)).