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## E-Jurors: A View from the Bench

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# E-JURORS: A VIEW FROM THE BENCH

HON. ANTOINETTE PLOGSTEDT\*

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## I. INTRODUCTION

Previous literature has criticized juror misconduct and offered solutions. However, this Article offers a unique view from a trial court judge during a period of electronic innovation in mobile communication and research technology. I tried my first case as a young law student prosecutor intern in 1990 with a notepad and pen and a court file consisting of carbon copied handwritten police reports and court orders. When I began my judicial career in 2001, I recall presiding over trials and cautioning the jurors to turn off their pagers and to refrain from reading about the cases in the newspaper. In 2011, as a more seasoned trial court judge, I began advising jurors to refrain from texting, blogging, posting Facebook updates or Tweeting about the case. I further began advising the jurors to refrain from Googling information about the case.

Juror misconduct involves several areas of concern. First, jurors must render verdicts based solely upon the evidence and testimony presented inside the courtroom and in the presence of the judge, the parties, their attorneys, and all of the

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jurors. While jurors may consider their own past life experiences in decision-making, they are precluded from conducting any research of their own.

Second, jurors must refrain from communicating with anyone outside of the courtroom about the case. Judges typically instruct jurors to refrain from speaking to others about the case other than to discuss their schedules with families and co-workers. Jurors must not share their thoughts, impressions, or any information about the case. Further, jurors must not receive any written or oral communications about the case.

Third, in almost all U.S. jurisdictions, jurors may not participate in pre-deliberation discussions with each other. A few states, such as Arizona, Colorado, and Massachusetts, do permit jurors to discuss the case with each other prior to the deliberation stage of the trial.<sup>1</sup> Generally, the defending party seeks to prevent juries from formulating any opinions on the evidence or issues until such time as all the evidence, including evidence in the Defendant's case-in-chief, is presented and considered.

As technology and communication evolve, so too, must judges' approaches to maintaining the integrity of the jury system. Jurors have easy access to research and communication tools while sitting inside the jury box. Their hand-held mobile devices provide easy internet access at the tips of their fingers.

Even after being instructed by the judge, jurors cannot resist the electronic temptations surrounding them. This Article provides a comparative analysis of foreign jury systems and reviews the history of juries. The Article then explores emerging technology and its effect upon electronic juror misconduct. It further identifies juror misconduct resulting from innovative technology.

The Article assesses solutions initiated in various U.S. state and federal jurisdictions. The Article reviews the role of more active juries, which incorporate note taking and jury notebooks. The Article analyzes the process of juror questioning and pre-deliberation juror discussions. The Article evaluates initiatives developed in various jurisdictions to deter juror misconduct by confiscating cell phones and improving jury instructions. Finally, this Article offers innovative solutions, from a judge's viewpoint, to address ongoing juror misconduct concerns through the following efforts: (1) educating judges on the changing use of social media; (2) providing early, frequent, and specific jury instructions identifying social media sites, reasons for banning social media activity and internet research, and associated consequences; (3) confiscating cell phones during deliberations; and (4) encouraging and embracing an innovative and more progressively active role of juries.

## II. FOREIGN JURY SYSTEMS

Jury systems exist, to some extent, and in variations, in many parts of the world. However, in civil cases, jury systems remain in existence primarily in the United

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<sup>1</sup> Ariz. Jury Instructions (Civil), Preliminary 9 (Admonition) (2013); ARIZ. R. CIV. P. 39(f); Colo. Jury Instructions (Civil), § 1.10 (Admonition at Recess) (4th ed. 2013); Mass. Super. Ct. Jury Instructions (Civil), ch. 1 (General Instructions) (2011) (Pre-deliberation instructions are furnished in the discretion of the judge, with the consent of counsel, and jurors are instructed to refrain from discussing the ultimate issues or final outcome. Jurors are instructed that they may discuss the evidence "only with the view toward better comprehending it, not with a view toward ultimately judging it.").

States and, in limited use, in some parts of Canada and in the United Kingdom.<sup>2</sup> Some scholars have recommended that Japan expand its reintroduced criminal jury system to civil cases.<sup>3</sup>

Criminal jury systems exist in the United States, Canada, the United Kingdom (England, Wales, Northern Ireland) and in more than 50 other countries.<sup>4</sup> In many continental European countries, criminal jury systems include mixed juries composed of professional judges and lay citizens sitting side-by-side deliberating together.<sup>5</sup> Historically, Russian citizens criticized such a system and referred to the lay jurors as “noddors” who simply nodded in agreement and deferred to the wisdom and views of the professional judges.<sup>6</sup> In Germany, citizens criticized the lay jurors as mere “puppets.”<sup>7</sup> Mixed jury systems exist in Germany where jurors preside over multiple cases during their four-year terms of service.<sup>8</sup> Mixed criminal jury systems also exist in France and in Italy, where the trial and appellate procedures in the Amanda Knox murder trial of an American college student have confused Americans. Amanda Knox’ Italian jury conviction resulted in an acquittal in the appellate court, where a second jury was empanelled.<sup>9</sup> The higher court then reversed the acquittal rendered by the appellate court and jury.<sup>10</sup> The Italian court system does not include the U.S. protection against Double Jeopardy.<sup>11</sup> Jury systems also exist in Africa, Asia (Hong Kong, Japan, South Korea), the Mediterranean, the South Pacific, South America, and the Caribbean.<sup>12</sup>

In some countries, jury systems have been abolished completely. India abolished its jury system and<sup>13</sup> in 1969, Singapore abolished its jury system.<sup>14</sup> In the many

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<sup>2</sup> NEIL VIDMAR, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 3 (Neil Vidmar ed., 2000) [hereinafter VIDMAR, *Perspective*].

<sup>3</sup> Antoinette Plogstedt, *Citizen Judges in Japan: A Report Card for the Initial Three Years*, 23 *IND. INT’L & COMP. L. REV.* (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2278908](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278908); see Matthew J. Wilson, *Prime Time for Japan to Take Another Step Forward in Lay Participation: Exploring Expansion to Civil Trials*, 46 *Akron L. Rev.* (forthcoming 2013), available at <http://ssrn.com/abstracts=2063269>.

<sup>4</sup> VIDMAR, *Perspective*, *supra* note 2, at 3.

<sup>5</sup> LESTER W. KISS, *Reviving the Criminal Jury in Japan*, in *WORLD JURY SYSTEMS* 353, 365 (Neil Vidmar ed., 2000).

<sup>6</sup> Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 *CORNELL INT’L L.J.* 355, 357 (2007).

<sup>7</sup> Plogstedt, *supra* note 3.

<sup>8</sup> KISS, *supra* note 5, at 365.

<sup>9</sup> Elisabetta Povoledo, *Italy’s Highest Court Overturns Acquittal of Amanda Knox*, *N.Y. TIMES* (Mar. 26, 2013), [http://www.nytimes.com/2013/03/27/world/europe/amanda-knox-retrial-ruling.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/27/world/europe/amanda-knox-retrial-ruling.html?pagewanted=all&_r=0).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> VIDMAR, *Perspective*, *supra* note 2, at 3.

<sup>13</sup> NEIL VIDMAR, *The Jury Elsewhere in the World*, in *WORLD JURY SYSTEMS* 421, 426 (Neil Vidmar ed., 2000).

countries that maintain a criminal jury system, juries are used primarily for the most serious criminal offenses.

In comparison, U.S. jurisdictions embrace jury trials in even the less serious civil and criminal cases. The Seventh Amendment to the U.S. Constitution guarantees the right to a jury trial in actions at common law where the amount in controversy exceeds \$20.<sup>15</sup> In U.S. jurisdictions, the Sixth Amendment to the U.S. Constitution guarantees the right to a jury trial in criminal cases.<sup>16</sup> In Florida, for example, jury trials are a daily routine in less serious misdemeanor cases.<sup>17</sup> In 2012, in the Ninth Judicial Circuit in Orange County, Florida, juries heard 256 criminal misdemeanor cases and 476 felony cases.<sup>18</sup>

Criminal jury systems have been reintroduced recently in Spain, Russia,<sup>19</sup> the Republic of Georgia,<sup>20</sup> Japan<sup>21</sup> and South Korea.<sup>22</sup> In 2009, Japan re-introduced a mixed jury consisting of three professional judges and six lay citizens who combine to deliberate jointly.<sup>23</sup> The mixed juries hear only serious criminal cases.<sup>24</sup> The Japanese juries vote by majority, impose sentences, and ask questions of the witnesses.<sup>25</sup> As in Italy and other continental European criminal jury systems, the juries' acquittals are subject to unlimited prosecutor appeals.<sup>26</sup>

Spain and Russia have re-introduced an all lay citizen jury to hear serious criminal cases, but some scholars have criticized the Spain and Russia jury systems for requiring specific, reasoned verdicts.<sup>27</sup> In comparison, U.S. jurisdictions require

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<sup>14</sup> *Id.*

<sup>15</sup> U.S. CONST. amend. VII.

<sup>16</sup> U.S. CONST. amend. VI.

<sup>17</sup> Ninth Judicial Circuit, Orange County, Florida (2012) (on file with author). Misdemeanor crimes are less serious crimes punishable by less than one year in the county jail.

<sup>18</sup> Criminal Jury Statistics, Ninth Judicial Circuit, Orange County, Florida (2012) (on file with author).

<sup>19</sup> STEPHEN C. THAMAN, *Europe's New Jury Systems: The Cases of Spain and Russia*, in WORLD JURY SYSTEMS 319, 319 (Neil Vidmar ed., 2000) [hereinafter THAMAN, *Europe's New Jury*].

<sup>20</sup> Peter Roudik, *Georgia: Courts with Jurors Established Nationwide*, LAW LIBR. OF CONG. (Nov. 9, 2011), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205402877\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402877_text).

<sup>21</sup> Plogstedt, *supra* note 3.

<sup>22</sup> Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?*, 12 ASIAN-PAC. L & POL'Y J. 58, 58 (2010).

<sup>23</sup> Plogstedt, *supra* note 3, at \*4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> THAMAN, *Europe's New Jury*, *supra* note 19, at 338.

general verdicts in criminal cases.<sup>28</sup> When U.S. juries elect to convict or acquit, their verdicts do not contain any reasoning or findings of fact. In civil cases, U.S. juries are sometimes asked to answer a few interrogatory type verdicts containing questions.<sup>29</sup>

In addition to Spain and Russia, South Korea and the Republic of Georgia have introduced all lay citizen criminal juries. In 2008, South Korea implemented its first civil participation jury system wherein the jury renders advisory opinions during the initial five year experimental phase.<sup>30</sup> South Korean courts have incorporated lay citizen juries similar to juries utilized in the modern American jury system. However, during the initial five year period, South Korean judges are not bound to follow the jury's decision regarding guilt or sentencing. Rather, the jury verdicts are intended to provide advice to the Korean judges, but afford discretion to the judges. The South Korea jury system is slated for review in 2013.<sup>31</sup>

### III. HISTORY OF JURIES

According to Alexis de Tocqueville, the French aristocrat, who studied American courts and government, “[t]he institution of the jury . . . raises the people itself . . . to the bench of judges.”<sup>32</sup> He described the jury as a political institution that invests the people with the “direction of society.”<sup>33</sup> De Tocqueville stressed the importance of juries in civil, as well as criminal cases. He regarded the jury system as a “gratuitous public school” which provided Americans with increased intelligence and “political good sense.”<sup>34</sup>

Juries serve important societal functions. First, juries inject community values into legal proceedings.<sup>35</sup> Second, juries are republican in nature by serving as a safeguard against government power.<sup>36</sup> Because juries protect citizens against the potential bias and power of appointed judges.<sup>37</sup> Third, juries educate citizens about their rights and responsibilities and encourage citizen participation in a deliberative democracy.<sup>38</sup> Last, juries lend respect and legitimacy to the rule of law.<sup>39</sup>

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<sup>28</sup> This Author served as both a prosecutor and a trial court judge from 2001-2013 and presided over criminal jury trial trials.

<sup>29</sup> This Author served as a trial court judge from 2001-2013 and presided over jury trials in civil cases.

<sup>30</sup> Lee, *supra* note 22, at 58.

<sup>31</sup> *Id.* at 58 n.3.

<sup>32</sup> ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 282 (Henry Reeves trans., Everyman's Library 1945) (1835).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> VIDMAR, *Perspective*, *supra* note 2, at 1.

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

The English jury system can be credited as the source of inspiration for many modern jury systems. As England expanded its empire, its jury system was transported to many English colonies.<sup>40</sup> As these English colonies became independent nations, they incorporated traditional and contemporary forms of the English jury systems.<sup>41</sup> Countries in the United States, Asia, and Africa developed jury systems influenced by the English jury.<sup>42</sup> Canada, Australia, and New Zealand continue to maintain jury systems similar to the English model.<sup>43</sup>

The mixed jury system has taken root in many continental European countries and in Japan. However, since 2000, several countries seeking court reform have followed a trend in implementing all lay citizen juries.<sup>44</sup> With all lay criminal jury systems functioning well in South Korea, Spain, Russia and the Republic of Georgia, it is reasonable to expect all lay citizen jury systems to regain popularity worldwide.

In the United States, the jury system originated from its common law English roots and has maintained much of its English style. In almost all American jurisdictions, juries in criminal and civil cases render verdicts by unanimous decision.<sup>45</sup> In two states, Louisiana and Oregon, jury verdicts reflect a super-majority opinion.<sup>46</sup>

American juries vary in size and in the applicability to various criminal offenses and proceedings. American jury sizes vary from six to twelve members.<sup>47</sup> In almost all U.S. jurisdictions, judges remain solely responsible for sentencing in non-capital criminal cases.<sup>48</sup>

The American founders valued the jury system. The colonists viewed the jury as their protection against British tyranny and biased, uneducated, and untrained judges.<sup>49</sup> The jurors held the power to refuse to convict accused colonists when they disagreed with the prosecution.<sup>50</sup> Juries served as powerful tools against the government and appointed judges. Early jurors held the power of nullification to refuse to convict when they disagreed with the laws.<sup>51</sup> Scholars believe that this

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 26.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Lee, *supra* note 22, at 58 (Korea has implemented a U.S. style jury system.); THAMAN, *Europe's New Jury*, *supra* note 19, at 338 (Spain and Russia have re-introduced all lay citizen juries.).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> KISS, *supra* note 5, at 364.

<sup>48</sup> VIDMAR, *Perspective*, *supra* note 2, at 31 (In the states of Missouri, Arkansas, Kentucky, Virginia, and Texas the jury may render a sentencing decision in non-capital offenses.).

<sup>49</sup> *Id.* at 7.

<sup>50</sup> JEAN KING, *The American Criminal Jury*, in *WORLD JURY SYSTEMS* 93, 104 (Neil Vidmar ed., 2000).

<sup>51</sup> *Id.*

same theory of jury nullification led southern American white juries to refuse to convict whites accused of committing crimes against black victims.<sup>52</sup>

To prevent jury nullification, in almost all states, the judge instructs jurors that they must follow the law, even if they do not like the law.<sup>53</sup> But in two states, Indiana and Maryland, jurors consider both questions of law and questions of fact.<sup>54</sup> Judge Simon Sobeloff has described the dangers of jury nullification as follows:

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.<sup>55</sup>

#### IV. EMERGING TECHNOLOGY

Internet research is available using search engines, such as Google, Safari and Bing. Google Earth is a product that provides maps of the Earth and claims to be a “virtual globe” and provides the opportunity to “view satellite imagery, maps, terrain, 3D buildings, and much more.”<sup>56</sup> Wikipedia is a website that boasts that it is a “free encyclopedia that anyone can edit.”<sup>57</sup>

Twitter is an information network made up of 140-character messages called *Tweets*.<sup>58</sup> Twitter is an easy method of discovering the “[l]atest news related to subjects you care about.”<sup>59</sup> Twitter is a free social networking microblogging service allowing individuals to share what they are doing in real life, in real time.

On April 30, 2013, this Author searched Twitter with the hashtag<sup>60</sup> *#juryduty* and discovered 235 Tweets from jurors discussing their jury duty or jury service.<sup>61</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 106.

<sup>54</sup> *Id.*; see IND. CONST. art. 1, section 19; MD. CONST. DECL. OF RTS. art. 23.

<sup>55</sup> Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 332, 342 (2005); see *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969).

<sup>56</sup> *Overview of Google Earth*, GOOGLE EARTH, <http://support.google.com/earth/bin/answer.py?hl=en&answer=176145&ctx=cb&src=cb&cbid=h2f6tco4epqu> (last visited May 30, 2013).

<sup>57</sup> *Main Page*, WIKIPEDIA.ORG, [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page) (last visited May 30, 2013).

<sup>58</sup> *Twitter 101: Getting Started with Twitter*, TWITTER.COM, <http://support.twitter.com/groups/50-welcome-to-twitter/topics/204-the-basics/articles/215585-twitter-101-getting-started-with-twitter#> (last visited Apr. 30, 2013).

<sup>59</sup> *Id.*

<sup>60</sup> *Using Hashtags on Twitter*, TWITTER.COM, <https://support.twitter.com/articles/49309-using-hashtags-on-twitter#> (last visited Apr. 30, 2013) (“The # symbol, called a hashtag, is used to mark keywords or topics in a Tweet. It was created organically by Twitter users as a way to categorize messages.”).



Several of the Tweets linked to photos which jurors posted on Instagram or Twitter.<sup>62</sup> The photos depicted their juror summons, the courthouse, themselves, and other jurors.<sup>63</sup>

One juror *checked-in* at Foursquare,<sup>64</sup> a social networking site where users log in at locations.<sup>65</sup> Foursquare attracts millions of *check-ins* each day.<sup>66</sup> One tweeting juror linked to his own blog detailing his jury service.<sup>67</sup> A sampling of *#juryduty* tweets from a five day period revealed the tweets reproduced in Appendix A of this Article.

Facebook was founded in 2004.<sup>68</sup> “Facebook’s mission is to make the world more open and connected.<sup>69</sup> People use Facebook to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them.”<sup>70</sup> Facebook users post their unlimited photographs, comments and thoughts as *updates* on their own personalized *Profile* page. These *updates* appear in the *Newsfeed* of other users. A Facebook *Newsfeed* is defined, as follows:

*Newsfeed* is a regularly updating list of stories from friends, pages, and other connections, like groups and events. People can like or comment on what they see. Each person’s news feed is personalized based on their interests and the sharing activity of their friends.<sup>71</sup>

Facebook *updates*, along with the comments and likes from others, are visible to the user’s friends and others, as authorized by the user’s selected privacy settings.<sup>72</sup>

Facebook users may communicate privately with each other by using the Facebook messaging feature. A Facebook *Message* is defined, as follows:

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<sup>61</sup> *#juryservice*, TWITTER.COM (last visited Apr. 30, 2013) (Americans tend to describe their jury service as “jury duty” and Europeans refer to service as “jury service.”).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *About Foursquare*, FOURSQUARE.COM, <https://foursquare.com/about> (last visited Apr. 30, 2013) (Foursquare has a community of about 40 million worldwide and describes itself as “[a] free app that helps you and your friends make the most of where you are. When you’re out and about, use Foursquare to share and save the places you visit. And, when you’re looking for inspiration for what to do next, we’ll give you personalized recommendations and deals based on where you, your friends, and people with your tastes have been.”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *#juryservice*, TWITTER.COM, *supra* note 61.

<sup>68</sup> *About Facebook*, FACEBOOK.COM, <http://newsroom.fb.com/Key-Facts> (last visited on Apr. 30, 2013).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Products*, FACEBOOK.COM, <http://newsroom.fb.com/Products> (last visited on Apr. 30, 2013).

<sup>72</sup> *Id.*

Facebook *Messages* weaves messages, emails, chats, and text messages together in one ongoing conversation. This makes it easy for people to communicate from whichever device they're using to access Facebook – whether they're chatting on the web or texting on the go. Messages are organized by conversations with friends or groups of friends. Thanks to smart filtering, people always see messages from their friends and friends of friends first.<sup>73</sup>

The Facebook messaging feature operates similarly to the text messaging function on a cell phone. Other users are unable to view the Facebook messages.<sup>74</sup>

While Facebook and Twitter appear to be the most widely used social media sites, many other means of social media continue to emerge. Myspace advertises that people may “[d]iscover, share and connect with culture, creativity, sound, images and people.”<sup>75</sup> Myspace is a social media site that existed before Facebook experienced widespread popularity.<sup>76</sup> Myspace was initially very similar to Facebook where users created individualized profiles, connected with their friends, and posted updates.<sup>77</sup> However, Facebook gained popularity due to its simplicity.

YouTube provides a venue where users upload videos they have created.<sup>78</sup> YouTube provides a “forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators.”<sup>79</sup> Users create *channels* where they upload multiple videos.<sup>80</sup> *Youtubers* with channels create a television celebrity-like persona by developing large numbers of viewers called *subscribers*.<sup>81</sup> Individuals have an opportunity to view videos with or without subscribing to the channels.<sup>82</sup> *Youtubers* have a platform to share their views by ‘vlogging,’ using a video log or video blog.<sup>83</sup>

LinkedIn, launched on May 5, 2003, is a networking site with employment information for professionals.<sup>84</sup> LinkedIn maintains “225 million members in over 200 countries and territories around the globe.”<sup>85</sup> Individuals use the site to market

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Discover*, MYSPACE.COM, <http://new.myspace.com> (last visited on May 30, 2013).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *About*, YOUTUBE.COM, <http://www.youtube.com/yt/about/index.html> (last visited May 30, 2013).

<sup>79</sup> *Id.*

<sup>80</sup> *Getting Started*, YOUTUBE.COM, <http://youtube.com/yt/about/getting-started.html> (last visited May 30, 2013).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *About*, LINKEDIN.COM, <http://www.linkedin.com/about-us> (last visited May 30, 2013).

<sup>85</sup> *Id.*

themselves in the business and employment world and search for new employment.<sup>86</sup> LinkedIn professionals provide a profile photograph, contact information, and a resume listing their employment history and skills.<sup>87</sup> Other professionals *connect* and endorse other users' skills.<sup>88</sup> LinkedIn users communicate by posting status updates and sharing links to published news articles and websites.<sup>89</sup> LinkedIn *Connections* indicate when they *like* another post and *comment* or *share* the updates from other *Connections*.<sup>90</sup>

Social media users post photographs they have taken on Instagram, where followers can "like" the photo or post a comment.<sup>91</sup> Instagram users link their photographs to other social media sites and communication tools, such as Facebook, Twitter, Tumblr, Flickr, Foursquare and Email.<sup>92</sup> The iPhone includes a standard feature allowing users to take a photograph with a cell phone and then share the photograph easily via Mail, Message (text), Facebook and Twitter.<sup>93</sup>

Google+ ("Google Plus") allows users to communicate specifically with categories of their friends and acquaintances. For example, users may categorize their friends, family and colleagues into specific groups, called *circles*, and then target their communications to members of the particular groups.<sup>94</sup> Google advertises that this social media product allows users to "share life's important moments with just the right people."<sup>95</sup>

All of the above-described social media sites and communication tools are available on mobile devices.<sup>96</sup> Smartphones accommodates applications, known as *apps*, available for Facebook, LinkedIn, Twitter, Instagram, Foursquare, Youtube, Google+ and more.<sup>97</sup> In a brief moment, iPhone, Android, Windows and other smart cell phone users can communicate to thousands.

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *FAQ*, INSTAGRAM.COM, <http://instagram.com/about/faq> (last visited May 30, 2013).

<sup>92</sup> *Id.*

<sup>93</sup> *Built-in Apps*, APPLE.COM, <http://www.apple.com/iphone/built-in-apps> (last visited May 30, 2013).

<sup>94</sup> *Getting to Know Google+*, GOOGLE+, <https://www.google.com/intl/en/+/learnmore/circles.html> (last visited May 30, 2013).

<sup>95</sup> *Overview*, GOOGLE+, <https://www.google.com/intl/en/+/learnmore/#> (last visited May 2, 2013).

<sup>96</sup> *See generally App Store*, APPLE.COM, <http://www.apple.com/iphone/from-the-app-store>; *Apps*, ANDROID.COM, <http://www.android.com/apps>; *Featured Apps*, WINDOWSPHONE.COM, <http://www.windowsphone.com/en-us/store/featured-apps>.

<sup>97</sup> *Social Networking—App Store*, APPLE.COM, <https://itunes.apple.com/us/genre/ios-social-networking/id6005?ls=1>.

According to Pew Internet & American Life Project, 81% of all U.S. adults over age 18 use the internet and 94% of American adults ages 18-29 are internet users.<sup>98</sup> “As of December 2012, 87% of American adults have a cell phone, and 45% have a smartphone.”<sup>99</sup> As of January 2013, 26% of American adults own an e-book reader, and 31% own a tablet computer.”<sup>100</sup>

Americans use the internet for a multitude of reasons. Of the 85% of American adults who use the internet, 91% access search engines to find information, 78% view the news, 67% use a social networking site, such as Facebook, LinkedIn or Google+, and 16% use Twitter.<sup>101</sup> Internet users use other social media sites, including LinkedIn (20%), Pinterest (15%), Instagram (13%), and Tumblr (6%).<sup>102</sup>

In a typical day, 59% of American internet users use search engines to find information, 45% get news, 48% use a social networking site, such as Facebook, LinkedIn or Google+, and 8% use Twitter.<sup>103</sup> Facebook has more than a billion monthly active users, with 18% of them located in the U.S. and Canada.<sup>104</sup> Facebook maintained 618 million daily active users as of December 2012.<sup>105</sup> Of its active *monthly* users, 680 million use Facebook via a mobile device.<sup>106</sup>

In general there is disparity social media according to age, gender, and location. Internet users under 50 years of age are “particularly likely” to use a social networking site of any kind.<sup>107</sup> Internet users between 18-29 years of age are the “most likely” to use social media (83%).<sup>108</sup> Women are more likely than men to use

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<sup>98</sup> *Post-Election Internet Survey*, PEW INTERNET & AMERICAN LIFE PROJECT, [http://www.pewinternet.org/Static-Pages/Trend-Data-\(Adults\)/Whos-Online.aspx](http://www.pewinternet.org/Static-Pages/Trend-Data-(Adults)/Whos-Online.aspx) (last visited on Apr. 30, 2013).

<sup>99</sup> *Trend Data*, PEW INTERNET & AMERICAN LIFE PROJECT, [http://www.pewinternet.org/Trend-Data-\(Adults\)/Device-Ownership.aspx](http://www.pewinternet.org/Trend-Data-(Adults)/Device-Ownership.aspx) (last visited Apr. 30, 2013).

<sup>100</sup> *Id.*

<sup>101</sup> *Tracking Surveys*, PEW INTERNET & AMERICAN LIFE PROJECT, [http://www.pewinternet.org/Trend-Data-\(Adults\)/Online-Activities-Total.aspx](http://www.pewinternet.org/Trend-Data-(Adults)/Online-Activities-Total.aspx) (last visited on Apr. 30, 2013).

<sup>102</sup> *The Demographics of Social Media Users—2012*, PEW INTERNET & AMERICAN LIFE PROJECT, <http://www.pewinternet.org/Reports/2013/Social-media-users.aspx> (last visited on Apr. 30, 2013).

<sup>103</sup> *Trend Data (Adults)*, PEW INTERNET & AMERICAN LIFE PROJECT, [http://www.pewinternet.org/Trend-Data-\(Adults\)/Online-Activities-Daily.aspx](http://www.pewinternet.org/Trend-Data-(Adults)/Online-Activities-Daily.aspx).

<sup>104</sup> *Newsroom/Facts*, FACEBOOK.COM, <http://newsroom.fb.com/Key-Facts> (last visited Apr. 30, 2013).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *The Demographics of Social Media Users—2012*, PEW INTERNET & AMERICAN LIFE PROJECT, <http://www.pewinternet.org/Reports/2013/Social-media-users.aspx> (last visited Apr. 30, 2013).

<sup>108</sup> *Id.*

social media sites.<sup>109</sup> People living in urban environments are “significantly more likely” to use social media sites.<sup>110</sup>

Many cell phone owners use their phones to access social media sites. According to a Pew Internet Study Forty percent of all cell phone owners access social sites using their phones.<sup>111</sup> Sixty-seven percent of cell phone owners ages 18-29 access social media sites using their phones.<sup>112</sup> The survey found that “Facebook users are much more politically engaged than most people.”<sup>113</sup>

#### V. INSTANCES OF ELECTRONIC JUROR MISCONDUCT

With easy access to technology at their fingertips, jurors cannot resist the temptation to violate the judge’s orders restricting internet use. First, judges routinely instruct jurors to refrain from conducting their own investigation of the facts of the case and the parties. Second, judges further instruct the jurors to refrain from communicating with others about the case. Last, in almost all jurisdictions, judges instruct jurors to refrain from discussing the case among themselves prior to the deliberation stage. Despite court instructions, juror misconduct still causes judges to declare mistrials.

“Google Mistrials” began popping up in 2009.<sup>114</sup> A 2009 federal trial in Miami, Florida gained national headlines when nine jurors admitted electronic misconduct, thereby causing a mistrial.<sup>115</sup> After eight weeks of trial, during jury deliberations, one juror advised the judge that another juror had conducted improper research.<sup>116</sup> After the judge questioned all the jurors, the judge learned that eight additional jurors Googled the defendant and the attorneys.<sup>117</sup> When questioned about the motive, one juror explained, “Well, I was curious.”<sup>118</sup>

Jurors have ignored court instructions and Tweeted information, along with their own thoughts and impressions, coined as the “Twitter Effect.”<sup>119</sup> In one Arkansas case, *Stoam Holdings*, involving a \$12 million judgment, one juror tweeted “oh and nobody buy Stoam. Its bad mojo and they’ll probably cease to Exist, now that their

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Pew Internet: Social Networking (Full Detail)*, PEW INTERNET & AMERICAN LIFE PROJECT, <http://www.pewinternet.org/Commentary/2012/March/Pew-Internet-Social-Networking-full-detail.aspx>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> John Schwartz, *As Jurors Turn to the Internet, Mistrials Are Popping Up*, N.Y. TIMES (Mar. 18, 2009), <http://www.nytimes.com/2009/03/18/us/18juries.html>.

<sup>115</sup> Ralph Artigliere, Jim Barton & Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLA. B.J., Jan. 2010, at 8.

<sup>116</sup> Schwartz, *supra* note 114.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Ebony Nicolas, *Note and Recent Development: A Practical Framework For Preventing "Mistrial by Twitter"*, 28 CARDOZO ARTS & ENT. L.J. 385, 392 (2010).

wallet is 12 m lighter. <http://www.stoam.com/>,<sup>120</sup> and "So Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money."<sup>121</sup> On appeal, the Defendant argued that the Tweeting juror conducted outside research and "was predisposed toward giving a verdict that would impress his audience."<sup>122</sup> The appellate court affirmed the lower court verdict finding that the defendants failed to demonstrate that outside information was brought into the deliberations and influenced the verdict.<sup>123</sup> Rather, the tweets were merely tantamount to a jury leak.<sup>124</sup> The juror later subsequently stated, "[t]he courts are just going to have to catch up with the technology."<sup>125</sup> In a South Dakota case, a trial judge ordered a new trial when a juror Googled the defendant company prior to voir dire.<sup>126</sup> The juror's research concluded that the defendant was not involved in prior litigation.<sup>127</sup> The juror advised other jurors during deliberations about his findings.<sup>128</sup>

In the United Kingdom, one juror sitting on a child abduction and sexual assault case, conducted an on-line poll.<sup>129</sup> The juror detailed facts of the case and sought her friends' opinions on the defendant's guilt or innocence.<sup>130</sup> The juror posted, "I don't know which way to go, so I'm holding a poll."<sup>131</sup> When the judge learned of the misconduct, the juror was dismissed and the case proceeded with the remaining jurors.<sup>132</sup>

In the New Hampshire case of *Goupil v. Cattell*,<sup>133</sup> a juror wrote posts on a web blog about his upcoming jury service.<sup>134</sup> He posted that he would "get to listen to the

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<sup>120</sup> *Id.*

<sup>121</sup> Schwartz, *supra* note 114.

<sup>122</sup> Nicolas, *supra* note 119.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Artigliere, *supra* note 115, at 8.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*; see *Russo v. Takata Corp.*, 774 N.W.2d 441 (S.D. 2009).

<sup>129</sup> Amanda McGee, Note, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 309 (2010); see Urmee Khan, *Juror Dismissed from a Trial After Using Facebook to Help Make a Decision*, THE TELEGRAPH (Nov. 24, 2008), <http://www.telegraph.co.uk/news/newstopics/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html>.

<sup>130</sup> McGee, *supra* note 129.

<sup>131</sup> Patrick M. Delaney, *Sorry Linus, I Need Your Security Blanket: How the Smartphone, Constant Connectivity with the Internet, and Social Networks Act as Catalysts for Juror Misconduct*, 24 ST. THOMAS L. REV. 473, 482 (2011).

<sup>132</sup> *Id.*

<sup>133</sup> *Goupil v. Cattell*, No. 07-CV-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008).

<sup>134</sup> *Id.* at \*6.

local riff-raff try and convince [him] of their innocence."<sup>135</sup> The court found that the juror's comments did not violate the defendant's Sixth Amendment rights.<sup>136</sup>

In July 2011, the *North Texas Juror* gained notoriety for Facebook "friend requesting" the Defendant.<sup>137</sup> Juror Jonathan Hudson was serving on a civil jury in Fort Worth, Texas, when he discussed the case on Facebook and then sent a "friend request" to the defendant.<sup>138</sup> The judge dismissed the juror.<sup>139</sup>

In *Wardlaw v. Maryland*, the Defendant was tried for several sexual offenses, including rape and child sexual abuse.<sup>140</sup> During the trial, the victim's therapist testified that the victim suffered from several disorders, including Oppositional Defiant Disorder.<sup>141</sup> During the trial Oppositional Defiant Disorder was not defined.<sup>142</sup> During deliberations, one juror conducted internet research of the definition of the disorder and learned that one symptom of the disorder was lying.<sup>143</sup> The juror communicated the research results to the remainder of the jurors.<sup>144</sup> Since the victim's veracity was a key component to the prosecution's case, the appellate court determined that the trial court abused its discretion by failing to grant a mistrial.<sup>145</sup>

In the Chandra Levy murder trial, a prospective juror Tweeted "Guilty guilty... I will not be swayed. Practicing for jury duty."<sup>146</sup> The juror was dismissed from the venire.<sup>147</sup> He later stated that he "tweeted out of habit."<sup>148</sup>

In another example of electronic juror misconduct involving Facebook, a female juror "friend requested" one of the male firefighter witnesses in the criminal trial of Cesar Rios.<sup>149</sup> The judge dismissed the juror who later admitted that she acted impulsively.<sup>150</sup>

"The Facebook Five" received attention during the trial of former Baltimore Mayor Shelia Dixon.<sup>151</sup> During the criminal trial, five jurors "friended" each other on

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at \*29.

<sup>137</sup> Delaney, *supra* note 131.

<sup>138</sup> *Id.* at 481.

<sup>139</sup> *Id.* at 481-82.

<sup>140</sup> *Wardlaw v. Maryland*, 971 A.2d 331, 334-39 (Md. Ct. Spec. App. 2009).

<sup>141</sup> *Id.* at 334.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 338.

<sup>145</sup> *Id.* at 339.

<sup>146</sup> Delaney, *supra* note 131, at 483.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 484.

Facebook.<sup>152</sup> While Facebook “friending” does not necessarily amount to juror pre-deliberations, it does present a modern issue to address in this quickly changing era of electronic communication.

In a Michigan criminal trial, one juror posted on Facebook, “actually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY. :p.”<sup>153</sup> The judge dismissed 20-year-old juror, Hadley Jons.<sup>154</sup> At a subsequent hearing for Contempt of Court, the judge ordered the juror to write an essay about the Sixth Amendment and pay a fine in the amount of \$250 for her misconduct.<sup>155</sup>

Celebrities are no stranger to jury service and social media. Al Roker, television weatherman and celebrity, tweeted from his 2009 jury service.<sup>156</sup> His Tweets from inside the New York jury lounge included photos of other jurors taken on his iPhone.<sup>157</sup> His Tweets were available to his more than 20,000 followers.<sup>158</sup> When asked by the jury services personnel to stop, he replied with *Tweets*, “So everyone is clear, I am NOT taking pictures in the courtroom. So folks need to lighten up. I am in the jury lounge.”<sup>159</sup>

In the 2009 federal criminal trial of Vincent J. Fumo, former Pennsylvania state senator, a jury convicted him of federal corruption offenses.<sup>160</sup> During the trial, he moved for the removal of a juror who Tweeted, posted Facebook updates, and updated his blog.<sup>161</sup> During jury deliberations, he Tweeted, “This is it . . . no looking back now!”<sup>162</sup> When questioned by the judge, the juror indicated that he used Twitter as “a brief, stream-of-consciousness diary of his thoughts.”<sup>163</sup> He indicated that while individuals could reply back with their own thoughts and comments, he did not review anyone else’s comments.<sup>164</sup> The judge denied the request for dismissal of the juror and the juror remained on the jury panel.<sup>165</sup> Fumo raised this issue on appeal

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<sup>152</sup> *Id.*

<sup>153</sup> Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 613 (2012).

<sup>154</sup> *Id.*

<sup>155</sup> Jameson Cook, *Video: Juror Ordered to Write Essay About Sixth Amendment for Facebook Posting*, MACOMB DAILY (Apr. 11, 2012), <http://www.macombdaily.com/article/20100902/NEWS/309029991/video-juror-ordered-to-write->.

<sup>156</sup> Nicolas, *supra* note 119, at 390.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *United States v. Fumo*, No. 06-319, 2009 U.S. Dist. LEXIS 51581, at \*211 (E.D. Pa. June 17, 2009).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at \*193-94.

<sup>163</sup> *Id.* at \*193.

<sup>164</sup> *Id.* at \*210.

<sup>165</sup> *Id.* at \*211.



following his conviction, but the appellate court affirmed the lower trial court.<sup>166</sup> The appellate court reasoned that the juror's Tweets "could not serve as a source of outside influence because, even if another user had responded to [his] Twitter postings (of which there was no evidence), his sole message suggested that the jury's decision had been made and that it was too late to influence him."<sup>167</sup>

In a Baltimore criminal case involving corruption, five jurors posted status updates on their respective Facebook pages.<sup>168</sup> One juror posted on another juror's Facebook page, "Hi James! Ready for round. . oh I lost count! See you tomorrow."<sup>169</sup> On another juror's Facebook page, a non-juror "friend" posted an update indicating, "not guilty." The juror then posted, "NO AL GUILTY AS HELL. . SORRY."<sup>170</sup> Before the judge ruled on all of these issues, the parties resolved the case by agreement.<sup>171</sup>

#### VI. HISTORY OF JUROR MISCONDUCT

The problem of jurors conducting their own research is not new. One of the earliest reported cases occurred in the 19<sup>th</sup> century.<sup>172</sup> U.S Courts have stressed that evidence shall originate from the witness stand.<sup>173</sup> Criminal defendants have the protected right of confrontation under the *Confrontation Clause* of the Sixth Amendment.<sup>174</sup> Under the 14<sup>th</sup> Amendment, the "Confrontation Clause" rights are extended to individuals prosecuted in state courts.<sup>175</sup> This right has been interpreted to include the right to cross-examine the witnesses in a criminal case.<sup>176</sup>

Jurors bring their life experiences and common sense with them inside the jury box. One Florida Standard Jury Instruction in criminal cases instructs jurors to "[u]se your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict."<sup>177</sup> In Florida civil cases, judges instruct jurors, as follows:

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<sup>166</sup> *Fumo*, 639 F. Supp. 2d 544 (E.D. Pa. 2009).

<sup>167</sup> *Id.*

<sup>168</sup> Miland F. Simpler, *The Unjust "Web" We Weave: The Evolution of Social Media and its Psychological Impact on Juror Impartiality and Fair Trials*, 36 LAW & PSYCHOL. REV. 275, 286 (2012).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Hoffmeister, *supra* note 153, at 417; *see Medler v. State ex rel. Dunn*, 26 Ind. 171, 172 (1866).

<sup>173</sup> *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) ("'[E]vidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.").

<sup>174</sup> U.S. CONST. amend. VI ("[T]o be confronted with the witnesses against him.").

<sup>175</sup> U.S. CONST. amend. XIV.

<sup>176</sup> *Turner*, 379 U.S. 466.

<sup>177</sup> Fla. Stand. Jury Instructions (Criminal) (2013).

In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of *your own experience and common sense*.<sup>178</sup>

Arizona juries are similarly instructed to “[c]onsider all of the evidence in light of reason, common sense, and experience.”<sup>179</sup> However, jurors are generally prohibited from considering extrinsic information generated and disseminated outside of the courtroom.<sup>180</sup>

It is important to review the reasons for jurors conducting their own research. One legal scholar has described juror conscientiousness, curiosity and confusion as reasons.<sup>181</sup> First, many jurors want to get things right and find the truth. As a trial court judge for 12 years, this Author has observed that prospective jurors generally complain when they receive their juror summons and again when they are *not* selected to serve on an actual jury. Further, Alternate Jurors seemed disappointed when they were advised that they were Alternates and could not deliberate with the jury.<sup>182</sup> Some Alternate Jurors remained behind after being discharged and waited for the verdict. Others contact the judge’s chambers the next day to discover the verdict. Jurors who render a verdict contact judges to inquire about the subsequent sentence imposed by the judge. The Author has observed that when jurors were selected to serve on a jury, they appeared to be honored, proud, serious, enthusiastic, engaged, and conscientious about their new role.<sup>183</sup> Therefore, it comes as no surprise that jurors desire accurate and thorough answers to all of their questions and are willing to break the rules to conduct easy, free, and tempting research of their own.

Second, many jurors are simply curious. In early English juries, , jurors were selected because of their prior knowledge of a particular case or the parties.<sup>184</sup> However, modern American jurors are precluded from serving when they have

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<sup>178</sup> Fla. Stand. Jury Instructions (Civil), § 601.2 (Believability of Witnesses) (2013) (emphasis added).

<sup>179</sup> Ariz. Jury Instructions (Criminal), Preliminary 10 (Credibility of Witnesses) (2013).

<sup>180</sup> *Id.*

<sup>181</sup> Hoffmeister, *supra* note 153.

<sup>182</sup> Generally, one or two jurors are selected to serve as an alternate juror. It is typical for judges in Florida not to identify which, if any, juror is selected as the alternate. Once the final jury instructions are given, the alternate juror is discharged, and the jury is sent to deliberate without the alternate juror.

<sup>183</sup> The Author served as a trial court judge for 12 years in the Ninth Judicial Circuit, in and for Orange County, Florida. The Author estimates presiding over more than 100 juries.

<sup>184</sup> SALLY LLOYD-BOSTOCK & CHERYL THOMAS, *The Continuing Decline of the English Jury*, in *WORLD JURY SYSTEMS* 53, 55 (Neil Vidmar ed., 2000).

personal knowledge surrounding the parties or the case.<sup>185</sup> Judges are expected to grant challenges for cause and strike a potential juror who has knowledge of a case that may affect their ability to follow the law and render a fair and an impartial verdict.<sup>186</sup> Further, it is common for lawyers to lodge objections during a trial. Frequently, the objections are heard at a sidebar conference outside the hearing of the jury. Jurors stare at the backs of the lawyers and listen to audio static or white noise imposed by the judge. The jurors watch as the judge leans in closer to the attorneys from the seat on the bench to prevent the jurors from hearing their whispered conversations. On occasion, the judge strikes certain testimony and then instructs the jury to disregard that testimony.

In Florida, judges instruct jurors on objections, as follows:

When an objection is made you should not speculate on the reason why it is made; likewise, when an objection is sustained, or upheld, by me, you must not speculate on what might have occurred had the objection not been sustained, nor what a witness might have said had [he] [she] been permitted to answer.<sup>187</sup>

Therefore, it is anticipated that the jurors will be curious about information that lawyers and witnesses attempt to present to them. When an objection is sustained, a juror may feel that the judge is hiding important information from them. A juror might also attach some importance to the precluded information, since an attorney or witness attempted to introduce the testimony or evidence in the first place.

Last, jurors face confusion with many of the terms in jury instructions and legal and expert terms used by witnesses, parties, attorneys and the judges. Early juror misconduct concerns involved jurors looking up legal terms and theories in law books.<sup>188</sup> Later, jurors began looking up terms using the internet.<sup>189</sup> When jurors do not understand terminology and are unable to speak or ask substantive questions, they simply resort to answering their own questions through independent research.

Many courts attempt to resolve confusion by providing clearly written jury instructions. Other courts have addressed confusion by providing jurors with individual copies of written jury instructions. Many U.S. jurisdictions now seek to satisfy jurors' thirst for information by allowing juror note-taking, juror notebooks, and juror questioning of witnesses.

#### VII. JUROR NOTE TAKING AND TRIAL NOTEBOOKS

Lawyers and judges resisted juror note-taking for many years. Some lawyers and judges were concerned that jurors taking notes might be distracted and not pay close attention to the proceedings. Others feared that the jurors who took notes might have an undue influence over the independent judgment of the other jurors. Still others feared that jurors might become too actively engaged in the proceedings.

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<sup>185</sup> VIDMAR, *Perspective*, *supra* note 2, at 7.

<sup>186</sup> *Id.*

<sup>187</sup> Fla. Stand. Jury Instructions (Criminal), § 2.1 (Preliminary Instructions) (2013).

<sup>188</sup> Caren Myers Morrison, *Jury 2.0*, 62 *Hastings L.J.* 1579, 1586 (2011).

<sup>189</sup> Hoffmeister, *supra* note 153, at 422.

But in the 21<sup>st</sup> century, most courts now allow jurors to take notes and use trial notebooks. When the Author first took the bench in 2001, juror note-taking was already being implemented in criminal and civil trials in Florida, even though juror note-taking was not commonly encouraged. Some judges and attorneys were resistant. Other judges waited to see whether jurors requested to take notes. Gradually, more and more judges made it a common occurrence to automatically provide pads and pens to the jurors and advise the jurors of their right to take notes, if they chose.

Standard jury instructions describing note-taking did not exist in Florida when this Author took the bench in 2001. Rather, judges crafted their own individualized note-taking instructions utilizing instructions sanctioned by other courts. Eventually, Florida courts promulgated standard note-taking instructions for jurors.<sup>190</sup> The instructions encourage note-taking, caution against overemphasis and distraction, and provide housekeeping rules.<sup>191</sup> The housekeeping rules require that the jurors maintain their notes in the courtrooms, use them appropriately during deliberations, and require that the judge round up the notes and destroy them upon conclusion of the trial.<sup>192</sup>

Juror note-taking has been encouraged to assist jurors in paying attention and to make jurors feel more engaged in the jury system process. Encouraging citizen participation in juries enhances democracy. Most U.S. jurisdictions now support juror note-taking. In Florida, judges use standard note-taking instructions, as follows:

If you would like to take notes during the trial, you may do so. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you individually.

You will be provided with a note pad and a pen for use if you wish to take notes. Any notes that you take will be for your personal use. However, you should not take them with you from the courtroom. During recesses, the bailiff will take possession of your notes and will return them to you when we reconvene. After you have completed your deliberations, the bailiff will deliver your notes to me. They will be destroyed. No one will ever read your notes.

If you take notes, do not get so involved in note-taking that you become distracted from the proceedings. Your notes should be used only as aids to your memory.

Whether or not you take notes, you should rely on your memory of the evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than each juror's memory of the evidence.<sup>193</sup>

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<sup>190</sup> Fla. Stand. Jury Instructions (Criminal), § 1.6 (Note Taking by Jurors) (2013).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Further, Florida Rule of Civil Procedure 1.455 provides that judges have discretion to authorize the use of juror notebooks containing “documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.”<sup>194</sup> Jury notebooks assist jurors in remaining organized, avoiding confusion, and maintaining juror engagement in the proceedings. This instruction does not appear in criminal jury instructions.<sup>195</sup>

In Arizona, judges must give preliminary instructions to jurors after they are sworn in.<sup>196</sup> The judges provide the jurors with juror notebooks.<sup>197</sup> The juror notebooks include a copy of preliminary jury instructions, which are later replaced by final jury instructions.<sup>198</sup> The juror notebooks also include a list of witnesses with their photographs and biographies, along with copies of the exhibits.<sup>199</sup> The juror notebook includes definitions of certain terms and a section for juror notes.<sup>200</sup>

Most state courts provide for juror note-taking and juror notebooks. Most states encourage note-taking and provide instructions for the same. Most state jury instructions caution jurors on the use of notes and the potential for distraction. Many state instructions advise jurors to leave their notes on their jury-box courtroom seats when they take a recess. Further, most states allow jurors to take their notes into the jury room at the time of deliberations. A few states do not permit jurors to take their notes with them into the deliberations. In Mississippi, jurors are instructed that their own notes “may not be shown to or shared with other jurors.”<sup>201</sup> Jurors are generally instructed that the judge will take their notes upon the conclusion of the jury trials and destroy the notes without anyone ever reading them.

The American Bar Association (ABA) has recommended that jurors be furnished with the opportunity to take notes during a jury trial.<sup>202</sup> In its report, the ABA Committee recommended that judges provide jurors with supplies to take notes, retrieve their notes at the end of each day, and destroy the notes at the end of the trial.<sup>203</sup> The ABA further recommends that jurors be permitted to use their notes throughout the trial and during deliberations.<sup>204</sup>

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<sup>194</sup> FLA. R. CIV. P. 1.455.

<sup>195</sup> *Standard Jury Instructions—Criminal Cases*, Fla. Sup. Ct., [http://www.floridasupremecourt.org/jury\\_instructions/index.shtml](http://www.floridasupremecourt.org/jury_instructions/index.shtml).

<sup>196</sup> ARIZ. R. CRIM. P. 18.6.

<sup>197</sup> *Id.*

<sup>198</sup> ARIZ. R. CRIM. P. 47(g) (cmt. to 1995 amend.).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Miss. Model Jury Instructions (Criminal), § 1:9 (Note Taking Permitted During Trial) (2012), available at Westlaw MSPRACJICR.

<sup>202</sup> AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS 17 (2005), available at <http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf>.

<sup>203</sup> *Id.* at 18.

<sup>204</sup> *Id.* at 17.

This Author regularly permitted jurors to take notes and furnished pads and pens to each juror. As a sitting trial court judge, this Author advised the jurors that they could take notes if they chose and that the notes should remain on their jury-box courtroom seats when they left the courtroom for a recess. The jurors were always permitted to take their notes with them into the deliberation room; however, the jurors were cautioned to rely on their own memory about the courtroom testimony. The deputies were instructed to gather the jurors' notepads at the conclusion of the case and this Author, as judge, personally destroyed the notes without anyone reading the notes.

#### VIII. JUROR QUESTIONING

Much consideration has been given to the issue of jurors providing questions to witnesses. Juror questioning has been met with much resistance. Juror questioning is a large part of a movement toward more active juror participation. Some scholars and jurists believe that when jurors are more actively engaged in the proceedings, just like students in a classroom, they develop increased attention skills, better comprehend the testimony, evidence, and instructions, and leave with increased satisfaction of their experience.

Many jurisdictions resist juror questioning in criminal cases. Conversely, more jurisdictions have accepted and embraced juror questioning and other changes to jury procedures and systems, initially in civil cases.<sup>205</sup>

Both judges and attorneys have resisted juror questions. As a trial court judge, this Author did not permit juror questions in criminal cases. When this Author presided over jury trials from 2001 through 2013, juror questions became encouraged in civil cases, but remained strongly discouraged in criminal cases. Judges, including this Author, feared that juror questions would prejudice criminal defendants' rights to a fair trial and maintained concerns about creating unnecessary issues for appellate court reversal.<sup>206</sup>

Judges must always consider their limited governmental court resources in managing large dockets. In sluggish state economies, judges are asked to "do more with less" of the public's taxpayer money.<sup>207</sup> This means that while the numbers of court cases may increase, new judge positions are not necessarily funded by the legislature. Judges maintain large numbers of cases.<sup>208</sup> The number of new cases assigned to a judge in a given month exceeds the number of days in the month.<sup>209</sup> Even with the utmost efficiency, courts are generally unable to conduct a jury trial in

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<sup>205</sup> Nancy L. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 747 (2010).

<sup>206</sup> Jonathan M. Purver, Annotation, *Propriety of Jurors Asking Questions in Open Court During Trial*, 31 A.L.R.3d 872, 875 (1970).

<sup>207</sup> This Author served as an Orange County Judge in the Ninth Judicial Circuit, in and for Orange County, Florida, from 2001-2012. Florida courts are financed by the state budget and the state courts' operating budget was frequently reduced in response to lower state general revenues.

<sup>208</sup> While this Author served as an Orange County Judge, hundreds of open and active cases remained pending.

<sup>209</sup> While this author served as an Orange County Judge presiding over criminal and civil cases, a few hundred new cases were assigned to her division each month.

every criminal case filed.<sup>210</sup> Some criminal cases are dropped by the prosecution; however, most cases resolve by a plea agreement of the parties.<sup>211</sup> A plea agreement generally reflects an agreement between the parties as to the sentence and nature of the offenses, which is presented to the judge for ratification.<sup>212</sup> If the judge blesses the agreement, then the defendant pleads guilty as charged or guilty to a lesser offense, and the judge imposes the agreed upon, or modified, terms of a sentence.<sup>213</sup>

The remaining pending cases then proceed to a jury trial. Since judges can only use the number of workdays in a week to conduct jury trials, judges are always conscious of scheduling demands. Further, judges must afford timely trials to criminal defendants.<sup>214</sup> Many judges, therefore, have concerns that jury questions might lengthen a jury trial. This Author maintained similar concerns that jury questioning would, in fact, lengthen a trial and result in fewer cases tried.

Criminal defense attorneys, likewise, feared that juror questioning of witnesses would only assist the prosecution in cementing a conviction. In a criminal case, judges instruct jurors that *reasonable doubt* as to the guilt of the defendant may arise “[f]rom the evidence, conflict in the evidence, or the lack of evidence.”<sup>215</sup> Usually, a defending party fares better when the plaintiff, or the prosecution, provides confusing testimony or leaves gaps in the evidence.

In a civil case, Florida jury instructions include the following:

You may draw reasonable inferences from the evidence. But you should *not guess about things that were not covered here*. And, you must always apply the law as I have explained it to you.<sup>216</sup>

The civil plaintiff must prove its case by the *greater weight of the evidence*.<sup>217</sup> *Greater weight of the evidence* means the “[m]ore persuasive and convincing force

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<sup>210</sup> Criminal Jury Statistics for Orange County Circuit (2012) (on file with author) (During 2012, circuit judges presided over 19 -70 jury trials per circuit judge.)

<sup>211</sup> As a trial court judge presiding over county criminal jury trials, this Author reviewed plea agreements on an almost daily basis.

<sup>212</sup> Trial court judges routinely review plea agreements between prosecutors and defense attorneys. As a trial court judge, the Author reviewed specific sentencing provisions discussed by the parties. Parties would negotiate specific sentencing provisions, including the length of a jail term and length of probationary terms, as well as the amounts of fines, community service hours, and court-ordered counseling.

<sup>213</sup> Prosecutors and defense attorneys typically discuss the strengths and weaknesses of their case and agree upon the nature of the offense and the terms of a proposed sentence. As a judge, this Author reviewed the terms of the parties’ agreement. If acceptable, this Author would impose the agreed upon sentence terms. If unacceptable, this Author would announce concerns.

<sup>214</sup> U.S. CONST. amend. VI (criminal defendants are afforded the right to a speedy trial).

<sup>215</sup> *Standard Jury Instructions—Criminal Cases*, Fla. Sup. Ct., [http://www.floridasupremecourt.org/jury\\_instructions/index.shtml](http://www.floridasupremecourt.org/jury_instructions/index.shtml).

<sup>216</sup> Fla. Stand. Jury Instructions (Civil), § 601.1 (Weighing the Evidence) (2013) (emphasis added).

<sup>217</sup> *Id.* at § 415.3 (Greater Weight of the Evidence).

and effect of the entire evidence in the case.”<sup>218</sup> Therefore, any effort to organize evidence or testimony for jurors to better understand or encourage jurors to become more involved usually faces resistance. Unanswered questions or confusion can equal a verdict for the defendant in a criminal or civil case.

Notwithstanding all of the voiced concerns with jurors posing questions to witnesses, almost all U.S. federal and state trial judges maintain discretion to permit jurors’ indirect questions to witnesses in both civil and criminal cases.<sup>219</sup> Almost every federal appellate court has authorized the trial court using discretion to permit jurors to provide indirect questions to witnesses.<sup>220</sup> Many states discourage the use of juror questioning, especially in criminal cases. However, authority for juror questions can be located for almost every U.S. state, except for the states of Minnesota,<sup>221</sup> Mississippi,<sup>222</sup> Texas<sup>223</sup> and Pennsylvania,<sup>224</sup> where courts have expressly prohibited the use of jury questions.

In other states, authority and procedure for jury questions can be located in court opinions and precedent, rules of procedure, and standard jury instructions. Standard jury instructions for juror questioning in criminal cases exist in the states of Florida, Michigan, Arizona, Colorado, Indiana, Massachusetts, New Mexico, New York and Ohio.<sup>225</sup> Standard jury instructions for juror questioning in civil cases also exist in Missouri, Alabama, New Jersey, and Washington.<sup>226</sup> Many states’ standard jury instructions do not reference juror questioning in any type of case. The states without jury question standard instructions include Oklahoma, Connecticut, California, Alaska, Arkansas, Maryland, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Nebraska, Tennessee, and Virginia.

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<sup>218</sup> *Id.*

<sup>219</sup> Purver, *supra* note 206, at 875, 878.

<sup>220</sup> *Id.* at 879.

<sup>221</sup> State v. Costello, 646 N.W.2d 204, 221 (Minn. 2002) (ensuring the fair administration of justice by holding that no court shall permit jurors to question witnesses in a criminal trial).

<sup>222</sup> Wharton v. State, 734 So. 2d 985, 988 (Miss. 1998).

<sup>223</sup> Allen v. State, 845 S.W.2d 907 (Tex. Crim. App. 1993).

<sup>224</sup> Pa. Suggested Stand. Jury Instructions (Civil), § 1.240 (Questions by Jurors) (2013), available at Westlaw PA-JICIV.

<sup>225</sup> *Standard Jury Instructions—Criminal Cases*, Fla. Sup. Ct., [http://www.floridasupremecourt.org/jury\\_instructions/index.shtml](http://www.floridasupremecourt.org/jury_instructions/index.shtml); Ariz. Jury Instructions (Criminal), Preliminary 16 (Questions by Jurors) (2013); Colo. Jury Instructions (Criminal), ch. B (Criminal Jury Orientation, Examination & Selection Process), at 10 (2008), available at [http://www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Criminal\\_Jury\\_Instructions/CHAPTER\\_BJuryOrientation.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Criminal_Jury_Instructions/CHAPTER_BJuryOrientation.pdf); IND. CT. R. 20 (Preliminary Instructions); Mass. Jury Instructions (Criminal), § 1.180 (Questions to Witnesses from Jurors) (2009); N.M. Jury Instructions (Criminal), § 14-101 (Explanation of Trial Procedure) (2013), available at Westlaw NMCRI-MJI; N.Y. Jury Instructions (Criminal), Preliminary 17 (Juror Questions) (2013); Ohio Jury Instructions (Criminal), § 401.21 (Jurors Asking Questions) (2004), available at Westlaw OH-JICRIM.

<sup>226</sup> Mo. Jury Instructions (Civil), § 2.01 (2012), available at Westlaw MO-JIF-CIV; Ala. Jury Instructions (Civil), § 1.15 (2012); N.J. Jury Charges (Civil), § 1.23 (2002); Wash. Jury Instructions (Civil), § 1.01 (6th ed. 2012).



Of the many states that do authorize juror questioning, questions are often still discouraged in criminal cases. For example, the New York jury instruction indicates that “jurors do not regularly ask questions” and juror questions should be the “[e]xception and not the rule” and should be used in a “[r]are instance.”<sup>227</sup> The New York trial judges must further caution jurors that they should not “feel compelled” to ask a question.<sup>228</sup> The jurors must be cautioned that their questions should be directed to clarify witness testimony.

In New Mexico, jury instructions in criminal cases discourage juror questions. The instructions provide that the “[a]ttorneys will develop all pertinent evidence.”<sup>229</sup> It is the exception rather than the rule that an individual will have an unanswered question.<sup>230</sup>

The 2001 Final Report of the Florida Juror Innovations Committee recommended several improvements to Florida’s jury system.<sup>231</sup> The Committee recommended the use of juror notebooks, juror note-taking, and juror questioning of witnesses in both civil and criminal cases.<sup>232</sup> It also reviewed the advantages and disadvantages of juror questions. The Committee identified the following advantages of juror questioning:

1. The accuracy of the decision-making process will be improved.
2. Jurors will be more confident in their verdict and satisfied that they possessed all of the information necessary to reach a correct verdict.
3. Jurors will be more involved in the trial process, which could heighten their overall satisfaction with the trial.
4. Allowing the jury to play a more active role will instill in jurors a better understanding of the importance of their responsibility.
5. The asking of questions may help inform the attorneys about issues in the case that the jurors do not understand and what points need further clarification.

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<sup>227</sup> N.Y. Jury Instructions (Criminal), Preliminary 17 (Juror Questions) (2013).

<sup>228</sup> *Id.*

<sup>229</sup> N.M. Jury Instructions (Criminal), § 14-101 (Explanation of Trial Procedure) (2013), available at Westlaw NMCRIM-JI.

<sup>230</sup> *Id.*

<sup>231</sup> JURY INNOVATIONS COMM., Fla. Sup. Ct., FINAL REPORT 4 (2001), available at [http://www.flcourts.org/gen\\_public/pubs/bin/JuryInnovationsFinalReport.pdf#xml=http://search.flcourts.org/tehis/search/pdfhi.txt?query=juror+innovation&pr=external&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=r&cq=&id=4b7191fd7c7](http://www.flcourts.org/gen_public/pubs/bin/JuryInnovationsFinalReport.pdf#xml=http://search.flcourts.org/tehis/search/pdfhi.txt?query=juror+innovation&pr=external&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=r&cq=&id=4b7191fd7c7).

<sup>232</sup> *Id.* at 7-8.

6. Juror questions may reveal important evidence or issues that were not covered by the lawyers.<sup>233</sup>

The Florida Juror Innovations Committee identified four potential problems with juror questioning of witnesses, as follows:

1. Jurors might ask inappropriate or prejudicial questions because they do not know the rules of evidence and procedure, but this will be balanced by the trial judge making the final decision on whether the question is appropriate and should be asked.
2. Juror questions might upset an attorney's strategy or result in unwanted surprises.
3. An individual juror's question and the answer elicited may take on a stronger significance to the jury than those questions and answers presented and received in the normal adversarial manner.
4. Jurors who are the most active in the trial may be the most influential during deliberations.<sup>234</sup>

In Florida, for example, juror questioning is mandated in civil trials.<sup>235</sup> The rule mandates that judges permit jurors to submit written questions directed to witnesses or the court.<sup>236</sup> Florida Rule of Civil Procedure 1.452(a) provides, in part, as follows:

The court shall permit jurors to submit to the court written questions directed to witnesses or to the court. Such questions will be submitted after all counsel have concluded their questioning of a witness.<sup>237</sup>

Colorado instructions provide for juror questioning in criminal cases, as follows:

Rules governing jury trials do not allow jurors to ask questions directly of a witness. However, if you do have a question you would like to ask a witness during the trial, write your question down, but do not sign it. Hand the question to the bailiff during a recess. If you have a question for a witness who is about to leave the witness stand, signal the bailiff or me before the witness leaves the stand.<sup>238</sup>

Arizona has developed a very progressive attitude toward active jury participation. Rule 18.6(e), Arizona Rules of Criminal Procedure, requires the court

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<sup>233</sup> *Id.* at 41.

<sup>234</sup> *Id.* at 41-42.

<sup>235</sup> FLA. R. CIV. P. 1.452(a).

<sup>236</sup> Fla. Jury Instructions (Civil), § 202.4 (2013).

<sup>237</sup> FLA. R. CIV. P. 1.452(a).

<sup>238</sup> Colo. Jury Instructions (Criminal), ch. B (Criminal Jury Orientation, Examination & Selection Process), at 10 (2008), available at [http://www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Criminal\\_Jury\\_Instructions/CHAPTER\\_BJury\\_Orientation.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Criminal_Jury_Instructions/CHAPTER_BJury_Orientation.pdf); *Medina v. People*, 114 P.3d 845, 847 (Colo. 2005) (permitting the jury to ask questions through the judge did not violate defendant's due process rights).

to instruct the jurors that “they are permitted to submit to the court written questions directed to witnesses or to the court.” Review of the juror questions must be done out of the presence of the jury (for example, at a bench conference) and should be done on the record.<sup>239</sup> Arizona’s instruction provides, as follows:

If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the bailiff. If your question is for a witness who is about to leave the witness stand, please signal the bailiff or me before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question and the answer is available, an answer will be given at the earliest opportunity. When we do not ask a question, it is no reflection on the person submitting it. You should attach no significance to the failure to ask a question. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers. If a particular question is not asked, please do not guess why or what the answer might have been.<sup>240</sup>

In the Jodi Arias murder trial, the jurors posed questions to the defense expert on post traumatic stress disorder,<sup>241</sup> the defense expert on domestic violence,<sup>242</sup> and the defendant.<sup>243</sup> Jurors submitted more than 100 questions to the defendant.

Indiana mandates that jury questioning be allowed in criminal cases.<sup>244</sup> In Florida, judges are specifically authorized to exercise discretion in allowing juror questions in criminal cases. Florida Rule of Criminal Procedure 3.371. JUROR QUESTIONS OF WITNESSES, provides, as follows:

(a) Judicial Discretion. At the discretion of the presiding trial judge, jurors may be allowed to submit questions of witnesses during the trial.

(b) Procedure. The trial judge shall utilize the following procedure if a juror indicates that the juror wishes to ask a question:

(1) the questions must be submitted in writing;

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<sup>239</sup> Ariz. Jury Instructions (Criminal), Preliminary 9 (Bench Conferences & Recesses) (2013).

<sup>240</sup> Ariz. Jury Instructions (Civil), Preliminary 11 (Questions by Jurors) (2013).

<sup>241</sup> Brian Skoloff, *Jurors Question Expert Witness in Arias Trial*, USA TODAY (Mar. 21, 2013), <http://www.usatoday.com/story/news/nation/2013/03/21/arias-trial-jurors-question/2007167/>.

<sup>242</sup> David Lohr, *Jodi Arias Jury Questions Show Skepticism About Domestic Violence Defense*, HUFFINGTON POST (Apr. 11, 2013), [http://www.huffingtonpost.com/2013/04/11/jodi-arias-jury-questions-\\_n\\_3065445.html](http://www.huffingtonpost.com/2013/04/11/jodi-arias-jury-questions-_n_3065445.html).

<sup>243</sup> Colleen Curry, *Jodie Arias Jurors Show Skepticism in Questions to Arias*, ABC NEWS (Mar. 6, 2013), [http://abcnews.go.com/US/jodi-arias-jurors-show-skepticism-questions-arias/story?id=18665931#.UYfiad7D\\_IU](http://abcnews.go.com/US/jodi-arias-jurors-show-skepticism-questions-arias/story?id=18665931#.UYfiad7D_IU).

<sup>244</sup> IND. CT. R. 20 (Preliminary Instructions).

- (2) the trial judge shall review the question outside the presence of the jury;
- (3) counsel shall have an opportunity to object to the question outside the presence of the jury;
- (4) counsel shall be allowed to ask follow up questions; and
- (5) the jury must be advised that if a question submitted by a juror is not allowed for any reason, the juror must not discuss it with the other jurors and must not hold it against either party.<sup>245</sup>

The Florida Standard Jury Instruction states, as follows:

### 2.13 QUESTIONS BY JURORS

Note to Judge.

To be given if the Judge decides to permit jury questions.

To be given if a juror(s) indicates that the juror wishes to ask a question:

During the trial, you will be permitted to ask questions of witnesses in case you missed something, you did not understand something, or you need to clarify a pertinent issue.

The rules of evidence apply regardless of whether a question is asked by the attorneys, by me or by you. Therefore, there may be a legal reason why I will not ask your question. If I do not ask your question, you must not hold that against any of the parties, you must not discuss it with the other jurors, and please do not take it personally.

Subject to that understanding, this is how we will proceed: (Two possible procedures are outlined below. Give only one. The second alternative is designed to ensure anonymity).

1) When the attorneys have finished asking their questions, please raise your hand to get my attention. I will give you time to write your question[s] on a clean piece of paper and give the paper to the [bailiff][court deputy]. I will then confer privately with the attorneys. If I ask your question[s], the witness will answer and the attorneys may follow up if they choose. The questioning of witnesses is the primary responsibility of the attorneys. If your question[s] is [are] not asked, you must not discuss it with other jurors or hold it against either party. You are not obligated to ask any questions, but if it will help your understanding of the case, you may do so.

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<sup>245</sup> FLA. R. CRIM. P. 3.371.

2) When the attorneys have finished asking their questions, I will ask each of you to write something down on a clean piece of paper. If you do not have a question, please write – “no questions.” If you have [a] question[s], please write the question[s] on the paper. Please do not put your name on the paper because I do not want anyone to know which juror is submitting a question. Please then fold the paper in half and give it to the [court deputy][bailiff]. I will then confer privately with the attorneys. If I ask the question[s], the witness will answer and the attorneys may follow up if they choose. The questioning of witnesses is the primary responsibility of the attorneys. If your question[s] is [are] not asked, you must not discuss it with other jurors or hold it against either party. You are not obligated to ask any questions, but if it will help your understanding of the case, you may do so.

A juror has indicated that the juror wishes to ask a question of the witness. After the attorneys have completed their questioning of the witness, I will give sufficient time for the juror to write the question on the paper which you have been provided, fold it and give it to the bailiff, who will pass it to me. Please do not show your question to anyone or discuss it with anyone.

I will then review the question with the attorneys. Under our law, only certain evidence may be considered by a jury in determining a verdict. You are bound by the same rules of evidence and procedure that control the attorneys' questions. If I decide that a question may not be asked under our rules of evidence or procedure, I will tell you. Otherwise, I will direct the question to the witness. The attorneys may ask follow-up questions.<sup>246</sup>

Michigan authorizes juror questions in criminal cases and requires that judges exercise discretion.<sup>247</sup> In Michigan, it is erroneous for a trial court judge to prohibit all juror questions.<sup>248</sup> In Michigan, judges have some discretion in allowing juror questioning; however, judges are required to instruct criminal jurors that they may pose questions.<sup>249</sup>

Juror questioning is increasingly accepted in most U.S. jurisdictions and it seems to be the norm in civil cases. Juror questioning is being incorporated slowly and cautiously into criminal cases. But judges and lawyers fear that jurors will become advocates for one side when they start formulating questions. Others fear that the juror questions will advertise any prejudices or opinions that the jurors might hold. This showing of the jurors' “poker hand” might influence the opinions of the other jurors early on in the proceedings, thereby giving one side an unfair advantage.

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<sup>246</sup> *Standard Jury Instructions—Criminal Cases*, Fla. Sup. Ct., [http://www.floridasupremecourt.org/jury\\_instructions/index.shtml](http://www.floridasupremecourt.org/jury_instructions/index.shtml).

<sup>247</sup> J. RICHARDSON JOHNSON, *MICHIGAN CIRCUIT COURT BENCHBOOK: CRIMINAL PROCEEDINGS—REVISED EDITION 5-43* (2013).

<sup>248</sup> *Id.*

<sup>249</sup> MICH. COMP. LAWS ANN. § 2.513(I) (West 2013).

One Florida circuit judge, with a long background in criminal defense prior to becoming a judge, did allow questioning in a criminal case.<sup>250</sup> The judge described it as a logistical “nightmare” and would not try it again.<sup>251</sup> He explained how painstaking the extra time was in removing the jurors from the courtroom to review every juror question with the attorneys.<sup>252</sup> The attorneys had an opportunity to raise objections to each question outside the presence of the jury.<sup>253</sup> The judge ruled on each question and considered revisions of each questions.<sup>254</sup> The juror questioning added a few extra days to what would normally be a two-day trial.<sup>255</sup> The circuit judge agreed that the juror questioning did not necessarily impact the defendant’s right to a fair trial.<sup>256</sup>

One concern with juror questions is the impact on the juror whose question was not permitted by the court. Juror questioning further invites potential appellate error and reversal, and prohibiting a juror question is a safer procedure that does not result in error. However, notwithstanding the concerns, juror questions stimulate juror attention and deter jurors from conducting their own research to answer their questions.

#### IX. PRE-DELIBERATION DISCUSSIONS

In almost all U.S. jurisdictions, jurors are specifically instructed that they must not discuss the case among themselves until the deliberation stage of the trial.<sup>257</sup> Deliberations do not commence until after both parties present their case in chief and both sides provide a closing argument.<sup>258</sup> After closing arguments, the judge instructs the jurors on the law applicable to the evidence.<sup>259</sup> Jury instructions generally include rules for deliberation.

The main reason for this prohibition on pre-deliberation jury communications is to provide a fair trial for the defending party.<sup>260</sup> In both criminal and civil cases, the defending party does not want the jury to make a decision until the defense has had its opportunity to provide evidence and testimony. The defense fears that the jurors could make up their minds before it gets an opportunity to be heard.

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<sup>250</sup> Interview with Marc Lubert, Ninth Judicial Circuit Judge (May 19, 2013).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Hoffmeister, *supra* note 153, at 425-26.

<sup>258</sup> During jury trials, this Author, as a trial court judge, advised jurors of their duty to refrain from discussing the case with one another until after both sides have made their final arguments and the judge has instructed them on the law.

<sup>259</sup> Following the closing arguments of the lawyers, this Author, as trial court judge, instructed the jurors on the applicable law before commencing deliberations.

<sup>260</sup> Hoffmeister, *supra* note 153, at 425-26.

The defense also fears that pre-deliberation discussions could cause jurors to decide prematurely in favor of the plaintiff after hearing only the plaintiff's case in chief. The attorneys for the defending party are concerned that once the jury leans toward the plaintiff, they will have an uphill battle to change the jurors' positions. Thus, those who champion the cause of the defense want the juries to wait until they hear all the evidence and testimony from both parties before deciding their verdict.

As a trial court judge, this Author routinely instructed jurors to refrain from discussing the case among themselves until instructed by the court. However, a few states have implemented more progressive steps to encourage and engage active juries. In Massachusetts,<sup>261</sup> Colorado,<sup>262</sup> Indiana<sup>263</sup> and Arizona,<sup>264</sup> judges may authorize jurors to discuss the civil case with each other prior to the deliberation stage.<sup>265</sup> The judges authorizing pre-deliberation juror communications provide cautionary instructions to prevent the jury from making a final decision before the defense is fully heard. In Massachusetts, the court's jury instructions state, in part, as follows:

As the evidence in this case progresses, I will permit you to discuss the evidence among yourselves. If you choose to discuss the evidence as it develops, there are certain conditions that you must abide by, which I will explain in a moment.

It is, of course, extremely important that you keep an open mind as the case unfolds. The case can only be presented one piece at a time, and until you have heard the whole thing, all the evidence, the lawyers' arguments, and my complete explanation of the governing legal principles, it is premature to reach conclusions on the ultimate issues in the case. As you may know, many judges instruct jurors not to discuss the evidence until the case is placed in their hands for deliberation and decision. This is because many judges fear that jurors may prejudge the case, that is, reach premature conclusions on only part of the evidence, and perhaps even express strong opinions about the merits of the case which may make it difficult for them to view the remaining evidence with an impartial and open mind.

But, particularly in cases like this which may last several days, there are significant advantages to a jury discussing evidence relatively soon after they have heard it. If you choose to discuss the evidence as it develops, it is likely that you will better understand it, minimize the risk of misunderstanding it, and better retain it when, several days from now, you begin your deliberations. That is why I will permit you to discuss the evidence as it develops during trial.<sup>266</sup>

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<sup>261</sup> Mass. Super. Ct. Jury Instructions (Civil), ch. 1 (General Instructions) (2011).

<sup>262</sup> Colo. Jury Instructions (Civil), § 1:10 (Admonition at Recess) (2013).

<sup>263</sup> IND. CT. R. 20 (Preliminary Instructions).

<sup>264</sup> ARIZ. JURY INSTRUCTIONS (CIVIL), Preliminary 9 (Admonition) (2013).

<sup>265</sup> Gareth S. Lacy, *Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research*, 1 Reynolds Ct. & Media L.J. 169, 189 (2011).

<sup>266</sup> Mass. Super. Ct. Jury Instructions (Civil), ch. 1 (General Instructions) (2011).

Jurors who are permitted to conduct pre-deliberation discussions must be cautioned, however, that they may only discuss the case when inside the jury room and when all jurors are present.<sup>267</sup> They are further instructed to withhold their final decision until the conclusion of all of the evidence.<sup>268</sup> In Colorado, the judge shall instruct the jurors that “they must avoid discussing any potential outcome” of the case and “must avoid reaching any conclusion until they have heard all the evidence, final instructions by the court and closing arguments by counsel.”<sup>269</sup> The Colorado trial courts may prohibit or limit pre-deliberation discussions upon good cause.<sup>270</sup> The Arizona courts further admonish the jurors to refrain from forming “final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence,” along with the closing arguments of the attorneys and the judge’s instructions on the law.<sup>271</sup> The Arizona courts go one step further in providing detail and reasoning. The Arizona standard civil instructions require that the judge explain that “both sides have the right to have the case fully presented and argued before you decide any of the issues in the case.”<sup>272</sup> The Arizona judges further instruct the civil jurors to “keep an open mind during the trial.”<sup>273</sup>

In Indiana, the judge instructs jurors and alternate jurors in both criminal and civil cases that they may discuss the evidence among themselves prior to the jury deliberation stage of trial.<sup>274</sup> Indiana state judges advise the jurors and alternates that their pre-deliberation jury discussions shall occur only in the jury room on recesses and when all the jurors are present.<sup>275</sup> The judges caution the jurors not to otherwise discuss the case among themselves prior to the deliberation stage.<sup>276</sup>

Pre-deliberation jury discussions present an interesting change in the traditional restraints imposed upon jurors. Similar to most changes in U.S. jury systems, the changes are introduced slowly into civil cases. Some states seem to accept jury system change more easily than others. As the states of Indiana, Arizona, Colorado, and Massachusetts test the waters with jurors conducting pre-deliberation discussions in civil cases, it seems likely that other states will soon follow. Once a majority of the states develop a comfort level with juror pre-deliberation discussions in civil cases, it is only a matter of time before the more progressive states start discussing the application of these changes in criminal cases.

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> COLO. R. CIV. P. 47(a)(5).

<sup>270</sup> *Id.*

<sup>271</sup> Ariz. Jury Instructions (Civil), Preliminary 9 (Admonition) (2013).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> IND. CT. R. 20 (Preliminary Instructions).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*



## X. CONFISCATING JUROR CELL PHONES

Many jurisdictions have made attempts to prevent juror misconduct. In the Ninth Judicial Circuit, in and for Orange County, Florida, judges routinely instruct court deputies<sup>277</sup> to remove the jurors' cellphones during deliberations.<sup>278</sup> When jurors retire to deliberate, deputies routinely take all of their cell phones and hold them in the hallway outside of the deliberation room until the jurors reach a verdict.<sup>279</sup> Deputies have performed this function for decades pursuant to what has developed as a local custom.<sup>280</sup> The deputies are trained and do not rely on specific judge directions. In Indiana, judges are required to instruct bailiffs to remove the jurors' cell phones, computers and other devices prior to deliberations.<sup>281</sup>

By judges removing juror cell phones, jurors avoid any temptation to improperly research and communicate with others about the case during deliberations. This practice does eliminate the most egregious juror misconduct. Of course, most modern buildings, like the Orange County Courthouse have wireless internet access allowing all individuals with laptops and tablets to have easy internet access without their cell phones. Therefore, any policy of removing cellphones must be extended to laptop computers, iPads, tablets, and e-readers.

Further, jurors often maintain possession of their cell phones, laptops, and tablets during the trial proceedings and during their lunch breaks and other brief recesses.<sup>282</sup> More importantly, many trials take more than one day and jurors have complete access to all forms of electronic research and communication after they leave the courthouse and return home for the night.

Notwithstanding repeated judicial admonitions, some jurors cannot resist the temptation to use their phones to communicate during the trial proceedings. As a trial court judge, this Author repeatedly advised jurors to refrain from using their

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<sup>277</sup> Following a fatal tragic courthouse shooting on January 10, 1984, in Orange County, Florida in the Ninth Judicial Circuit, courts discontinued the use of bailiffs and implemented the use of Orange County deputies to provide courthouse security. The sworn deputies provide security for the perimeter of the courthouse and grounds and armed sworn law enforcement deputies are located inside each courtroom. See *Victims of Orange Co. Courthouse Shooting Remembered*, WESH NEWS (Jan. 10, 2013), <http://www.wesh.com/news/central-florida/orange-county/Victims-of-Orange-Co-courthouse-shooting-remembered/-/12978032/18083484/-/248j1bz/-/index.html>.

<sup>278</sup> *Id.*

<sup>279</sup> As a trial court Orange County Judge, this Author presided over many criminal jury trials over seven years. In each trial, the court deputies routinely confiscated juror cell phones without the Author's specific request. This practice of removing juror cell phones occurred in every trial before every judge.

<sup>280</sup> As a trial court judge from 2001-2013, this Author observed court deputies also confiscate juror cell phones during deliberations.

<sup>281</sup> IND. CT. R. 20 (Preliminary Instructions).

<sup>282</sup> As a trial court judge, this Author observed jurors possessing cell phones, laptop computers, and tablets. While this Author instructed the jurors to refrain from using the devices, the jurors maintained full use of the devices while not sitting inside the courtroom.

cellphones to receive or transmit any communication while inside the courtroom.<sup>283</sup> For example, this Author explained that while jurors were present inside the courtroom, voice and data could not be received or transmitted about any topic using the telephone, e-mail, text, or social media.

In the US District Court for the Middle District of Florida, all courthouse visitors are precluded from bringing cell phones, laptops, and cameras into the courthouse, without the express order of judge.<sup>284</sup> This practice promotes security and also limits juror misconduct while inside the courthouse building. By disallowing communication devices inside the building, jurors cannot commit misconduct inside the courtroom jury box, on brief recesses while using the restroom, and during juror deliberations in the jury room. This practice limits the impulsive juror misconduct that might occur during trial proceedings and while on restroom breaks. This practice would have no impact on the more thoughtful and deliberate misconduct that could occur when jurors go to lunch outside the courthouse and retire to go home for the night.

In Chicago, a courthouse cell phone ban was implemented to avoid photography used by gangs for witness intimidation.<sup>285</sup> But the cell phone ban does not apply to judges, attorneys or jurors. Citing security reasons, the 17<sup>th</sup> Circuit Harford County Courthouse in Arlington, Virginia also bans individuals from bringing cell phones and iPads into the courthouse, while iPods, laptops, and e-readers are permitted.<sup>286</sup> Unlike Chicago's rules, this Virginia cell phone and technology ban does, in fact, apply to jurors. One courthouse even lifted a cell phone ban after a juror was trapped in a juror parking lot on a cold day without cell phone access.<sup>287</sup>

New Jersey jurors are permitted to bring cell phones inside the courthouse, however, jurors must keep the cell phones turned off while they are inside the courtroom and the jury deliberation room.<sup>288</sup> Jurors are provided with a telephone number to give to friends and family members who might need to contact the

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<sup>283</sup> As a trial court judge from 2001-2013, this Author presided over many criminal jury trials. The jury instructions involving technology evolved with the changing mobile devices, applications, and social media.

<sup>284</sup> *Security*, U.S. DIST. CT. FOR THE MIDDLE DIST. OF FLA., <http://www.flmd.uscourts.gov/About/Security.htm> (last visited May 19, 2013) (Items such as cellphones, laptop computers, cameras, audio recorders, etc., are not allowed in the courthouse).

<sup>285</sup> Maggie Carlo, *Courthouse Cell Phone Ban Begins Monday*, WGNTV.COM (Apr. 14, 2013), <http://wgntv.com/2013/04/14/courthouse-cell-phone-ban-begins-monday/#ixzz2TkZEUVRk>.

<sup>286</sup> *Security Issue—Cell Phones Not Permitted in Courthouse*, ARLINGTON, VA. 17TH JUDICIAL CIRCUIT COURT, <http://www.arlingtonva.us/departments/clerkofcircuitcourt/clerkofcourtmain.aspx> (last visited May 19, 2013).

<sup>287</sup> Jim Kennedy, *Ban on Cell Phones Lifted in Bel Air Courthouse, Two Years After Everywhere Else in Maryland*, BALT. SUN (Apr. 19, 2013), <http://www.baltimoresun.com/news/maryland/harford/belair/ph-ag-cell-phones-0419-20130419,0,2046337.story#ixzz2TkjEmqVt>.

<sup>288</sup> N.J. SUPER. CT., POLICY REGULATING JURORS' USE OF ELECTRONIC DEVICES DURING JUROR SERVICE (2010), *available at* [http://www.judiciary.state.nj.us/jury/juror\\_wireless\\_use.pdf](http://www.judiciary.state.nj.us/jury/juror_wireless_use.pdf).

juror.<sup>289</sup> Judges are permitted to implement additional policies, such as confiscating cell phones and devices.<sup>290</sup> Their courthouse policy is posted in the jury deliberation room.<sup>291</sup>

Courts must ban juror cell phone use during the trial proceedings and must confiscate juror cell phones, laptop computers, iPads, tablets, e-readers and other electronic devices during juror deliberations. These minimum protections are necessary to ensure the integrity of the trial.

#### XI. JURY INSTRUCTIONS

In an effort to avoid juror confusion, courts have moved toward standard instructions containing easy to understand jury instructions in plain English. The courts now avoid older legalese and, in its place, have inserted everyday language and well understood words.<sup>292</sup>

Courts intend for the clearer and simpler standard jury instructions to curtail jurors conducting research to answer their own questions. Juror misconduct is more likely to occur when jurors don't clearly understand the language utilized in the standard jury instructions.<sup>293</sup> By clearing up confusion, judges expect that jurors will be less tempted to conduct research to define legal terms.

Studies have shown that jurors struggle with legalese or legal jargon, ambiguous drafting, awkward grammar, confusing and long sentence structure, and confusing organization of the passages.<sup>294</sup> Courts have spent the last few decades modifying standard jury instructions to use plain English language with a vocabulary geared for sixth grade reading comprehension.<sup>295</sup> While some judges have resisted dumbing down standard jury instructions, state and federal courts continue to modify jury instructions so that they are most widely understood by jurors.<sup>296</sup>

Some scholars have recommended adjusting the timing of the delivery of standard instructions.<sup>297</sup> Jury instructions are typically provided after closing arguments by the attorneys and prior to the commencement of deliberations.<sup>298</sup> Nancy S. Marder has recommended that judges instruct juries at the beginning of a trial with preliminary instructions.<sup>299</sup> Preliminary instructions should include some definitions including the jurors' role, the case, the law, and the burden of proof.<sup>300</sup>

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> See Fla. Stand. Jury Instructions (Criminal) (2013).

<sup>293</sup> Hoffmeister, *supra* note 153, at 422.

<sup>294</sup> Nancy S. Marder, *Bring Jury Instructions Into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 454 (2005) [hereinafter Marder, *Twenty-First Century*].

<sup>295</sup> *Id.* at 478.

<sup>296</sup> *Id.* at 481.

<sup>297</sup> *Id.* at 498.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 499.

<sup>300</sup> ARIZ. R. CRIM. P. 18.6.

Professor Marder and others have recommended that these preliminary jury instructions be furnished by the judge orally, and in writing, to each individual juror.<sup>301</sup>

Arizona took the lead in modifying jury instructions to improve juror comprehension.<sup>302</sup> Pursuant to Arizona Rules of Criminal Procedure, judges shall instruct the jurors immediately after they are selected, empaneled and sworn.<sup>303</sup> The Arizona judges instruct the jurors regarding their duties, their conduct and the “order of proceedings.”<sup>304</sup>

One progressive recommendation to improve juror comprehension, attention, and recall is for judges to instruct jurors as the issues arise in trial. Instructions relating to the testimony of witnesses could be furnished right before or after a particular witness testifies. For example, once an expert witness concludes testimony, the judge could instruct the jury on how to evaluate such testimony. Once the criminal defendant testifies, the judge could then instruct the jury on how to consider such testimony.

In its Report, the ABA recommends the use of both preliminary jury instructions and instructions throughout the trial as issues arise.<sup>305</sup> The ABA recommends that preliminary jury instructions address the role of juries and trial procedure.<sup>306</sup> The ABA Report also recommends more detailed preliminary instructions, including a description of the nature of evidence, issues to be decided the jury, definitions of terms, and elements of the criminal offenses.<sup>307</sup>

## XII. MODIFIED JURY INSTRUCTIONS ADDRESSING ELECTRONIC MISCONDUCT

Most U.S. state and federal courts have addressed electronic juror misconduct by modifying standard jury instructions. States’ standard jury instructions vary by the frequency and stage of trial when given; whether the instructions specify prohibited internet research sites; whether the instructions specify the various social media sites; whether jurors are threatened with judicial sanctions for violations; whether the jurors are advised to report other jurors committing misconduct; and whether the judge explains the reasons for the prohibited conduct.

Historically, judges have instructed jurors to refrain from conducting their own research or visiting the locations related to litigation.<sup>308</sup> Typically, jurors were told to refrain from reading about the case in the newspaper or watching television reports.<sup>309</sup> Juror misconduct also included jurors using law books to look up words used in the courtroom.<sup>310</sup> Other jurors reviewed maps to better understand witness

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<sup>301</sup> Marder, *Twenty-First Century*, *supra* note 295, at 298.

<sup>302</sup> ARIZ. R. CRIM. P. 18.6.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> AM. BAR ASS’N, *supra* note 202, at 7-8.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Fla. Stand. Jury Instructions (Criminal), § 2.1 (Preliminary Instructions) (2013).

<sup>309</sup> *Id.*

<sup>310</sup> Hoffmeister, *supra* note 153, at 422.

testimony or satisfy their curiosity.<sup>311</sup> The most concerning instances of juror misconduct included jurors conducting their own experiments to evaluate expert opinions or develop their own opinions about scientific testimony.

With the development of easy, quick and inexpensive internet access, jurors began visiting Google Earth to access maps and photographs.<sup>312</sup> Jurors also visit Wikipedia to review easy to locate and easy to understand summary definitions and facts on key concepts.<sup>313</sup>

With internet search engines, such as Google, jurors gained simple and accessible tools to replace the dictionary and the newspaper. As such, judges began modifying jury instructions to specifically advise jurors not to conduct their own research using the Internet.<sup>314</sup> Over the years, instructions became more comprehensive and addressed the restriction to avoid Google Earth and Wikipedia.

As a result, most federal and state courts developed some type of standard jury instruction prohibiting internet research.<sup>315</sup> More progressive jurisdictions direct jurors to refrain from using phones and mobile devices to engage in internet research.<sup>316</sup> Many thorough standard or model jury instructions explain to jurors why they should not conduct research on their own.<sup>317</sup>

In Florida, courts instruct jurors on improper electronic communication and internet research multiple times throughout various stages of the criminal trial.<sup>318</sup> Florida courts provide a standard qualification instruction when jurors arrive at the courthouse for juror orientation, an introductory instruction when jurors arrive at an assigned courtroom for voir dire, a preliminary instruction after the jury is seated and sworn, and admonitions at recesses and prior to deliberations.<sup>319</sup>

The Florida courts provide an initial qualifications instruction when all of the jurors arrive at the courthouse to check in as a juror pool and receive general juror orientation information. This instruction advises jurors to refrain from communicating about their jury service. The instruction provides a brief reference to refraining from conducting internet research. The Florida initial qualifications instruction provides, in part, as follows:

#### QUALIFICATIONS INSTRUCTION

Many of you have cell phones, computers, and other electronic devices. Even though you have not yet been selected as a juror, there are some strict rules that you must follow about using your cell phones, electronic

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<sup>311</sup> *Id.* at 412.

<sup>312</sup> GOOGLE EARTH, <http://www.google.com/earth> (last visited Oct. 7, 2013).

<sup>313</sup> WIKIPEDIA, [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page) (last visited Oct. 7, 2013).

<sup>314</sup> Fla. Stand. Jury Instructions (Criminal), § 1.1 (Qualifications Introduction) (2013).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at §§ 1.1, 2.1.

<sup>319</sup> *Id.*

devices and computers. You must not use any device to search the Internet or to find out anything related to any cases in the courthouse.

Between now and when you have been discharged from jury duty by the judge, you must not provide or receive any information about your jury service to anyone, including friends, co-workers, and family members. You may tell those who need to know where you are that you have been called for jury duty. If you are picked for a jury, you may tell people that you have been picked for a jury and how long the case may take. However, you must not give anyone any information about the case itself or the people involved in the case. You must also warn people not to try to say anything to you or write to you about your jury service or the case. This includes face-to-face, phone or computer communications.

In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages, including e-mail and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.

After you are called to the courtroom, the judge will give you specific instructions about these matters. A judge will tell you when you are released from this instruction. All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution of every case.<sup>320</sup>

The Florida standard criminal jury instructions provide a second instruction on electronic jury research in the preliminary instructions given to the entire venire just prior to commencing voir dire. This introductory instruction describes, in more detail, that the jurors should refrain from conducting internet research whether they are at the courthouse or at home. The instruction provides several reasons for the jurors to refrain from conducting their own internet research. Judges advise jurors that internet research might be improper, irrelevant, or simply inaccurate. Judges further instruct the jurors of the parties' right to question or rebut evidence. The more specific Florida introductory instruction provides, as follows:

You must not do any research or look up words, names, [maps], or anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.

[i]f you investigate, research or make inquiries on your own outside of the courtroom, the trial judge has no way to assure they are proper and

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<sup>320</sup> *Id.*

relevant to the case. The parties likewise have no opportunity to dispute the accuracy of what you find or to provide rebuttal evidence to it. That is contrary to our judicial system, which assures every party the right to ask questions about and rebut the evidence being considered against it and to present argument with respect to that evidence. Non-court inquiries and investigations unfairly and improperly prevent the parties from having that opportunity our judicial system promises.<sup>321</sup>

The third Florida standard preliminary jury instruction cautions jurors again to refrain from conducting independent research or electronic communications with others. The judge instructs the juries with general directions. The Florida preliminary instruction is given after the jury is selected and sworn to try a criminal case, but just prior to attorney opening statements, as follows:

During the course of the trial, the court may take recesses, during which you will be permitted to separate and go about your personal affairs. During these recesses you will not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case. If anyone attempts to say anything to you or in your presence about this case, tell [him] [her] that you are on the jury trying the case and ask [him] [her] to stop. If [he] [she] persists, leave [him] [her] at once and immediately report the matter to the bailiff, who will advise me.

The case must be tried by you only on the evidence presented during the trial in your presence and in the presence of the defendant, the attorneys and the judge. Jurors must not conduct any investigation of their own. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else. You must not visit places mentioned in the trial or use the Internet to look at maps or pictures to see any place discussed during the trial.

Jurors must not have discussions of any sort with friends or family members about the case or the people and places involved. So, do not let even the closest family members make comments to you or ask questions about the trial. In this age of electronic communication, I want to stress again that just as you must not talk about this case face-to-face, you must not talk about this case by using an electronic device. You must not use phones, computers or other electronic devices to communicate. Do not send or accept any messages related to this case or your jury service. Do not discuss this case or ask for advice by any means at all, including posting information on an Internet website, chat room or blog.<sup>322</sup>

Finally, Florida jury instructions again provide a general instruction on jurors' prohibition against electronic communication with others just prior to deliberations.

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<sup>321</sup> *Id.* at § 1.1.

<sup>322</sup> *Id.* at § 2.1.

When submitting the cases to the jury for deliberations, judges instruct the jury, in part, as follows:

You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means. Do not contact anyone to assist you during deliberations.<sup>323</sup>

Florida courts provide multiple standard criminal jury instructions regarding improper electronic research and communications.<sup>324</sup> The instructions reference the use of electronic devices including computers and cell phones in some instructions.<sup>325</sup> The Florida instructions provide a vague reference to relevancy and accuracy and the parties' rights to question evidence.<sup>326</sup> The Florida instructions also provide a reference to applicability at home and at the courthouse.<sup>327</sup>

The Florida instructions lack specificity sufficient to describe the misconduct and deter juror misconduct. Florida courts fail to reference the impropriety of using specific social media, such as Facebook or Twitter, to discuss the case. The Florida instructions do not describe electronic research to include specifically Google searches, Wikipedia information, or Google Earth maps.

But the Florida instructions do not reference that juror misconduct may cause a mistrial wasting taxpayer money and the time of the litigants, lawyers, witness, judges, other jurors and the judge. The Florida instructions also do not clearly state nor repeat that independent juror research may be completely or partially inaccurate or unfairly prejudicial to a party. The Florida instructions do not clearly describe the problems that could exist when jurors hold different information and when the lawyers, parties and the judge are unaware of what information the juror has discovered from independent research. The Florida instructions do not reference potential sanctions that a judge could impose upon a juror for committing misconduct. For example, a judge could hold a juror in contempt of court for failing to follow the judge's instructions and impose a fine or imprisonment.<sup>328</sup> Last, the Florida instructions do not clearly instruct a juror to advise the court if they discover another juror researching or communicating about the case.

In federal cases, the U.S. Courts have promulgated model instructions to address electronic juror issues.<sup>329</sup> Two model instructions were developed to address internet research and communications. One model jury instruction was developed for use at the beginning of the trial and one model instruction was developed for use after

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<sup>323</sup> *Id.* at § 3.10.

<sup>324</sup> *Id.* at § 2.1.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> JUDICIAL CONFERENCE COMM., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (June 2012), available at [www.uscourts.gov/uscourts/news/2012/jury-instructions.pdf](http://www.uscourts.gov/uscourts/news/2012/jury-instructions.pdf).



closing arguments and prior to deliberations. The preliminary instruction states, as follows:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

The second federal court instruction for use after closing arguments, states, as follows:

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.<sup>330</sup>

The second instruction is more detailed and provides specific and clear reasons why the jurors should not conduct outside electronic research of their own.<sup>331</sup> First, this latter instruction clearly explains in plain language that research on the internet or in social media might be “wrong, incomplete, or inaccurate.”<sup>332</sup> Second, the latter federal instruction stresses the importance of all the jurors and parties hearing and considering the same evidence.<sup>333</sup>

The initial federal court jury instruction is detailed in that it explains that jurors should not research the case, the people, or the company involved. However, the initial instruction does not describe improper juror communications and internet research to include the use of social media, such as Facebook or Twitter. The initial federal court instruction does not specifically describe the prohibited use of Google, Wikipedia and other search engines or internet sites. The initial federal jury instruction does not caution jurors to refrain from conducting research about the attorneys.

Further, the initial instruction fails to include the reasons for the prohibition against internet research and communication. The latter instruction provided after closing arguments and just prior to deliberations clearly states the reasons why jurors

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<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

should not conduct independent research. The detailed reasons for preventing juror misconduct should include a reference to the potential of costly mistrials.

The federal standard instructions would be improved by expanding and incorporating clearly stated reasons for refraining from outside research into the preliminary instructions. Due to federal courthouse bans on electronic devices, the jurors are unlikely to have access to research devices, including computers and cell phones, during deliberations. Therefore, most opportunities for improper juror research would occur prior to deliberations, when the jurors are at home. More detailed reasons for avoiding juror research should be included in both instructions for the best effect to deter juror misconduct before it occurs. For example, federal standard instructions could explain that outside research is often wrong, incomplete, inaccurate, outdated or inapplicable. Federal judges could explain that parties have the right to have all of the evidence come from the witness stand when all of the parties, the lawyers, the judge and all of the jurors are present. This requirement puts the parties on notice of the evidence being considered by the jurors and provides them with the opportunity to dispute or correct erroneous or incomplete information and respond or reply to other information. This process further insures that all of the jurors are considering all of the same evidence and that the parties are aware of what evidence or testimony is being considered by the jurors. Federal jury instructions could explain that the jurors failing to comply with the judges' instructions could cause a mistrial and waste the time of the judge, the attorneys, the parties, the witnesses and the other jurors, as well as waste taxpayer money. Judges could explain that mistrial would require that the trial start anew with a different panel of jurors, regardless of the trial stage when the juror research occurred.

Some states use standard instructions that specifically describe internet research. Alaska courts prohibit using "a search engine like Google."<sup>334</sup> New Jersey preliminary jury instructions provide a lengthy explanation of reasons to refrain from internet research. Notably, New Jersey judges explain that independent internet research might be wrong, incomplete, inaccurate, outdated, or inapplicable.<sup>335</sup> New Jersey courts advise the jurors of the consequences of failing to comply with the court's instructions.<sup>336</sup> New Jersey judges explain that juror misconduct could result in a mistrial costing time and money in retrying the case.<sup>337</sup> Further, the New Jersey judges explain that the jurors may be subject to sanctions by the judges if they commit misconduct.<sup>338</sup>

In the state of Nebraska, judges instruct jurors, as follows:

Do not use any electronic device in any way to discover or share any information about this case. This includes cell phones, Blackberries, computers, and other electronic devices. This includes searching, blogging, emailing, texting, using Facebook, Twitter, My Space, LinkedIn, or any similar social network.

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<sup>334</sup> Alaska Jury Instructions (Criminal), § 1.02 (2011).

<sup>335</sup> N.J. Jury Charges (Civil), ch. 1 (General Instructions) (2012).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

Do not conduct any of your own independent research about this case. Do not consult dictionaries, other reference materials, or electronic devices to obtain any information about this case—about the parties, the issues, the locations, or any thing else that has to do with this case. [Do not go near any of the places discussed in this case.]

Do not pay any attention to any news reports regarding this case.

Any information obtained outside of this courtroom, whether through reference materials, newspapers, television, [or] computers or other electronic devices, [or visits to the places involved in this case,] could be misleading, inaccurate, or incomplete. For example, information found in newspapers or books, or on the internet, may be wrong. [The places involved in this case may have changed.] In addition, relying on any of this information would be unfair because the parties would not have the opportunity to refute, explain, or correct it.

(5) You are not allowed to use a computer, cell phone, or other electronic device at all while you are in the courtroom and during your deliberations near the end of the trial. You may use such devices during breaks or recesses, but you may not use them to obtain or disclose information about this case or any of the people involved in this case.<sup>339</sup>

The Nebraska instruction is very specific in identifying the devices, means of communication, and social media sites. The instruction also clearly explains the reasons for prohibiting the misconduct and adds a mention that the locations may have changed since the occurrence at issue in the trial. The instruction further explains that the parties would not have an opportunity to refute, explain or correct misinformation or incomplete information. The instruction clarifies that the jurors should refrain from conducting research about the case or the people involved in the case.

Alabama judges advise the jurors that their misconduct can cause the verdict to be “thrown out.”<sup>340</sup> The jurors are further instructed to report other jurors’ misconduct to the judge.<sup>341</sup>

In state courts, judges appear to follow a trend in incorporating more detailed and easy to understand standard jury instructions in an effort to deter electronic juror misconduct. State courts continue to amend their respective standard instructions to describe prohibited juror research about the case, the parties, and the attorneys.<sup>342</sup> Many states describe specifically improper electronic research to include accessing Google, Wikipedia, and Google Earth.<sup>343</sup> Other state court instructions describe improper communications methods to include texting, e-mail, Facebook posts,

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<sup>339</sup> Neb. Jury Instructions, ch. 1 (Preliminary Instructions) (2013).

<sup>340</sup> Ala. Jury Instructions (Civil), § 1.12 (Jurors Not to Make Investigation) (2012).

<sup>341</sup> *Id.*

<sup>342</sup> Neb. Jury Instructions, ch. 1 (Preliminary Instructions) (2013).

<sup>343</sup> Alaska Jury Instructions (Criminal), § 1.02 (2011).

Tweets on Twitter, LinkedIn updates and photos on Instagram and YouTube.<sup>344</sup> To respond to evolving technology and social trends, courts must review their standard instructions more frequently.

### XIII. U.S. COURTS

Federal judges use a variety of means to deter jurors from using social media during trials. In October 2011, the U.S. Courts commissioned a survey of its judges.<sup>345</sup> This survey was conducted after a significant revision to the standard jury instructions addressing social media use by jurors.<sup>346</sup> But the instructions were modified yet again after this study. The actual instances of jurors using social media was low; however, the judges identified several steps to avoid misconduct.<sup>347</sup>

A majority of the judges indicated that they explained, in plain meaning, to the jurors the reasons for the social media ban during the trial (62%).<sup>348</sup> A majority of the federal judges indicated that they provided jury instructions on the social media ban at multiple points in the trial (54%).<sup>349</sup> Many judges reminded jurors during voir dire not to use social media (39%).<sup>350</sup> Many judges confiscated cell phones and devices during deliberations (29%).<sup>351</sup> Other judges indicated that they confiscated cell phones at the beginning of the trial (22%).<sup>352</sup> Many judges advised jurors of their own personal consequences for violating the court order (20%).<sup>353</sup>

### XIV. RECOMMENDATIONS

Courts should continue to frequently revisit methods of preventing and monitoring electronic juror misconduct. First, jurors' habits and temptations to communicate and research can be understood and addressed effectively when judges are better educated on the most current technology and social media trends. Second, jury instructions should be modified to provide more specific detail in juror summons, court websites, and early and frequent judge verbal, written, and electronic jury instructions and information. Third, attorneys should discuss social media and electronic research during voir dire and monitor jurors' social media sites. Last, jurors should be offered more active participation by using juror notes, notebooks, and juror questions.

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<sup>344</sup> Neb. Jury Instructions, ch. 1 (Preliminary Instructions) (2013).

<sup>345</sup> Meghan Dunn, *Jurors' Use of Social Media During Trials and Deliberations*, FED. JUD. CENTER, Nov. 22, 2011, available at [http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 10.

<sup>348</sup> *Id.* at 8.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

First, judges would benefit from increased and continued education regarding the most current trends in social media, electronic devices, and internet research. When this Author first became a trial court judge in 2001, individuals in certain industries, such as law enforcement, carried pagers and some people started carrying hand held flip cell phones, which did not have internet or texting capabilities. In 2001, many people starting using desktop computers with dial up internet access to view e-mails.<sup>354</sup> Technology savvy individuals started using the internet to explore information sources.

Fast forward to 2013: most people now carry smart cell phones with internet and SMS (“short messaging service”) text capabilities.<sup>355</sup> These cell phones contain applications apps that provide easy and quick access to social media sites, such as Facebook, Twitter, LinkedIn, Google+, Instagram, FourSquare, YouTube and TUMBLR.<sup>356</sup> Emoticons or Emojis are used to add emotion symbols to brief text messages.<sup>357</sup> Search engines include Google, Bing, and Yahoo.<sup>358</sup> Internet web browsers include Internet Explorer, Mozilla Firefox, Chrome and Safari.<sup>359</sup> Electronic informational and communication devices include smart cell phones, desktop computers, laptop computers, tablets including Apple iPad and iPad mini and Microsoft tablets, such as the Surface. Book e-Readers, such as the Kindle and Nook also contain internet and communication abilities.

With some judges still in the process of embracing the use of e-mails, it becomes critical to provide judges with continually updated information about electronic devices, electronic research and current trends in social media. If judges fully understand the prevalent daily and continued use of social media by jurors, they can then fully comprehend the inherent risks of electronic juror misconduct. Judges must appreciate the jurors’ needs and desires to remain constantly connected in a multi-tasking world. Jurors desire to communicate or boast about their disguised pride in playing an important and unique civic role by serving as a juror. The first step in deterring jurors from communicating with others and conducting independent research is to analyze the tools and methods available to jurors. Social media provides a forum for for individuals to vent, brag, and learn. Social media has replaced the telephone, the newspaper, birthday cards, condolence cards, and the

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<sup>354</sup> This Author observed widespread use of desktop computers in private and government legal offices by 2001. By 2001, this Author maintained a desktop computer inside the courtroom and in chambers. These computers offered internet use for research and e-mail communications.

<sup>355</sup> This Author has owned and operated an iPhone, Windows phone, i-Pad, and Windows Surface Tablet. This Author has owned smart phones with internet capability since 2009.

<sup>356</sup> This Author owns, or has recently owned, a smart phone with social media applications, including Facebook, LinkedIn, Twitter, Instagram, and FourSquare.

<sup>357</sup> Emoticons are symbols, such as smiling faces, used to illustrate a short message with a positive or other underlying expression. These communication tools are added to most text used in SMS text messaging, e-mails, and social media. This Author has used this tool with family communications.

<sup>358</sup> This Author uses these search engines on smart phones, tablets, laptop computers, and desktop computers.

<sup>359</sup> This Author uses these Internet web browsers on smart phones, tablets, laptop computers, and desktop computers.

collegiality surrounding the water cooler at the office. People discuss everything from their personal family, health, and employment to politics, sports, and current local and international events.

Individuals have become accustomed to instant access to information on demand. Individuals no longer wait patiently for someone to answer their question or to peruse a library or bookstore and then purchase a book or magazine. Within a few moments, all questions can be answered through search engines, such as Google.<sup>360</sup> Individuals can obtain a quick, though often unreliable, answer on Wikipedia.<sup>361</sup> With handheld devices in most pockets or purses, it becomes a normal daily experience to research simple and complex questions on cell phones through data access. Individuals at lunch no longer need to wait to return to a desktop computer at their home, school, or office.

Judges should stay abreast of the changing social and technological trends to better understand jurors' difficulty in complying with court instructions. For example, social media presents an opportunity for jurors to improperly post comments about their thoughts during a trial. Even innocent thoughts about their schedule, their lunch, and the other jurors may constitute a violation of the court's order not to communicate about the case, the people or the places. The juror's posted comments may pose no prejudice to the parties if the comments do not demonstrate juror bias and the other jurors do not see the comments. However, the inherent description and design of social media encourages others to communicate or reply back to the person who posted a comment. For example, if a juror posts a comment on Facebook, their "friends" may "like" or post a comment or reply. It is the comments or communications of others that provide inappropriate research or communications for the juror and potentially causes prejudice, which may warrant a mistrial.

Well-drafted standard jury instructions furnish a necessary initial start to curbing juror communications and research. However, judges could simply deter juror misconduct by crafting case specific instructions that recognize the jurors' daily habits and communication and research desires. Jurors will better understand judges' instructions if judges reference the most current social media and computer research language. Judges who fully comprehend juror social media use can explain to jurors how social media can lead to improper and prejudicial juror communications and research.

Second, standard jury instructions should be improved by providing more specific instructions at various stages throughout the trial. Jury instruction should begin from the issuance of the juror summons. The summons should advise jurors that they are prohibited from communicating about their service and posting photos on social media sites, including Facebook, Twitter, and Instagram until the conclusion of the case. Jurors should be directed to the court's website for further information. The local and state courts' websites should contain both a video and text orientation where a judge instructs jurors to refrain from communicating about their jury service on social media sites until the case is concluded. Further, courts should use social media sites of their own to provide juror information, including admonishing current and future jurors about conducting electronic research or communications.

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<sup>360</sup> GOOGLE, <http://www.google.com> (last visited Oct. 7, 2013).

<sup>361</sup> WIKIPEDIA, [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page) (last visited Oct. 7, 2013).

Once jurors arrive at the courthouse for orientation, court employees should instruct jurors that they are prohibited by the judges from using social media sites to discuss their jury service. This prohibition is best communicated through a current video narrated by a local judge. The judge should explain in detail the conduct that is prohibited. For example, the judge should identify commonly used social media sites, such as Facebook and Twitter. Furthermore, the judge should instruct prospective jurors that they should not post Facebook updates or Tweet about their jury service and should not take photos. During juror orientation, the prospective jurors should be cautioned not to conduct internet research about the case, the judges, the attorneys, or the individual and corporate parties and locations involved in the case.

When the venire is sent to a courtroom for voir dire, the trial court judges should repeat the specific jury instructions. Judges should instruct jurors not to “Google” or search for the parties, lawyers, witnesses or judge on the internet. Judges should instruct jurors to refrain from the use of all electronic devices while they are inside the courtrooms. Judges should remind jurors that they may not check, read or send text messages or e-mail messages of any kind while they are inside the courtroom. Judges should remind jurors that they shall not post updates on Facebook or Tweet about any subject related to their jury service.

When jurors first arrive inside the courtroom for voir dire, judges should explain the reasons for prohibiting social media communications and internet research. Judges should explain that it is important that all jurors see and hear the exact same evidence. Judges should explain that the parties, attorneys and judge should be completely aware of all information that a juror relies upon in rendering a verdict. Judges should explain that independent research obtained from others, from internet research or from social media, may be wrong, incomplete, inaccurate or misleading. Locations may change. Judges should explain that it is only fair that a party have an opportunity to know about all information considered by a juror so that the party can rebut, explain, or reply to the information.

Judges should explain to jurors the consequences of conducting outside research or communications. Judges should explain that failing to follow the judge’s orders could result in a mistrial, wasting a significant amount of their own taxpayer money, wasting the time of the attorneys, the parties, the witnesses, the judge, the court personnel, and the other jurors and delaying justice even longer for the parties and the victims. Judges should remind the jurors that violating the judge’s orders could result in a juror being held in contempt of court, facing a potential fine and/or imprisonment. Judges should advise jurors that they are obligated to report to the judge when another juror violates the judge’s orders.

These jury instructions should be provided again to the jury after the jury is sworn and prior to opening statements. The jury instructions should be repeated when the jury breaks for a recess in the jury room, breaks for lunch, and retires home for the evening. When the jury returns from a recess, lunch break, or overnight evening break, the judge should inquire whether the jurors followed the judge’s instructions during the recess or break. When the jurors are departing for a break, the judge should ask the jurors whether they understand the instruction and whether they promise to abide by all of the judge’s instructions.

When the jurors are sworn, they should each be given their own individual typewritten copy of the judge’s instructions prior to the judge reading the same. When the jurors retire to go home for the evening, the judge should advise the jurors to review their copy of the jury instructions while the judge reads the instruction.

Third, attorneys should provide assistance to judges in curbing juror misconduct. Attorneys gather much information about jurors from researching the jurors' individual social media site profiles. When jurors provide publicly accessible information, attorneys gain information to select jurors and to design their theory of the case to best appeal to individual jurors. During jury selection, attorneys should question jurors about their social media usage. This information will aid attorneys in locating information about jurors, while at the same time provide a caution to jurors. When the jurors understand that their social media sites are accessible to some extent, jurors should be deterred from using the sites to comment about the case, as they will fear discovery of their misconduct.

Further, attorneys should monitor jurors' social media sites and immediately report misconduct to the judge and opposing counsel. Attorneys have learned to review jurors' social media sites to research demographical juror information, interests and views. Many lawyers monitor juror social media profiles.<sup>362</sup> Lawyers do not always report jurors' comments about a case. Attorneys may wait until a case is over to decide whether to report the jurors' inappropriate communication on social media. They may choose to refrain from reporting the discovered juror misconduct. By requiring that attorneys report juror misconduct to the judge, attorneys will assist the court in maintaining the integrity of the jury system.

Last, active and engaged jurors should be less tempted in conducting research to clarify misunderstandings, decipher unclear legal jargon and fill in the gaps of missing information. Jurors remain engaged when they participate more in the proceedings. More active jurors take notes, maintain a jury notebook, and pose witness questions for the judge to review. Consider how poorly student might learn in a classroom setting when the student could not take notes or speak to clarify information or ask questions.

At a minimum, jurors should be afforded an automatic opportunity to take notes with the judge providing note pads and pencils. Jurors should be allowed to take their notes into the deliberation rooms.

When jurors proceed to deliberations, court deputies and bailiffs should confiscate all cell phones and electronic devices from jurors. While jurors are inside a courtroom, judges should also confiscate phones and electronic devices from jurors. Electronic devices and phones should be returned to jurors during lunch breaks. By removing the devices, jurors are prevented from succumbing to the impulsive need to answer questions during the deliberations.

However, courts should study the desire of jurors to take notes on their own electronic laptop computers and tablets and iPads. Juror misconduct can be avoided by blocking internet access via wireless connections or by using software or applications that can block internet access on computers and devices brought into the courthouse. Software is currently used to allow law students to take examinations on their computers and submit their typed answers electronically while blocking internet access. This same type of technology and software can be used to keep jurors engaged while disallowing internet access. This process of electronic note-taking should be explored through a focus study group and juror surveys.

Finally, juror questioning in both criminal and civil cases can establish active jury participation. Active jury participation, just like active classroom engagement of students, keeps jurors more focused and more satisfied with the court experience.

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<sup>362</sup> Hoffmeister, *supra* note 153, at 614.



More progressive jurisdictions develop more engaged jurors and expand the positive civic experiences. Juror questions can lengthen the time of a trial and the risk of appellate error. Juror questions can clarify juror confusion, satisfy juror curiosity, assure conscientious jurors that they “got it right,” improve juror attention and retention, and maintain more engaged and satisfied juror participation. Juror questions further the civic goals of citizen participation in a democracy.

Jurors in civil cases would become more engaged in the trial proceedings by communicating with the other jurors about the case prior to the deliberation stage. The defending party risks an unfavorable outcome when jurors prematurely decide on a position before hearing from both sides. However, many jurors are already tempted to prematurely decide an issue or verdict after the first witness testifies and before the jurors hear from other witnesses and the defendant’s case in chief. Other jurors may be committing misconduct by communicating with some or all of the other jurors before the deliberation stage.

Rather than ignoring this possibility of early decision making by jurors, judges should instruct the jurors of the risks associated with early decision-making. Further, judges should instruct the jurors to only speak about the case when all of the jurors are present in the jury room and to refrain from making a final decision until all of the evidence is heard. Once pre-deliberation juror discussions are universally embraced in civil cases, then the courts should cautiously study this notion in criminal cases. Juror instructions that explain the risks and parameters of pre-deliberation juror communications may, in fact, better protect a criminal defendant from prejudice, than the current trend to ignore or briefly address the issue with jurors.

Jurors would be less likely to conduct independent research and communicate with others when they clearly understand the proscribed conduct using the most up to date specific language identifying social media sites, search engine tools and commonly used internet sites. Judges should explain in detail all of the reasons for refraining from the improper juror communications and research. These detailed instructions should be provided at several trial stages using verbal and individual copies of written instructions. Notes regarding prohibited misconduct should be posted on signs in the jury deliberation room and juror orientation room. Orientation videos should contain specific judge instructions and the juror summons should contain restrictions and should refer to the court’s websites containing the judge’s orders.

The modern juror is less likely to initiate juror communications and research on social media sites and internet when the prohibited conduct is clearly described, reasons for the prohibitions provided, constant reminders offered, and sanctions outlined. With more active and engaged jurors, progressive and well-informed judges and diligent lawyers should prevent instances of electronic juror misconduct in emerging technology and social trends.

## APPENDIX A: SAMPLE #JURYDUTY TWEETS (APRIL 30, 2013-MAY 3, 2013)

(User Twitter names and photo links have been redacted.)

Photo: 8am check in. I might be in a throw-the-book-at-em kind of mood.  
#JuryDuty #PublicService #WhyMe <http://tumblr.co/----->

Noooooooo!!!!!!!!!!!! I got selected for a trial!!!!!!!! #JuryDuty

There are lawyers in this court that make me look like the czar of organization  
#juryduty

This is pretty cool, I hope I'm picked as a juror for a case.. #juryduty

Time to put some criminals in jail. #juryduty @ Kings County Civil Court  
<http://instagram.com/p/-----/>

You know it's going to be a long night when the judge buys you pizza #juryduty

Lunch break. I'm gonna go get a drink at the mill hill. This will continue. Swear  
it. #juryduty

No where to run. No where to hide. #juryduty #brooklyn #lawandorder #nyc  
#guiltyascharged <http://instagram.com/p/-----/>

I ruined two lives and a marriage today! I love being a #juror

Served on a bank robbery jury, an incredible experience, and lived to write about  
it in today's Gazette. #juryduty [http://www.montrealgazette.com/sports/Jury+](http://www.montrealgazette.com/sports/Jury+duty+sobering+civic+duty/8302893/story.html)  
[duty+sobering+civic+duty/8302893/story.html](http://www.montrealgazette.com/sports/Jury+duty+sobering+civic+duty/8302893/story.html) ...

Time to serve some Justice #juryduty #jurynullification #novictimnocrime #court  
#justice <http://instagram.com/p/-----/>

This is terrible, but what ratchet thing can I do to make sure I'm not selected as a  
juror tomorrow #juryduty

Photo: I'm the only person on the planet that would be excited about jury duty...  
#juryduty #jury #summons <http://tumblr.co/----->

Oh joy! Please don't pick me! #newbie #juryduty <http://instagram.com/p/-----/>

So happy I'm not in deliberations yet for #juryduty. Now I can watch the first  
playoff game tonight. #goleafsgo #TMLtalk

Had #JuryDuty today. Didn't get picked. One lawyer wore skin-tight pants and 2"  
platform shoes with 5" spike heels.

Honored to have served on a jury but very glad to be done with this trial. What a  
difficult few weeks... #DC #JuryDuty

My luck I'm gonna get picked for this damn trial! #juryduty

Just started #juryduty. Decided to start forming opinions on the trial now to save  
time. #guilty! #nodickingaround

"Hangman, hangman slack your rope." #juryduty

Part 1 of another 3 part blog series... [http://absurdburg.wordpress.com/2013/](http://absurdburg.wordpress.com/2013/04/29/jury-duty-its-total-bull-part-1/)  
[04/29/jury-duty-its-total-bull-part-1/](http://absurdburg.wordpress.com/2013/04/29/jury-duty-its-total-bull-part-1/) ... #juryduty

Every time a witness completes their testimony, I feel like clapping for their  
performance. #juryduty

#juryduty got picked

Just served on my first jury, and it was amazing! #juryduty

And now we've got a crier. Awesome #juryduty

Now this is getting good - we've got a Haight-dwelling Quaker peace worker.  
#juryduty

Verdict reached. Trial completed. Civic duty served. #juryduty Suck it,  
communism!

This trial was supposed to end today. It's not looking good right now. #juryduty

It feels good to bring justice to honest hardworking ppl being wrongfully accused by someone just looking for a handout #juryduty

Completely distracted by the fact that the ADA is wearing the same blouse she wore on Friday. #juryduty

Day 4. The natives are restless. Playing Hangman on the white board. Have learned about our captors, aka US Marshals. #juryduty

What a soap opera of a case! I might be inspired to write a book about it! #jurydutyOk. #juryduty. I was picked. Trail set for 1:30. Honey. LUNCH! I'm come home for lunch. What ya makin????

## APPENDIX B: PROPOSED JURY INSTRUCTION

(To be given at juror orientation, *voir dire*, after selection, at recesses, and prior to deliberations by the judge, orally and in writing, with an individual copy for each juror.)

I recognize that most people use smart cell phones, computers, laptops, tablets, iPads, and e-reader devices at home, at work, and throughout their busy days. These devices help people remain organized and multi-task with calendars, e-mails and texting. These devices also allow people to communicate for professional, family, and social reasons on social media sites. While you are sitting inside the courtroom and inside the jury deliberation room on brief recesses, I will have the Bailiff gather your cellphones and place them in a container. The container will remain in the courtroom where you and I can see it and no one will have access to it. If you have other devices with you today, such as a laptop, tablet, iPad, or e-reader, you must keep these stored away and out of sight while you are inside the courtroom and in the jury room on brief recesses and deliberations. When you break for lunch and go home for the day, we will return your phones to you.

Until you are discharged from this case, you shall not discuss this case with others. You shall not discuss this case, your jury service, the people, businesses, places or locations involved, what you think this case may be about, the lawyers, the parties, the judge, the witnesses, and the other jurors. When I say “discuss,” I mean you shall not speak to anyone in person, writing, e-mail, text, telephone, internet sites, blogs, and by commenting, posting or messaging on social media sites, such as Facebook, Twitter, LinkedIn, YouTube, Instagram, Google Plus, FourSquare, and Instagram. You shall not discuss the case by sending or receiving e-mails, messages, Facebook messages, text messages, or phone calls.

Until you are discharged from this case, you should not develop close ties with the other jurors, lawyers, parties, witnesses, judge or courtroom personnel, including the clerks and bailiffs or deputies. This means that you should not send a Facebook friend request, follow on Twitter or Instagram, connect on LinkedIn, subscribe on YouTube, or add these people to your Google Plus circles. You can, of course, eat lunch with the other jurors and talk about matters unrelated to this case.

Until you are discharged from this case, you shall not conduct any research about this case, the lawyers, the parties, the witnesses, the other jurors, or the judge. Research means reading a book, the newspaper, and a magazine. Research also means visiting websites or using search engines, such as Google or Bing. You shall not visit research sites, such as Wikipedia, Mapquest, and Google Maps. You shall not conduct research in court, at home, at work, on recesses, and at lunch.

You shall not take any photographs or recordings, whether still, audio or video, in this courthouse. Until you are discharged, you should not post any photos to any social media or other internet sites depicting you or others as jurors, including your juror badge or summons, whether or not the photo is taken in this courthouse.

These court orders apply to you whether you are inside the courthouse, at lunch, on a recess, home for the evening, at work, or traveling to or from the courthouse.

Despite judges’ instructions, jurors violate the court orders and use the internet and social media to satisfy their own curiosity, to explain matters that may not be explained well in the courtroom, to improve their decision making role, and to fill in the missing gaps in the information. Other times, jurors are bored or cannot break their habits or routines in accessing their phones and computers.

If you post any comments on social media sites, such as Facebook, Twitter or Instagram, about your day(s) here at the courthouse, how you are feeling today, your jury duty, the people, or this case, you impliedly invite others to make comments or replies. The comments of your friends or others cause a problem, just as if you posted, updated your Facebook status or Tweeted inappropriately about your jury duty or this case.

It is important that you follow my court orders. If you gather information of your own, you may then make decisions with information that is different from information considered by all of the other jurors. Your information and research may simply be wrong, inaccurate, or incomplete. Locations may change. The lawyers would have no method of knowing what research or information you have considered. The lawyers would be unable then to question or rebut your research or information. The law prohibits jurors from considering information that may be irrelevant or prejudicial to a party.

If you violate my order by communicating on social media sites or conducting research, you may cause a mistrial. A mistrial wastes your money as a taxpayer and causes the entire trial to begin anew regardless of how far we have come in the trial when your misconduct is discovered. A mistrial unfairly delays justice to the parties and wastes everyone's time, including the time of the judge, the attorneys, the parties, the witnesses, and your fellow jurors.

If you learn that a juror has violated any of my orders, you must report the matter to the court deputy or bailiff, who will then report the matter to me. If I learn that a juror has violated any court order, I must then consider an appropriate sanction, which may include discharging the juror, imposing a fine, or imposing a jail sentence.

While you may feel that the judge and the attorneys are hiding information from you, it is important that the judge decide which information should be provided to jurors to maintain fair proceedings for all parties and to maintain the integrity of the courts. Do you promise to follow my orders? While you are on break, did you follow my orders? Are you aware of any juror violating my orders?