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Modernizing Jury Instructions in the Age of Social Media

David Aaronson
American University Washington College of Law, daarons@wcl.american.edu

Sydney Patterson
American University Washington College of Law, sp3988a@american.edu

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By David E. Aaronson and Sydney M. Patterson

Following a jury trial in Vermont, the defendant, a Somali Bantu immigrant, was convicted of aggravated sexual assault on a child. A juror obtained information on the Internet about Somali culture and religion, a subject that played a significant role at trial, which the juror discussed for 10–15 minutes during deliberations to support his own position. The Vermont Supreme Court reversed, finding prejudicial error because this information had the capacity to affect the jury's verdict, as jurors could have relied on it to interpret the testimony of the Somali witnesses and determine the credibility of these witnesses. (State v. Abdi, 45 A.3d 29 (Vt. 2012).)

In the political corruption trial of former Baltimore Mayor Sheila Dixon, five jurors used social media to have direct, case-related communications with one another while the trial was still proceeding. The case, which resulted in the conviction of Dixon, was challenged after the verdict when Dixon's attorneys discovered that the five jurors had become Facebook friends during the course of the trial and had posted discussions about the trial on their pages. Dixon's attorneys alleged that the five "Facebook Friends" may have bullied other jurors into the guilty verdict, contending that they were "a caucus separate and apart" from their colleagues. Before presiding Circuit Court Judge Dennis Sweeney questioned the jurors about their conduct, which was in direct violation of his specific instruction to avoid discussing the case on social media sites, the prosecutors and Dixon reached a plea deal that ended Dixon's appeals. (*See* Dennis Sweeney, *Social Media and Jurors*, 43 Md. B.J. 44, 46 (2010).)

However, Judge Sweeney did question one juror who had posted "F--- the Judge" on his Facebook page after Judge Sweeney had called a hearing on the matter. Judge Sweeney reportedly asked the juror about his offensive comment and was told, "Hey Judge, that's just Facebook stuff." (*See* Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, Reuters Legal (Dec. 8, 2010), http://tinyurl.com/9nt4umx.)

These cases illustrate the two broad categories of improper juror social media use: (1) use of the Internet to conduct research, investigating facts or the law; and (2) use of social media to contact others or post/publish information. (*See* Caren Myers Morrison, *Can the Jury Trial Survive Google?*, 25 Crim. Just. 4, 5 (Winter 2011).)

The use of social media is now an integral part of the communication lexicon. It is commonplace to communicate and do research electronically through the use of e-mail, text messaging, or Twitter, through blogs and websites, such as Wikipedia, and search engines, such as Google, or other social networking websites, such as Facebook, LinkedIn, and YouTube.

Social media use by jurors poses many new litigation challenges and increases the risk of familiar jury concerns, such as exposure to news and media accounts of a trial that contain material not admitted into evidence. Juror misconduct using social media may have a direct impact on the administration, fairness, and integrity of the criminal justice system. In modern jury trials, judges, the parties, and their attorneys expect that many, if not most, jurors use social media.

Unlike inadmissible or stricken evidence heard by a jury during trial, ex parte information a juror obtains online cannot be addressed by the court with a curative or limiting instruction to correct any prejudicial effects. (*See, e.g.*, Hopt v. Utah, 120 U.S. 430 (1887) (holding that a trial should not be suspended where an error in admission of testimony can be corrected by its withdrawal with proper instruction from the court to disregard it).) Both the state and the defense are likewise deprived of the opportunity to consider and address the ex parte information by tailoring their case strategy or closing statement accordingly. Moreover, complications may arise during jury deliberations because the individual jurors will not all be considering the same evidence in reaching a verdict. Jurors who conduct online research may be tempted to share the results of their research with their fellow jurors.

The Sixth Amendment guarantees a criminal defendant "the right to a speedy and public trial, by an impartial jury of the State." The Supreme Court held that the failure

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to provide a defendant with an impartial hearing "violates even the minimal standards of due process." (Irvin v. Dowd, 366 U.S. 717, 721–22 (1961).) The Sixth Amendment guarantee of an impartial jury has been defined by the courts as one "capable and willing to decide the case solely on the evidence before it." (*See* Smith v. Phillips, 455 U.S. 209, 217 (1982).) Due process and the rules of evidence provide that juries may consider only legally admissible evidence that is subject to cross-examination in open court. (*See* Ronald D. Spears, *Looking for "Facts" in All the Wrong Places*, 98 Ill. B.J. 102 (2010).) Dispositive evidence may be kept out for various reasons, such as the manner in which it was obtained, or because it is determined to be unduly prejudicial. It is important that jurors do *not* know what is excluded and why it is excluded.

A growing number of cases address issues arising from allegations of improper juror use of social media. Between 1999 and 2010, 90 verdicts were challenged on the basis of Internet-related juror misconduct, according to a Reuters Legal study—more than half within a two-year period. Of the 90 challenges, 28 were overturned or had mistrials declared. In three-quarters of the cases in which judges declined to declare mistrials, Internet-related juror misconduct was present. (*See* Grow, *As Jurors Go Online*, *supra*.)

Jury instructions are a critical component of efforts to prevent juror social media-related misconduct. Professor Morrison observes: "The first line of defense is obviously to address the issue in jury instructions." (Morrison, *Can the Jury Trial Survive Google?*, *supra*, at 12; *see also* Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. Colo. L. Rev. 409, 451–52 (2012) (noting that the majority of respondents to the author's juror survey selected modernized jury instructions as the most effective method of preventing online research and improper communication by jurors); Emily M. Janoski-Haehlen, *The Courts Are All a "Twitter": The Implications of Social Media Use in the Courts*, 46 Val. U. L. Rev. 43, 61 (2011) ("Adopting pattern jury instructions that specifically address the use of social media sites is the most logical place to start.").)

The purpose of this article is to discuss a sampling of cases showing the need for social media jury instructions and the range of misconduct in criminal cases that modern social media jury instructions should address; identify criteria based on a review of federal and state social media jury instructions that should be useful in evaluating any pattern social media jury instruction; and, finally, to propose model instructions for jurisdictions seeking to adopt or improve their social media jury instructions.

Illustrative Cases Involving Jury Misconduct

The following cases illustrate the need for modernizing social media jury instructions and the range of juror misconduct that should be addressed. (For additional cases in which allegations were made of improper juror use of social media, *see* George L. Blum, Annotation, *Prejudicial Effect of Juror Misconduct Arising from Internet Usage*, 48 A.L.R.6th 135 (2009); Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 Reynolds Cts. & Media L.J. 307 (2011). *See generally* Eric P Robinson, Blog L. Online, http://bloglawonline.com (last visited Nov. 9, 2012) (covering the spectrum of blog and Internet law and policy, including up-to-date coverage of emerging cases involving juror misconduct).)

Improper use of the Internet to conduct research, investigating facts or the law. Trial safeguards may be significantly compromised when jurors conduct online research about the case without the knowledge of the court or trial counsel. Conducting Internet research allows a juror to read media stories about the crime, find personal information about the parties, including criminal history, and even view the scene of the crime using Google Maps' Street View, all without leaving the courthouse or home. The vast amount of information available increases the likelihood that the juror may be influenced by information that is prejudicial, unreliable, or inaccurate, or even evidence that has been ruled inadmissible. (*See, e.g.*, Caren Myers Morrison, *Jury 2.0*, 62 Hastings L.J. 1579, 1584 (2011).)

Despite instructions from the judge not to conduct research on the case, a juror in a murder trial looked up definitions online for the terms "livor mortis" and "algor mortis" and the role it might have had in fixing the time of a beating victim's death. When asked about it, the juror responded, "To me that wasn't research. It was a definition." The Court of Special Appeals reversed the conviction and ordered a new trial, finding that the juror's online search was in direct violation of the trial court judge's order prohibiting jurors from researching the case. (Clark v. State, No. 0953/08 (Md. Ct. Spec. App. Dec. 3, 2009) (unreported opinion); *see also* Dennis Sweeney, *Social Media and Jurors*, *supra*, at 46.)

After repeated explicit instructions not to conduct Internet research, a juror in a capital murder trial researched how a person could suffer "retinal detachment," the injury suffered by the victim. In the resulting contempt proceeding for misconduct, the juror's attorney explained that the juror misunderstood the judge's instruction not to conduct research, believing the judge was referring only to facts in the case, not related issues such as how a person could suffer certain injuries. (Brian Grow, *Juror Could Face Charges for Online Research*, Reuters Legal (Jan. 19, 2011), http://tinyurl.com/9kjhjv2.)

DAVID E. AARONSON *is B.J. Tennery Scholar and Professor of Law at the Washington College of Law, American University, Washington, D.C., and director of its Trial Advocacy Program. This article is based, in part, on a section from the 2011 cumulative supplement to his book,* Maryland Criminal Jury Instructions and Commentary *(LexisNexis:3rd ed., 2009).* **SYDNEY M. PATTERSON** *is a judicial law clerk in Montgomery County, Maryland. She is a 2011 graduate of the Washington College of Law. As a law student, she provided research and editing assistance the 2010 and 2011 cumulative supplements to* Maryland Criminal Jury Instructions and Commentary.

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In a federal case, defendants were charged with illegally operating an Internet pharmacy. After seven weeks of trial throughout which the judge gave repeated instructions not to conduct online research, it was discovered during deliberations that nine of the 12 jurors had conducted Internet research about the case during the trial. The jurors had Googled news articles, medical terms, the lawyers, the defendants, and evidence that had been specifically excluded by the judge. One juror discovered that a defendant had previously been implicated in a related criminal matter—evidence the defendant's attorney had specifically moved in limine to exclude (*See* John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. Times, Mar. 18, 2009, at A1.)

Internet research conducted by a juror and shared with fellow jury members does not always influence the jury's deliberative process to the extent that a mistrial or reversal is warranted. A judge will consider the type of information that resulted from the research in making this determination. For example, where a juror in California told his fellow jurors that his online search for "great bodily injury" retrieved no information, the court found that the juror's misconduct did not prejudice the defendant. The court found no substantial likelihood that the information seen by the juror in conducting the search of the term with no special legal meaning influenced him in any way detrimental to the defendant. (*See* People v. Hamlin, 89 Cal. Rptr. 3d 402 (Ct. App. 2009).)

Improper use of the Internet to communicate with others. Courts admonish jurors not to discuss the case among themselves prior to final deliberations to avoid having the jurors form opinions before they have heard all of the evidence in the case. In addition, jurors are admonished not to communicate about the case with third parties due to the concern that jurors may reach a verdict on the basis of an improper communication rather than the evidence admitted at trial.

Despite the apparent clarity of such jury instructions, a more specific instruction that addresses social media use is needed in order to adequately admonish jurors. Case law suggests that many jurors do not understand that acts such as tweeting or updating a Facebook status are the type of communication or discussion that courts prohibit. For many jurors, updating a Facebook status to reflect daily thoughts and activities is a matter of habit, and they no longer give it much thought. Others may simply determine that updating a Facebook status is a one-sided communication and, therefore, not the type of communication addressed by the court. (Hoffmeister, *supra*, at 433–34; *see also* Paula Hannaford-Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, Ct. Manager, Summer 2009, at 42–43 (2009) (stating that for some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication).)

For example, the day before a verdict was announced in a criminal trial in Michigan, a juror posted on her Facebook page that she was "actually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY." Defense counsel discovered the Facebook post and reported the juror, who was removed prior to the start of the second day of the two-day trial. (Hoffmeister, *supra*, at 429.)

After sentencing a gang member to prison for murder, a California judge reportedly "ripped into" the jury foreman, holding him in contempt for writing a blog that exposed the details of the case during trial. Despite daily instructions to refrain from discussing the case, the jury foreman had been blogging about the case throughout the trial and deliberations, posting a photograph of the murder weapon, and running a chat room where people could ask him questions about the case. In his testimony at the contempt hearing, the foreman said he did not believe his blog constituted "discussing the case" in defiance of the judge's instructions. (Raul Hernandez, *Juror Held in Contempt for Blog of Murder Trial*, Ventura County Star (Jan. 23, 2008), http://tinyurl.com/9twxldd; *see also* State v. Goupil, 908 A.2d 1256 (N.H. 2006).)

At the conclusion of the evidence in the sentencing phase of a capital murder trial in *Dimas-Martinez v. State*, 2011 Ark. 515 (2011) a juror tweeted, "Choices to be made. Hearts to be broken. We each define the great line." (*Id.*, slip op. at 12.) When the court questioned the juror, he admitted that he had disregarded the court's instruction not to tweet about the case. The court denied the request of counsel to remove the juror for his misconduct and the fact that one of the juror's Twitter followers was a reporter. (*Id.*) Thereafter, during jury deliberations in the sentencing phase of the trial, the juror tweeted, "If its [sic] wisdom we seek . . . We should run to the strong tower." (*Id.*, slip op. at 14.) An hour before the jury announced that it had reached a sentence, the juror tweeted, "Its [sic] over." (*Id.*, slip op. at 15.) The trial court denied the defendant's motion for a new trial, finding that the defendant suffered no prejudice. The Arkansas Supreme Court reversed the defendant's conviction and sentence, finding that the trial court's failure to acknowledge the juror's inability to follow the court's directions was an abuse of discretion. The court recognized that when jurors post musings, thoughts, or any other information about trials on any online forums, "[t]he possibility for prejudice is simply too high." (*Id.*, slip op. at 16–17.) The court found that "[s]uch a fact is underscored in this case . . . because one of the juror's Twitter followers was a reporter." (*Id.*, slip op. at 17.)

In a civil auto accident case in Texas, a juror pleaded guilty to four counts of contempt for trying to "friend" the defendant on Facebook and for discussing the case on his Facebook page. The misconduct was brought to the attention of the trial judge after the defendant notified her lawyer of the contact, and her lawyer informed the trial judge. The juror was sentenced to two days of community service. (*See* Eva-Marie Ayala, *Tarrant County Juror Sentenced to Community Service for Trying to "Friend" Defendant on Facebook*, Fort Worth Star-Telegram, Aug. 28, 2011.)

Many tweets or e-mails sent during trial may be found to be innocuous, such as comments about jury duty or lack of refreshments. For example, in the federal

corruption trial of former Pennsylvania state senator Vincent Fumo, the district court held that a juror's Facebook posts and tweets, including one stating, "Stay tuned for a big announcement on Monday everyone!" did not prejudice the defendant. The Third Circuit held that there was no abuse of discretion in the district court's finding that the juror's statements were innocuous. Far from raising specific facts about the trial or indicating any bias toward the parties, the postings were "so vague as to be virtually meaningless" and "nothing more than harmless ramblings." (United States v. Fumo, 655 F.3d 288, 299, 305–06 (3d Cir. 2011); *see also* Michael C. Bromby, Paper Presented at the Jury Research Symposium, Institute for Advanced Studies, Glasgow: The Temptation to Tweet—Jurors' Activities Outside the Trial 2–4 (Mar. 25–26, 2010), *available at* http://ssrn.com/abstract=1590047.)

Distinguishing Harmless from Prejudicial Error

Improper use of social media by jurors, when discovered and challenged, may be viewed by the trial and appellate courts as harmless rather than prejudicial error. Judges have substantial discretion to determine on a case-by-case basis whether juror misconduct is prejudicial enough to a criminal defendant or the state to warrant removing the juror from the panel, declaring a mistrial, or, if on appeal, reversing a conviction. When an issue of misconduct arises, the presiding judge has a duty to fully investigate allegations of misconduct to assess the extent of any prejudice. (*See, e.g.*, Remmer v. United States, 350 U.S. 377, 379 (1956).)

Courts have assessed the prejudicial impact of juror misconduct involving Internet research by looking at the totality of the circumstances, including the type of information that resulted from the improper research, the stage of the trial when the misconduct occurred, whether the extrinsic evidence was communicated to the other jurors, and whether it related to a material issue in the case. (*See* 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, 313–14 (2010).)

In drawing the line between prejudicial information and harmless error, social psychologists Julie Blackman and Ellen Brickman classify the nature of the information that jurors might discover online as falling within five broad categories: (1) media accounts of the case; (2) virtual physical or other factual evidence; (3) expert opinions; (4) personal and professional information on the parties involved, including the judge, attorneys, and the defendant in criminal cases; and (5) the law (such as researching sentences associated with conviction for the particular crime charged). (Julie Blackman & Ellen Brickman, *Let's Talk: Addressing the Challenges of Internet-Era Jurors*, Jury Expert, Mar. 2011, at 7–8, *available at* http://tinyurl.com/3r3gubf.)

While trial judges have considerable discretion to assess whether juror misconduct is unduly prejudicial, they are required to reasonably exercise this discretion. In *State v. Gunnell*, 973 N.E. 2d 243 (Ohio 2012), the issue before the Ohio Supreme Court was whether the trial court acted unreasonably in addressing juror misconduct and in determining that a manifest necessity existed for a mistrial. The misconduct involved a juror who conducted Internet research on "involuntary manslaughter" and attempted to bring the printed material into the jury room during deliberations. The trial court questioned the juror about the information she had found and why she had looked for it, but did not ask her "a single question about the prejudice or bias, if any, created by the improper information or her ability to disregard it." (*Id.* at 247.) The Ohio Supreme Court found that the trial court had not exercised sound discretion in determining whether juror bias existed and whether it could be cured. The court held that although it was error for the juror to conduct outside research, "it was also error for the judge to make no more than a limited inquiry of the juror—an inquiry that merely established the misconduct, not any prejudice from it." (*Id.* at 251.)

Internet research consisting of looking up the meaning of a word may not be found to be sufficiently prejudicial, while research that uncovers an inadmissible prior conviction of the defendant is more likely to result in reversible error. Misconduct involving research related to a material issue in a case, such as a factual dispute or the credibility of a witness or party is also more likely to be found prejudicial.

In *Wardlaw v. State*, 971 A.2d 331 (Md. Ct. Spec. App. 2009), a juror's online research led the Maryland Court of Special Appeals to order a new trial for the defendant accused of rape of his 17-year-old daughter. At trial, the defendant's daughter testified that she had sex with the defendant on three different occasions and that she had been diagnosed with oppositional defiant disorder. A juror conducted online research on "oppositional defiant disorder," and reported to the other jurors her finding that lying was associated with the disorder. Because the daughter's credibility was a crucial issue, and there was no other evidence to substantiate her allegations, the court found that the juror's research constituted egregious misconduct and that the trial court's failure to question the jurors about the influence of the individual juror's online research required a reversal.

Other Remedies to Deter Misuse of Social Media

Many courts and legislatures have adopted remedies to supplement social media jury instructions. The use of some of these remedies may increase the effectiveness of social media jury instructions.

A complementary response may include showing a film to prospective jurors shortly after they report for jury duty, illustrating prohibited uses of social media, explaining why using social media is prohibited, and notifying them of the penalties that may be imposed. The court's social media jury instructions might be included in this initial presentation.

Attorneys may use voir dire to ask prospective jurors, or request the judge inquire, about their social media use and whether they would be able to comply with the judge's instructions prohibiting improper social media use. Voir dire may provide another opportunity to repeat the court's social media jury instructions and educate jurors at an

early stage of the process.

Another suggestion is to require that jurors sign a written statement, possibly under oath, acknowledging that they have been notified of prohibited social media uses and agreeing to abide by the prohibitions, subject to penalties. (*See* Hoffmeister, *supra*, at 456–57.)

The threat of sanctions such as fines and contempt may be helpful in deterring the kind of misconduct, such as Facebook posts and tweets, which is easily detected. Also, judges have discretion to confiscate all electronic devices during jury deliberations or, in a trial of brief duration, for the entire trial. (*See* Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, Fla. B.J., Jan. 2010, at 8, 12.) Although it is not a widely used remedy, a judge may require that jurors be sequestered for the duration of the trial or during jury deliberation.

Some of these approaches may discourage citizens from serving as jurors. (Hoffmeister, *supra*, at 436–41; *see also* Dennis M. Sweeney, Md. Circuit Court Judge (Retired), Address to the Litigation Section of the Maryland State Bar Association: The Internet, Social Media and Jury Trials: Lessons Learned from the Dixon Trial (Apr. 29, 2010) (transcript available at http://juries.typepad.com/files/judge-sweeney.doc) ("Banning all cell phones, I-Pads [sic], and laptops for everyone called in for jury duty is unlikely to work and will be viewed as a Luddite solution with little support in the jury pool.").)

Under a California law, jurors who use electronic or wireless communication to conduct their own research on a case, or talk to outsiders about it, can be sentenced to jail time of up to six months for criminal contempt. (A.B. 141, 2011 Leg., Reg. Sess. (Cal. 2011).) The law was reportedly prompted by numerous accounts of jurors using electronic devices to research or communicate about cases. (Eric P. Robinson, *New California Law Prohibits Jurors' Social Media Use*, Citizen Media L. Project (Sept. 1, 2011), http://tinyurl.com/9rw24jo.)

Other states have adopted different prophylactic measures to supplement social media jury instructions. Michigan, for example, recently implemented new jury reform rules that attempt to reduce the incidence of "Google mistrials" by aiming to "alleviate the stress jurors feel about not being able to talk about the case." (*See* Lindsay M. Sestile, *Michigan Adopts New Jury-Reform Rules*, Litig. News, Sept. 28, 2011.) The new jury reform rules include permitting jurors to submit questions to witnesses through the judge and to take their notes into the jury room for use during deliberations. (Mich. Admin. Code r. 2.513 (2011).)

Remedies that allow jurors to take on a more active role may lessen the likelihood that jurors will feel the need to seek additional information on the Internet. (*See* Morrison, *Jury 2.0*, *supra*, at 1625–31 (supporting a more active role for the jury on the ground that allowing them to ask questions will reduce the urge to seek information online).)

Four Criteria for Modernizing Jury Instructions

Among the most practical and cost-effective solutions for accommodating social media in the courtroom is to adopt explicit and explanatory jury instructions that address improper social media use.

Of the 47 states and the District of Columbia that have compiled criminal jury instructions, 11 have yet to formally adopt modern instructions that address the Internet or social media. Thirty-six states and four federal circuits have adopted pattern criminal jury instructions that address social media use with varying degrees of specificity. Several of these states contain only blanket admonitions not to use social media to research or communicate about the case. (*See* Robinson, *Jury Instructions for the Modern Age*, *supra*.)

Voir dire may provide another opportunity to repeat the court's social media jury instructions and educate jurors at an early stage of the process.

Based on a review of the criminal pattern jury instructions on improper social media use that have been adopted by states and federal circuits and our review of applicable case law, we have identified four criteria that jurisdictions should consider in adopting or revising modern social media jury instructions.

1. Use plain language and social media terminology. Jury instructions should use plain language and common social media terminology that accurately describe the prohibited social media conduct, such as "texting," "e-mailing," "tweeting," or "posting." The cases discussed above illustrate that many jurors do not understand that prohibited "communications" or "discussions" include a blog entry or a Facebook update and that prohibited "research" means that jurors cannot use a dictionary or a Google search to obtain the definition of a word they do not understand. Jury instructions need to clearly describe the types of information that may not be shared, such as "facts," "impressions," "opinions," "thoughts," and "reactions" about the case, any place discussed in the testimony, or any of the individuals participating in the trial, including the parties, witnesses, attorneys, court personnel, and the judge. Using social media terminology in a way that indicates an understanding of social media use puts the admonition in context for jurors, encouraging attentive listening and improving juror comprehension.

Hawaii's standard criminal jury instruction, amended in 2009 by the Hawaii Supreme Court to address juror

use of social media, uses effective social media terminology in admonishing jurors not to communicate about the case, stating, "No discussion also means no e-mailing, text messaging, tweeting, [or] blogging. . . ." (Haw. Criminal Jury Instructions 2.01 (rev. 2009); *see also* Jana Lauren Harris, *Social Media in the Jury Room Can Sabotage Trials*, Findlaw Knowledge-Base, July 28, 2009 ("[D]o not 'Google' any party . . . 'blog' about the case or . . . 'tweet' about anything. . . .").)

2. Give specific examples of prohibited social media conduct. Providing specific examples of prohibited social media reduces the likelihood of misinterpretation by individual jurors. (*See* Tricia R. DeLeon & Janelle S. Forteza, *Is Your Jury Panel Googling during the Trial?*, 52 Advoc. 36, 38 (2010) (quoting statements made by Texas judges suggesting that jurors do not think of their Internet activities as violating their jury instructions).) Instructions are most effective when only a few selective examples are provided to jurors along with the rationale for the restrictions, rather than an admonition consisting of a long list of examples of prohibited social media conduct. By providing specific examples of prohibited social media use, such as using Wikipedia or Googling to look up the definition of a word or obtain other information about the case, there is less ambiguity.

It is often not the means of conducting research that the juror misunderstood, but the term "research" itself. (*See* Grow, *Juror Could Face Charges for Online Research*, *supra* (discussing a mistrial in Pennsylvania caused by a juror who conducted online research about the injuries suffered by the victim and later explained that she misunderstood the judge's instruction not to conduct research, believing the judge was referring only to facts in the case, not related issues such as how a person could suffer certain injuries).)

A proposed instruction by retired Maryland Circuit Court Judge Dennis Sweeney addresses this issue by instructing jurors not to conduct research and then defining what constitutes research: "I mean 'research' in the broadest possible meaning of the word. That is, you cannot use a public library, a dictionary, or a simple Google search to clarify or obtain, for example, even something as simple as the definition of a word you do not understand." (Dennis M. Sweeney, *Worlds Collide: The Digital Native Enters the Jury Box*, 1 Reynolds Cts. & Media L.J. 121 (2011).)

A predominant use of social media sites is to "post" or "publish" information that may be directed to no one in particular, yet viewable to everyone, using popular features like a tweet, a Facebook status, or a blog post. Given its widespread popularity, this particular use of social media should be specifically addressed in jury instructions to resolve any misconceptions jurors may entertain regarding their duty not to communicate about the case. As opposed to "communicating" or "discussing" information, which usually implies a two-sided interaction, this particular use of social media is more accurately described by using different terminology, such as "posting" or "publishing" information.

The ongoing emergence of new technology will likely require periodic revisions to keep jury instructions updated with current examples of social media misconduct. New Mexico's social media jury instructions include a blank space meant to be filled in by the judge with up-to-date illustrations. (N.M. Uniform Jury Instructions Criminal 14-101 (2011).) This type of provision provides built-in flexibility and ensures that the instruction will be adaptable and well-tailored to new technology and social media.

3. Explain the rationale for social media restrictions. Jurors who are provided with the rationale underlying social media restrictions are less likely to arrive at the mistaken conclusion that they have not run afoul of the court's admonitions. Also, jurors are more likely to understand that compliance with the restrictions helps ensure that the parties receive a fair trial. Jurors need to be informed, for example, that tweeting case-specific information is prohibited because it divulges that information to outsiders and may be viewable by a witness excluded from proceedings prior to testimony. In addition, social media use can take many forms, and providing jurors with the rationale for the restrictions will equip them with the means to evaluate their own social media conduct and determine whether it falls within the court's admonition. Finally, jurors will be better able to see the restrictions as meaningful and important, rather than a boilerplate limitation on their conduct. For a good example of a thorough rationale for social media restrictions, see Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 1 (2010) (preliminary instruction).

Our review of criminal pattern jury instructions on improper social media use that have been adopted by federal circuits and the states leads us to conclude that the most prevalent and serious deficiency is an inadequate explanation of the rationale for social media prohibitions. Professor Morrison states: "Probably the most helpful way to give instructions is to explain to jurors why they should not surf, blog, or tweet during trial. If this instruction comes across as nothing more than another admonition, jurors may well shrug it off." (Morrison, *Can the Jury Trial Survive Google?*, *supra*, at 12–13.) Professor Hoffmeister adds:

> Providing the "why" is important because jurors in the Digital Age are more receptive to learning information online. Moreover, many jurors today feel comfortable using technology to discover facts for themselves or communicate with others. As a result, it is a challenge to get these jurors to give up their methods of learning and acquiring information and adhere to the court's instructions.

(Hoffmeister, *supra*, at 453–54 (footnotes omitted).)

4. Describe the consequences of violating social media restrictions. To further impress upon jurors the importance of the social media restrictions, courts should inform jurors of the consequences of failing to adhere to them, such as mistrials, resulting in a substantial waste of time and resources, and disciplinary sanctions for jurors who

violate the court's instructions. Hoffmeister suggests the following language:

> If you communicate with anyone about the case or do outside research during the trial, it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. Furthermore, you could be held in contempt of court and subject to punishment such as paying the costs associated with having a new trial.

(*Id.* at 467.)

Application of Criteria to Illustrative Modern Social Media Jury Instructions

The following are excerpts from selected jury instructions that address the two categories of social media use in which most instances of juror misconduct occur: the use of social media to conduct case-related research and the use of social media to communicate or post/publish information about a case. In addition, the following instructions also contain one or more of the four criteria for effective social media jury instructions discussed above.

US Judicial Conference. On August 21, 2012, the US Judicial Conference Committee on Court Administration and Case Management approved a model jury instruction to help deter jurors from using social media to research or communicate about cases on which they serve. The instruction is an updated version of a prior social media instruction adopted in January 2010.The following is an excerpt from the updated 2012 instruction:

> 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.
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> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

(U.S. Judicial Conference Comm. on Court Admin. & Case Mgmt., Proposed Model Jury Instruction on the Use of Electronic Technology to Conduct Research on or Communicate about a Case (June 2012).)

Minnesota. Recognizing the need to use plain language jury instructions, Minnesota's criminal jury instructions provide two versions of its preliminary criminal instruction, an original version and a more simplified plain language version. A note to judges in the instructions explains, "Each judge will probably find jurors respond best to a statement about the process and the case that is phrased as naturally as possible by the judge." (10 Minnesota Practice, Jury Instruction Guides—Criminal (CRIMJIG) ch. 1, n.1 (5th ed. 2010).) The following is an excerpt from the plain language version:

> When you go home during the trial, do not talk to your family, friends, or others about the case. You may tell them you are a juror on a criminal case and that is all that you should tell them. Do not report your experiences as a juror while the trial and deliberations are going on. Do not e-mail, blog, tweet, text or post anything to your Facebook, MySpace, or other social networking sites about this trial. Do not visit any "chat rooms" where this case may be discussed.
>
> Do not read or listen to news reports about the case. Do not do your own investigation. Do not ask people about this case. Do not visit any of the locations mentioned in the trial. Do not research anything about the case, including the issues, evidence, parties, witnesses, location, or the law, through any form of written, print, electronic or Internet media.
>
> . . . .
>
> If you do not follow these instructions, you may jeopardize the trial. This may require the whole trial to be redone and we will have to start over.

(*Id.* at CRIMJIG 2.08.)

Idaho. Instructions in this article are based, in part, on Idaho's criminal jury instruction on juror conduct. Idaho's instruction improves juror comprehension by addressing social media restrictions as they apply to specific popular uses of social media, such as looking up information online as a matter of routine. The instruction also accomplishes this by addressing social media using the popular terminology, such as "Googling," the most common way of referring to looking something up on the Internet. Instructions not to "Google" anything makes it instantly clear to jurors the type of conduct that is prohibited.

> In our daily lives we may be used to looking for information on-line and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to

work as it should. I specifically instruct that you must decide the case only on the evidence received here in court. If you communicate with anyone about the case or do outside research during the trial it could cause us to have to start the trial over with new jurors and you could be held in contempt of court.

(Idaho Criminal Jury Instructions 108 (2010).)

Utah. The "model" jury instruction we propose below is based, in part, on Utah's criminal jury instruction, which contains elements of all the criteria suggested for effective social media instructions. Utah's instruction is also unique in that it references the growing number of trials that have been disrupted by jurors who have failed to abide by social media restrictions. The reference to real events may be more effective in commanding the interest and attention of the jury because it lessens the impression of being a boilerplate admonition. Also, Utah's instruction is unusual because it attempts to cast doubt in the minds of jurors that they can avoid the consequences of violating the court's instructions by doing so surreptitiously, or by evading detection until after the conclusion of the trial.

Jurors have caused serious problems during trials by using computer and electronic communication technology. You may be tempted to use these devices to investigate the case, or to share your thoughts about the trial with others. However, you must not use any of these electronic devices while you are serving as a juror.

You violate your oath as a juror if you conduct your own investigations or communicate about this trial with others, and you may face serious consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial. . . .

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court, and not on other sources of information. Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost.

(Model Utah Jury Instructions, Criminal 109B (2d ed. 2010) (recess admonition).)

Proposed "Model" Social Media Jury Instructions

Needless to say, there is no "perfect" social media instruction, and some jurors will disregard any social media jury instruction. The effectiveness of an instruction will depend, in part, on such factors as the delivery of the instructions, their repetition at various points throughout the trial, and the use of complementary remedies to deter social media misconduct.

The proposed social media jury instructions, below, are based on jury instructions published in the 2011 *Supplement* to *Maryland Criminal Jury Instructions and Commentary*. They include two versions of the instruction: an "amplified instruction" to be given at the beginning and conclusion of the trial and an "abbreviated instruction" to be given, as appropriate, before a recess and before jurors leave for home at the end of a trial day.

Social Media Cautioning: Beginning and End of Trial (Amplified Instruction)

There are rules that each of you must follow in order to have a fair trial in this case. If you fail to follow these rules, you violate your oath as a juror and may face serious consequences. You must not be exposed to any information other than the evidence presented in this courtroom. This includes any information about issues or people involved in this trial. I now want to give you a detailed explanation about what you should and should not do during your time as jurors.

First, do not communicate to anyone any information about this case, or disclose your thoughts about this case or the individuals participating in it. This includes, but is not limited to, discussing the evidence, the lawyers, the court, or your thoughts, opinions, and reactions about any aspect of the case. In addition to not talking face to face with anyone, you must not share information with anyone about the case by any other means, for example, by texting, emailing, tweeting, or posting on social-networking sites such as Facebook. This includes not communicating with your fellow jurors until I give you the case for deliberation. It also applies to communicating with everyone else, including your family members and your employer, although you may notify your family and your employer that you have been seated as a juror in the case.

Second, you must not conduct your own research or investigation about the case or try to get information from any source other than what you see and hear in the courtroom. I use the word "research" in the broadest possible meaning of the word. This means, for example, you cannot use a dictionary or a Google search to obtain even something as simple as the definition of a word you do not understand. You must not consult any news sources, reference materials, or "Google" any information about the case, the law that applies to the case, or the people involved, including the defendant, the witnesses, the lawyers, or myself. You must not do any personal investigation, including visiting any of the places related to this case or viewing them on the Internet, for example, using Google Maps. This applies whether you are in the courthouse, at home, or anywhere else.

In summary, you may not use any social media technology to conduct your own investigation or communicate about matters related to this case. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "tweet" or text about the trial; do not text or email information about the case; do not post updates about the trial on Facebook; do

not use Google Maps or other Internet sources. Even using something as seemingly innocent as "Wikipedia" to obtain information related to this case can result in serious consequences.

It is important that you understand why these rules exist and why they are so important:

Only you have been qualified to be jurors in this case and only you have taken an oath to be fair and impartial.

The law does not permit you to talk among yourselves about the case until I tell you to begin deliberations because early discussions can lead to a premature final decision.

In our daily lives we may be used to looking for information online and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision, but you must resist the temptation to seek outside information. Looking for outside information is unfair because the parties do not have the opportunity to refute, explain or correct what you have discovered. The trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find.

For this reason, you are not permitted to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have a mistaken view of the scene that may not be subject to correction by either party.

Finally, you must not read or listen to any news accounts of the case, and you must not do research on any fact, issue, or law related to the case. For instance, the law often uses words and phrases in special ways, so it's important that any definitions you hear come only from me, and not from any other source. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom which may be incomplete, misleading, or inaccurate.

These rules are designed to help guarantee a fair trial. The fairness of the entire system depends on your reaching your verdict based solely on the evidence presented to you in court. If you violate these rules, you jeopardize the fairness of these proceedings and could be held in contempt of court. Also, a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. [Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried.]

I trust that you understand and appreciate the importance of following these rules and, based on your oath and promise, I know you will do so.

[If any of you have any difficulty whatsoever in following these instructions, please notify the bailiff or the clerk, who will notify me. If any of you become aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If a headline or announcement catches your attention, do not read or listen further. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well.]

(David E. Aaronson, Maryland Criminal Jury Instructions and Commentary § 1.06(E) (3d ed. 2009 & Supp. 2011).

Social Media Cautioning: During Trial (Abbreviated Instruction)

Let me remind you once again that you must decide this case based only on the evidence introduced at trial. You must not communicate or share any information with anyone about this case, or disclose your thoughts about it or the individuals participating in it. This includes, but is not limited to, discussing the evidence, the lawyers, the court, or your thoughts, opinions, and reactions about any aspect of the case. In addition to not talking face to face with anyone about the case, you must not communicate information about the case by any means, including texting, emailing, tweeting, or posting on social-networking sites like Facebook. You also must not read or listen to any news accounts of the case. Finally, you must not conduct your own research or investigation about the case or try to get information from any source other than what you see and hear in the courtroom. This means, for example, you cannot use a dictionary or a Google search to obtain even something as simple as the definition of a word you do not understand.

In summary, do not "Google" the parties, witnesses, issues, or counsel; do not "tweet" or text about the trial; do not text or email information on the case; do not post updates about the trial on Facebook; do not use Google Maps or other Internet sources. Even using something as seemingly innocent as "Wikipedia" to obtain information related to this case can result in serious consequences.

[If any of you have any difficulty whatsoever in following these instructions, please notify the bailiff or the clerk, who will notify me. If any of you become aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If a headline or announcement catches your attention, do not read or listen further. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information

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about the case, please report this promptly as well.] (*Id.* § 1.06(G).)

Conclusion

An increasing number of cases address issues arising from allegations of juror misconduct using social media. At least 36 states and four federal circuits have adopted jury instructions that seek to deter juror misuse of social media with varying degrees of specificity and effectiveness, as reflected in the case law. A review of these jury instructions suggests that effective social media instructions should meet four criteria: (1) use plain language and social media terminology; (2) give specific examples of prohibited social media conduct; (3) explain the rationale for social media restrictions; and (4) describe the consequences of violating social media restrictions. The most common and serious deficiency is an inadequate explanation of the rationale for social media restrictions.

We propose two "model" jury instructions—an amplified and an abbreviated version—that should reduce juror misunderstanding and confusion, enable jurors to better understand the restrictions as meaningful and important, and direct juror attention to the serious consequences of violating the court's instructions. ■