

Juror Misconduct in the Age of Social Networking[†]

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*“It has become appallingly obvious that our technology
has exceeded our humanity.”*

— Albert Einstein

I. INTRODUCTION

Dr. Einstein’s reflection on the advance of technology resonates in the context of a growing problem in the American justice system—jurors’ use of social media during trial. While juror misconduct undoubtedly predates the printing press, advances in smart phones and social networking sites provide new avenues by which jurors may stray from their sworn duties. Today, jurors can violate the rules by posting information about the case or the parties on their Facebook or Twitter accounts. Jurors also can conduct research, which gives them information outside of what was presented during the trial. Both of these actions can result in a denial of the defendant’s due process rights, which require a jury to consider only the evidence before it in the trial.

[†] Submitted by the authors on behalf of the Property Insurance section of the FDCC.



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The beginning of this Article provides background information regarding the rise of social networking sites and then provides a brief history of juror misconduct in the United States. Next, it discusses how courts have reacted when jurors have used social network sites or conducted Internet-based research during a trial. This section also describes the different ways in which jurors may use social networking sites to improperly communicate with another juror, a party, a witness, or others outside the courtroom or courthouse. A juror's privacy rights may be a barrier to discovering evidence sufficient to support a claim of misconduct. With that barrier in mind, we recommend that courts consider three remedies with the potential to deter or prevent juror misconduct involving social networking and Internet research: amending jury instructions to address Internet usage; "digitally" sequestering jurors; and imposing fines on jurors who engage in the type of electronic misconduct address in this Article.

II. THE RISE OF SOCIAL NETWORKING SITES

When the first social networking site was launched in 1997,¹ few anticipated how widespread Internet-based social networking would become. In the short time since 1997,

¹ Danah M. Boyd & Nicole B. Ellison, *Social Networking Sites: Definition, History, and Scholarship*, J. COMPUTER-MEDIATED COMM. VOL. 13(1) (2007) <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (last visited Feb. 23, 2012).



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multiple sites have fueled an explosion in personal connectivity. With the 2003 release of MySpace, Internet-based social networking truly hit the mainstream market.² Juggernauts Facebook³ and Twitter⁴ followed in 2004 and 2006 respectively.⁵ Since then, the influence of social networking on everyday life has become undeniable and, to the chagrin of some, unavoidable. Facebook claims to have 845 million active users worldwide.⁶ Of these, it is estimated that about 150 million users are Americans.⁷ Twitter boasted more than 500 mil-

² *Id.*

³ Facebook uses a social networking platform where users can create profiles, upload pictures and interact with other users. Users become "friends" with other users by sending "friend requests." Users can broadcast updates on their "Wall," which is a space on their profile page that lists their recent activity.

⁴ Twitter is a much more limited social networking application than Facebook. Twitter users "follow" and have "followers." Users can post text-based updates (also known as "tweets") on their profile page. The updates must be 140 characters or fewer and may include links to pictures uploaded through numerous third party web applications. In some cases, a user may set privacy options where only approved "followers" can see that user's tweets, or he or she can allow all other Twitter users to view his or her tweets.

⁵ Boyd & Ellison, *supra* note 1.

⁶ Fact Sheet, *Newsroom*, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Feb. 23, 2012).

⁷ Chloe Albanesius, *How Many U.S. Users Does Facebook Have, Will It Affect an IPO*, PCMAG.COM (June 14, 2011), <http://www.pcmag.com/article2/0,2817,2386896,00.asp>.

lion registered users worldwide in February 2012.⁸ In the United States alone, it is estimated that more than 107 million people have Twitter accounts.⁹

The rise of social networking sites has been accelerated by the use of smartphones. As of the end of 2011, forty-six percent of United States cell phone users owned smartphones, and sixty percent of new cell phones purchased were smartphones.¹⁰ American smartphone owners rarely leave home without their Internet-capable devices.¹¹ On average, they spend approximately three hours per day socializing on social networking applications on their mobile devices¹² - more than twice the amount of time the average American spends eating.¹³ Our reliance on social networking sites has even spawned a market for treatment of addiction to Internet-based social networking.¹⁴ In a society where every passing thought and mundane life experience are potential topics for an email, text message, or tweet, it is hardly surprising that jurors are tempted to post their courthouse experiences in “real time.”

III.

BACKGROUND ON JUROR MISCONDUCT IN THE UNITED STATES

The laws governing juror misconduct are rooted in the constitutional right to trial by a fair and impartial jury.¹⁵ Jurors are required to decide cases solely on the evidence presented to

⁸ Joann Pan, *Will You Be Twitter's 500 Millionth User?*, MASHABLE SOCIAL MEDIA (Feb. 22, 2012), <http://mashable.com/2012/02/22/twitters-500-million-user/>.

⁹ Lauren Dougan, *The US Has the Most Twitter Users, But the Netherlands Is More Active*, ALL TWITTER (Feb. 1, 2012), http://www.mediabistro.com/alltwitter/the-us-has-the-most-twitter-users-but-the-netherlands-is-more-active-stats_b18172.

¹⁰ *More US Consumers Choosing Smartphones as Apple Closes the Gap on Android*, NIELSENWIRE (Jan. 18, 2012), <http://blog.nielsen.com/nielsenwire/consumer/more-us-consumers-choosing-smartphones-as-apple-closes-the-gap-on-android/>.

¹¹ Amanda McGee, Comment, *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).

¹² Sarah Kessler, *Mobile By the Numbers*, MASHABLE TECH (Mar. 23, 2011), <http://mashable.com/2011/03/23/mobile-by-the-numbers-infogrpahic/>.

¹³ *Id.*

¹⁴ See McGee, *supra* note 11, at 309. For an example of a technology dependence program, see reSTART Internet and Technology Addiction Recovery Program, <http://www.netaddictionrecovery.com/> (last visited Feb. 23, 2012) (outlining the mission plan and programs available to Internet addicted individuals at a Fall City, Washington treatment center).

¹⁵ U.S. CONST. amends. VI–VII.

them.¹⁶ Standard jury instructions from across the country explain this duty, and jurors swear to uphold it.¹⁷ Of course, experience shows that some jurors will look beyond the evidence to reach a verdict, leaving the courts to create remedies for this species of misconduct.

Postings or interactions with other users on social networking sites would seem to fall into the broad category of juror misconduct based on external communications. In this context, courts have broad discretion to investigate alleged misconduct and determine what actions to take in the event misconduct is verified.¹⁸ In *Remmer v. United States*,¹⁹ the United States Supreme Court articulated the basic rule on external communications with jurors, stating that

any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.²⁰

The Court later stepped back from the presumption of prejudice and took the view that a party alleging improper juror communications must demonstrate actual prejudice. In *Smith v. Phillips*,²¹ the Court observed that

¹⁶ See *United States v. Olano*, 507 U.S. 725, 738 (1993) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *United States v. Medlin*, No. 10-7030, 2011 U.S. App. LEXIS 2064, at *6 (10th Cir. Feb. 1, 2011); *Davis v. Woodford*, 384 F.3d 628, 652 (9th Cir. 2004) (noting jury questions and judge's response that it would be improper to consider matters outside of the evidence presented, such as cost to the state's taxpayers for death penalty compared to life sentence); *Chavez v. Cockrell*, 310 F.3d 805, 811 (5th Cir. 2002); *Whitehead v. Cowan*, 263 F.3d 708, 720 (7th Cir. 2001); *United States v. De La Vega*, 913 F.2d 861, 871 (11th Cir. 1990).

¹⁷ See, e.g., 1-1 MODERN FED. JURY INSTRS.—CRIM., P 1.02 (2010); 4-71 MODERN FED. JURY INSTRS.—CIVIL, P 71.01 (2010); *Diamond-8 MODERN FED. JURY INSTRS.—CIVIL*, 8th Cir. § 3.06; S1-2 MODERN FED. JURY INSTRS.—CRIM., 3d Cir. § 2.33 (2010).

¹⁸ *Tanner v. United States*, 483 U.S. 107, 113–15 (1987) (recounting evidence that the trial court heard after learning of potential juror misconduct, including defense attorney's testimony).

¹⁹ *Remmer v. United States*, 347 U.S. 227 (1954).

²⁰ *Id.* at 229.

²¹ *Smith v. Phillips*, 455 U.S. 209 (1982).

due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.²²

The party raising the alleged external communication must show by competent evidence “that the extrajudicial communications or contacts were ‘more than innocuous interventions.’”²³ If this burden is satisfied, the other party must then prove that there is no “reasonable possibility that the jury’s verdict was influenced by an improper communication.”²⁴ To determine if the contact was merely innocuous, the court will consider several factors: “(1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly with a juror during trial; (5) about the matter before the jury.”²⁵ Though jury misconduct arising from social networking is a developing area of the law, some basic trends are starting to emerge.

IV. COURT REACTIONS TO JURORS’ INAPPROPRIATE USE OF TECHNOLOGY DURING TRIALS AND DELIBERATIONS

Jurors can use technology to commit misconduct in several different ways. First, jurors can use social media to provide updates on the proceedings. Parties have been generally unsuccessful in obtaining relief when a juror uses social media to report trial proceedings. In this area, courts are equally unwilling in criminal and civil matters to grant relief to the challenging party. Second, some jurors have improperly attempted to make a personal connection by “friending” or “following” a party in the proceedings. Courts are generally less tolerant of this type of misconduct. Third, jurors can use social media to improperly communicate with one another during the trial. The “jury is still out,” if you will, on this type of misconduct because the leading case was settled before the court resolved the issue of the jury misconduct. Finally, jurors can use the Internet to conduct research about the case and gain information that was not presented during the trial. Courts again are generally less tolerant of this type of misconduct.

²² *Id.* at 217.

²³ *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996) (quoting *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986)).

²⁴ *Id.* (quoting *Haley*, 802 F.2d at 1537).

²⁵ *Id.*

A. *Posting and Tweeting Public Messages about the Trial*

One highly-publicized example of this sort of misconduct was the criminal corruption trial of former Pennsylvania Senator Vincent J. Fumo, where the defense sought a mistrial due to a juror's updates on the status of the case on a social networking site.²⁶ The juror posted that there would be a big announcement on the day the verdict was handed down. The court denied the motion for mistrial,²⁷ which the defense unsuccessfully appealed. The appellate court upheld the district court's opinion that the juror's postings were "nothing more than harmless ramblings" that did not prejudice the defense.²⁸

In another criminal case, the court refused to grant relief based on a juror's Facebook postings. In the case, the court questioned the jury foreperson about Facebook postings during a highly publicized rape trial in Florida.²⁹ There were several postings, but the defense attorneys attacked only one. That posting contained the following comment: "Boring, boring, boring testimony from one witness all day."³⁰ The jury convicted the defendant of the rape charge, and the court denied the defense motion to set aside the verdict.³¹

Another court similarly refused to grant relief to a defendant in a civil case that had resulted in a \$12,000,000 verdict against the defendant where a juror had tweeted updates about the trial.³² In that case, the juror posted updates on his Twitter account that included comments such as, "'oh and nobody buy Stoam [the defendant company]. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter' and '[s]o Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money.'"³³ The court refused to set aside the verdict because the "tweets" did not discuss the substance of the case and "did not rise to the level of improper conduct."³⁴

²⁶ United States v. Fumo, 639 F. Supp. 2d 544 (E.D. Pa. 2009).

²⁷ *Id.* at 555–56.

²⁸ United States v. Fumo, 655 F.3d 288, 306 (3d Cir. 2011).

²⁹ Tanya Arja, *Jury Foreman Questioned About Facebook Postings*, MY FOX TAMPA BAY (Dec. 2, 2010), <http://www.myfoxtampabay.com/dpp/news/local/hillsborough/jury-foreman-questioned-about-facebook-postings-12022010>.

³⁰ *Id.*

³¹ See *Kendrick Morris Gets 65 Years in Prison for Rapes*, TBO.COM (Oct. 6, 2010), <http://www2.tbo.com/news/breaking-news/2011/may/20/16/teen-set-for-sentencing-in-library-day-care-rapes-ar-208602/>.

³² John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1.

³³ *Id.*; McGee, *supra* note 11, at 308–09.

³⁴ Though the judge's decision was unpublished, the case received a lot of media attention. See Martha Neil, *Juror Tweets in \$12.6M Case Teach Lawyer a Lesson: Ask About Web Use*, ABA JOURNAL (Apr. 9, 2009), http://www.abajournal.com/news/article/sweet_news_for_plaintiff_in_12.6m_case_jurors_tweets_wont_change_verdict.

B. *Using Social Media to Contact a Party or Witness*

Another category of misconduct arises when a juror attempts to “friend” or “follow” a party or witness. For instance, in a criminal case, a juror sent a firefighter witness a “friend request” on Facebook.³⁵ The witness did not recognize the juror and ignored the request. After the jury convicted the defendants, the juror sent the witness a message on Facebook saying she was a juror in the trial. The witness then accepted the renewed friend request and engaged in a conversation with the juror via Facebook. Upon realizing the potential impropriety of his Internet contact with the juror, the witness contacted the prosecutor. Although the court believed that the juror’s conduct was “unquestionably a serious breach of her obligations as a juror,” it denied the defendants’ motion for relief based on jury misconduct because it did not believe that the juror’s conduct “prejudiced a substantial right of the defendants.”³⁶

Similarly, in a federal district court case, a juror sent a Facebook “friend request” to two of the plaintiffs after the jury had rendered its verdict.³⁷ After the plaintiffs accepted the request, the juror learned of the plaintiff’s “party animal” ways, and after the trial, the juror contacted the plaintiffs’ counsel to bring it to his attention.³⁸ The plaintiffs’ counsel raised the matter with the court and moved for a new trial. The judge denied the motion, stating that he did not find any evidence of misconduct “*during the trial*” and apparently did not impose any penalties on the juror.³⁹

Despite the media attention given to these improper “friend requests,” some prospective jurors still seek to initiate these types of improper online connections. However, courts are appearing to become more intolerant of this type of misconduct. For example, in a February 2012 case out of Sarasota, Florida, a prospective male juror in an automobile negligence case sent a “friend request” to the female defendant.⁴⁰ The defendant informed her attorney, who brought the matter to the court’s attention. The defense attorney emphasized that while his client responded properly by reporting the incident, other parties may be tempted to accept the request, hide the matter from counsel and the court, and attempt to use the new digital relationship with the juror to influence the verdict.

³⁵ *People v. Rios*, No. 1200/06, 2010 N.Y. Misc. LEXIS 312, at *3 (N.Y. Sup. Ct. Feb. 23, 2010).

³⁶ *Id.* at *9. However, the court granted the defendants’ motion to set aside the verdicts because the court found that the evidence was legally insufficient to support a conviction. *Id.* at *44–45.

³⁷ John G. Browning, *When All that Twitters Is Not Told: Dangers of the Online Juror*, 73 TEX. BAR J. 216, 218 (Mar. 2010) (citing *Wilgus v. F/V Sirius, Inc.*, 665 F. Supp. 2d 23 (D. Me. 2009)).

³⁸ *Id.*

³⁹ *Wilgus*, 665 F. Supp. 2d at 27–28.

⁴⁰ Douglas Stanglin, *Juror Jailed for Contempt for ‘Friending’ Defendant*, USA TODAY, Feb. 17, 2012, <http://content.usatoday.com/communities/ondeadline/post/2012/02/juror-jailed-for-contempt-for-friending-defendant-1#.Tz553IG2Z8E>; Ben Zimmer, *Juror Could Face Jail Time for ‘Friending’ Defendant*, USA TODAY, Feb. 7, 2012, <http://www.usatoday.com/news/nation/story/2012-02-07/juror-facebook-friend-defendant/53000186/1>. This appears to be the first publicized instance of a U.S. court sentencing a juror to jail time for using Facebook to send a friend request to a party.

The prospective juror in that case, Jacob Jock, was dismissed from duty, but his misconduct did not end there. Mr. Jock then posted a status update on Facebook boasting that he escaped jury duty. During a contempt hearing on Mr. Jock's misconduct, the court held him in contempt of court and sentenced him to three days in county jail. When issuing her decision, Judge Nancy Donnellan explained to Mr. Jock that "[f]reedom is not free. It comes with responsibilities and duties, one of the most important of which is to serve as a juror when called. You were called, and you thumbed your nose at it."⁴¹

C. *Improper Communication among Jurors*

Facebook and Twitter can also facilitate premature discussions among the jurors. In the embezzlement trial of former Baltimore Mayor Dixon, five of the jurors became friends on Facebook and communicated with each other through the social networking site.⁴² When the former mayor's defense team became aware of the online interactions between the five jurors, it moved to set aside the guilty verdict. The judge asked the jurors to testify about the communications and to refrain from further discussing the case on Facebook. Some of the jurors continued to post about their former jury duty, despite the judge's request. The issue of the jury misconduct was not fully resolved, however, since the former mayor entered into a plea agreement on the charges and resigned from office.⁴³

D. *Internet Research*

Another area of concern has been the use of Internet search engines, such as Google, by jurors. A prime example of this type of misconduct occurred in a 2009 Southern District of Florida drug trial involving Internet pharmacies.⁴⁴ In that case, nine jurors admitted that they had conducted Google searches on the lawyers, parties, and media coverage of the case. They also admitted that they had consulted Wikipedia for definitions of words that had been used during trial. The court declared a mistrial based on the jurors' violation of his instructions not to conduct outside research during the trial.⁴⁵

⁴¹ Stanglin, *supra* note 40.

⁴² Bradley Shear, *The Facebook Five and Alleged Juror Misconduct in Baltimore Mayor's Trial*, SHEAR ON SOCIAL MEDIA LAW (Jan. 15, 2010), <http://www.shearsocialmedia.com/2010/01/facebook-five-and-alleged-juror.html>; *Dixon Jurors Ignore Judge, Continue Facebook Posts*, WBALTV.COM (Jan. 4, 2010), <http://www.wbalTV.com/t/22117438/detail.html>; Gary Haber & Robert J. Terry, *Baltimore Mayor Sheila Dixon Resigning Post*, BALT. BUS. J., Jan. 6, 2010, <http://www.bizjournals.com/baltimore/stories/2010/01/04/daily31.html>.

⁴³ See Shear, *supra* note 42.

⁴⁴ See McGee, *supra* note 11, at 308.

⁴⁵ *Id.*; Deirdra Funcheon, *Jurors Gone Wild: The Feds Slink Away from a Flubbed Internet Pharmacy Case*, MIAMI NEW TIMES (Apr. 23, 2009), <http://www.miaminewtimes.com/content/printVersion/1517107/>.

Another example of jurors improperly using Internet search engines is in *Wardlaw v. State*.⁴⁶ In that case, a man was charged with rape, child sexual abuse, and incest against his seventeen-year-old daughter. At trial, an expert testified about working with the daughter on her behavioral issues, including opposition defiant disorder (ODD). A juror decided to research ODD online and found out that lying was a trait associated with the disorder. She shared this information with the other jurors, after which another juror sent a note to the judge advising him of the incident. The defense moved for a mistrial, which the judge denied.⁴⁷ On appeal, the court found that a mistrial should have been granted.⁴⁸ It reasoned that the juror's research was "egregious misconduct" because the daughter's credibility was a crucial issue, and researching non-evidentiary information on that issue could have unduly influenced the jury.⁴⁹

Yet another example of such misconduct arose in a criminal case out of Maryland.⁵⁰ In that case, a court overturned a first-degree murder conviction because a juror had consulted Wikipedia for information not introduced into evidence at the trial. This information included research of scientific terms and principles. The court reversed the conviction, emphasizing that an "adverse influence on a single juror compromises the impartiality of the entire jury panel."⁵¹

In another case, a juror searched for pornographic sites in an attempt to verify information discussed by an expert witness in a criminal trial for sexual abuse.⁵² The defendant was charged with possessing child pornography, and the defense introduced an expert witness who opined that it was impossible to discern the actual age of the individuals on the pornographic websites found on the defendant's computer. Despite specific warnings from the court, the juror searched for the websites referenced in the expert's testimony to assess the expert's contentions. The jury found the defendant guilty for sexual abuse and child pornography. After the verdict, the defense counsel uncovered the evidence of the juror's Internet searches. When defense counsel brought the matter to the trial court's attention, the court held a hearing and found that the juror had committed misconduct, but it refused to set aside the verdict against the defendant.⁵³ The Nevada Supreme Court upheld the trial

⁴⁶ 971 A.2d 331 (Md. Ct. Spec. App. 2009).

⁴⁷ *Id.* at 337.

⁴⁸ *Id.* at 338.

⁴⁹ *Id.*

⁵⁰ Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace: Panelists Can Do Own Research on Web, Confer Outside Courthouse*, BALT. SUN, Dec. 19, 2009, http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13_1_deliberations-period-florida-drug-case-jurors.

⁵¹ *Id.*

⁵² *Zana v. State*, 216 P.3d 244 (Nev. 2009). See also K.C. Howard, *Juror Misconduct Cited*, LAS VEGAS REV.-J., Dec. 1, 2007, <http://www.lvrj.com/news/11993056.html>.

⁵³ *Zana*, 216 P.3d at 546.

court's ruling, finding that the juror's actions did constitute misconduct but that the actions did not prejudice the defendant.⁵⁴

Courts have also found improper jury research in the following circumstances: where a juror researched Internet databases for the defendant corporation's past profits;⁵⁵ where a juror used MapQuest to assess testimony regarding the distance between two relevant locations in the case;⁵⁶ and where a juror researched whether Tasers are lethal devices in a wrongful death case.⁵⁷ It is easy to see that the possibilities for improper Internet research by jurors are virtually endless.

While courts have been reluctant to grant new trials based solely on a juror's use of social media, it is apparent that courts are much more likely to grant new trials when the misconduct is Internet research. However, there are extreme examples where the use of social media has had repercussions for the litigants and juror alike.⁵⁸ For example, a juror in California, who was also an attorney, blogged about the details of the case and criticized the judge and defendant on a social networking site. The court set aside the verdict, and the California State Bar later initiated disciplinary proceedings against the juror and suspended him from practice for forty-five days.⁵⁹

Lawyers are not the only jurors who have had to face sanctions for their failures to follow the law and refrain from discussing the case on social networking sites. In Michigan, a juror posted the following message on Facebook: "actually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY. :P."⁶⁰ The court removed the juror, levied civil contempt fines against her, and ordered her to write an essay on the Sixth Amendment.⁶¹

⁵⁴ *Id.*

⁵⁵ *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 787 (8th Cir. 2009).

⁵⁶ *Brown v. State*, 620 S.E.2d 394, 397-98 (Ga. Ct. App. 2005).

⁵⁷ *Browning*, *supra* note 37, at 218.

⁵⁸ *In re Wilson*, No. 06-O-13109 (Cal. State Bar Ct. 2008); John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. TIMES, Sept. 13, 2009, at A1.

⁵⁹ See Martha Neil, *Calif. Lawyer Suspended over Trial Blogging While Serving as Juror*, ABA JOURNAL (Aug. 4, 2009), http://www.abajournal.com/news/article/calif._lawyer_suspended_over_trial_blog_while_serving_as_juror/.

⁶⁰ Russell Smith, *Judge Throws the (Face)book at Juror*, LEGAL AS SHE IS SPOKE: A DISCUSSION OF LAW AND JOURNALISM, (Sept. 26, 2010), <http://lasisblog.com/2010/09/26/judge-throws-the-facebook-at-juror/>.

⁶¹ *Id.*

V.

THE ISSUE OF PRIVACY RIGHTS IN LIGHT OF THE NEW JUROR MISCONDUCT

As the courts draw the contours of acceptable juror behavior in this area, litigants face another challenge: they must overcome the jurors' privacy rights to establish that misconduct occurred. The California Supreme Court recently issued a stay of a trial court order that compelled a jury foreman to produce his private Facebook postings.⁶² In that case, a defendant was charged with a gang-related assault. During the trial, the foreman posted on his Facebook page that the evidence was "boring." Defense attorneys sought records of the foreman's posting from Facebook, which he refused to turn over. The foreman then challenged the subpoena on grounds that production would violate his right to privacy. A trial judge found the subpoena valid and ordered the foreman to sign a consent form within ten days for the release of his Facebook records.⁶³ The foreman appealed the decision and requested a stay of the order that forced him to sign the consent form. The intermediate appellate court denied the foreman the relief he had requested, but the California Supreme Court granted the stay and has remanded the case to the intermediate appellate court for a full hearing on the matter.⁶⁴

VI.

REMEDIES

Several suggestions have been made as to how courts and attorneys should address the problem of technology-based juror misconduct. The most popular suggestion is the amendment of jury instructions to include specific language instructing jurors that they should completely refrain from using any social networking sites, such as Facebook and Twitter, to research or post comments related to the case.⁶⁵ The idea is that if the prospective jurors are instructed on the exact conduct that is prohibited, they will be less likely to engage in that type of conduct.⁶⁶ These instructions should be written in short sentences using common terms to ensure that the jurors understand the instructions.⁶⁷

⁶² Kathy Robertson, *Court Orders Stay in Juror's Facebook Case*, SILICON VALLEY/SAN JOSE BUS. J., Feb. 15, 2011, <http://www.bizjournals.com/sanjose/news/2011/02/15/court-orders-stay-in-jurors-facebook.html>; Rachel Costello, *California Court to Examine Juror's Facebook Privacy*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Apr. 1, 2011), <http://www.rcfp.org/newsitems/index.php?i=11807>.

⁶³ Robertson, *supra* note 62.

⁶⁴ *Id.*

⁶⁵ Timothy J. Fallon, Note, *Mistrial in 140 Characters or Less? How the Internet and Social Networking are Undermining the American Jury System and What Can be Done to Fix It*, 38 Hofstra L. Rev. 935, 963–67 (2010); Jeffrey T. Frederick, *You, the Jury, and the Internet*, 39-WTR BRIEF 12 (Winter 2010); McGee, *supra* note 11, at 316–17.

⁶⁶ Fallon, *supra* note 65, at 964.

⁶⁷ See Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37, 73 (1993).

Several states, including New York and Florida, have adopted pattern jury instructions including this type of language. The New York pattern instruction states as follows:

In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, [I]nternet chat or chat rooms, blogs, or social websites, such as Facebook, MySpace or Twitter.⁶⁸

The Florida instruction is not as specific, but it provides a similar message: “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.”⁶⁹

Local Florida courts have supplemented this instruction with juror orientation videos.⁷⁰ The Sixth Judicial Circuit’s version specifically identifies Facebook and Twitter in a video explaining that jurors are not to communicate with anyone about the case through social media.

Another suggestion is to threaten or order sequestration of the jury if there is a danger of social network or Internet-based misconduct.⁷¹ Combining sequestration with the confiscation of smart phones and laptop computers will effectively eliminate any chance for the jurors to access social networking sites. However, sequestration has long been disfavored due to its cost, lack of popularity among jurors, and difficulty to administer.⁷²

⁶⁸ OFFICE OF COURT ADMIN., COMM. ON CRIMINAL JURY INSTRUCTIONS, CRIMINAL JURY INSTRUCTIONS 2D: JURY ADMONITIONS IN PRELIMINARY INSTRUCTIONS (2009), http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf (last visited Feb. 15, 2012).

⁶⁹ SUPREME COURT COMM. ON STANDARD JURY INSTRUCTIONS IN CIVIL CASES, FLORIDA STANDARD JURY INSTRUCTIONS—CIVIL CASES, §700—Closing Instructions, http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#700 (last visited Mar. 3, 2012). See Declan McCullagh, *Florida Bans Jurors from Tweeting, Blogging*, CNET NEWS (Oct. 29, 2010), http://news.cnet.com/8301-13578_3-20021178-38.html. See also Memorandum from Judge Julie A. Robinson, Chair, Judicial Conference Committee on Court Administration and Case Management, to Judges, United States District Courts (Jan. 28, 2010), <http://federalevidence.com/downloads/blog/2010/Memorandum.On.Juror.Use.Of.Electronic.Communication.Technologies.pdf>; *Juror Use of Electronic Social Media*, FEDERAL EVIDENCE REVIEW, <http://federalevidence.com/evidence-resources/federal-jury-instructions> (last visited March 8, 2012).

⁷⁰ See, e.g., Information for Jurors, Jury Orientation Video, http://www.flcourts.org/gen_public/jury/index.shtml.

⁷¹ See Fallon, *supra* note 65, at 965–66; McGee, *supra* note 11, at 323.

⁷² Fallon, *supra* note 65, at 965–66.

A new idea to emerge in light of the new types of juror misconduct is the concept of enforcing a “digital sequestration” of the jurors.⁷³ Unlike traditional sequestration, this method would not require that jurors be housed at a hotel during the trial. Instead, it would cut off only the jurors’ access to social networking sites. While this “digital sequestration” would limit jurors’ ability to send improper “friend requests” to parties or witnesses or engage in improper dialogue with individuals regarding the case, its enforcement would be difficult and may have little effect.

For this method to be successful, social networking sites like Facebook and Twitter would have to cooperate by restricting jurors’ access to their accounts during the pendency of the trial, which would likely be impossible to facilitate, given that these companies embrace an overarching desire to provide — not restrict — access to information and networking. Furthermore, digital sequestration would undoubtedly result in an overwhelming amount of litigation regarding whether the method unnecessarily infringes on individual privacy rights. Finally, even if the digital sequestration method could be implemented, it would certainly fail to totally cut off a juror from the Internet. There would be no absolute way to restrict a juror’s ability to conduct research on the Internet, and a juror could always use the online social networking account of a family member or friend to search for a party or witness. In the end, the minimal remedial effect of this novel idea would seem to be far outweighed by the problems that would arise through its implementation.

A more direct remedy for the problem is the use of sanctions, which could help to curb a juror’s desire to research the case or post information about the case online.⁷⁴ If courts were more willing to impose civil fines against non-compliant jurors, the imposition of those fines could help to deter future misconduct. The idea of having to pay a fine for just posting a comment about a case could keep many prospective jurors from picking up their iPhones or Blackberrys and signing on to Facebook or Twitter. Courts could also threaten and impose criminal contempt sanctions, such as short jail sentences, for cases of extreme misconduct. Although these types of sanctions might be considered excessive by some, they could have a better deterrent effect than amended instructions and the threat of sequestration.

⁷³ The concept of digital sequestration was addressed in a legal blog authored by Ben Buchwalter on LinkedIn. *See Digital Sequestration?*, <http://www.attorneycredits.com/wordpress/2011/02/digital-sequestration/> (last visited Feb. 25, 2012). Interestingly, the discussion of this potential remedy appears to have been initiated on LinkedIn, which suggests that using social networking sites to discuss the problem and discourage jury misconduct during trial could help to prevent this problem. *Id.*

⁷⁴ *See McGee, supra* note 11, at 321–22.

VII.
CONCLUSION

Like other kinds of juror misconduct, a percentage of jurors will always misuse social media during trial. When asked about how to fix this problem, Douglas L. Keene, president of the American Society of Trial Consultants conceded, “It’s really impossible to control it.”⁷⁵ Even the prospect of sanctions has not fully stopped the misconduct. In fact, if you go online right now to Twitter or Facebook and do a search for tweets or posts about jury duty, you will surely find people across the nation updating everyone about their civic duty or the case they are hearing.⁷⁶

The fight to prevent juror misconduct in the use of social networking sites has only just begun. For some, a connection to Facebook or Twitter will be more important than a juror’s oath or a court’s instruction. Of course, this behavior may be just the latest manifestation of an age-old problem—jurors want to talk about a trial from a position of importance and power. New technology may change the method of delivery, but human nature remains the same.

⁷⁵ Schwartz, *supra* note 32.

⁷⁶ On February 15, 2012, the authors of this article conducted a general Twitter search for “jury duty.” In the hour preceding the search, there were more than 170 tweets referencing jury duty on Twitter, including such comments as, “Someone, pls take a bat & beat me senseless with it. Why am I here yo!?! Jury duty is so cornyyyyyyyyyy,” “Anyone ever have to go for jury duty? Do they let you text and email etc from your phone while you wait? Any other helpful info,” and “Hes Guilty....Jury Duty is honestly the biggest waste of time....”