SEQUESTRATION FOR THE TWENTY-FIRST CENTURY: DISCONNECTING JURORS FROM THE INTERNET DURING TRIAL

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I. INTRODUCTION

Judges and trial lawyers around the country are shocked by court systems' apparent inability to control the behavior of jurors.[1] There is a landslide of juror misconduct nationwide in spite of admonitions from judges.[2] Recent examples of this phenomenon are extensive.[3] During an

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1. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 17, 2009, http://www.nytimes.com/2009/03/18/us/18juries.html?-r=2.

2. *See, e.g.*, John G. Browning, *When All That Twitters is Not Told: Dangers of the Online Juror*, 73 TEX. B.J. 216 *2010) (detailing various instances of jurors

overnight break, a juror in a capital murder trial in Pennsylvania looked up and printed out information on "retinal detachment" from the Internet and then shared it with her fellow jurors, resulting in a mistrial.[4] A Florida first-degree murder conviction was overturned on appeal after the foreperson looked up the word "prudent" on his smartphone and shared the definition with other jurors during deliberations.[5] A mistrial was declared in a Florida felony case because jurors admitted to the judge that they talked to the bailiff, made cell phone calls, and sent text messages during deliberations.[6] In another Florida trial, a judge declared a mistrial and granted a new trial for a defendant convicted of drugging and raping a family member—all because the jury forewoman introduced a Wikipedia article from the Internet during deliberations.[7] As these cases illustrate, important, expensive, and heart-wrenching verdicts can be overturned when jurors fail to get the message on the limits of their conduct or fail to heed the instructions they receive.[8]

Jurors are obligated to pay attention, comply with the judge's instructions, and honestly decide the matter before them without prejudice.

engaging in their own research and the efforts of various courts to combat the practice); *see also* Harry A. Valetk, *Facebooking in Court: Coping with Socially Networked Jurors*, LAW.COM, Oct. 11, 2010, http://www.law.com/jsp/article.jsp?id=1202473157232&slreturn=1&hbxlogin=1 (describing more instances of misconduct and new model jury instructions designed to prevent electronic communication by jurors).

3. *See* Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. (forthcoming 2011) (listing specific instances of jurors performing online research, as well as statistics regarding how frequently the practice occurs).

4. Michael R. Sisak, *Judge Orders Dismissed Cherry Juror to Turn Over Research*, CITIZENS' VOICE (Wilkes-Barre, Pa.), Jan. 29, 2011, http://citizensvoice.com/news/judge-orders-dismissed-cherry-juror-to-turn-over-research-1.1097019#.

5. Tapanes v. State, 43 So. 3d 159, 162–63 (Fla. Dist. Ct. App. 2010).

6. Melissa E. Holsman, *Facebook Poem Gets Prosecutor in Hot Water*, SUN SENTINEL (Fort Lauderdale, Fla.), Apr. 22, 2010, http://articles.sun-sentinel.com/2010-04-22/news/fl-facebook-poem-ada-20100422_1_jurors-trial-facebook. The judge also learned, during the same three-day jury trial, one of the prosecutors posted to his Facebook page a poem about the trial to be sung to "the tune of the TV show 'Gilligan's Island.'" *Id.*

7. Susannah Bryan, *Davie Police Officer Convicted of Drugging, Raping Family Member to Get New Trial*, SUN SENTINEL (Fort Lauderdale, Fla.), Dec. 16, 2010, http://articles.sun-sentinel.com/2010-12-16/news/fl-davie-cop-jurors-query-20101215_1_olenchale-penile-penetration-new-trial.

8. *See* Brian Grow, *As Jurors Go Online, U.S. Trials Go off Track*, REUTERS, Dec. 8, 2010, http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208.

Instruction on difficult legal matters, such as the elements of a cause of action or crime, burden of proof, and reasonable doubt, can be challenging. Some jury instructions purport to teach lay jurors in a few sentences legal concepts that take law students days or weeks to learn. However, one would assume procedural rules, such as, "Do not do any research about the case on your own," should be easily *understood* and *accepted* by jurors. But experience, past and present, belies the notion that attaining compliance on that particular instruction is routine. Are jurors not getting the message, or are they simply ignoring the instructions of the court to conduct their own search for the truth?[9] With the current rash of misbehavior, answering such questions is critical, and both study and analysis are necessary as solutions are sought.[10] Yet, empirical study on the subject is notably absent in the United States.[11]

Regardless of the underlying reasons for misconduct, there are practical steps court systems, judges, and lawyers can take right now to avoid or discourage juror misbehavior. Sequestration of jurors is not a viable alternative in all but the rarest of cases.[12] Certainly misconduct can

9. One recent article persuasively argues juror research outside the evidence and law presented in court is not so much misconduct as it is a "misplaced sense of responsibility to render the 'right' decision" and such behavior may "be a signal from jurors that they are chafing under the restrictions of their role." Morrison, *supra* note 3.

10. Empirical research would be helpful to understand the root causes of juror misconduct so the courts could systematically address the problem. While there are barriers to overcome regarding confidentiality, getting a handle on the source of the problem is a prerequisite to solving it.

11. There have not been any empirical studies about juror misconduct in the United States. *Id.* at 7. Jurors in Great Britain have been surveyed on the subject, but that effort does not provide the type of information that would assist in understanding the cause and extent of the problem. *Id.* at 7 n.25 (citing CHERYL THOMAS, U.K. MINISTRY OF JUSTICE, ARE JURIES FAIR? 48 (2010), *available at* http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf). The surveys of British jurors cited by Morrison found juror impropriety was sometimes a result of misunderstanding the judge's instructions. THOMAS, *supra*, at vi, 48. Most improper Internet research, however, was done by jurors over age thirty, which suggests a cultural component as well. *Id.* at viii. The study cited misuse of the Internet and media as an issue of "growing importance." *Id.* at 50. Some empirical information on juror behavior in the United States may be on the way, as the National Center for State Courts recently began the pilot phase of a study of juror research and communication conduct entitled "Jurors and New Media: A Baseline Exploration." *See Calling All Intrepid Trial Judges*, JUR-E BULL. (Nat'l Ctr. for State Courts), May 6, 2011.

12. True sequestration of jurors is largely outmoded and economically untenable for almost all civil cases today. *See* Ralph Artigliere, Jim Barton & Bill

be punished, and judges and lawmakers will undoubtedly consider imposing sanctions on jurors in the right case.[13] Sanctions, however, are not a cure-all solution.[14] Proactive prevention of error is preferable to costly mistrials and punitive contempt charges. The court system can ill afford to antagonize jurors,[15] especially if the genesis of the problem is based in whole or in part on the failure of the bench, bar, or system to effectively adapt to changing times in order to connect with jurors and provide them with information they need to do their job. Effective instruction on required juror conduct explains the limits of the law and is delivered in a way that is understood and motivates jurors to abide by the prescribed limits.[16] While empirical study is sorely needed to determine the

Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, 84 FLA. B.J. 9, 9 (2010). A court committee on jury management in Arizona determined that no one could remember sequestration occurring in the past twenty years. *Id.* at 16 n.5 (citing ARIZ. SUPREME COURT COMM. ON THE MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12: PART 2, 15 (1998), *available at* http://azcourts.gov/Portals/15/Jury/Jury12.pdf). A judge, however, might consider sequestration in "a highly publicized, high profile case." *See* ARIZ. SUPREME COURT COMM. ON THE MORE EFFECTIVE USE OF JURIES, *supra*, at 15.

13. When a Pennsylvania judge discovered a juror did Internet research and tried to share it with other jurors during the deliberations, the judge ordered the juror to produce the documents so prosecutors could investigate a possible contempt charge against the juror. Sisak, *supra* note 4. State lawmakers may consider stiff sanctions for jurors as the problem intensifies. *See* Ginny LaRoe, *Barry Bonds Trial May Test Tweeting Jurors*, LAW.COM, Feb. 15, 2011, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202481944364&slreturn=1&hbxlogin=1.

14. Even when judges are inclined to hold jurors in contempt, most contempt sanctions will not be published broadly enough outside legal circles to be a deterrent to other jurors. Law professor Caren Morrison argues that any "marginal deterrent" gained by threat of sanctions in this context is outweighed by mistrust and resentment engendered among jurors. Morrison, *supra* note 3; *but see* Joel Cohen & Katherine A. Helm, *Should Twittering Jurors Know Better?*, LAW.COM, June 22, 2009, http://www.law.com/jsp/article.jsp?id=1202431621808&slreturn=1&hbxlogin ("One stiff and highly publicized contempt order against an offending juror can be worth a thousand toothless admonitions against breaching an old-fashioned obligation to do justice.").

15. For many citizens, jury service is an important source for understanding the system of justice. In addition, in tough economic times, judges and court systems are under budgetary pressure. Thus, judges have a duty *and* self-interest in making the system as competent as possible in the eyes of jurors.

16. Jurors highly motivated to make the right decision may be disappointed in the information provided by judges and lawyers in the trial and may turn to their own devices to get what they think is needed. *See* Morrison, *supra* note 3. While not justified, this behavior is understandable. As shown herein, practical and reasonable steps may be taken to discourage this type of misguided behavior.

reasons behind jury misconduct, this Article argues there are existing innovative and practical methods that court systems, judges, and lawyers may use to improve the quality and methodology of addressing the juror misconduct problem rather than relying on sanctions to right the ship.[17]

II. UNIVERSAL CHALLENGES TO JUROR COMPREHENSION

Justice in a jury trial relies on effective communication. A trial lawyer who fails to communicate the client's cause effectively and persuasively risks injustice to the client, and the judge who fails to effectively teach the law to jurors similarly places a just result at risk. Jurors are entitled to know what their job is, how they are to do that job, and the law they are supposed to use in the case. The judge delivers such information using both structured and extemporaneous jury instructions. The quality of the judge's communication is a key element of successful jury instruction, and much of that success depends on knowing the audience and any impediments to their understanding and ability to comply with jury instructions.

Some basic factors contribute to juror distraction and lack of comprehension of jury instructions in any case. Jurors have diverse experiences, abilities, language skills, and attention spans. Most jurors are thrust into an unfamiliar situation with little specific guidance regarding their roles before the judge and lawyers start speaking to them.[18] The

17. Increasing evidence of juror misconduct is but a symptom of difficulty courts are having while adapting the trial system to a computer-driven culture. Jury innovations go beyond jury instruction and communication, and adapting the jury system to keep up with societal change will be a recurring issue. This Article limits its recommendations to practical solutions within the current framework of jury roles. *See id.* (making a provocative argument to go outside the existing paradigm and broaden the role of and information accessed by jurors to create a new "collaborative, information-sharing model" in order to produce a "more active, better informed jury").

18. Hopefully most jurors receive written, video, or online orientation before jury service in addition to oral or video orientation from a judge or clerk personnel before jury selection. *See, e.g.*, *Jury Duty*, ARIZ. JUDICIAL BRANCH, http://www.azcourts.gov/Default.aspx?alias=www.azcourts.gov/juryduty (last visited Apr. 23, 2011); *Welcome to Jury Duty!*, WASH. COURTS, http://www.courts.wa.gov /newsinfo/resources/index.cfm (last visited Apr. 20, 2011) (providing general juror instructions); *see also, e.g.*, *All Rise: Jury Service in Minnesota*, MINN. JUDICIAL BRANCH, mms://stream2.video.state.mn.us/Courts/allrise.wmv (last visited Apr. 20, 2011) (providing a juror orientation video). Juror orientation material is important but limited by the generality of its content. An exception is a new Florida standard instruction on juror conduct, which was approved by the Florida Supreme Court as part of juror orientation to inform jurors of prohibited communication at the earliest

courtroom may be too cold or too warm when instruction is delivered. The subject matter of the case may be distasteful, complicated, or boring. Frequently, judges and lawyers do not present the case in a compact and efficient fashion, resulting in long periods of wasted time with needless testimony, delay, and waiting in the jury room while the judge and lawyers handle matters that could have been addressed in advance or after hours. Delay and wasting jurors' time are particularly disrespectful and distracting.[19] While jury instructions can and should always be carefully crafted and presented, some are not written, organized, or delivered well.[20] With careful preparation and due attention to juror needs, most of the foregoing factors can and should be mitigated.[21]

There is an imposing and increasing challenge to jury communication and compliance not fully appreciated by the bench and bar. Many jurors, especially those under age thirty, are part of a generation that receives and processes facts, communicates, learns, and uses information differently than ten or fifteen years ago.[22] Digital communication and online research

time. SUPREME COURT COMM. ON STANDARD JURY INSTRUCTIONS IN CIVIL CASES, FLORIDA STANDARD JURY INSTRUCTIONS—CIVIL CASES, Section 200, Qualifications Instruction [hereinafter FLA. CIVIL JURY INSTRUCTIONS], *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml.
This instruction regarding the use of cell phones, computers, and electronic devices is now supposed to be given to all prospective jurors in Florida at orientation. *See id.*

19. Jurors given an estimated schedule by the judge are often disappointed when delays occur. Jurors are distracted by the stress delay creates for themselves, their families, or their co-workers. Proper planning and holding counsel to a strict schedule helps. Unanticipated delay should be explained to jurors in detail, unless it would cause prejudice against one party or the other.

20. Instructions should both be written in direct, organized, and brief sentences and timely presented to ensure every element of the instruction can be heard and understood. Instructions should be written in plain language with unfamiliar, legal, and technical terms defined. *See* RALPH ARTIGLIERE & WILLIAM M. ARTIGLIERE, FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES, App. D at 27–31 (2d ed. 2010).

21. Now more than ever, judges and lawyers must work together to assure juror comfort and effective delivery of instructions.

22. An important distinction exists between those raised with computer games, e-mail, texting, Twitter, Internet access, and social networking as a function of their entire learning lives and those raised in a less digital environment. *See* MARC PRENSKY, DIGITAL NATIVES, DIGITAL IMMIGRANTS 1, 3–6, *available at* http://www.emeraldinsight.com/journals.htm?issn=1074-8121&volume=9&issue=5&articleid=1532742&show=pdf&PHPSESSID=mmlfamj9l42lmmlqpqibrvipg6. Prensky asserts modern students think and process information differently than their predecessors because they have received, recorded, and "spent their entire lives surrounded by and using computers, videogames, digital music players, video cams, cell phones, and all the

are ubiquitous, immediately responsive, and much easier and more effective than analog research and communication—all characteristics that present unprecedented temptation to jurors. Many jurors, young and old, are habitually linked to other people and information resources through the Internet, phone technologies, and social networks.[23] Taking away jurors' ability to communicate on social websites or research on the Internet can evoke unexpected reactions and concerns; to many people, such resources are a way of life rather than a tool or toy. Judges and lawyers must understand the perspective and propensities of modern jurors. Those who ignore the impacts of the culture, habits, and learning style of twenty-first century jurors risk the inability to effectively communicate with and motivate them.

III. HISTORIC PERSPECTIVE ON JURY INSTRUCTIONS

Altering the content and methodology of jury instruction is not easy. A jury trial is a formulaic exercise with procedural and evidentiary rules, traditional and constitutional safeguards, and patterned language to ensure the fundamental consistency of a fair trial for litigants. Before standard jury instructions were given to jurors as a common practice,[24] the judge in each case instructed the jury after hearing competing suggestions from the parties on the law.[25] Instruction from the judge carried great weight with

other toys and tools of the digital age." *Id*. at 1. Presnky's theory is not without its critics. *See* Doug Holton, *The Digital Natives/Digital Immigrants Distinction Is Dead, or at Least Dying*, EDTECHDEV (Mar. 19, 2010), http://edtechdev.wordpress.com/2010/03/19/the-digital-natives-digital-immigrants-distinction-is-dead-or-at-least-dying/ (claiming the distinction between digital natives and digital immigrants is growing irrelevant and citing numerous sources criticizing the distinction).

23. Social media are currently so popular and easily accessed that Ohio Supreme Court Justice Judith Lanzinger worries many "jurors won't be willing to disconnect during a trial." Laura A. Bischoff, *Courthouse Tweets Not So Sweet, Say Judges*, DAYTON DAILY NEWS, Feb. 12, 2010, *available at* http://www.allbusiness.com/legal/trial-procedure-judges/13916591-1.html.

24. Florida first published standard jury instructions for civil negligence cases in 1967. *See In re* Standard Jury Instructions, 198 So. 2d 319, 319–20 (Fla. 1967). A limited number of standard instructions were prepared by a committee of judges and lawyers seeking to "prepare instructions that express the applicable issues and guiding legal principles briefly and in simple, understandable language, without argument, without unnecessary repetition and without reliance on negative charges." FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, at "The Theory and Technique of Charging a Jury with these Instructions." The Committee has continuously adhered to that theory to the present day. *Id*. at n.1.

25. Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 55 (1999).

jurors, so it was necessary to choose words carefully. Judges frequently wrote instructions and recited them to jurors to ensure statements made were legally correct.[26]

The efficacy of this system, however, varied since some judges were more experienced or better communicators than others. Moreover, as trials became more complicated and diverse, judges faced increasing difficulty in accurately, consistently, and effectively instructing jurors, especially when opposing counsel proposed conflicting language and authority. The adoption of pattern jury instructions was a major advancement toward uniformity in quality and accuracy of jury instruction and made locating presumptively correct instructions easier.[27] Over time, the quality of standard instructions improved as courts around the country applied "plain English" initiatives and engaged in earnest efforts to create structured, comprehensive, and accurate instructions readily understandable to jurors.[28] For example, Florida's Supreme Court recently

26. *See* Don Babwin, *Forget High Tech, Jurors and Judge Stick to Notes*, BOSTON GLOBE, Aug. 15, 2010, http://www.boston.com/news/education/k_12/articles/2010/08/15/forget_high_tech_jurors_and_judge_stick_to_notes/. According to Stanford Law Professor Lawrence Friedman, judges were historically not always so formal when communicating with the jury. *Id.* Instead, in the nineteenth century, judges actually explained concepts to jurors and did not just read instructions to them or send them notes. *Id.* Over the succeeding years, however, the risk of creating reversible error led to more formal and stilted instruction. *Id.*

27. Standard instructions create consistency within a jurisdiction through the use of carefully drafted wording chosen by diverse committees of experienced lawyers and judges who are unencumbered by time constraints and use guiding principles of construction. *See* FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, at "The Theory and Technique of Charging a Jury with these Instructions." Judges can and should vary from pattern instructions if necessary to state the law accurately in a given case. *See infra* note 33.

28. *See, e.g.*, *In re* Standard Jury Instructions in Civil Cases, 35 So. 3d 666, 668 (Fla. 2010) (describing Florida's changes). Drafters must balance accuracy in stating the law with use of plain, effective language. *See* ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTIONS xvii (2011), *available at* http://www.courts.ca.gov/partners/documents/2011_Edition.pdf. The California Civil Jury Instructions (CACI) "are the culmination of years of work by the Task Force on Jury Instructions to draft comprehensive, legally accurate jury instructions that are readily understood by the average juror." *Civil Jury Instructions Resource Center*, CAL. JUDICIAL BRANCH, http://www.courts.ca.gov/partners/311.htm (last visited Apr. 20, 2011). California's effort to reform instructions was award-winning. *Id.* (follow "About" hyperlink). Florida undertook a similar laudable effort. However, it took California from 1996 to 2003—and Florida from 1967 to 2008—to convert their civil instructions to more understandable English, which shows volunteer efforts of court committees attempting to change entrenched, traditional forms of

expanded the standard civil instructions to encompass all aspects of trial, including preliminary instructions, voir dire colloquy, evidence instructions, closing instructions, instructions for questions during deliberations, and discharge instructions.[29]

IV. CURRENT DAY CHALLENGES IN JURY INSTRUCTION

There are some disadvantages to standard jury instructions. Reading lengthy standard instructions for all aspects of the case hampers the judge's ability to apply individual style and maintain a connection to the jury.[30] By their nature, standard instructions are generally not spontaneous, responsive to juror query, or written and timed for maximum effectiveness in a given trial.[31] Standard instructions are not the judge's own words, anecdotes, or examples, and almost all instructions are a speech or series of speeches rather than a colloquy or conversation.[32] While judges may be permitted to vary from standard instructions in a given case, there is a reluctance to modify instructions that are approved as standard.[33] Also,

instruction is difficult and challenging work. *See id.*; FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, at "Committee Summary." For assistance in drafting comprehensible instructions, the Florida civil jury instruction committee includes Allan Campo, an ex officio member who is a trial consultant and an expert in neurolinguistics and interpersonal communication. FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, at "Current Members of the Committee."

29. *See generally id.* at "Standard Instructions." Florida also published standard jury instructions for use when court language interpreters translate testimony from languages other than English. *Id.* at Instruction 202.5.

30. Florida's standard preliminary instructions grant some latitude to the judge in two footnotes: "The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. It may be useful in cataloging the subjects to be covered in an introductory instruction." *Id.* at Instructions 201.3 n.1, 202.2 n.2. Otherwise, the Florida civil judge is bound to use the wording of standard instructions if applicable and requested by counsel. *See* FLA. R. CIV. P. 1.470(b).

31. An exception is a standard instruction tailored to specific circumstances, such as in response to juror questions or requests for testimony to be read back during deliberations. *See* FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instructions 801.1–.2.

32. *See, e.g.*, FLA. R. CIV. P. 1.470(b) (stating "[t]he court shall orally instruct the jury," which consists of the instructions being read aloud to the jury).

33. In Florida, judges are expressly permitted to lend their own style of presentation and language to preliminary instructions, as opposed to procedural and substantive instructions. *See* FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instructions 201.3 n.1, 202.2 n.2. Standard instructions are not advanced by the Florida Supreme Court as the correct law in a given case, and the judge is admonished to prepare whatever instruction is needed. *See In re* Standard Jury Instructions in Civil

there is only so much time available in court, and expanding upon already lengthy standard instructions may be counterproductive. In addition to stylistic issues, the legal envelope created by rules, statutes, standard jury instructions, and caselaw further hampers communication. Judges are bound to present instructions in their entirety and, in most cases, without emphasizing one instruction over another.[34] When reading instructions becomes systematic and robotic, important information may be lost within a lot of boring noise. Unlike an effective opening statement or closing argument by the attorney, jury instructions do not tell a story and are intentionally devoid of climax, emphasis, and drama.

Notwithstanding the structured requirements, some judges do a yeoman's job of making the jury instruction more effective through timing, transition, and extemporaneous clarification consistent with the prepared instruction. The better the judge understands the case and the law, the easier it is for the judge to speak extemporaneously while remaining accurate, consistent, and coherent. However, many judges simply read pattern instructions because they think they must follow the standard despite the fact improved delivery of instructions would enhance juror comfort and comprehension.[35] As jury trials continue to decrease in number, judicial experience, skill, facility, and comfort in extemporaneous communication will suffer, and the willingness to vary from scripted instruction may fade further.[36] Judges should be encouraged and taught to

Cases—Report No. 09–01, 35 So. 3d 666, 671 (Fla. 2010) ("In authorizing the publication and use of the standard civil jury instructions, we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions."). However, when a judge varies from standard instructions, a specific reason for variance must be placed in the record upon objection. FLA. R. CIV. P. 1.470(b).

34. *See, e.g.*, Darby v. State, 514 N.E.2d 1049, 1055 (Ind. 1987) ("Instructions should be read as a whole and construed together.") (citing Davidson v. State, 442 N.E.2d 1076, 1081 (Ind. 1982)). It should be acceptable for the judge to emphasize procedural requirements. For example, a judge in a high profile trial should have the discretion to repeatedly stress the requirements that jurors not look at accounts of the trial and not communicate to anyone during the case about salacious matters heard in court because, in such a case, jurors would understandably be tempted to text, tweet, or blog about such details.

35. In Florida, for example, a judge is required upon objection to legally justify, in writing, any deviation from an applicable standard instruction by stating in a separate order or on the record why the standard instruction is erroneous or inadequate. FLA. R. CIV. P. 1.470(b).

36. *See* Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, LITIG. J., Winter 2004, at 2, *available at* http://www.americanbar.org/content/dam/aba/publishing

be prepared enough in every trial to confidently and effectively deliver jury instructions rather than simply read a cold script.[37]

V. SYSTEMIC IMPROVEMENTS NEEDED TO ADJUST TO CURRENT CULTURE

The wave of juror misconduct is more of a sweeping trend than a bump in the road for courts. The accelerating amount of juror misconduct should serve as a wake-up call for study, analysis, and innovation to improve effectiveness in reaching jurors and accommodating their needs.[38] Individual judges and lawyers can only go so far in applying customized techniques, as trial judges are constrained by rule, precedent, and tradition.[39] Court systems will need to evolve, and judges must embrace and implement needed change.

A. *Education and Enlightenment*

Assistance in achieving better communication with jurors can come from institutions, such as law schools and continuing judicial education, which should do a better job teaching jury communication and drafting of jury instructions.[40] Judicial education and continuing legal education classes on the subject of juror accommodation, comfort, and communication are rare.[41] Education can shed light on how cultural and

/litigation_journal/04winter_openingstatement.authcheckdam.pdf ("In 1962, 11.5 percent of federal civil cases were disposed of by trial [and] [b]y 2002, that figure had plummeted to 1.8 percent.").

37. Whether judges should have the reins of standardized instruction loosened or whether they should be better trained in how to deliver instructions should be the subject of study and analysis. The touchstone and strength of using standard instructions is that, when used properly, they enable judges to accurately state the law. The question is whether slavishly reading standard instructions in every case best communicates what is contained within them.

38. *See, e.g.*, Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, JURY EXPERT, Nov. 2009, at 14 (2009), *available at* http://www.thejuryexpert.com/wp-content/uploads/KeeneTJENov2009.pdf (discussing the increase in jurors' use of the Internet and social media). The National Center for State Courts recently initiated a study of juror research and communication conduct. *See Calling All Intrepid Trial Judges*, *supra* note 11.

39. *See, e.g.*, FLA. R. CIV. P. 1.470(b).

40. Few law schools currently teach students about the theory and practice of drafting jury instructions. A notable exception is Dean Stephen D. Easton, who teaches Trial Practice at Wyoming School of Law and incorporates material and exercises on drafting jury instructions.

41. In Florida, judicial education subjects, like communication with jurors, are

technological change has modified the expectations and propensities of the jury pool and suggest ways to bridge the cultural gap. The trial process needs to continue to evolve. Judges who implement the rules should be encouraged to embrace innovation and accommodate the modern juror rather than force jurors to blindly conform to outdated expectations.

B. *Jury Innovations*

Fortunately, jury innovation initiatives in many states have improved their respective judges' ability to better meet current juror needs and expectations. For example, Florida instituted extensive jury innovations to assist juror comprehension and comfort.[42] In Florida civil cases, the judge must now permit juror questions for witnesses.[43] In longer civil cases, Florida jurors must be permitted to take notes during trial and have them available during deliberations.[44] The trial court may, in its discretion, authorize the use of juror notebooks to contain documents and exhibits as an aid to the jurors in performing their duties.[45] Jurors are provided written copies of jury instructions, which they may use during deliberations.[46] Judges are encouraged to respond to juror questions on the law and read back testimony during deliberations.[47] Judges in Florida civil

considered enrichment rather than core courses such as substantive law, procedure, and rules of evidence. Accordingly, the subject of communication with the jury is taught occasionally at the Florida College of Advanced Judicial Studies.

42. The Florida legislature passed the Juror's Bill of Rights in 1999. FLA. STAT. ANN. § 40.50 (West 2003). Soon thereafter, the Florida Supreme Court initiated a jury innovations study, and in 2007, the court modified rules of procedure and standard jury instructions to incorporate many juror innovations. *In re* Amendments to the Fla. Rules of Civil Procedure, 967 So. 2d 178, 179–80 (Fla. 2007). Some perceptive Florida trial judges used many of the "innovative" efforts years before their formal adoption by the Florida Supreme Court. In 1993, the Arizona Supreme Court ordered a committee to review the needs of the jury system and published its report, including a proposed Bill of Rights, on the court's website for jurors. *See* ARIZ. SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, *supra* note 12, at 9.

43. FLA. R. CIV. P. 1.452; FLA. STAT. ANN. § 40.50(1). In Florida, witness questions by jurors are not required and may not be appropriate in criminal cases. *See* FLA. R. CIV. P. 1.452 ("The court *shall permit* jurors to submit to the court written questions . . . ." (emphasis added)); FLA. R. CRIM. P. 3.371(a) (granting judicial discretion to judges on whether juror questions for witnesses are allowed).

44. *See* FLA. STAT. ANN. § 40.50(2). In cases that are likely to exceed five days, jurors must be able to take notes. *Id.* However, judges normally permit note taking in any case upon juror request and some routinely allow it in any case.

45. *See* FLA. R. CIV. P. 1.455.

46. *See* FLA. R. CIV. P. 1.470(b).

47. *See* FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instructions 801.1–.2.

cases are now given the flexibility of delivering most, if not all, instructions at the beginning of the case and again before closing argument, rather than during the traditional time just before deliberations.[48] Innovations such as these assist the juror in receiving timely information needed to understand the rules and, hopefully, enough information to decide the case without temptation to learn more through improper research or communication.[49]

VI. PERSONAL IMPROVEMENTS FOR BETTER INSTRUCTION

With or without jury innovations, judges and lawyers nationwide are struggling to catch up with a culture that is more independent, more plugged in, and less deferential to authority than traditional jurors.[50] Judges and lawyers can and should personally strive to improve their interaction with jurors.[51] Keys to successful communication include preparation and responding to needs of the audience.

A. *Preparation*

Effective communication with jurors requires advanced preparation. Trial lawyers understand that knowing a case top to bottom is the only way

48. *See In re* Standard Jury Instructions in Civil Cases, Report No. 09-01, 35 So. 3d 666, 668 (Fla. 2010) ("[I]n the exercise of its discretion, the trial court may choose to instruct the jury at the beginning of the case as to substantive matters, prior to the introduction of evidence.").

49. Further innovations to modernize the jury trial may be considered after study. For example, jurors are becoming so facile in use of computers that courts may consider, in certain cases, providing the jury with a computer and an electronic searchable copy of the evidence. By word search or exhibit number, jurors could peruse the record and locate evidence they would not be able to find in a paper record. Eventually, when technology reaches a point where real time court reporting is sufficiently accurate, perhaps jurors could be given searchable transcripts of testimony. Facilitating juror access to the evidence serves the functions of providing more accurate information for deliberations while reducing frustration and temptation to research outside the record.

50. Keene & Handrich, *supra* note 38, at 17–18 (noting some attempts by the justice system to appropriately respond to jurors' use of electronic devices and the Internet).

51. Judges should embrace court innovation and use the tools these changes bring to the courtroom. Understandably, but regrettably, some judges do not like change and cling to old habits. If the current trends continue, change may be forced upon judges rather than voluntarily undertaken. *See, e.g.*, FLA. STAT. ANN. § 40.50 (West 2003) (requiring judges to implement various procedures to improve juror experience and interaction). As more judges use innovative methods in the courtroom, more jurors will come to expect them. Judges who do not provide for juror note taking, juror questions, and other accommodations will become outliers.

to effectively handle communication with the jury in the shifting sands of a trial. Likewise, the judge must know and understand the case before it begins in order to accurately and effectively instruct the jury. Working on jury instructions in advance of trial lets the judge comfortably deliver more comprehensible, more consistent, and more effective instruction earlier in the trial.[52] Gone are the days of holding a charge conference and settling on jury instructions just before closing arguments.[53] The judge needs to carefully construct the order and timing of the jury instructions for maximum comprehension and effectiveness. From the moment prospective jurors enter the courtroom, the judge imparts significant procedural instruction by explaining to the jury the conduct of the trial, the role of the participants, and requirements and limits on juror conduct. Juror comprehension and comfort could likely improve with a strong frame of reference.[54] Some jurisdictions now allow presentation of substantive instructions at the beginning of the case.[55] Judges should take advantage of this flexibility in jurisdictions that allow it. If the bulk of substantive instructions are presented early, jurors might better understand the significance of evidence as it is presented. Jurors who are comfortable with the process may learn better and are hopefully less likely to feel the need to do their own research. Jurors should be given instructions in writing to aid memory and comprehension. When possible, the judge should use

52. In Florida Judicial Colleges, judges are taught to require jury instructions in advance of trial, and pretrial conference and the pretrial order are vehicles for expressing the requirement.

53. In a few cases, final substantive instructions may vary from those given early in the trial if the anticipated proof does not actually materialize. Adjustments can be made to instruct jurors of that possibility. Florida's jury instructions, for example, include the following:

> Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instruction 401.1.

54. *See, e.g.*, Power, *supra* note 25, at 112 (citations omitted) (noting jurors could better put evidence into legal context with instructions early in trial).

55. *See, e.g.*, FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instruction 202.1 ("I can anticipate most of the law and give it to you at the beginning of the trial so that you will better understand what to be looking for while the evidence is presented.").

visual aids to assist in comprehension of instructions.[56]

B. *Responsiveness to Juror Questions*

To the extent possible, court rules should permit, and judges should facilitate, juror questions. While juror questions for witnesses may not be appropriate for some criminal cases,[57] juror questions in civil cases are discretely screened for admissibility by the judge and counsel and asked by the judge, which affords jurors the opportunity to seek answers they feel they need to reach a just decision.[58] When evidentiary rules prevent a juror from asking a particular question, the judge should politely explain why the question may not be asked.[59]

The best way for judges to avoid juror questions on the law is to

56. From 2003 to 2008, the author used a SMART Board to display the text during delivery of jury instructions. The screen was positioned to optimize control and attention of the jurors. Jurors of the current generation expect and appreciate teaching aids that hold their attention, and many, if not most, jurors under age twenty-five were taught in school with devices like SMART Boards. *See generally SMART Board Interactive Whiteboard*, SMART TECHS., http://smarttech.com/us/Solutions/Education+Solutions/Products+for+education/Interactive+whiteboards+and+displays/SMART+Board+Interactive+whiteboards (last visited Apr. 23, 2011) (displaying and advertising the various features and functions of SMART boards).

57. *See* AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 13, at 18 (2005) [hereinafter ABA PRINCIPLES], *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.pdf. The American Bar Association endorsed the concept of permitting juror questions as follows:

> In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. In deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.

Id. As of 2005, at least thirty states and the District of Columbia permitted juror questions for witnesses, while some states prohibited the practice. Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions,* 89 JUDICATURE 16, 16 (2005) (citations omitted); *see also*, Kara Lundy, Note, *Juror Questioning of Witnesses: Questioning the United States Criminal Justice System*, 85 MINN. L. REV. 2007, 2029–30 (2001) (suggesting "judicial direction may encourage a jury to become an active body during a criminal trial").

58. *See* Keene & Handrich, *supra* note 38, at 21 (proposing jurors are less likely to conduct research on their own to the extent they are permitted reasonable and proper questions for witnesses).

59. Some Florida judges offer to answer objectionable and excluded juror questions after the trial is over, which they contend mollifies jurors who must proceed with questions unanswered.

prepare clear, direct, plain, and understandable instructions in the first place,[60] and to provide written copies of instructions for juror reference during deliberations.[61] However, the ability of jurors to ask the judge for clarification or further information on the law is fundamental to the trial process.[62] In most jurisdictions, if the jury has a question for the judge, it comes in a note passed via the bailiff.[63] Some jurors and judges experience difficulty communicating while using handwritten notes, as exemplified by the jurors' questions and the judge's responses during deliberations in former Illinois Governor Rod Blagojevich's trial.[64] The judge is responsible for employing an effective method to respond to juror questions regarding the law and process.[65] The judge must be prepared to courteously and promptly answer every juror question that is permitted by law.[66] The judge should meet with the lawyers on the record and obtain

60. *See* Morrison, *supra* note 3 ("One issue is whether instructions could be made sufficiently understandable and plain that jurors would not have to resort to seeking legal definitions online.").

61. ABA PRINCIPLES, *supra* note 57, Principle 14, at 21. There is no downside to having written instructions for jurors, though it does take preparation and effort to ensure an accurate set of clean instructions. Reportedly, some jurisdictions still do not provide written copies of the court's jury instructions for use in deliberations. *See* Babwin, *supra* note 26 ("[J]udges often . . . call jurors out into court and read the instructions verbatim."). Florida requires the trial judge to provide each juror with his or her own written set of instructions for use in deliberations. FLA. R. CIV. P. 1.470(b).

62. *See* Morgan Int'l Realty, Inc. v. Dade Underwriters Ins. Agency, Inc. 571 So. 2d 52, 53 (Fla. Dist. Ct. App. 1990) (quoting Sutton v. State, 51 So. 2d 725, 727 (Fla. 1951)) (stating the jury has a right at any time to ask questions that will assist them in lawfully doing their job).

63. FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instruction 700. Instruction 700 states, "If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication." *Id.* All notes must be made a part of the record to eliminate *ex parte* contact between judge and jury.

64. Babwin, *supra* note 26 (reporting a judge answered a juror question with a "careful response—negotiated with the attorneys—[that] was complex enough to give a law professor pause"). Problems with notes between judges and jurors have arisen in cases around the country. *Id*.

65. *See Morgan Int'l Realty, Inc.*, 571 So.2d at 53.

66. *See* Sutton v. State, 51 So. 2d 725, 726 (Fla. 1951). In *Sutton*, the trial judge gave a jury question short shrift and delivered to the jurors a curt and salty response. *Id*. On appeal, the Florida Supreme Court stated:

> In our system of jurisprudence, the jury is of ancient and constitutional sanction, . . . and by the same token it is accorded a function on the horizontal with that of the trial judge. It is in no sense a menial to be ordered hither and yon by the court, it performs an extremely important duty and neither its duty

their input before preparing a response.[67] If the question involves clarification of the law, the jury should ideally return to the courtroom for face-to-face communication on the record, which dignifies the process, permits the judge to see the jurors' nonverbal cues as to the effectiveness of the communication, and permits a brief reply or follow up from the jury, if appropriate for open court.[68] By thoroughly answering juror questions, juror frustration and temptation to go outside the process for information, such as the definitions of terms, is hopefully abated.[69]

VII. RECENT CHALLENGES TO COMMUNICATION WITH JURORS: THE MISCONDUCT EXAMPLE

Improper juror research and communication is by no means a new problem,[70] but the recent behavior by jurors using electronic devices to research and communicate with the outside world is now reaching epidemic proportions.[71] Jury instruction on digital research and

> nor that performed by the court can be done properly in the absence of mutual aid and assistance. . . . The writer of this opinion speaks from personal experience as a juror in holding that the court room behavior of the trial judge is the most potent factor in guiding the trial of any cause to a righteous verdict. To inspire public confidence in the method employed it is more important than all other factors combined.

Id. (citation omitted). The judge, court clerk, counsel, and court reporter should be readily available to field, discuss, and resolve questions quickly and efficiently. Taking excess time to assemble the group, argue the matter, send out for research, and reargue can annoy jurors. Getting the right answer is important, but failure to consider the impact passing time has on the attitude of the jury can be devastating. If necessary, the judge may explain to the jury how long it may take to get an answer to the jury's question.

67. ABA PRINCIPLES, *supra* note 57, Principle 13, at 18.

68. If needed, the response read to the jury can be sent back to the jury room in writing like all the other jury instructions.

69. *See* Morrison*, supra* note 3.

70. *See, e.g.*, Keene Bros. Trucking, Inc. v. Pennell, 614 So. 2d 1083, 1084 (Fla. 1993); Fla. Bar v. Heller, 473 So. 2d 1250, 1252 (Fla. 1985) (Boyd, J. concurring); City of Miami v. Bopp, 158 So. 89, 89–90 (Fla. 1934).

71. Schwartz, *supra* note 1. Anecdotal and media-reported incidents of misconduct seem to be on the rise. *See id.* In Great Britain, the problem is also regarded by empirical study as "an issue of growing importance." THOMAS, *supra* note 11, at 49–50. It is possible that some of the increase in misbehavior results from the fact that juror communication by texting, Facebook posting, tweeting, and the like present a written and largely open record of such conduct. In the past, a discussion of the case with one's wife over dinner or a friend over drinks was less public. However, without empirical analysis and comparative data, there is no way to tell whether this is

communication has improved in most jurisdictions but may not be keeping pace with changing technology. Rule makers and lawmakers act with deliberation and some reluctance. Florida state courts are a prime example. While some Florida judges for many years have individually admonished jurors against going on the Internet or using cell phones to research or communicate with the outside world, it was not until 2006 that the Florida standard preliminary instructions were modified to warn against Internet research.[72] In 2010, Florida adopted comprehensive instructions addressing juror misconduct using digital devices and specified Internet social media and research techniques.[73] Several state and federal courts now have instructions proscribing communication or research using digital devices, and some have standard language specifically prohibiting blogging, texting, tweeting, and use of social media to report on jury service during the trial and deliberations.[74]

Those in the connected digital generation have the enormous power and facility of Internet resources at their fingertips and embedded in their daily lives,[75] which provides a ready and tempting source of potentially dangerous information.[76] Misconduct occurs in many different ways.

a significant reason for an increasing number of violations.

72. The new language instructed jurors to not "obtain on [their] own any information about the case or about anyone involved in the case, from any source whatsoever, including the internet . . . ." *In re* Standard Jury Instructions in Civil Cases (No. 06–01), 943 So. 2d 137, 141 (Fla. 2006). This was a modest improvement at best, causing individual judges to offer more specific examples and explanation during voir dire to supplement the instruction.

73. *See In re* Standard Jury Instructions in Civil Cases—Report No. 09–01, 35 So. 3d 666, 676 (Fla. 2010); *see also* FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instruction 700 (stating jurors cannot communicate by electronic means, such as "a blog, twitter, e-mail, text message, or any other means"). Florida's instructions are given at several points in the trial. The judge is urged to modify the list of prohibited conduct in the standard instruction as cultural changes modify the manner in which jurors communicate with others and do research. *See* FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instruction 202.2 n.3.

74. *See infra*, note 97.

75. *See* Schwartz, *supra* note 1 (illustrating this point with an example from 2009 in which Federal Judge William Zloch was shocked to learn that nine of his jurors in a Miami federal drug trial were researching the case on the Internet in direct violation of his instructions not to do so).

76. Law professor Caren Morrison argues that jurors' online investigation is more insidious than past juror transgressions of looking at news reports about the case.

> First, Internet activity has become fully embedded in most people's everyday lives. While a juror might refrain from reading the paper, it might be

Jurors research terms that are not adequately defined in trial,[77] medical evidence,[78] parties to the case, lawyers, and judges.[79] A juror in England attempted to poll her Facebook "friends" to help her decide a difficult case.[80] Several jurors in a Baltimore case became Facebook "friends" during the trial and electronically exchanged information and commentary with each other about the case, including "an outsider's online opinion of what the verdict should be."[81] Sometimes research is done even before the jurors show up for jury duty—like when a prospective juror in South Dakota did a Google search on the corporate defendant upon receipt of a jury summons and then ended up on the jury.[82]

Such misconduct is evidence of a growing cultural disconnect between judges and the rising number of young jurors raised in an exclusively digital world. Take, for example, the idea of removing jurors' cell phones and computers when they present to the courthouse, enter the courtroom or begin jury deliberations.[83] To some jurors, the cell phone, iPad, notebook,

> impossible to refrain from updating her Facebook status. Second, there is an almost limitless amount of information on the Internet, even about facts or individuals who would otherwise not be deemed 'newsworthy.' Third, because there is no system of fact checking on the web, this information might be incomplete, erroneous, or deliberately false. Fourth, a juror conducting her own research is likely to be more invested in the results because she is actively engaged in seeking out the information.

Morrison, *supra* note 3.

77. Tapanes v. State, 43 So. 3d 159, 160 (Fla. Dist. Ct. App. 2010).

78. Sisak, *supra* note 4.

79. Browning, *supra* note 2, at 217–18.

80. *Id.* at 217.

81. *Id.* at 218.

82. Russo v. Takata Corp., 774 N.W.2d 441, 443 (S.D. 2009). In *Russo*, a juror Googled the Takata Corporation upon receiving the juror summons. *Id*. at 466. When an issue arose in juror deliberations about prior lawsuits, the juror made it known to some other jurors that he had not seen any evidence of prior lawsuits in his research on the Internet. *Id*. After a defense verdict, this exchange was brought to the judge's attention in plaintiff's motion for new trial. *Id*. The trial court judge granted a new trial and the Supreme Court of South Dakota affirmed the decision. *Id*. at 447, 454.

83. Some courthouses, mostly federal, prohibit cell phones and electronic devices in the courthouse. *See, e.g.*, *Information for Jurors: Jurors' FAQs—Are Cell Phones Allowed in the Courthouse?*, U.S. DIST. COURT FOR THE N. DIST. OF IOWA, http://www.iand.uscourts.gov/e-web/home.nsf/cb753adff3cb7a72862573a80001fe9d/96638a34fec22728862573a9005288aa?OpenDocument#Are%20cellphones%20allowed%20in%20the%20cou (last visited Apr. 12, 2011); *Jury Service FAQ—Am I Permitted to Use My Cell Phone?*, U.S. DIST. COURT FOR THE S. DIST. OF IOWA, http://www.iasd.uscourts.gov/index.php?option=com_moofaq&view=category&id=34&Itemid=19

or other digital device is a lifeline to which they feel addicted. These jurors require constant communication with others on events and matters from the mundane to the critical. This is a way of life—or an ingrained lifestyle—rather than a convenience.[84] Even if cell phones, iPads, computers, and other digital devices are secured while jurors are in the courtroom, jurors will have the devices back during recesses and when they go home at night. Judges and lawyers must find ways to limit temptation, present clear boundaries, and convince jurors to stay within the lines.

As one former juror stated, jurors want to do the right thing,[85] but recent experience shows that many jurors feel that doing the right thing includes doing their own research and communicating with others about the case.[86] Some jurors even consider the limits placed by judges and lawyers on information presented in trial to be abhorrent to finding the truth.[87] Such a conclusion or rationalization is not legally acceptable. Regardless of the truthfulness or validity of the fruits of information obtained from outside the courtroom, the harm to the case is done when the juror strays from his or her duty.[88] While the cultural divide should be considered in establishing rules, boundaries, and requirements, it obviously cannot fundamentally alter how the trial will be conducted. Some aspects of the trial are considered inviolate, including the rule that jurors must not receive information by research or communication from outside the

2 (last visited Apr. 12, 2011). Some judges remove juror phones and electronic devices during trial, and others remove them during deliberations. *See, e.g.*, SUPREME COURT OF S.C., RE: JUROR USE OF PERSONAL COMMUNICATION DEVICES (2009), *available at* http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2009-07-20-01.

84. *See* Keene & Handrich, *supra* note 38. "[S]ocial media is a fact of life. If the current patterns hold true, we will see increasing numbers of jurors for whom social networking is so habitual and life-integrated, they will be hard pressed to see the justification for abstaining from 'updating their status' during trial." *Id.* at 15.

85. Pea.elle, Comment to Schwartz, *supra* note 1 (Mar. 17, 2009, 2:46 PM), http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?permid=22#comment22.

86. *See* Bill, Comment to Schwartz, *supra* note 1 (Mar. 17, 2009, 2:43 PM), http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?permid=17#comment17.

87. *See* James, Comment to Schwartz, *supra* note 1 (Mar. 17, 2009, 2:46 PM), http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?permid=28#comment28. Jurors may be simply frustrated from not getting the whole picture. *Id.* Some even assert the system is designed to keep jurors from finding the truth, so jurors must dig deeper to find the real truth. *Id.*

88. *See* Morrison, *supra* note 3.

courtroom.[89] As Justice Oliver Wendell Holmes so eloquently stated in *Patterson v. Colorado*, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[90] Under our rules of evidence and formal process limiting admissibility, relevant and probative evidence may be excluded for many logical reasons.[91] Jury deliberations are private and sacrosanct, and during the trial, jurors should not be communicating with others *about the case*, including communication by social media.[92]

While the legal reality is obvious to judges, lawyers, and legal scholars, some jurors will remain either oblivious or indifferent to these requirements. With information and communication so accessible and the use of such resources by jurors so ubiquitous, the danger of misdirected transgression is severely heightened.[93]

VIII. PRACTICAL STEPS FOR CURBING JUROR MISCONDUCT

Jury instruction must be both understood and accepted by all jurors, and for that to happen the cultural makeup of current juries must be taken into account. First, instructions should speak to the full range of juror types, from the digitally dependent to the digitally ignorant. Judges can use voir dire to learn about the jurors' digital capabilities and habits in order to target specific conduct during instructions. Further, instructions must be complete and specify exactly what is prohibited.[94] Some judges

89. In the criminal case, this concept invokes constitutional rights of direct and cross-examination by counsel. *See* Turner v. Louisiana, 379 U.S. 466, 472–73 (1965).

90. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

91. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

92. Still, juror limits must not be excessive. While jurors may be required not to send, receive, or research information about the case, jurors might find it unduly oppressive to prohibit all communication or access to the Internet and social media sites.

93. Bischoff, *supra* note 23 (quoting Ohio Supreme Court Justice Judith Lanziger, who stated, "I think this is one of the biggest concerns that we have about fair trials").

94. Proposed model instructions prepared by the Judicial Conference Committee on Court Administration and Case Management lists five specific sites where jurors should not discuss the trial: Twitter, Facebook, My Space, LinkedIn, and YouTube. JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT.,

could elaborate by telling jurors what they *can* say to family and friends.[95] With the absence of ambiguity, misconduct is either avoided or easier to deal with by sanction.

The American College of Trial Lawyers studied the issue of juror misconduct and recommended specific jury instructions on electronic research and communication on the Internet.[96] Some state and federal courts and bar associations have promulgated or recommended standard or pattern jury instructions for this purpose.[97] In 2010, the Florida Supreme

PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2009), *available at* http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf. Other instructions use a more general warning, such as the Ninth Judicial Circuit pattern instruction, which warns jurors not to discuss cases on blogs, in chat rooms, and via wireless devices. *See* U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS, Instruction 1.8 (2010), *available at* http://207.41.19.15/web/sdocuments.nsf/crim?OpenView.

95. The American College of Trial Lawyers developed a message which could be composed into a text message, social network message, or "tweet" to send to any of their friends. AM. COLL. OF TRIAL LAWYERS, JURY INSTRUCTIONS CAUTIONING AGAINST USE OF THE INTERNET AND SOCIAL NETWORKING 5 (2010), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213. The message explains why the juror will *not* be communicating about his or her jury service until after the trial and asks friends to avoid contacting the juror about the case. *Id.* This is a remarkable adaptation to the digital habits of jurors. Whether it solves the problem of social networking or invites curious friends into the mix is debatable. However, the tactic certainly involves thinking outside the box.

96. *Id.* at 2, 5 (suggesting proposed instructions to jurors and a text message to send to family and friends).

97. *See* U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, GENERAL INSTRUCTION FOR CIVIL CASES, Instruction 1.3 (2010), *available at* http://www.ca3.uscourts.gov/civiljuryinstructions/toc_and_instructions.htm; U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, CRIMINAL JURY INSTRUCTIONS, Instruction 1.03(8) (2009), *available at* http://www.ca3.uscourts.gov/criminaljury/tocandinstructions.htm; U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS, Instruction 1.05 (2011), *available at* http://www.juryinstructions.ca8.uscourts.gov/civ_manual_2011.pdf; U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, *supra* note 94, Instruction 1.9; JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 94; ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, *supra* note 28, Instruction 100, at 2–5; CIVIL JURY INSTRUCTIONS COMM., CIVIL JURY INSTRUCTIONS, Instruction 1.1-1, *available at* http://www.jud.ct.gov/JI/Civil/; CRIMINAL JURY INSTRUCTIONS COMM., CRIMINAL JURY INSTRUCTIONS, Instruction 1.2-10 (2009), *available at* http://www.jud.ct.gov/JI/criminal/default.htm; INDIANA RULES OF COURT: JURY RULES, Rules 20, 26 (2011), *available at* http://www.in.gov/judiciary/rules/jury/jury.pdf; MICH. SUPREME COURT, MICHIGAN COURT RULES, Rule 2.511

Court approved two fully coordinated sets of instructions designed for use before and during various stages of criminal and civil trials.[98] Such innovations are positive steps toward more understandable instructions.

With preparation and effort, judges can take the standard language of jury instructions on these subjects to another level of effectiveness by lending their own anecdotal touch. One approach is to compare juror self-regulation to the alternative of sequestration. Here is how one state court judge does it:

> I have two ways I can do this. I can lock you up—that's called sequestering, it's a fancy word for locking you up—during the course of the trial, or I can have you promise me that you will strictly abide by my instructions during the trial and not do any investigations, not have any communications about the case. . . . Will each of you promise me that you will follow those instructions?[99]

Judges should use all lawful means to reinforce the message behind misconduct instructions. Important instructions on juror conduct benefit from repetition and emphasis. Voir dire is an excellent context for imparting information and reinforcing the court's instructions because the question and answer format permits the type of give and take that improves communication and comprehension. The judge should first ask jurors if they have any questions about the instructions relating to juror

(2011), *available at* http://coa.courts.mi.gov/rules/; COMM. ON CRIMINAL JURY INSTRUCTIONS, CRIMINAL JURY INSTRUCTIONS: FULL SAMPLE CHARGES & VERDICT SHEETS: PRELIMINARY INSTRUCTIONS 39–40 (2009), *available at* http://www.nycourts.gov/cji/5-SampleCharges/CJI2d.Preliminary_Instructions.pdf; COMM. ON PATTERN JURY INSTRUCTIONS, CIVIL JURY INSTRUCTIONS, Instructions 1:10, 1:11 (2011), *available at* http://www.courts.state.ny.us/judges/cpji/index.shtml; OHIO STATE BAR ASS'N JURY INSTRUCTIONS COMM., JURY INSTRUCTIONS, Instruction I(C)(2)-(3) (2010); SUPREME COURT OF S.C., *supra* note 83; WISC. CRIMINAL JURY INSTRUCTIONS COMM., WISCONSIN JURY INSTRUCTIONS—CRIMINAL, Instruction 50 (2010).

98. *See* FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instructions 1.1, 2.1, 3.13, 200, 201.2, 700. The note on use for civil instruction 201.2 explains the portions of the instructions "dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops." *Id*. at Instruction 201.2.

99. David E. Shelton, *"No Googling—No Texting" Jury Instruction Video*, NAT'L CTR. FOR STATE COURTS (Sept. 13, 2010), http://www.ncsc.org/topics/jury/jury-selection-trial-and-deliberations/resource-guide.aspx (scroll down to "Jury Instructions" subheading); *see also* Morrison, *supra* note 3 (providing examples of jury instructions and judicial tactics for producing an informed and engaged jury).

misconduct and then confirm they will abide by the instructions.[100] A judge who politely listens to juror concerns and questions and explains the restrictions is much more likely to obtain juror cooperation.[101] Explaining the restrictions helps make the requirements more understandable and palatable for jurors and, therefore, more effective.[102] Thus, if cell phones are taken away during deliberations, the judge should explain why they are being taken away and provide an emergency number for juror family members while deliberations take place. The judge may warn jurors they will be asked after recesses and breaks if they did any research or communicated with anyone about the case. Then, the judge should follow up by asking jurors if they followed the instructions. Finally, jurors can be told it is their sworn duty as jurors to inform the court if they have intentionally or unintentionally obtained or received information or communicated with anyone outside the case.[103] Many times, it takes a fellow juror coming forward to the judge for the court to learn about even rampant misconduct.[104]

Timing of the message can be critical to heading off misconduct. The

100. For example, a judge may ask the jurors, "Is there anyone here who feels that they cannot follow these instructions for any reason?"

101. Morrison, *supra*, note 3 ("But if the instructions enlist the jurors' help as equal participants in a common enterprise with the court and the litigants, the goal of which is to ensure the defendant a fair trial, they might reduce the kinds of online misconduct that arise out of boredom and disaffection.").

102. *See id.* ("Courts need to work on ways of explaining to jurors *why* they should not surf, blog or tweet during trial. If these instructions come across as no more than another admonition, jurors may well shrug them off."); Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1887–1904 (2001) (explaining the importance of allowing jurors to ask questions and the statistical significance related to such allowance, specifically in the context of insurance and attorney's fees—two areas of historical difficulty for jurors).

103. *Cf.* COMM. ON CRIMINAL JURY INSTRUCTIONS, JURY ADMONITIONS IN PRELIMINARY INSTRUCTIONS (2009), *available at* http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf ("You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.").

104. For the judge to uncover misconduct of nine jurors in a federal criminal drug trial, it took an older juror coming forward with a note saying she heard another juror make comments that indicated he had had gone home during an overnight recess and conducted research on the Internet about medications referred to in the trial. 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/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies.

jurors should receive the initial message in the orientation video or the assembly room, followed by a second message during the trial.[105] Such an instruction informs jurors that tweeting or texting about their experience as a potential juror or looking up information about cases they may be asked to sit on is strictly prohibited.[106] The instruction in the jury assembly room should be consistent with and set a framework for further instruction by the judge in the courtroom.[107]

IX. ROLE OF LAWYERS IN PREVENTING MISCONDUCT

Communication in trial is facilitated by a team effort between the judge and trial lawyers. Good case management involves early consideration of proposed instructions to ensure the judge has the information needed to correctly rule on instructions sufficiently in advance of trial. This will allow the instructions to be timely prepared and effectively delivered. Last minute effort leads to poor performance and mistakes. Preferably, there should be sufficient time for the judge to review

105. Florida has a specific instruction on prohibited communication and research that the court gives jurors in the juror assembly room. FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instruction 200; *see also* MICH. SUPREME COURT, AMENDMENT OF RULE 2.511 OF THE MICHIGAN COURT RULES 2 (2009), *available at* http://courts.michigan.gov/supremecourt/Resources/Administrative/2008-33.pdf ("This amendment requires judges to instruct jurors that they are prohibited from using computers or cell phones at trial or during deliberation, and are prohibited from using a computer or other electronic device or any other method to obtain or disclose information about the case when they are not in the courtroom. The instruction shall be given when the jury is empaneled.").

106. The infamous episode of TV personality Al Roker's ill-advised tweets from the jury assembly room presumably would have been prevented if Mr. Roker and his fellow prospective jurors were told to not communicate with others about their jury service. Dareh Gregorian, *Oh, What a Twit! Tweeting Roker Sorry for Taking Juror Pix*, N.Y. POST, May 29, 2009, http://www.nypost.com/p/news/regional/item_orPeW3RKHabFGbsbXOYCXI.

107. The Florida instruction given to jurors in the assembly room states:

> Many of you have cell phones, computers, and other electronic devices. Even though you have not yet been selected as a juror, there are some strict rules that you must follow about using your cell phones, electronic devices and computers. You must not use any device to search the Internet or to find out anything related to any cases in the courthouse.

FLA. CIVIL JURY INSTRUCTIONS, *supra* note 18, Instruction 200. The instruction goes on to explain exactly what conduct is prohibited and that more specific instructions on the subject will be given by the judge in the courtroom. *Id.*

and rehearse delivery and adjust timing or structure if necessary.[108] In a given case, lawyers may urge the judge to modify instructions to more specifically list prohibited activity or take other steps to ensure jurors will not engage in prohibited conduct.[109]

Where lawyers are permitted to conduct voir dire, they can inquire about a juror's online and communication habits. They can also use follow-up questions and reference the judge's specific instructions to test the juror's ability and willingness to abide by court-imposed limitations. If the judge has not taken steps to fully instruct jurors and follow up on these instructions after recesses, the lawyers may ask the judge to do so. Lawyers can also have their staff monitor the social networking activity of the jurors during the trial to determine whether jurors are blogging or posting information to the world.[110]

X. CONCLUSION

For judges, lawyers, and court systems, the journey of adjusting to the digitally linked world of the twenty-first century juror is not going to be easy. Empirical study to determine the causes of the current wave of juror misconduct will take time and ingenuity, but must be done. Meanwhile, it is up to the system and the officers of the court to operate as effectively as possible to stem the trend of juror misconduct. Fortunately, the system of justice is not a relic, but a living, evolving enterprise with the ability to adapt process and methodology to comport with the culture, needs, and

108. Settling as much as possible on the content of instructions at or before the start of the case is also an advantage for lawyers in case preparation.

109. For example, in Barry Bonds's recent criminal case, there may have been salacious details that jurors were tempted to tweet about and famous or infamous witnesses that jurors may have wanted to learn about through Google or electronic tabloid sources. Bonds's defense counsel proposed that the judge require jurors to sign a pledge that they would not search the Internet, use Twitter, or log on Facebook, and that contempt sanctions may be imposed for violation of the pledge. LaRoe, *supra* note 13. The prosecutor apparently agreed in principle to stricter admonitions to jurors. *Id.* Whether a judge would actually require jurors to sign such a statement remains to be seen. *See id.*

110. Valetk, *supra* note 2. However, there are ethical limits for lawyers and staff conducting self-help social media research. "Friending" jurors through deception in order to gain access to a person's limited access messages is likely to be considered unethical. *Cf.* Ethical Op. 2009-2, The Philadelphia Bar Assoc. Prof. Guidance Comm. (Mar. 2009) (advisory opinion involving self-help research of a witness's Facebook page), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

concerns of those who become jurors. Judges and court systems should embrace the tools that jury innovation efforts provide because every conceivable tool will be needed to address the challenge of juror Internet research and digital communication misconduct. Judges can raise their game by studying the problem, learning the needs of the audience, and carefully preparing for trial. When judges impart a direct and personal touch to their communication with jurors, and when jurors are respectfully treated as partners with the court in the task of reaching a just verdict, the resulting collaboration is more effective in achieving justice. Making jurors partners with the judge does not lower the standing of the judge, but instead enhances the judge's role as a leader and respected guide in the eyes of the jurors for the duration of the trial. Mutual respect works wonders.