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## Juror Internet Misconduct: A Survey of New Hampshire Superior Court Judges

Brooke Lovett Shilo  
*University of New Hampshire School of Law*

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Juror Internet Misconduct:  
A Survey of New Hampshire Superior Court Judges

BROOKE LOVETT SHILO\*

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\* J.D. Candidate 2014, University of New Hampshire School of Law; B.S.E. Tulane University, New Orleans, LA. I would like to thank Professor Albert Scherr of the University of New Hampshire School of Law and Judge Tina Nadeau of the New Hampshire Superior Court for their help and guidance.

[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him[.]<sup>1</sup>

## I. INTRODUCTION

The Constitution guarantees criminal defendants the right to a fair trial before an impartial jury and the right to confront the evidence against them.<sup>2</sup> When a juror improperly accesses the Internet during a criminal trial, the defendant is denied these constitutional rights. The problem of outside information entering the courtroom is as old as our judicial system. As early as 1907, Justice Holmes observed that, “The theory of our [criminal justice] 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.”<sup>3</sup> Yet in recent years, the issue of juror misconduct has been brought to the forefront by striking examples of jurors seeking information on the Internet, outside of the evidence presented in court.<sup>4</sup>

This Note examines the prevalence of Internet-related juror misconduct in the New Hampshire Superior Court and the efforts of Superior Court judges to detect and prevent such misconduct. I conducted a survey of New Hampshire Superior Court judges regarding their experience with juror Internet misconduct and solicited their feedback about a sample jury instruction. I have incorporated their feedback into a proposed set of jury instructions specifically targeted at reducing juror Internet misconduct.

## II. BACKGROUND

The Internet has become an integral part of our daily lives. The most recent U.S. census shows that 75.9% of Americans have Internet access in the home and 38.9% have Internet access outside the home.<sup>5</sup> While this increased access enables the court system to communicate with the public

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1. U.S. CONST. amend. VI.

2. *Id.*

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

4. See John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES (Mar. 17, 2009), <http://www.newyorktimes.com/2009/03/18/us/18juries.html>; *Juror in Mattapan Massacre Trial Discharged for Misconduct*, WCVB NEWS (Dec. 10, 2012, 6:34 PM), <http://www.wcvb.com/news/local/metro/Juror-in-Mattapan-Massacre-trial-discharged-for-misconduct/-/11971628/17719126/-/rcu95t/-/index.html> [hereinafter *Mattapan Massacre*].

5. *Computer and Internet Use in the United States: 2010*, U.S. CENSUS BUREAU, tbl.2A (Feb. 23, 2013, 12:35 PM), <http://www.census.gov/hhes/computer/publications/2010.html>.

more easily, it also presents new challenges. With unprecedented Internet usage and accessibility, it is no surprise that the Internet follows jurors when they enter the jury box and the deliberation room.

Today it is natural to follow up on an initial meeting with a new person by searching his or her name on the Internet.<sup>6</sup> The “social media revolution” has changed the way that people interact.<sup>7</sup> Social media sites such as Facebook and Twitter facilitate social interactions at a faster rate than ever before.<sup>8</sup> With just a few clicks, we can learn a person’s virtual life story. And the user bases of these websites are growing. Facebook reached one billion users in October 2012.<sup>9</sup> Twitter users publish five hundred million tweets per day.<sup>10</sup> People chronicle their everyday activities through blog entries.<sup>11</sup> These entries often resemble diaries of yesteryear, but with one rather critical difference: they are accessible to the public with just a few clicks. And all of this activity can be done anonymously, leaving no easily accessible trail of evidence.<sup>12</sup>

#### A. Juror Internet Use

The media has showcased anecdotal reports of juror misconduct in several high-profile cases. In one case reported in the *New York Times*, a judge discovered that nine of twelve jurors had improperly used the Internet.<sup>13</sup> Collectively, the jurors had researched the lawyers and the defendant on Google, looked up news reports about the case, and searched Wikipedia for information relating to the trial, thereby uncovering evidence that had been specifically excluded by the judge.<sup>14</sup> In another recent episode,

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6. Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 294 (2008).

7. Marc Benioff, *Welcome to the Social Media Revolution*, BBC (Feb. 23, 2013, 12:40 PM), <http://www.bbc.co.uk/news/business-18013662>.

8. *Id.*

9. Geoffrey A. Fowler, *Facebook: One Billion and Counting*, WALL. ST. J. (Oct. 4, 2012), <http://online.wsj.com/news/articles/SB10000872396390443635404578036164027386112>.

10. Susanna Kim, *Twitter's IPO Filing Shows 215 Million Monthly Active Users*, ABC NEWS (Oct. 3, 2013), <http://abcnews.go.com/Business/twitter-ipo-filing-reveals-500-million-tweets-day/story?id=20460493>.

11. See Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 431–32 (2012); Molly McDonough, *Blogger's Posts Don't Equal Juror Misconduct*, 40 ABA J. E-REP. 2 (2006).

12. 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, 945 (2010).

13. See Schwartz, *supra* note 4; see also 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>.

14. Schwartz, *supra* note 4.

a juror in a high-profile murder trial was dismissed because he researched ballistics online.<sup>15</sup> Despite these anecdotal reports, there is little empirical data on the prevalence of juror Internet misconduct.<sup>16</sup>

Several scholars have speculated that incidents of juror Internet misconduct are widely underreported because Internet misconduct is difficult to discover.<sup>17</sup> In both cases described above, the incidents of juror misconduct were discovered only when a fellow juror reported the misconduct to the judge.<sup>18</sup> And in both cases, the misconduct came to light only because the juror shared his or her outside research with other jurors.<sup>19</sup> It is possible (and indeed, likely) that many jurors conduct outside research and do not share the information with other jurors.<sup>20</sup> In these cases, the misconduct may go unreported.<sup>21</sup> Jurors may also hesitate to report Internet activity because they do not perceive it to be misconduct, or because they are aware of the consequences that reporting could have on the duration of a trial.<sup>22</sup> When one juror was asked why he did not report another juror's misconduct, he candidly replied, "If everybody did the right thing, the trial, which took two days, would have gone on for another bazillion years."<sup>23</sup>

#### B. Discovery of Juror Internet Misconduct

Several empirical studies have considered how often jurors improperly use the Internet during their jury service. One study by the Federal Judicial Center surveyed federal district court judges about their experiences with jurors using social media while on jury duty.<sup>24</sup> Six percent of judges reported that they had detected juror use of social media during the trial or in the

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15. *Mattapan Massacre*, *supra* note 4.

16. Brickman, *supra* note 6, at 292; Hoffmeister, *supra* note 11, at 414; Caren M. Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1586–87 (2011).

17. *See, e.g.*, Daniel W. Bell, Note, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 86 n.38 (2010) ("Given the public's widespread reliance on the Internet for information, we can reasonably surmise that undetected Internet usage by jurors is quite common.").

18. *See Schwartz*, *supra* note 4.

19. *Id.*

20. *Id.*

21. Luci Scott, *Internet-Surfing Jurors Vex Judges*, NAT'L L.J. 2 (2002), available at [http://029b39b.netsolhost.com/images/InternetSurfing\\_Jurors\\_Vex\\_Judges\\_Luci\\_ScottThe\\_National\\_Law\\_Journal.pdf](http://029b39b.netsolhost.com/images/InternetSurfing_Jurors_Vex_Judges_Luci_ScottThe_National_Law_Journal.pdf).

22. *See Morrison*, *supra* note 16, at 1589 (citing several examples of juror reluctance to disclose misconduct of fellow jurors).

23. *Schwartz*, *supra* note 4.

24. *See Meghan Dunn, Juror's Use of Social Media During Trials and Deliberations*, FED. JUD. CTR. 2 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf).

course of deliberations.<sup>25</sup> Another study, which surveyed federal judges, public defenders, and prosecutors, found that “ten percent of the respondents [had] personal knowledge of a juror conducting Internet research.”<sup>26</sup> A recent study tracked Twitter for tweets containing “Jury Duty” or “Jury Service” over a twenty-four hour period.<sup>27</sup> The study’s author found 286 tweets that fit those criteria.<sup>28</sup> The tweets were mostly innocuous, but several jurors expressed their belief in the defendant’s guilt before a verdict was returned.<sup>29</sup> While these studies do not present overwhelming evidence of juror Internet misconduct, taken in conjunction with statements from those who work most closely with juries, the evidence shows that juror Internet misconduct is a persistent problem that permeates every level of the judicial system.<sup>30</sup>

### C. Nature of Juror Internet Use

When do jurors improperly use the Internet? At all stages of the trial. In a recent case, the New Hampshire Supreme Court considered the conduct of a juror who “expressed bias against criminal defendants” in a blog comment about his upcoming jury duty prior to trial.<sup>31</sup> In Florida, a juror was disciplined for “friending” a defendant in the courtroom during jury selection.<sup>32</sup> Another juror went home and blogged each day about a trial.<sup>33</sup> From this anecdotal evidence, it is highly probable that jurors are using the Internet improperly at all stages of trial. This conclusion is not surprising because Internet access has become an integral part of our daily lives. Jurors carry their Internet use habits with them into the jury box and the deliberation room.

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25. *Id.*

26. Hoffmeister, *supra* note 11, at 415.

27. Michael Bromby, *The Temptation to Tweet: Jurors’ Activities Outside the Trial* (Mar. 26, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1590047](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590047).

28. *Id.*

29. *Id.*

30. See Brickman, *supra* note 6, at 301–02; Paula Hannaford-Agor et al., *Juror and Jury Use of New Media: A Baseline Exploration*, NAT’L CTR. FOR STATE COURTS 5 (2011), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/249>; Morrison, *supra* note 16, at 1590. See also *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 739 F.Supp.2d 576, 609 n.215 (S.D.N.Y. 2010) (observing that juror internet misconduct is a “recurring problem”).

31. *State v. Goupil*, 154 N.H. 208, 213 (2006).

32. Robert Eckhart, *Juror Jailed Over Facebook “Friend” Request*, HERALD TRIB. (Feb. 16, 2012 12:38 PM), <http://www.heraldtribune.com/article/20120216/article/120219626>.

33. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 15 (2012).

What do jurors do on the Internet? Everything. They engage in two-way communication by posting messages and following each other on Twitter and Facebook.<sup>34</sup> They post “one-way” blog entries.<sup>35</sup> They research anything and everything: minimum prison sentences,<sup>36</sup> medical information,<sup>37</sup> statutes,<sup>38</sup> and law firms and lawyers.<sup>39</sup> Each of these activities jeopardizes a party’s right to a fair trial by introducing evidence that the defendant has no opportunity to confront.

Research is not the only hazard of improper jury Internet use. Jurors who communicate with one another or with outside parties may endanger the jury’s ability to render a fair and impartial verdict. Jurors who express opinions to others may feel compelled to maintain their positions when they otherwise may have changed their minds. And when jurors believe that their deliberative processes will be revealed to the media post-verdict, they may feel pressured to conform to community values or yield to a majority.<sup>40</sup>

A blogging or posting juror also destroys the privacy of the jury. This is true even if the communication is only one-way, posing no risk of exposing the blogging juror to outside influences. This presents a serious problem because “[j]uror privacy is a prerequisite of free debate, without which the decision making process would be crippled. . . . Sensitive jurors will not engage in such dialogue without some assurance that it will never reach a larger audience.”<sup>41</sup> When a jury’s privacy is breached, not only is the outcome of the trial threatened, but society’s confidence in the verdict is also in danger. As one expert has observed, “[i]f the linchpin of the jury’s legitimacy is that their [sic] verdicts are opaque, so all mistakes are hidden from sight, the fact that increasing numbers of jurors are blogging may change the calculus that keeps jury decisionmaking secret.”<sup>42</sup> In addition to this serious danger to the verdict, more practical concerns also arise. For example, juror one-way communication may provide inappropriate information to the media.<sup>43</sup>

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34. Ebony Nicolas, Note, *A Practical Framework for Preventing “Mistrial by Twitter”*, 28 CARDOZO ARTS & ENT. L.J. 385, 395–96 (2010).

35. *Goupil*, 154 N.H. at 213.

36. Scott, *supra* note 21, at 1.

37. *Id.*

38. Sontaya Rose, *Juror Misconduct in Fresno County Led to a Mistrial*, ABC NEWS (Apr. 20, 2012), <http://www.fresnobee.com/2013/02/21/3183591/valley-briefs-murder-trial-set.html>.

39. See Henry Gottlieb, *Website Designs with Jurors in Mind*, N.J. L.J. 1, 6 (2006).

40. Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 889–90.

41. *Id.*

42. Morrison, *supra* note 16, at 1603.

43. Brickman, *supra* note 6, at 300.

#### D. Causes of Juror Internet Misconduct

The literature suggests several potential causes of juror Internet misconduct. The problem is likely a result of some jurors misunderstanding directions, and others willfully disobeying instructions. Many blame outdated jury instructions for juror confusion leading to Internet misconduct.<sup>44</sup> Older jury instructions simply instruct jurors to avoid news stories about the case and to refrain from speaking with anyone about the trial.<sup>45</sup> While these instructions do broadly prohibit improper Internet use, new media poses a problem because many jurors do not understand that new methods of research and communication fit within the prohibited conduct.<sup>46</sup> As Judge Linda K. Lager, Chief Administrative Judge of the Connecticut Judicial Branch's Civil Division, observed, "with a lot of the social networking sites and Twitter, people don't get that it's a form of communication."<sup>47</sup> Jurors go online without thinking.<sup>48</sup> Jurors simply do not equate online activities with the bans on communication described in traditional jury instructions.<sup>49</sup>

Case studies reveal clear instances of jurors misunderstanding instructions. One district court clerk openly brought medical information she had printed and a Physician's Desk Reference to the deliberation room while serving as a juror.<sup>50</sup> Another juror printed a statute from a website and asked the judge if it was okay to share it to the other jurors.<sup>51</sup> While these case studies show that jurors sometimes do not understand jury instructions, there are an equal number of instances in which jurors willfully disregard

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44. See, e.g., Hoffmeister, *supra* note 11, at 424.

45. *Id.* at 459.

46. Nicolas, *supra* note 34, at 402.

47. *Id.* (internal quotation marks omitted).

48. See, e.g., *Prospective Juror Tweets Self Out of Levy Murder Trial*, NBC WASH. (Oct. 22, 2010, 8:18 PM), <http://www.nbcwashington.com/news/local/Prospective-Juror-Tweets-Self-Out-of-Levy-Murder-Trial-105553253.html> (potential juror admits to tweeting merely "out of habit").

49. See, e.g., *State v. Dellinger*, 696 S.E.2d 38, 40 (W. Va. 2012) (juror fails to equate her online interactions with the defendant on MySpace as "knowing" the defendant for purposes of voir dire). As the juror explained:

I just didn't feel like I *really* knew him. I didn't know him personally. I've never, never talked to him. And I just felt like, you know, when [the trial judge] asked if you knew him personally or if he ever came to your house or have you been to his house, we never did. . . . I knew in my heart that I didn't know him.

*Id.* at 41 (emphasis added).

50. Scott, *supra* note 21, at 1–2.

51. See Karen Rivas, *Jury's Conduct Leads to Mistrial: Foreman Brought in Copy of Law, Discussed it with Jurors*, TIMES-NEWS (Apr. 23, 2010), available at 2010 WLNR 8530803.

instructions that contain Internet-use rules.

Jurors may willfully disregard jury instructions when frustrated by court procedure.<sup>52</sup> They may feel a misplaced sense of duty to find the “right” answer in order to serve justice.<sup>53</sup> In an age of almost unlimited access to information, jurors may feel cheated in their quest for justice when the court keeps information away from them. This may lead jurors to “resist instructions when those instructions clash with their innate sense of justice.”<sup>54</sup> Jurors may access inappropriate information believing they will be able to purge the information from their minds and therefore still follow the judge’s instructions despite conducting outside research. But numerous studies have shown that once a juror knows information, it is likely to influence her decision even if the juror is resolved that it will not.<sup>55</sup>

#### E. Remedies

Preventative measures should be the court’s primary tool to combat both innocent and willful juror Internet misconduct because remedial measures are ineffective. Our court system insulates jury deliberations from scrutiny, which makes juror Internet misconduct difficult to discover.<sup>56</sup> Federal Rule of Evidence 606(b) limits the court’s ability to seek testimony about the jury’s deliberations.<sup>57</sup> The court is limited in its inquiry into a juror’s mental

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52. Morrison, *supra* note 16, at 1581.

53. *Id.*

54. *Id.* at 1610.

55. See generally Linda J. Demaine, *In Search of the Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99 (2008); Steven Fein et al., *Can the Jury Disregard That Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERS. SOC. PSYCHOL. BULL. 1215 (1997); Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors on Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994); Joel Leiberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677 (2000); Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & HUM. BEHAV. 469 (2006).

56. Fallon, *supra* note 122, at 949.

57. FED. R. EVID. 606(b). The rule provides in relevant part:

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations[.] . . . (2) Exceptions. A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury’s attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.

*Id.*

process of reaching a verdict,<sup>58</sup> allowing jurors to evade court discovery of their improper Internet use.

The investigation into juror decision-making necessary for discovery of misconduct could threaten the integrity of the justice system. Today's jury acts as a lie detector.<sup>59</sup> As one commentator has observed:

By permitting the jury to resolve credibility conflicts in the black box of the jury room, the criminal justice system can present to the public an “answer”—a single verdict of guilty or not guilty—that resolves all questions of credibility in a way that is largely immune from challenge or review. By making the jury its lie detector, the system protects its own legitimacy.<sup>60</sup>

Therefore, the need to protect the juror decision-making process makes the proactive prevention of jury misconduct, as opposed to remedial measures, essential.

Remedial measures are also less than desirable because of their cost to the justice system. If a judge deems a juror's conduct to warrant a mistrial, the economic and emotional toll can be quite high.<sup>61</sup> These challenges and costs have led some experts to believe that “an ounce of prevention is worth a pound of cure.”<sup>62</sup>

### 1. Jury Instructions

Past surveys of judges and juries have suggested that updated, repeated jury instructions explaining the reasons why certain Internet use is prohibited may be the court system's best preventative tool.<sup>63</sup> Juries tend to listen and respond to the judge's instructions.<sup>64</sup> This makes it important for judges to

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58. *Id.*

59. George Fisher, *The Jury's Rise As Lie Detector*, 107 *Yale L.J.* 575, 579 (1997).

60. *Id.*

61. See Nancy West, *Lawyer: \$2.5M Spent on Refugee's Mistrial*, *THE UNION LEADER* (Mar. 31, 2012), <http://www.unionleader.com/article/20120401/NEWS03/704019985> (estimating that a new trial would cost taxpayers an additional one million dollars); see also Martina Valverde, *Assistant District Attorney Says Biggest Costs in Mistrials Is Emotional*, *KFox14* (June 6, 2012), <http://www.kfoxtv.com/news/news/assistant-district-attorney-says-biggest-costs-mis/nPNQw/> (quoting a prosecutor who opines that the biggest cost of a mistrial is emotional).

62. See, e.g., Brickman, *supra* note 6, at 296.

63. St. Eve, *supra* note 33, at 29; Hoffmeister, *supra* note 11, at 468; Dunn, *supra* note 24, at 6.

64. St. Eve, *supra* note 33, at 22–24.

give jury instructions that are sufficiently specific for jurors to clearly understand the types of Internet use that are prohibited.<sup>65</sup> To be effective, jury instructions should specifically name Internet sites such as blogs, Facebook, Twitter, and Google.<sup>66</sup> These specific instructions make it clear to jurors that the prohibition on communication in traditional jury instructions extends to Internet activity. With some traditional jury instructions, it is possible for a juror to follow the instruction literally, yet still conduct online research.<sup>67</sup> These inconsistencies make jury instruction specificity perhaps the most important preventative element of Internet-specific jury instructions.<sup>68</sup>

The earlier Internet-specific instructions are given to the jury, the better.<sup>69</sup> An amusing story about Al Roker, the *Today Show* weatherman, illustrates the importance of this point.<sup>70</sup> While waiting to be called for jury selection, Roker tweeted and uploaded photos of potential jurors who were waiting to be called before a clerk asked him to stop.<sup>71</sup> In response, Roker explained, "I'm not breaking the laws[,] . . . just trying to share the experience of jury duty."<sup>72</sup> This anecdote demonstrates that Internet-specific jury instructions cannot be given soon enough because without the instruction, jurors may not realize that they are doing anything wrong. Internet-specific jury instructions should also be given often because jurors have access to the Internet at almost all times.<sup>73</sup>

Jury instructions should include an explanation of why certain Internet use is prohibited.<sup>74</sup> "If jurors are going to be asked to sacrifice some of their personal freedom and forego their case-specific e-mailing, texting, blogging, instant messaging, and social networking for the duration of their service, they are entitled to a clear and thoughtful explanation of the reason."<sup>75</sup> It is also important for the instructions to acknowledge the temptation to go

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65. Scott, *supra* note 21, at 2.

66. St. Eve, *supra* note 33, at 27.

67. Brickman, *supra* note 6, at 294.

68. Fallon, *supra* note 12, at 957.

69. Hoffmeister, *supra* note 11, at 456.

70. See Debra C. Weiss, *Media Atwitter Over Al Roker's Twitter Photos from Jury Duty Wait*, ABA J. (May 29, 2009), [http://www.abajournal.com/news/article/media\\_atwitter\\_over\\_al\\_rokers\\_twitter\\_photos\\_from\\_jury\\_duty\\_wait/](http://www.abajournal.com/news/article/media_atwitter_over_al_rokers_twitter_photos_from_jury_duty_wait/).

71. *Id.*

72. Corky Siemaszko, *Al Roker Gets Ripped for Snapping Court Pix and Tweeting During Jury Duty*, N.Y. DAILY NEWS (May 28, 2009), <http://www.nydailynews.com/entertainment/tv-movies/al-roker-ripped-snapping-court-pix-tweeting-jury-duty-article-1.374749> (internal quotation marks omitted)

73. Nicolas, *supra* note 34, at 403.

74. Brickman, *supra* note 6, at 297.

75. Hon. Linda Giles, *Does Justice Go Off Track When Jurors Go Online?*, 55 BOSTON B.J. 7, 9 (2011).

online and to explain why it is important to resist that temptation.<sup>76</sup> “[J]urors need to know that information obtained outside of the courtroom cannot be considered . . . [no matter] how helpful the information may seem” because the parties must have the ability to confront the evidence in court to preserve the fairness of a trial.<sup>77</sup> With this information, jurors will be less likely to violate otherwise seemingly arbitrary rules.

Finally, jury instructions should inform jurors of the consequences of prohibited Internet use. Experts agree that jurors should be aware of the costs of a mistrial,<sup>78</sup> but some believe that jurors should also be informed of possible contempt charges to deter improper behavior.<sup>79</sup> Others reason that informing jurors of the consequences of disobeying instructions will make some jurors unwilling to report the misconduct to their fellow jurors.<sup>80</sup> Because lack of reporting may be a widespread problem, avoiding juror fear of reporting should be a priority.

Juror misconduct may be widely underreported because courts have little opportunity to discover misconduct.<sup>81</sup> Jurors reporting each other or admitting to prohibited conduct themselves may be the only way for courts discover misconduct.<sup>82</sup> It is therefore critical to include an instruction for jurors to inform the judge if they believe other jurors are committing misconduct.<sup>83</sup>

## 2. Jury Internet Use Policies

Another method of preventing juror misconduct is to eliminate the temptation of the Internet by limiting juror’s cell phone access. Some states have also adopted juror cell phone and Internet use policies to prevent juror Internet misconduct.<sup>84</sup> Internet bans are the only sure way to keep jurors off the Internet, but enforcing a ban is almost impossible when jurors serve on multi-day trials.<sup>85</sup> However, preventing jurors from accessing the Internet while at the courthouse may prevent impulsive searches.

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76. Brickman, *supra* note 6, at 297.

77. Hoffmeister, *supra* note 11, at 454.

78. *Id.* at 455; Nicolas, *supra* note 34, at 412; St. Eve, *supra* note 33, at 28.

79. Hoffmeister, *supra* note 11, at 455.

80. Morrison, *supra* note 16, at 1611.

81. *Id.* at 1612

82. *Id.*

83. Fallon, *supra* note 12, at 956.

84. Nicolas, *supra* note 34, at 400–03.

85. Hoffmeister, *supra* note 11, at 439–40; Morrison, *supra* note 16, at 1610–11.

## F. Recent Studies

Recent interest in juror Internet misconduct and reports of anecdotal evidence have led to several studies of juror Internet misconduct.<sup>86</sup> All of these studies, however, have collected information from the federal judiciary and juries.<sup>87</sup> From the collected data, scholars have developed sample jury instructions to prevent juror Internet misconduct.<sup>88</sup> These instructions were developed by academics, and the authors did not receive feedback from judges about whether the instructions could be easily implemented in the courtroom.<sup>89</sup>

## III. SURVEY

To investigate the prevalence of juror Internet misconduct in New Hampshire and the court system's response, I conducted an anonymous survey of New Hampshire Superior Court judges. The survey collected information about the judges' experiences with juror Internet misconduct and the mechanisms currently in place to prevent juror Internet misconduct. The survey also sought feedback from judges on a sample jury instruction. While the sample size is too small to be conclusive,<sup>90</sup> the information does provide valuable insight into juror Internet misconduct in New Hampshire.

## A. Design

I conducted the survey in December 2012. I used a combination of original questions and questions taken from surveys conducted by Thaddeus Hoffmeister and Meaghan Dunn.<sup>91</sup>

In addition to questions, the survey includes a sample jury instruction, also taken from Hoffmeister's article.<sup>92</sup> Hoffmeister conducted a survey of federal prosecutors, defense attorneys, and federal judges from across the nation to determine the best way to address juror Internet misconduct.<sup>93</sup> He then pieced together jury instructions from across the country to develop a

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86. See, e.g., Dunn, *supra* note 24; Hannaford-Agor, *supra* note 30; Hoffmeister, *supra* note 111; St. Eve, *supra* note 33; Amy St. Eve et al., *More from the Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 65 (2014).

87. See Dunn, *supra* note 24; Hannaford-Agor, *supra* note 3030.

88. See, e.g., Hoffmeister, *supra* note 111.

89. *Id.*

90. Ten New Hampshire Superior Court judges completed the survey.

91. See Hoffmeister, *supra* note 11, at 469–70; Dunn, *supra* note 24, at 15–21.

92. See Hoffmeister, *supra* note 11, at 465–68.

93. *Id.* at 414–16.

jury instruction that addressed the issues identified in his survey.<sup>94</sup> The resulting jury instruction incorporates key elements designed to prevent juror Internet misconduct.<sup>95</sup> First, Hoffmeister specifically names websites, devices, and methods of communication.<sup>96</sup> Second, the instruction acknowledges that it asks the jurors to “do something that may seem strange” when asking them to disconnect from the Internet and explains why improper Internet use is harmful to the judicial process.<sup>97</sup> Third, the instruction asks jurors to report if they observe misconduct.<sup>98</sup> The survey presents the instruction and asks judges whether their jury instruction is similar, whether they would use the instruction, and what changes, if any, they would make to the sample instruction.<sup>99</sup>

## B. Results

Judges reported only a few instances of juror misconduct, but the results suggest that many instances of juror misconduct may go undetected. In general, New Hampshire Superior Court judges have implemented Internet-specific jury instructions, and all responding judges restrict juror cell-phone use during deliberations.<sup>100</sup> While the results of the survey show that most judges are taking active steps to prevent this type of juror misconduct, there are still steps to be taken.

The survey revealed that thirty percent of responding judges have experienced instances of jurors improperly using the Internet while on jury duty.<sup>101</sup> Of those that had experienced juror Internet misconduct, all reported that misconduct has occurred in only one or two trials.<sup>102</sup>

Judges reported that one hundred percent of jurors who had used the Internet improperly conducted research, sixty percent communicated, and forty percent accessed media reports.<sup>103</sup> Most judges believe that juror Internet misconduct is willful, rather than the result of jurors misunderstanding jury instructions.<sup>104</sup>

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94. *Id.* at 465.

95. *See infra* Appendix 3.

96. *See infra* Appendix 3.

97. *See infra* Appendix 3.

98. *See infra* Appendix 3.

99. *See infra* Appendix 3.

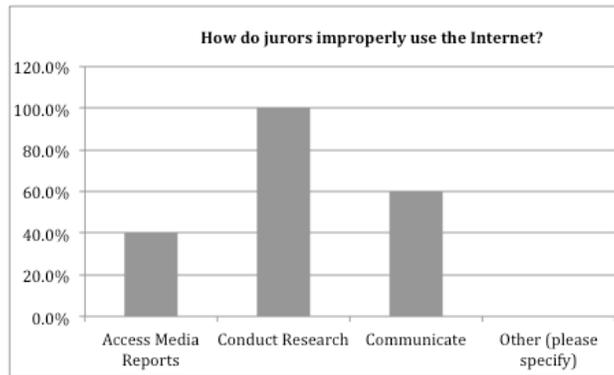
100. *See infra* pp. 273, 276.

101. *See infra* p. 269.

102. *See infra* p. 269.

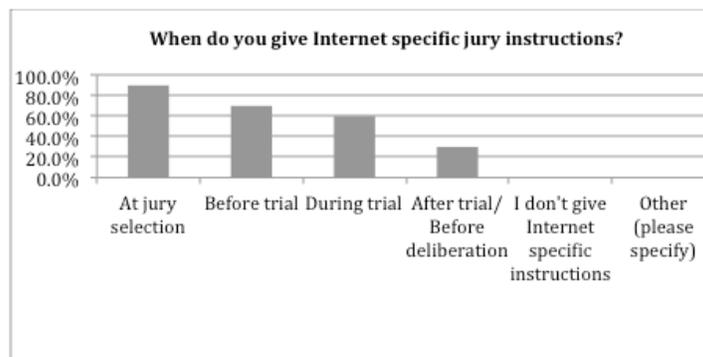
103. *See infra* p. 270.

104. *See infra* p. 271.



Ninety percent of judges have a policy on jurors accessing the Internet during jury duty.<sup>105</sup> No responding judges allow jurors to have cell phones during jury deliberations.<sup>106</sup> As one judge explained, “[Jurors are] allowed to have their phones during the trial until they actually begin deliberations. Then the phones are held by a bailiff until a verdict is reached.”<sup>107</sup> Most judges have had their cell phone policy in place for a few years, while several have adopted a policy more recently.<sup>108</sup> All surveyed judges believed their policy is effective in preventing juror misconduct.<sup>109</sup>

All responding judges give Internet-specific jury instructions at some point, but the timing and frequency of jury instruction varies. Ninety percent of judges give Internet-specific jury instructions at jury selection, while only thirty percent of judges give them after trial/before deliberation.<sup>110</sup>



105. See *infra* p. 274.

106. See *infra* p. 273.

107. See *infra* p. 275.

108. See *infra* pp. 275–76.

109. See *infra* p. 276.

110. See *infra* pp. 277–78.

Interestingly, only thirty percent of judges include a statement asking jurors to report other jurors who commit misconduct.<sup>111</sup> The survey also revealed that two judges have declared mistrials due to juror Internet misconduct,<sup>112</sup> confirming that juror Internet misconduct costs New Hampshire's judicial system valuable resources.

Eighty percent of responding judges believed the sample jury instruction presented in the survey or a similar instruction would prevent jurors from improperly accessing the Internet,<sup>113</sup> and seventy percent said they would use the sample instruction.<sup>114</sup> The most common criticism of the sample jury instruction was that it was too long.<sup>115</sup> Another judge would "assume compliance and delete the heavy-handed threats" included in the jury instruction.<sup>116</sup>

#### IV. ANALYSIS

##### A. Juror Internet Use

The results of the survey show that while juror Internet misconduct is not a rampant problem in the New Hampshire Superior Court, it is present.<sup>117</sup> Recently, most judges have adopted policies and jury instructions to prevent improper juror improper use.

However, the results of the survey also show that many instances of juror Internet misconduct may go unreported. Of the three judges who reported experiencing juror Internet misconduct, two reported that they include a statement instructing jurors to report the misconduct of other jurors.<sup>118</sup> Seven of the ten judges who responded to the survey reported no instances of juror Internet misconduct and indicated that they do not instruct jurors to report the misconduct of others.<sup>119</sup> As discussed earlier, many cases of juror Internet misconduct are only discovered when jurors report the misconduct of another juror.<sup>120</sup> All three instances of juror Internet misconduct captured by this survey were discovered when jurors reported the misconduct.<sup>121</sup> These results show that encouraging jurors to report the misconduct of fellow jurors

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111. *See infra* p. 278.

112. *See infra* pp. 271–72.

113. *See infra* p. 278.

114. *See infra* p. 279.

115. *See infra* pp. 279–80.

116. *See infra* p. 279.

117. *See infra* p. 269.

118. *See infra* pp. 269, 278.

119. *See infra* pp. 269, 278.

120. *See discussion supra* p. 255.

121. *See infra* p. 270.

may be the most effective way to discover juror Internet misconduct. If all judges asked jurors to report the misconduct of their peers, more instances of juror misconduct would likely come to light.<sup>122</sup>

Eighty percent of judges surveyed believe that juror Internet misconduct is willful,<sup>123</sup> yet many experts believe that jurors simply do not understand that they are committing misconduct by bringing their Internet habits into the courthouse.<sup>124</sup> The discrepancy could be explained by the type of misconduct discovered. A more brazen juror is more likely to be discovered than a juror who believed she did nothing wrong by quietly looking up the definition of an unfamiliar term at home at night. If most instances of juror misconduct are willful, jury instructions focused on juror understanding of prohibited Internet use may be of little use.

#### B. Jury Instruction Delivery

The survey also revealed that each judge gives jury instructions at different times and with different frequency.<sup>125</sup> The majority of judges give Internet-specific jury instructions at jury selection, but only thirty percent of judges report giving Internet-specific instructions after trial and/or before deliberation.<sup>126</sup> Most judges do not allow jurors to have their cell phones during deliberations,<sup>127</sup> making Internet-specific instructions before deliberations moot. But if jurors do have access to the Internet before or during deliberations—for example, when they return home for the night—an Internet-specific instruction may aid in preventing juror misconduct. Some judges expressed concern that repeating jury instructions too often was unnecessary or “overkill.”<sup>128</sup> However cumbersome the instructions may be to repeat, a recent reminder may prevent a juror from reflexively “Googling” an unknown term.

#### C. Sample Jury Instruction

The majority of judges were receptive to Hoffmeister’s sample jury instruction.<sup>129</sup> The judges identified two weak elements: (1) the length of the instruction; and (2) the statement of consequences should jurors improperly

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122. *See, e.g.*, Schwartz *supra* note 4.

123. *See infra* p. 271.

124. *See Rivas, supra* note 51.

125. *See infra* pp. 277–78.

126. *See infra* pp. 277–78.

127. *See infra* p. 273.

128. *See infra* p. 280.

129. *See infra* p. 279.

use the Internet.<sup>130</sup> Several judges commented that the sample jury instruction is too long and that giving an Internet-specific jury instruction at every break is “overkill.”<sup>131</sup> The length of the jury instruction is a concern because it is a drain on the court’s valuable time, but also because jurors are less likely to pay attention to an instruction that is too long.

The jury instruction in the survey also included the statement, “If you communicate with anyone about the case or do outside research during the trial . . . you could be held in contempt of court and subject to punishment such as paying the costs associated with having a new trial.”<sup>132</sup> One judge raised a concern about these “heavy-handed” threats contained in the sample instruction.<sup>133</sup> The literature echoed this concern.<sup>134</sup> If jurors are threatened with criminal or monetary consequences resulting from jury service, they may be more reluctant to serve.<sup>135</sup> Perhaps more concerning, heavy-handed threats may further discourage jurors from coming forth when they observe other jurors engaging in misconduct.<sup>136</sup> The balance between prevention and discovery of misconduct therefore weighs in favor of discovery of misconduct.

#### V. PROPOSED JURY INSTRUCTION

I modified two key elements of the sample jury instruction based on the survey results to create a new proposed jury instruction. First, I developed a set of instructions instead of a single instruction in response to the criticism that the sample instruction is too long to be read repeatedly.<sup>137</sup> In the set, I include a longer instruction to be read at the beginning of jury service, a shorter instruction to be read at breaks, and a targeted instruction to be read just prior to deliberation.<sup>138</sup> With a set of instructions, judges will be able to select an instruction that fits the current stage of the trial and the time they have allotted for jury instruction. By offering instructions of varied lengths, judges may read the instructions to jurors more frequently and the jurors may listen to the entire instruction. I also developed a juror handout that summarizes the instruction,<sup>139</sup> which may be given to jurors to remind them of the judge’s instructions.

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130. *See infra* pp. 279–80.

131. *See infra* p. 280.

132. *See infra* Appendix 3.

133. *See infra* p. 279.

134. *See Morrison, supra* note 16, at 1611–12.

135. *Id.*

136. *Id.*

137. *See* Appendix 4.

138. *See* Appendix 4.

139. *See infra* p. 286–87.

Second, I eliminated the strong statement of consequences that jurors face if they improperly use the Internet. Based on the survey results and literature review, it is clear that the court should encourage jurors to come forward when they observe a fellow juror improperly using the Internet, or when they improperly use the Internet themselves. Including a statement of the consequences in the jury instruction may discourage reporting. I have eliminated the statement of consequences from my proposed jury instructions.

The New Hampshire courts should consider adopting this proposed set of Internet specific jury instructions. Adoption of a court-wide instruction would ensure uniformity across the New Hampshire court system. Although the instruction would add to the time that judges spend instructing the jury, this cost is minimal when balanced against the costs associated with a possible mistrial.<sup>140</sup>

## VI. CONCLUSION

Preventing jurors from improperly using the Internet while serving on a jury is essential to preserving the integrity of our judicial system. When jurors conduct outside research, they deny the parties the chance to confront the evidence in open court. And when jurors improperly communicate with each other or with third parties, they may form unfair opinions about the case. Perhaps equally important, when the public perceives trials as unfair, the judicial system loses the public's confidence.

Juror Internet misconduct is a serious problem that permeates jury trials, but with diligent preventative measures the New Hampshire Superior Court is combating the problem. While judges have recently adopted policies to prevent such misconduct, there it still work to be done. Adopting a system-wide policy for instructing jurors and detecting misconduct would provide additional safeguards.

Several scholars have suggested that the judicial system should discard the old model of jury trials and introduce "Jury 2.0."<sup>141</sup> At the time of our founding, juries were expected to have outside knowledge of the parties.<sup>142</sup> "Impartial" simply meant that the jurors did not have family or financial ties to the case.<sup>143</sup> Juries of the future may return to this conception of impartiality. Someday, we may trust juries to assess the credibility and relevance of all the evidence they can find inside and outside the

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140. *See, e.g.*, West, *supra* note 61.

141. *See, e.g.*, Morrison, *supra* note 16.

142. *Id.* at 1617–18.

143. *Id.* at 1618–19.

courtroom.<sup>144</sup> Our judicial system and societal expectations may adapt in a way that enables fair trials with such a free flow of information. Our system, however, has not yet adapted. So we must continue to ensure fair trials by limiting the information available to the jury, and diligently preventing jurors from improperly seeking such information on the Internet.

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144. *Id.* at 1626.

APPENDIX 1: SURVEY QUESTIONS

**Juror Misconduct Survey**

**\*1. Have you had instances of jurors improperly using the Internet while on jury duty?\***

Yes

No

**\*2. In how many trials have you encountered jurors improperly using the Internet?\*\*\***

0

1-2

3-5

6-10

11-20

more than 20

**3. How do jurors improperly use the internet?**

Access Media Reports

Conduct Research

Communicate

Other (please specify)

**4. How did you discover that a juror was improperly using the internet?**

Do you believe Internet juror misconduct is:

**\*5. The result of jurors misunderstanding jury instructions?**

Yes

No

**\*6. Willful misconduct?**

Yes

No

**Juror Misconduct Survey**

**7. What action was taken after the improper Internet use was discovered?\***

- Removed juror from jury
- Cautioned juror, but allowed him or her to remain on the jury
- Declared a mistrial
- Held juror in contempt of court
- Fined juror
- Other (please specify)

**8. Do you allow jurors to have cell phones during deliberations?\***

Yes  
 No

**9. Do you believe restricting juror access to cell phones during deliberation would prevent Internet related juror misconduct? (Ex. Bailiff holds juror cell phones during deliberations)**

Yes  
 No

**\*10. Do you have a policy on jurors accessing the Internet while on jury duty?\***

Yes  
 No

**11. Please describe this policy.\***

**12. How long has this policy been in place?\***

**13. Do you think this policy is effective?\***

Yes  
 No

If no, what changes should be made?

**Juror Misconduct Survey**

**\* 14. Do you give jury instructions specifically addressing Internet usage?**

Yes

No

**\* 15. When do you give general jury instructions?**

At jury selection

Before trial

During trial

After trial/Before deliberation

Other (please specify)

\_\_\_\_\_

**\* 16. When do you give Internet specific jury instructions?**

At jury selection

Before trial

During trial

After trial/Before deliberation

I don't give Internet specific instructions

Other (please specify)

\_\_\_\_\_

### Juror Misconduct Survey

Below is a sample jury instruction including instructions regarding Internet use.

**Introduction:** Serving on a jury is an important and serious responsibility. Part of that responsibility is to decide the facts of this case using only the evidence that the parties will present in this courtroom. As I will explain further in a moment, this means that I must ask you to do something that may seem strange to you: to not discuss this case or do any research on this case. I will also explain to you why this rule is necessary and what to do if you encounter any problems with it.

**Communications:** During this trial, do not contact anyone associated with this case. If a question arises, direct it to my attention or the attention of my staff. Also, do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. This includes, but is not limited to, discussing your experience as a juror on this case, the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony, exhibits, or any aspect of the case or your courtroom experience. "No discussion" extends to all forms of communication, whether in person, in writing, or through electronic devices or media such as: email, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, iPads, iPhones, ITouches, Google, Yahoo!, or any other Internet search engine or form of electronic communication for any purpose whatsoever, if it relates to this case.

After you retire to deliberate, you may begin to discuss the case with your fellow jurors and only your fellow jurors.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don't think that you are paying attention. I do it because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common, that which they just watched together. There are at least three reasons for this rule.

The first is to help you keep an open mind. When you talk about things, you start to make decisions about them, and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you will not have heard that until the very end of the trial. The second reason is that, by having conversations in groups of two or three during the trial, you will not remember to repeat all of your thoughts and observations to the rest of your fellow jurors when you deliberate at the end of the trial. The third, and most important, reason is that by discussing the case before deliberations you increase the likelihood that you will either be influenced by an outside third party or that you will reveal information about the case to a third party. If any person tries to talk to you about this case, tell that person you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to me or my staff.

**Research:** Do not perform any research or make any independent personal investigations into any facts, individuals, or locations connected with this case. Do not look up or consult any dictionaries or reference materials. Do not search the Internet, websites, or blogs. Do not use any of these or any other electronic tools or other sources to obtain information about any facts, individuals, or locations connected with this case. Do not communicate any private or special knowledge about any facts, individuals, or locations connected with this case to your fellow jurors. Do not read or listen to any news reports about this case. The law prohibits a juror from receiving evidence not properly admitted at trial. If you have a question or need additional information, contact me or my staff. I, along with the attorneys, will review every request. If the information requested is appropriate for you to receive, it will be released in court.

In our daily lives, we may be used to looking for information online and we may "Google" things as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. However, the moment you try to gather information about this case or the participants is the moment you contaminate the process and violate your oath as a juror. Looking for outside information is unfair because the parties do not have the opportunity to refute, explain, or correct what you discovered or relayed. The trial process works through each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. You must resist the temptation to seek outside information for our system of justice to work as it should. Once the trial ends and you are dismissed as jurors, you may research and discuss the case as much as you wish. You may also contact anyone associated with this case. [Questions by the Judge to the Jury: Are there any of you who cannot or will not abide by these rules concerning communication or research with others in any way during this trial? Are there any of you who do not understand these instructions?]

**Ramifications:** If you communicate with anyone about the case or do outside research during the trial, it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. Furthermore, you could be held in contempt of court and subject to punishment such as paying the costs associated with having a new trial. If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty to report it to me or my staff so that we can protect the integrity of this trial. \*\*\*

### Juror Misconduct Survey

**\* 17. Does your current jury instruction include a statement similar to the last sentence of the sample instruction?**

**"If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty to report it to me or my staff so that we can protect the integrity of this trial."**

- Yes  
 No

**\* 18. Do you believe this jury instruction or a similar jury instruction would prevent jurors from improperly accessing the Internet?**

- Yes  
 No

**\* 19. Would you use this jury instruction?**

- Yes  
 No

**\* 20. Would you make changes to this jury instruction?**

- Yes  
 No

**21. If yes, what changes would you make?**

**22. Do you have any additional views about juror misconduct not addressed in this survey?\***

\* These questions were included in or modified from a survey reported in Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. Colo. L. Rev. 409 (2012).

\*\* These questions were included in or modified from a survey reported in Megan Dunn, *Jurors' use of Social Media During Trials and Deliberations: A report to the Judicial Conference Committee in Court Administration and Case Management* (Fed. Judicial Ctr., ed., Nov. 22, 2011).

\*\*\* Sample Jury Instruction from Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. Colo. L. Rev. 409 (2012).

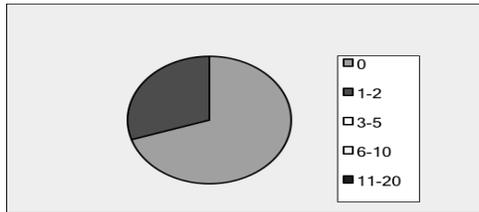
APPENDIX 2: SURVEY DATA

**1. Have you had instances of jurors improperly using the Internet while on jury duty?**

Answer Options	Response Percent	Response Count
Yes	30.0%	3
No	70.0%	7
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

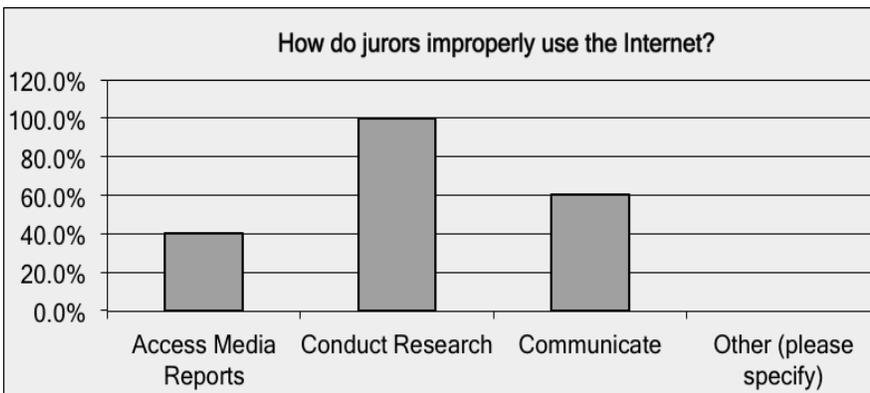
**2. In how many trials have you encountered jurors improperly using the Internet?**

Answer Options	Response Percent	Response Count
0	70.0%	7
1-2	30.0%	3
3-5	0.0%	0
6-10	0.0%	0
11-20	0.0%	0
more than 20	0.0%	0
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>



**3. How do jurors improperly use the Internet?**

Answer Options	Response Percent	Response Count
Access Media Reports	40.0%	2
Conduct Research	100.0%	5
Communicate	60.0%	3
Other (please specify)	0.0%	0
<i>answered question</i>		<b>5</b>
<i>skipped question</i>		<b>5</b>



**4. How did you discover that a juror was improperly using the Internet?**

	Response Count
	3
<i>answered question</i>	<b>3</b>
<i>skipped question</i>	<b>7</b>

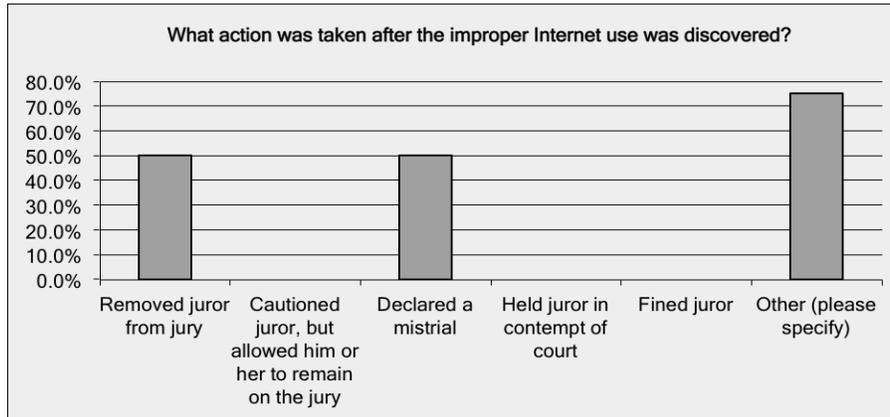
Responses:

- \* Report of other jurors; report of attorney who was a neighbor of the juror
- \* Other jurors advised the bailiff and/or clerk
- \* Another juror informed the court

<b>5a. The result of willful misconduct?</b>		
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Yes	80.0%	8
No	20.0%	2
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

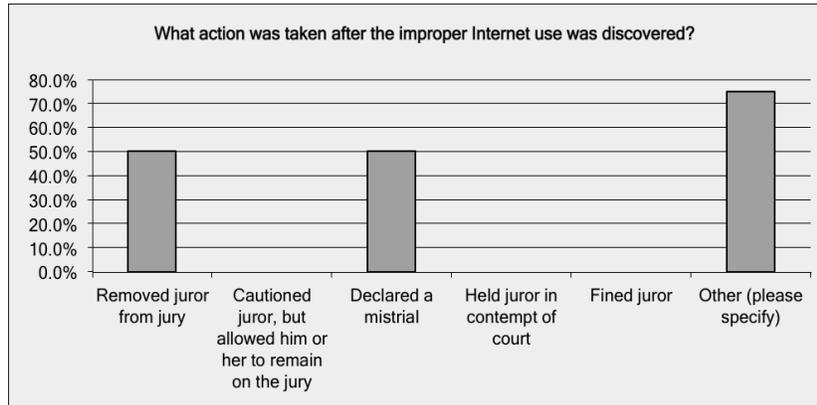
<b>5b. The result of jurors misunderstanding jury instructions?</b>		
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Yes	40.0%	4
No	60.0%	6
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

<b>6. What action was taken after the improper Internet use was discovered?</b>		
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Removed juror from jury	50.0%	2
Cautioned juror, but allowed him or her to remain on the jury	0.0%	0
Declared a mistrial	50.0%	2
Held juror in contempt of court	0.0%	0
Fined juror	0.0%	0
Other (please specify)	75.0%	3
<i>answered question</i>		<b>4</b>
<i>skipped question</i>		<b>6</b>



**7. What action was taken after the improper Internet use was discovered?**

Answer Options	Response Percent	Response Count
Removed juror from jury	50.0%	2
Cautioned juror, but allowed him or her to remain on the jury	0.0%	0
Declared a mistrial	50.0%	2
Held juror in contempt of court	0.0%	0
Fined juror	0.0%	0
Other (please specify)	75.0%	3
<b>answered question</b>		<b>4</b>
<b>skipped question</b>		<b>6</b>



Responses (Other):

- \* Conducted a voir dire pursuant to State v. Rideout, 143 N.H. 363 (1999).
- \* Referred juror for criminal contempt prosecution
- \* It has not happened to me

8. Do you allow jurors to have cell phones during deliberations?		
Answer Options	Response Percent	Response Count
Yes	0.0%	0
No	100.0%	10
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

9. Do you believe restricting juror access to cell phones during deliberation would prevent Internet related juror misconduct?		
Answer Options	Response Percent	Response Count
Yes	80.0%	8
No	20.0%	2
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

**10. Do you have a policy on jurors accessing the Internet while on jury duty?**

Answer Options	Response Percent	Response Count
Yes	90.0%	9
No	10.0%	1
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

**11. Please describe this policy.**

Answer Options	Response Count
	10
<i>answered question</i>	<b>10</b>
<i>skipped question</i>	<b>0</b>

*Responses:*

\* I do not restrict juror access to the Internet, but I do plainly and unequivocally instruct them about their obligation not to communicate, including electronically, about the case or their service, and not to do any kind of research concerning the case or their service whatsoever, including an explicit prohibition on Internet research of any kind.

\* Can't use Internet to communicate or do research involving case or jury duty on case.

\* Jurors are advised that they may not use the Internet to research any aspect of the case or disseminate information about the case.

\* They are given clear and assertive instructions prohibiting any Internet use related to the trial and told that failure to follow the instructions will be treated as contempt of court.

\* No Internet research on the case, including the participants, the nature of the case and the law.

\* Jurors are not permitted any electronic devices during jury deliberations.

\* They may not seek to obtain any information having to do with the case, the parties, the witnesses or the attorneys.

\* There is not a policy per se. Rather, I instruct jurors specifically not to use the Internet in any way to research the case, the parties, the lawyers, the witnesses, or the law. I also instruct them not to post status updates on facebook, twitter, or email about their jury service, even if that is only "innocent" because such status updates tend to elicit responses from other users which might effect the impartiality of the jurors. I do not instruct the jury that they cannot use the Internet at all. They are allowed to have their phones during the trial until they actual begin the deliberations. Then the phones are held by the bailiff until a verdict is reached. I also specifically instruct the juror that they will be found in contempt of court if they violate the instructions. I explain to them that the consequences of violating the instruction is a mistrial which is very unfair to the parties and very costly to the taxpayers.

\* They are prohibited from doing any independent research, including Internet.

\* Prohibition on all communications during trial and deliberations

<b>12. How long has this policy been in place?</b>	
<b>Answer Options</b>	<b>Response Count</b>
	10
<i>answered question</i>	<b>10</b>
<i>skipped question</i>	<b>0</b>

*Responses:*

\* Many years.

\* As electronic communication and research is an extension of more conventional communication, press consumption and research, it has always been in place,

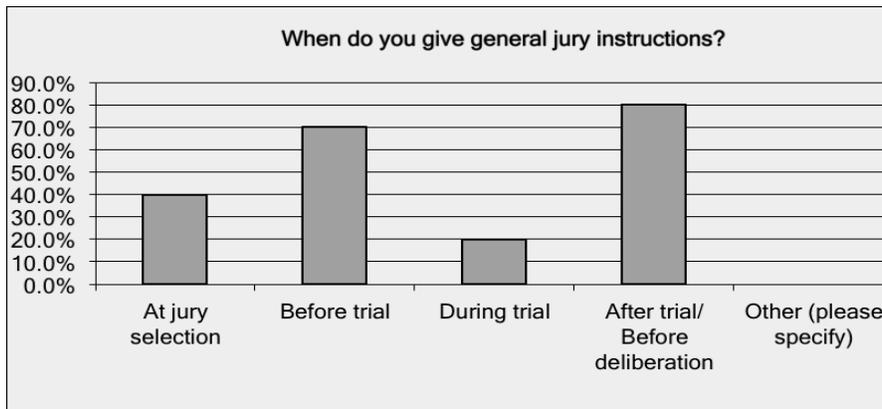
- \* Informally 3 years and more formally 6 months.
- \* About a year.
- \* For several years.
- \* 2 years
- \* 3 years
- \* I have been giving these instructions for about 18 months.
- \* Mine - 3 years
- \* 5 years

<b>13. Do you think this policy is effective?</b>		
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Yes	100.0%	10
No	0.0%	0
If no, what changes should be made?		0
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

<b>14. Do you give jury instructions specifically addressing Internet usage?</b>		
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Yes	100.0%	10
No	0.0%	0
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

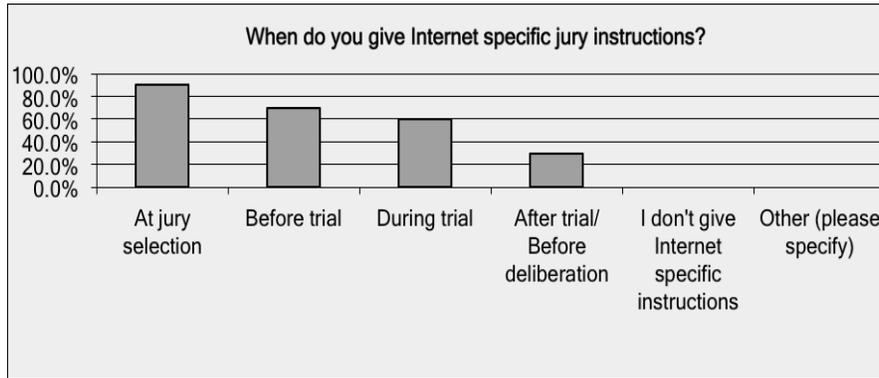
**15. When do you give general jury instructions?**

Answer Options	Response Percent	Response Count
At jury selection	40.0%	4
Before trial	70.0%	7
During trial	20.0%	2
After trial/Before deliberation	80.0%	8
Other (please specify)	0.0%	0
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>



**16. When do you give Internet specific jury instructions?**

Answer Options	Response Percent	Response Count
At jury selection	90.0%	9
Before trial	70.0%	7
During trial	60.0%	6
After trial/Before deliberation	30.0%	3
I don't give Internet specific instructions	0.0%	0
Other (please specify)	0.0%	0
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>



**17. Does your current jury instruction include a statement similar to the last sentence of the sample instruction? "If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty to report it to me or my staff so that we can protect the integrity of this trial."**

Answer Options	Response Percent	Response Count
Yes	30.0%	3
No	70.0%	7
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

**18. Do you believe this jury instruction or a similar jury instruction would prevent jurors from improperly accessing the Internet?**

Answer Options	Response Percent	Response Count
Yes	80.0%	8
No	20.0%	2
<i>answered question</i>		<b>10</b>
<i>skipped question</i>		<b>0</b>

<b>19. Would you use this jury instruction?</b>		
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Yes	70.0%	7
No	30.0%	3
<b><i>answered question</i></b>		<b>10</b>
<b><i>skipped question</i></b>		<b>0</b>

<b>20. Would you make changes to this jury instruction?</b>		
<b>Answer Options</b>	<b>Response Percent</b>	<b>Response Count</b>
Yes	60.0%	6
No	40.0%	4
<b><i>answered question</i></b>		<b>10</b>
<b><i>skipped question</i></b>		<b>0</b>

<b>21. If yes, what changes would you make?</b>	
	<b>Response Count</b>
	5
<b><i>answered question</i></b>	<b>5</b>
<b><i>skipped question</i></b>	<b>5</b>

*Responses:*

- \* I would assume compliance and delete the heavy-handed threats.
- \* It is simply too long.
- \* My changes are not substantive. I generally give this instruction but it is not as long as this one.
- \* I would shorten the instruction

\* I would not instruct them each time we take a break. That is overkill. This instruction is not more or less important than any other instruction. We have to assume that the jurors follow the instructions. I also do not ask the jurors whether they can abide by this instruction. Jurors must follow all instructions. Again this is no more or less important than any other instruction. I don't want to suggest implicitly that they can ignore other instructions by asking about this specific one. With these exceptions, the instructions I use are very similar to the instructions included in this survey.

<b>22. Do you have any additional views about juror misconduct not addressed in this survey?</b>	
	<b>Response Count</b>
	3
<i>answered question</i>	<b>3</b>
<i>skipped question</i>	<b>7</b>

*Responses:*

\* I have answered questions 5 and 6 only because the survey cannot be submitted without answering those questions. I have never experienced Internet-related juror misconduct in any of my trials, so I answer those questions based on what I know of the experience of some of my colleagues, not on my own experience.

\* See State v. Goupil, 154 N.H. 208 (2006).

\* Your questions are too black and white. For example, you ask if giving the instruction would prevent jurors from using the Internet. I said no because I believe that some jurors may use it anyway. I do, however, believe that the instruction will prevent most jurors from using the Internet.

APPENDIX 3: SAMPLE JURY INSTRUCTIONS<sup>145</sup>

**Introduction:** Serving on a jury is an important and serious responsibility. Part of that responsibility is to decide the facts of this case using only the evidence that the parties will present in this courtroom. As I will explain further in a moment, this means that I must ask you to do something that may seem strange to you: to not discuss this case or do any research on this case. I will also explain to you why this rule is necessary and what to do if you encounter any problems with it.

**Communications:** During this trial, do not contact anyone associated with this case. If a question arises, direct it to my attention or the attention of my staff. Also, do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. This includes, but is not limited to, discussing your experience as a juror on this case, the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony, exhibits, or any aspect of the case or your courtroom experience. “No discussion” extends to all forms of communication, whether in person, in writing, or through electronic devices or media such as: email, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, iPads, iPhones, iTouches, Google, Yahoo!, or any other Internet search engine or form of electronic communication for any purpose whatsoever, if it relates to this case.

After you retire to deliberate, you may begin to discuss the case with your fellow jurors and only your fellow jurors.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don't think that you are paying attention. I do it because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common, that which they just watched together. There are at least three reasons for this rule.

The first is to help you keep an open mind. When you talk about things, you start to make decisions about them, and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you will not have heard that until the very end of the trial. The second reason is that, by having conversations in groups of two or three during the trial, you will not remember to repeat all of your thoughts and observations to the rest of your fellow jurors when you deliberate at the end of the trial. The third, and most important, reason is that by discussing the case before deliberations you increase the likelihood that you will either be influenced by an outside third party or that you will reveal information about the case to a third party.

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145. This jury instruction was developed by Thaddeus Hoffmeister. See Hoffmeister, *supra* note 11, at 465–68.

If any person tries to talk to you about this case, tell that person you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to me or my staff.

**Research:** Do not perform any research or make any independent personal investigations into any facts, individuals, or locations connected with this case. Do not look up or consult any dictionaries or reference materials. Do not search the Internet, websites, or blogs. Do not use any of these or any other electronic tools or other sources to obtain information about any facts, individuals, or locations connected with this case. Do not communicate any private or special knowledge about any facts, individuals, or locations connected with this case to your fellow jurors. Do not read or listen to any news reports about this case. The law prohibits a juror from receiving evidence not properly admitted at trial. If you have a question or need additional information, contact me or my staff. I, along with the attorneys, will review every request. If the information requested is appropriate for you to receive, it will be released in court.

In our daily lives, we may be used to looking for information online and we may “Google” things as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. However, the moment you try to gather information about this case or the participants is the moment you contaminate the process and violate your oath as a juror. Looking for outside information is unfair because the parties do not have the opportunity to refute, explain, or correct what you discovered or relayed. The trial process works through each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. You must resist the temptation to seek outside information for our system of justice to work as it should. Once the trial ends and you are dismissed as jurors, you may research and discuss the case as much as you wish. You may also contact anyone associated with this case. [Questions by the judge to the jury: Are there any of you who cannot or will not abide by these rules concerning communication or research with others in any way during this trial? Are there any of you who do not understand these instructions?]

**Ramifications:** If you communicate with anyone about the case or do outside research during the trial, it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. Furthermore, you could be held in contempt of court and subject to punishment such as paying the costs associated with having a new trial. If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty to report it to me or my staff so that we can protect the integrity of this trial.

APPENDIX 4: PROPOSED JURY INSTRUCTIONS<sup>146</sup>**INTRODUCTORY INSTRUCTION**

**Introduction:** Serving on a jury is an important and serious responsibility. Part of that responsibility is to decide the facts of this case using only the evidence that the parties present in this courtroom. As I will explain further in a moment, this means that I must ask you to do something that may seem strange to you: to not discuss this case or do any research on this case.

**Communications:** During this trial, do not contact anyone associated with this case. Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, members of your family, or other jurors. This includes, but is not limited to, discussing your experience as a juror on this case, the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony, exhibits, or any other aspect of the case or your courtroom experience. “No discussion” extends to all forms of communication, whether in person, in writing, or through electronic devices or media such as: email, Facebook posts, Tweets, blog posts, instant messaging, or any other form of electronic communication for any purpose whatsoever, if it relates to this case.

After you retire to deliberate, you may begin to discuss the case with your fellow jurors and only your fellow jurors.

There are at least three reasons for this rule:

- The first is to help you keep an open mind. When you talk about things, you start to make decisions about them, and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you will not have heard that until the very end of the trial.
- The second reason is that, by having conversations in groups of two or three during the trial, you will not remember to repeat all of your thoughts and observations to the rest of your fellow jurors when you deliberate at the end of the trial.
- The third and most important reason is that by discussing the case before deliberations you increase the likelihood that you will either be influenced by an outside third party or that you will reveal information about the case to a third party.

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146. This jury instruction has been adapted from the instruction first developed by Hoffmeister. *See id.*

If any person tries to communicate with you about this case, tell that person you cannot discuss the case because you are a juror and report the incident to me or my staff.

**Research:** Do not perform any research or make any independent personal investigations into any facts, individuals, or locations connected with this case. Do not search the Internet, websites, or blogs or consult any reference materials. Do not communicate any private or special knowledge about any facts, individuals, or locations connected with this case to your fellow jurors. Do not read or listen to any news reports about this case. The law prohibits a juror from receiving evidence not properly admitted at trial.

In our daily lives, we may be used to looking for information online and we may “Google” things as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. However, the moment you try to gather information about this case or the participants is the moment you contaminate the process and violate your oath as a juror. The information you find on the Internet may be false or incomplete. Looking at it is unfair because the parties do not have the opportunity to refute, explain, or correct what you discovered. The trial process works through each side knowing exactly what evidence the jury considers and what law the jury applies to those facts. You must resist the temptation to seek outside information for our system of justice to work as it should. Once the trial ends and you are dismissed as jurors, you may research and discuss the case as much as you wish. You may also contact anyone associated with this case.

**Ramifications:** If you communicate with anyone about the case or do outside research during the trial it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty to report it to me or my staff so that we can protect the integrity of this trial.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don't think that you are paying attention. I do it because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common.

**BREAK INSTRUCTION**

Before we take a break I want to remind you of the instruction I gave you earlier. Do not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone approaches you and tries to talk to you about the case, do not tell your fellow jurors but tell me immediately. Do not communicate with anyone about this case. This means you may not post on Facebook or blogs, tweet, or communicate in any other way about your jury service. Do not send e-mails or text messages about the trial. Do not read or listen to any news reports of the trial. Do not research or look up information about anything related to this trial. Finally, remember to keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors. I ask this because each of these parties has a right to a fair trial. If you communicate or conduct research on the Internet, the trial will not be fair.

I expect you will inform me as soon as you become aware of another juror's violation of these instructions. If you violate these instructions, even accidentally, please inform me immediately.

**DELIBERATION INSTRUCTION**

During your deliberations, you must not communicate with or provide any information about this case to anyone by any means. Do not use any electronic device or media, such as a telephone, a cell phone, computer, the Internet, any blog or website, such as Facebook, MySpace, YouTube or Twitter, to communicate any information about this case to anyone until I accept your verdict.

As I have told you before, you may not do your own research because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the Internet or available through social media might be wrong, incomplete, or inaccurate.

You can only discuss the case in the jury room with your fellow jurors during deliberations. It is important that they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

I expect you will inform me as soon as you become aware of another juror's violation of these instructions. If you violate these instructions, even accidentally, please inform me immediately.

**DELIBERATION BREAK INSTRUCTION**

If you decide to leave for the day and resume tomorrow, you must not communicate with or provide any information to anyone by any means about this case. I would like to remind you again that you may not use any electronic device or media to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. This includes posting on Facebook, blogs, or websites and sending e-mails, chatting, or instant messaging. In other words, you cannot correspond with anyone, in person or electronically, about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations.

I expect you will inform me as soon as you become aware of another juror's violation of these instructions. If you violate these instructions, even accidentally, please inform me immediately.

Also, please leave your notes and instructions in the deliberation room.

**JURY INSTRUCTION HANDOUT**

**Research**

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial **you must not conduct any independent research** about this case. In other words, you should not:

- Consult dictionaries, encyclopedias, books, newspapers, or other reference materials
- Search the Internet, websites, blogs, or use any other electronic tools to obtain **any** information about this case or to help you decide the case. This includes but is not limited to:
  - Facebooking or Googling anyone involved in the case
  - Looking up definitions for words you don't know
  - Searching Wikipedia or other online reference sources for more information about facts presented to you in the courtroom
  - Looking at maps
  - Googling anything related to this case

Please do not try to find out information from any source outside the confines of this courtroom.

After you have returned a verdict and I have dismissed you from jury service, you may look up information about this case.

**Communication**

With Other Jurors: Until you retire to deliberate, you may not discuss this case with anyone, **even your fellow jurors**. After you deliberate, you may begin discussing the case with your fellow jurors in the deliberation room.

With Everyone Else: You cannot discuss the case with anyone else until you have returned a verdict and you are dismissed from jury duty.

Not communicating means:

- Do not talk in person or on the phone
- Do not send e-mail or text messages
- Do not communicate or post on the Internet. For example: Facebook, Twitter, Google+, YouTube, or other websites or blogs.
- Do not communicate using other forms of communication or social media not mentioned here

**I expect you will inform me as soon as you become aware of another juror's violation of these instructions. If you violate these instructions, even accidentally, please inform me immediately.**