



SOCIAL MEDIA JURY INSTRUCTIONS REPORT

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

DECEMBER 8, 2015

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Opinions expressed are those of the Section and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

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I. INTRODUCTION

Technology is so ubiquitous. For many people, it's their way of life. They tweet, they blog, they look up things online. It's literally in their pocket. It's their routine. You can't just tell people they can't do this and that. You have to tell them why and the consequences.¹

Social media has revolutionized how we communicate. It routinely serves as both a means of communication and a source of information for jurors and counsel. Its use must be anticipated and its impact addressed during jury selection, at trial, prior to and during jury deliberations, and after trial.² This report examines how jurors and attorneys use social media and its possible impact on jury trials and on our judicial system.

The use of social media by jurors and attorneys has been addressed in a 2014 Federal Judicial Center Report, entitled "*Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations*," A Report to the Judicial Conference Committee on Court Administration and Case Management (the "FJC Report"). In addition, in 2014-15, the Commercial and Federal Litigation Section (the "Section") of the New York State Bar Association surveyed its members concerning the use of social media at trial. Prior to developing its recommendations relating to social media jury admonitions, the Section analyzed the results of its survey and reviewed the analyses contained in the FJC Report, which sets out some of the measures used by federal judges to deal with the use of social media by jurors.

A. Jurors' Use of Social Media

During trial and deliberations, jurors have been found to have: (1) performed their own Internet research concerning the case; (2) communicated with parties, witnesses, experts and/or counsel using social media; (3) used emails, blogs, texts, tweets, and chat rooms, among other electronic media, to communicate their opinions and prejudices about the case on which they are sitting; (4) not followed jury instructions as evidenced by their social media communications; (5) intentionally or unwittingly failed to disclose "prejudicial" connections to parties, witnesses, counsel or others as evidenced by jurors' social media communications; and (6) otherwise engaged in misconduct through the use of social media technology. Such conduct, which is now often easily discoverable, may make its way to trial counsel who then may question the integrity

¹ Eric Robinson, Deputy Director of the Reynolds Center for Courts and Media, University of Nevada, Reno, *Juror's Research Led to Murder Mistrial*, STANDARDSPEAKER.COM (Jan. 17, 2011), <http://standardspeaker.com/news/juror-s-research-led-to-murder-mistrial-1.1091278>

² See *United States v. Fumo*, 655 F.3d 288, 305, 331 (3d Cir. 2011) (Nygaard, J., concurring) ("The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program."); *United States v. Juror No. One*, 866 F. Supp. 2d 442, 451 (E.D. Pa. 2011) ("the extensive use of social networking sites, such as Twitter and Facebook, have exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors.").

of jury verdicts.³ As such, the use of the Internet and social media by jurors has increasingly resulted in mistrials and jurors being held in contempt.

Given that jurors use electronic devices and social media in their daily lives, explicit rules concerning jurors' social media usage are required to ensure that social media is not misused during trial.⁴ Such rules are needed as it is just too easy and too convenient for even conscientious and careful jurors to misuse social media perhaps on the way to the courthouse, while waiting for the trial to begin, during breaks, and during deliberations. The risk that improper social media communications may occur can be reduced through frequent admonitions during *voir dire* and trial,⁵ and appropriate jury instructions using plain language.⁶

³ Even lawyers fail to observe court admonitions. Notwithstanding that there was a four-foot sign posted outside the courtroom warning that "photographing, recording or broadcasting is prohibited," an attorney from the spectator's gallery took pictures of evidence which he then tweeted, and may face possible sanctions for violating the ban on photography and cellphone use in the courtroom. *See* Debra Cassens Weiss, BigLaw Partner Faces Possible Sanction for Tweeting Photos During Trial, ABA JOURNAL (Nov. 10, 2015 7:49 AM). http://www.abajournal.com/news/article/biglaw_partner_faces_possible_sanction_for_tweeting_photos_during_trial/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

⁴ As courts have become increasingly aware – and wary – of jurors using social media and other Internet tools to communicate to or from the courthouse or do research into cases during trial or deliberations, several jurisdictions have adopted or proposed model jury instructions which explicitly tell jurors not to access information about cases on the Internet, or discuss the case on the Internet or social media.

Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 Reynolds Courts & L.J., 307, 310 (Sept., 2011). http://issuu.com/rnccm/docs/jury_instructions_for_the_modern_age.

⁵ Here, while the district court gave an appropriate instruction at the start of the jury's deliberations, it does not appear that it did so earlier. As demonstrated by this case, instructions at the beginning of deliberations may not be enough. We think it would be wise for trial judges to give the Committee's proposed instructions both at the start of trial and as deliberations begin, and to issue similar reminders throughout the trial before dismissing the jury each day. While situations like the one in this case will not always require a new trial, it is the better practice for trial judges to be proactive in warning jurors about the risks attending their use of social media.

United States v. Ganius, 755 F.3d 125, 133 (2d Cir. 2014), *reh'g granted en banc*, 791 F.3d 290 (June 29, 2015).

As explained below, the results show a small but significant number of jurors who were tempted to communicate about the case through social media. Almost all of these jurors ultimately decided not to do so because of the court's social-media instruction. Even jurors who were not tempted to communicate about the case through social media indicated that the court's instruction was effective in keeping their temptation at bay.

Hon. Amy J. St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, *More From The #Jury Box: The Latest On Juries And Social Media*, 12 Duke L. & Tech. Rev. 64, 78 (2014). <http://dltr.law.duke.edu/2014/02/24/the-jury-box/>.

⁶ United States Courts, *Revised Jury Instructions Hope to Deter Juror Use of Social Media During Trial* (Aug. 21, 2012)("[J]udges recommended that jurors frequently be reminded about the prohibition on social media before the trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate."). <http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial>.

It has been argued that advising jurors that attorneys or their agents may have investigated juror backgrounds and/or may monitor their “public” social media posts throughout the trial and deliberations may upset jurors or cause them to think that their privacy is being invaded, both of which, in turn, may discourage jury service. There is a fine line which needs to be considered in how to appropriately instruct jurors about the social cost to the efficacy of the jury system resulting from improper social media communications relating to a trial and jurors’ right to freely communicate in a manner that they do every day. We note in this regard that the American Bar Association Standing Committee on Ethics and Responsibility stated:

[J]udges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their [electronic social media] and websites.⁷

(emphasis added).

Some have also argued that instructing jurors that their social media communications may not be “public” may have the opposite of the desired effect of decreasing such communications and may actually increase the likelihood that certain jurors may instead make their previously “public” social communications “private,” and thus not easily discoverable, or cause jurors to potentially engage in “undetected” misconduct that they may not have otherwise considered.

Further research and data is needed in this relatively unexplored area before the Section takes a position on whether the above issues need to be specifically addressed with the jury, and, if so, what form such admonitions should take. However, the Section believes that these issues should at least be addressed with counsel at the beginning of the trial and prior to the jury being charged.

Putting aside issues relating to notifying jurors of potential attorney monitoring of their social media communications and the implications of communicating “publicly” as opposed to “privately” over social media, the Section believes that the increasing pervasive usage of social media by jurors requires affirmative and proactive intervention by reminding jurors not to engage in improper electronic communications. Without such proactive intervention, social media usage will threaten the integrity of the jury system.⁸

⁷ ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 466 (2014). <http://www.americanbar.org/content/dam/aba/publications/YourABA/fo466.authcheckdam.pdf>.

⁸ To tackle the rising tide of jury misconduct related to oversharing on the Web, a recently published report urged the judiciary to “hit social media on its head” by insisting on online silence during jury instructions. Roughly one in 12 jurors in Illinois surveyed about their attitudes regarding using social media tools like Twitter in the course of a trial were “tempted” to publicize their thoughts on the proceedings, according to the report by U.S. District Judge Amy St. Eve of the Northern District of Illinois.

Real risks are associated with juror misuse of social media during a trial. Relying on jurors to assume that a general jury instruction applies to all aspects of social media communications seems ineffective. Jurors should be provided with a detailed explanation of the dangers of using social media during the trial. Among the reasons for a ban on social media during the trial is the need to exclude information not properly admitted as evidence for the jury's consideration. Social media communications are external influences that can both consciously and unconsciously influence a juror's ability to evaluate the evidence in a particular case. If the significance of inappropriate social media communications is not sufficiently explained to jurors, admonitions and jury instructions – no matter how often a judge gives them – may not have their desired effect. Without personalizing the consequences⁹ of a juror's improper usage of social media too much by, for instance, affirmatively advising of the possibility of contempt or sanctions and thereby potentially discouraging jury service, jurors must be made aware in admonitions of the seriousness of such conduct and that denying parties their right to be tried based on admitted evidence creates the risk of a mistrial.

B. Use of Social Media by Attorneys to Investigate and Monitor Jurors

The issue of whether jurors should be made aware that attorneys may have investigated their backgrounds or may monitor their “public” use of social media during trial or deliberations needs to be continued to be reviewed.

It is well known that jurors often regard their social media communications as “private” even when they are “public,” as users may not understand the privacy setting of their social media services or that posts may be shared in ways that make their “private” posts “public,” and that such communications are increasingly becoming known to counsel, their agents and the court. Even in the absence of detailed juror research on the issue of whether such an instruction should be given as a matter of course, the Section believes that consideration should be given to apprising jurors, on a case-by-case basis, of the reality that many social media communications are “publicly” viewable.

Concomitantly, consideration also must be given whether to advise jurors that counsel may have researched them and that during trial and/or jury deliberations counsel may continue to view, monitor or “follow” juror “public” social media communications.¹⁰

Andrew Strickler, *Jurors Must Be Warned About Social Media Use, Study Says*, LAW360, (March 18, 2014, 6:42 PM). <http://www.law360.com/articles/519752/jurors-must-be-warned-about-social-media-use-study-says>.

⁹ See *supra* note 6, “A [Federal] Judicial Conference Committee has updated the model set of jury instructions federal judges use to deter jurors from using social media to research or communicate about cases on which they serve. The new guidelines provide detailed explanations of the consequences of social media use during a trial, along with recommendations for repeated reminders of the ban on social media usage.”

¹⁰ Ass'n of the Bar of the City of New York Comm. on Prof'l Ethics Formal Op. 2012-2 (2012)(“[i]t is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online - albeit public - social lives.”). <http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02>.

A social media site also may enable an account user to see who has viewed their social media profile or may automatically send a notification noting the viewer’s identity to the account holder.¹¹ While such notifications to jurors during trial and/or deliberations do not appear to be widespread, the Section believes that consideration should be given to advising jurors, on a case-by-case basis, of such potential to attempt to minimize the surprise a juror might feel if she learns that an attorney sitting nearby in the courtroom has reviewed her “public” social media posts.

Regardless of whether or to what extent a jury admonition or instruction is given to the jury concerning the potential for lawyers to review or monitor juror “public” social media, consistent with the judicial survey results reported in the FJC Report discussed below, the Section believes that, at a minimum, judges should consult with and address these issues with counsel prior to jury selection and determine whether or not any such instructions or admonitions are appropriate on a case-by-case basis concerning whether counsel will review and/or monitor “public” juror social media communications during jury selection, trial and/or deliberations, and, if so, discuss, for instance, such potential issues as: (i) what social media services will be reviewed; (ii) whether counsel or her reviewing agent is a member of each such social media service, and will they be logged in when such monitoring takes place; and (iii) whether, other than evidence of jury misconduct, the results of such monitoring will be shared with opposing counsel and/or the court during the various stages of the trial.

C. Section Recommendations

To reduce the potential impact of improper social media communications on jury trials, the Section recommends that courts, as discussed above, should: (1) consult with counsel prior to jury selection concerning the potential review and/or monitoring of “public” juror social media communications during jury selection, trial and/or deliberations; (2) consider the Section’s revised model New York’s Pattern Jury Instructions; and (3) consider displaying in the jury deliberation room a social media usage poster warning of the consequences of improper social media communications.

The objective of the Section’s proposed model admonitions to New York’s Pattern Jury Instructions is to better inform jurors about the dangers of discussing the trial on social media and to remove social media influences from deliberations.

Accordingly, the Section proposes that courts should consider amending their jury instructions to be more specific about the problems associated with the use of social media at trial. And without taking a position on whether such instructions must be given, the Section provides a proposed model instruction for consideration and use in the event that the court decides to advise jurors that: (i) their social media profiles, even though they might appear to be “private,” may actually be “publically” reviewable by others, or (ii) their “public” social media communications may have been or will be viewed and/or may be or will be monitored or

¹¹ LinkedIn is the primary social media platform that currently has this feature. If a viewer is logged in and her account is left to the LinkedIn default settings, the viewing of a LinkedIn profile may cause the person whose page has been viewed to receive a notification that her profile had been viewed by the viewer, who may be an attorney or an agent of the attorney.

“followed” by counsel during trial and afterwards.¹² We note that the Section’s proposed model language in this regard, if adopted, may be one of the first of its kind in the country. The bracketed language in the Section’s model instructions seeks to address the above.

The desired effect of the Section’s model language is in part to cause jurors to be as forthright as possible when answering questions during *voir dire* about personal or sensitive areas that counsel should be informed about that would otherwise be prejudicial to the trial, but which may have already been revealed to some degree in jurors’ extant “public” social media postings. More candid juror responses may also have the salutary effect of educating counsel whether certain jurors should not be chosen given their manner and usage of social media. In addition, such suggested admonitions would hopefully discourage jurors from engaging in inappropriate social media communications that might taint jury deliberations. The Section does appreciate, however, that such admonitions may provide some degree of pause for people wanting to avoid serving as a juror.

The suggested revisions would need to be tailored to the mores of the region of New York where the trial is being held and to the particular idiosyncrasies of the trial. The Section appreciates and acknowledges that judges are generally comfortable with the “tried and true” New York Pattern Jury Instructions which have been honed over the years by experienced judges, who then customize such jury instructions based on personal experience.

However, the Section believes that with the ubiquity of juror and attorney social media and mobile device usage and where the judiciary may not be as knowledgeable as counsel and jurors with respect to the use of social media and similar tools, such as blogging, standard jury instructions must deal with this reality. As such, the Section’s proposed revisions are suggested additions to the extant model Pattern Jury Instructions and should be used as a framework when crafting jury instructions in this new electronic era.

In addition to the suggested changes to the language of New York’s Pattern Jury Instructions, the Section recommends that a poster regarding social media usage be prominently displayed in jury deliberation rooms. The purpose of this poster is to further remind jurors of the potential risks – and ensuing consequences – of unauthorized social media use related to the trial.

The suggested changes to the standard jury instructions, along with the poster, would hopefully provide appropriate reminders to jurors while they are in the courtroom concerning the proper and improper use of social media.

The objective of the Section’s recommendations is to ensure the integrity of our jury system.

¹² See Colorado Bar Ass’n, Formal Ethics Op. 127 (2015)(“[e]ven if communication with a discharged juror is not otherwise prohibited, lawyers and those acting on their behalf must respect the desire of the juror not to talk with the lawyer and may not engage in improper conduct during any communications through social media.”). https://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_127.pdf.

II. A SYNOPSIS OF THE FEDERAL JUDICIAL CENTER'S REPORT: "JURORS' AND ATTORNEYS' USE OF SOCIAL MEDIA DURING VOIR DIRE, TRIALS, AND DELIBERATIONS"

The Federal Judicial Center issued a May 1, 2014 report entitled "*Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations*," A Report to the Judicial Conference Committee on Court Administration and Case Management (FJC Report).¹³

The FJC Report summarized its conclusions by stating that "detected social media use by jurors is infrequent and that most judges have taken steps to ensure jurors do not use social media in the courtroom."¹⁴

All active and senior federal district judges were sent a survey addressing the use of social media. Questions in the survey addressed judicial practices used to control juror social media usage, judicial views on the utility and extent of social media investigation of jurors during *voir dire*, and whether such investigations raised concerns or genuine difficulties. Four hundred and ninety-four federal district court judges responded to the survey.

A. Jurors' Use of Social Media During Trial

The FJC Report acknowledges that it is difficult for judges to police juror social media usage. The most common strategies that judges applied were preventive: explaining the reasons behind the ban on improper social media use in plain language, and incorporating directions on social media usage into jury instructions.

In total, 33 judges reported instances of detected social media usage by jurors during trial or deliberations, with the majority taking place during criminal trials. The detected prohibited uses of social media took several forms:¹⁵

- 6 judges reported that a juror divulged confidential information about the case;
- 5 judges reported a juror performing case-related research;
- 3 judges reported a juror sharing general jury service information;
- 3 judges reported that a juror communicated or attempted to communicate directly with case participants;

¹³ Megan Dunn, Federal Judicial Center. [http://www.fjc.gov/public/pdf.nsf/lookup/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf/\\$file/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf/$file/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf).

¹⁴ *Id.* at 3.

¹⁵ Surveyed judges could select more than one behavior in many questions, thus, the number of behaviors/incidents/issues identified exceeded number of respondents.

- 2 judges reported that a juror revealed aspects of the deliberation process;
- 1 judge reported a juror “friending” or an attempt to “friend” participants in the case; and
- 1 judge reported a juror texting.

Twenty-seven judges indicated how they had learned of the inappropriate use of social media by jurors: 12 reported that other jurors had alerted the court; 8 reported that attorneys had advised the court; 6 reported that the court was advised by court staff; 1 reported that the court was advised by a party; 1 observed the social media use through personal observation in court; and 3 learned of the behavior through post-trial motions.

The FJC Report indicated that, when a judge became aware of a juror’s use of social media in his or her courtroom, 70% of the judges cautioned the juror, but allowed him or her to remain on the jury, and 30% percent of the judges removed the juror.

The most common measures used by judges to prevent inappropriate social media usage were (in descending order):

- explain in plain language the reason behind the ban of social media (74%);
- instruct jurors at multiple points throughout the trial (70%);
- remind jurors at *voir dire* to refrain from using social media while serving as a juror (54%);
- use the Committee’s model jury instructions before trial (53%);
- use other jury instructions before trial (46%);
- use the Committee’s model jury instructions before deliberations (45%);
- use other jury instructions before deliberations (35%);
- confiscate phones and other electronic devices during deliberation (30%);
- confiscate phones and other electronic devices at the start of each day of trial (22%); and
- require jurors to sign a statement of compliance or written pledge agreeing to refrain from using social media while serving as a juror (2%).

In addition, some judges reported that they posted a notice in the jury assembly or deliberation room regarding the use of social media.

B. Judicial Knowledge of Attorneys' Use of Social Media During Trial

The FJC Report asked judges about whether and how attorneys used social media to investigate jurors during *voir dire*. Seventy-three percent of responding judges answered that they did not know how many of their trials during the relevant period involved attorneys performing social media investigations of jurors. Further, approximately 91% of the 329 responding judges indicated that they were unaware of what type(s) of juror social media that attorneys reviewed, if any. The remaining judges indicated that attorneys reviewed prospective jurors' Facebook pages (5%), LinkedIn profiles (2%), personal blogs/websites (2%), or ran prospective jurors' names through a search engine such as Google or Bing (5%).

Approximately 26% of judges surveyed forbade attorneys from using social media to investigate prospective jurors. Overall, judges who did not permit social media investigations cited both juror privacy concerns and logistical considerations. Specifically, 20% indicated they did not allow attorneys to research prospective jurors during *voir dire* in order to protect the jurors' privacy, 4% were worried about intimidating potential jurors, 17% thought such activity would be distracting, and 16% believed that this type of research would prolong *voir dire*. Moreover, one-third of the responding judges indicated that attorneys' use of social media to research jurors during *voir dire* was unnecessary because attorneys can conduct research before they arrive at court or because the information provided during *voir dire* is sufficient.

In addition to privacy and logistical issues, a small number of judges also noted that allowing attorneys to research potential jurors during *voir dire* may create an unfair advantage for one side, and that there is no way to evaluate the accuracy of the information gathered. In contrast to judges who forbade social media usage, of the judges who permitted social media research of potential jurors during *voir dire*: 62% did not require the attorneys to share results with the court or other attorneys; 2% reported that they required attorneys to share results with both the court and other attorneys; and one judge required that the results be shared only with the court. Over one-third of the responding judges, however, did not know whether such information was shared with other attorneys. Judges did not report many problems with attorneys using social media. When asked about attorneys' conduct during *voir dire*, 5% of the 64 responding judges indicated experience with an attorney who followed a prospective juror on Twitter. No judges reported attorneys "friending" or attempting to "friend" a prospective juror on Facebook or "subscribing" to a prospective juror's personal blog.

C. Notifying Jurors of Potential Social Media Investigations by Attorneys

The FJC Report also asked judges "whether they disclosed to the venire panel that attorneys may be looking at their social media accounts."¹⁶ Ninety-four percent reported that they do not disclose such information to potential jurors versus 2% who did make such disclosure. The FJC Report further stated that four judges "admitted that their focus is more on the use of social media by jurors and less on attorneys' actions concerning social media."¹⁷

¹⁶ FJC Report at 14.

¹⁷ *Id.* at 15.

III. ANALYSIS OF SURVEY OF COMMERCIAL AND FEDERAL LITIGATION SECTION MEMBERS CONCERNING SOCIAL MEDIA USAGE AS IT RELATES TO JURORS

The Section surveyed its members in 2015 concerning attorneys’ use of social media as it relates to jurors. The survey was sent electronically to members of the Section and provided to attendees of the Section’s 2015 Annual and Spring Meetings.

A limited group of 61 attorneys responded to the survey and, to the extent respondents’ cases went to a jury, approximately two-thirds were state court jury trials and approximately one-third was federal court jury trials.

Of those who indicated that their cases went to the jury, the following approximate percentages of respondents indicated “no” when asked whether admonitions concerning the use of social media by jurors were given by the court at the below stages of trial:

No admonition given during:	
jury selection or prior to the commencement of trial	37%
the course of the trial, but prior to the case being presented to the jury	42%
jury deliberations	50%

Over 85% of those respondents who indicated that their cases had gone to trial, stated “no” when asked if they were “aware that a member of the jury utilized social media during the course of the trial or during jury deliberations to discuss any aspect of the trial.” Of those few who reported the use of social media by a juror, one respondent responded that he or she found such communication by searching Facebook and the other two respondents indicated that such usage was reported to the court by fellow jurors and it concerned the use of Facebook and Twitter. In each case, the court was alerted to such usage and it was dealt with through a *voir dire* of the individual juror and then the jury panel. In addition, in the second case, it was further addressed by an admonition to the jury. In the third instance, the court was only first advised of such usage post-trial.

Over two-thirds of those who responded to the question indicated “no,” when asked whether counsel or his or her agent used social media to investigate jurors prior to their being empaneled or to monitor sitting jurors’ communications during trial or jury deliberations.

Further, almost all indicated “no” when then asked if their client had engaged in such monitoring of juror social media. When monitoring by an attorney’s agent took place, the amount of such monitoring was equally divided among paralegals, investigators and jury consultants. The most common social media platforms used to monitor jurors were Facebook and LinkedIn, followed by Twitter. Every respondent indicated “no” when asked whether any juror had become aware that counsel had monitored his or her social media account(s).

While the survey pool was not very large, certain general preliminary observations can be made from the above. First, courts do not appear to be sufficiently instructing jurors concerning their use of social media and, when admonitions are given to the jury, counsel believe that such admonitions are insufficient.

It is also apparent that trial counsel are not often monitoring jurors' "public" social media and, as recent authority noted herein is making clearer, there is a risk that jurors may improperly use social media during trial and deliberations, and thereby infect jury deliberations. Knowledge of such "public" social media communications could, among other things, affect how an attorney may conduct her trial and/or reveal juror misconduct that might lead to a mistrial. Given existing technology enabling counsel to anonymously monitor jurors' "public" social media, it may be prudent for counsel to consider the benefits, risks and costs of same and discuss juror monitoring with one's clients.

Last, the survey suggests that it may not be necessary to provide an instruction to jurors that trial counsel may be monitoring their "public" social media. In deciding whether to provide such an instruction, a court should consider the potential that a juror may become sufficiently upset upon learning of such monitoring (even though social media users, including jurors, always have the ability to make their posts "private") to discourage jury service or cause potentially improper "public" social media posts to be made "private" and thus not "non-monitorable."

IV. COMMENTARY TO PROPOSED REVISIONS TO NEW YORK'S PATTERN JURY INSTRUCTIONS

A. Proposed Amendments Addressing Technological Changes

There is an ever-growing universe of devices and services that prospective jurors may use on a daily basis to obtain information and communicate with others. Jury instructions must provide guidance concerning these devices and services. However, due to constant changes in technology and the changing popularity of certain devices or services, it would not be practical to address every device or service by name in jury instructions, and listing too many of them would make jury instructions too difficult to absorb. Nevertheless, specific examples should be provided to offer guidance to jurors as to what is impermissible. We address below the general categories of devices and services, referring to certain examples.

Generally, there are three areas of concern: (i) electronic devices, (ii) software or applications, and (iii) social media platforms, blogging and Internet use in general. Examples of electronic devices are computers, tablets (iPad, Surface), cell phones (iPhone, Galaxy, etc.) and wearable devices (Apple Watch). Some devices, like laptops and computers, may be easily seen when used. Others, however, are small enough to be inconspicuous to a judge or to the lawyers, and improving technology will make it even harder for judges or lawyers to notice such devices.

Each device contains an operating system which itself runs software known as applications or “apps” (for example, there are web browser applications, messaging and email applications, word processing software applications, and mapping applications). An application is a type of software designed to allow the user to perform specific tasks. Applications run services, including social media platforms, through which jurors may communicate. Most mobile devices also contain web browsers, from which websites may be accessed and also from which social media platforms can be accessed.

Examples of social media platforms or services are Facebook, Twitter, Google+, Instagram, LinkedIn, and Vine, located respectively at www.facebook.com, www.twitter.com, www.google.com/plus, www.instagram.com, www.linkedin.com and www.vine.co. These social media platforms, whether web-browser based or application-based, are more than mere tools for communication. They may be used to research witnesses and facts concerning a litigation. There are many other forms of Internet-based communication as well, such as blogs.

To adequately communicate the scope of what a prospective juror may or may not do and what is expected of them, it is necessary to instruct jurors using examples from the technology jurors are likely to use. For example, it may be difficult for some jurors to understand that a general instruction not to use the Internet or social media is also a specific instruction not to use common services and websites such as Google, Bing, Twitter, Facebook, YouTube, Snapchat, Wikipedia, Google Maps or MapQuest to perform “research” on a case.¹⁸

¹⁸ For instance, in *Quilez-Velar v. Ox Bodies, Inc.*, 2015 U.S. Dist. LEXIS 20817, *36 (D.P.R. Feb. 19, 2015), the court explicitly instructed jurors that:

To this end, we propose that jury instructions address generally the various types of devices and search engines, social media platforms and applications available without listing the names of all such devices or services.

Because jurors should not be engaging in communications that may invite others to communicate with them about jury duty, the court should consider advising the jury that, if a juror feels the need to communicate over social media for personal reasons, she should post a communication that simply says “I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it.”

Of course, a juror advising a family member over social media that she will be running late due to jury service is a permissible social media communication, and it would not be violation of a court instruction. Similarly, there is nothing improper with a juror tweeting that he is “proud to be discharging my duty by serving on a jury this week” or that jury duty is a “rewarding experience.” Admonitions should not prohibit such communications over social media.¹⁹

B. Proposed Amendments Explaining the Risks of Engaging in Improper Social Media Usage

The popularity of social media calls for more robust restrictions and clearer explanations to jurors of the risks inherent in engaging in improper social media communications during trial and deliberations. Jury instructions should be supplemented in order to clearly address these risks.

First, jury instructions should include detailed and specific explanations of the legal and practical reasons why jurors must not use social media to discuss or research any aspect of a trial. Jury instructions should explain that any discussion of the trial on social media constitutes premature deliberation which is prejudicial to the jury process.

Second, where possible, jury instructions should include examples of specific improper use of social media by jurors and how such actions may lead to a mistrial.²⁰ One possible

[d]uring your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

¹⁹ The State of Washington’s Pattern Jury Instruction, however, provides that a juror shall not “even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter.” Washington Pattern Jury Instructions 1.01 Advance Oral Instruction – Beginning of Proceedings.

²⁰ Martha Neil, *Juror is fined \$1K for Posting on Facebook and Causing Mistrial*, ABA JOURNAL (Nov. 4, 2015 4:30 PM) (noting “‘Dying from boredom’ while serving as a juror in a New York City robbery case in September, Kimberly Ellis couldn’t resist posting on her emotional state and details of the jury’s deliberations, the New York Daily News reports. The result was a mistrial in the Queens case, because no alternate juror was available to take her place. Held in contempt and fined \$1,000, Ellis was apologetic and regretful about her mistake. ‘I

example is where a juror conducted Internet research regarding the symptoms of ODD, a psychological disorder, one symptom of which was a propensity to lie, and which disorder allegedly affected a critical witness in a criminal prosecution. The juror shared this information with other jurors and, on review, the appeals court granted a mistrial. See Wardlaw v. State, 971 A.2d 331 (Md. 2009).

In another instance, concerning the sexual assault of a minor, the court discovered that a juror had done Internet research about the defendant's culture and religion and that the juror shared some of this research with the other jurors. In the court's view, even if only one juror reported the research, suggesting that the information did not affect the verdict of the other 11 jurors, the defendant was entitled to be tried by 12 impartial jurors and since the information related directly to a subject that pervaded the trial from start to finish, it was impossible to conclude that outside information used by at least 1 juror to interpret the witnesses' testimony and credibility could have had no impact on the jury verdict. See State v. Abdi, 45 A.3d 29 (Vt. 2012).

We suggest that courts should advise jurors that a single juror's Internet or social media research could improperly infect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings and/or potentially a mistrial. For these reasons, jurors should be advised of the importance to take care to heed to the court's admonitions.

Third, the jury instructions should specifically list the range of prohibited activity. Given the prevalence of social media in our lives and the numerous ways in which social media can now be accessed, there is a need to specifically mention multiple ways of engaging in improper social media communications. As a consequence, instructions should clarify that jurors must not, among other things, conduct any Internet research related to the trial, send "friend" requests to or otherwise connect with any trial participant, post messages, photos or videos online, or blog or tweet anything related to the trial. The Section believes that it would be helpful to specifically reference examples of seemingly innocuous acts which could lead to a possible mistrial, like looking up the dictionary definition of a term or expressing sympathy for the alleged crime victim in a case on a social media platform via an emoticon.²¹

continued my personal life as if I was not there to judge a trial,' she told the newspaper. 'It was my first time as a juror, and I was naive.' The forbidden postings came to light because a Facebook friend of Ellis, a former federal and state prosecutor, blew the whistle."

http://www.abajournal.com/news/article/juror_is_fined_1k_for_posting_on_facebook_and_causing_mistrial/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

²¹ When the embrace of social media is ubiquitous, it cannot be surprising that examples of jurors using platforms like Facebook and Twitter 'are legion. And because of the risks inherent in such activity, "vigilance on the part of trial judges is warranted." On this record, however, Defendants' claim must fail. Juror 2 was an attentive juror who, while engaging in banter with fellow Twitter users about her experience, was nonetheless careful never to discuss the substance of the case, as instructed by the Court. The record is devoid of any evidence that she was either dishonest or biased, or that Defendants were prejudiced by her tweets in any way.

United States v. Liu, 69 F. Supp. 3d 374, 386 (S.D.N.Y. 2014)(internal citations and quotations omitted).

Because juror misconduct has become more likely given the prevalence of social media and the corresponding ease with which it may be used, jury instructions need to include detailed and specific explanations of the reasons certain activities are prohibited, examples of violations drawn from existing case law, and the range of the activity prohibited.

C. Model Instructions Relating to Attorneys' Review of Juror "Public" Social Media

As noted above, although the Section believes that courts should give due consideration to them, the Section takes no position at this time as to whether instructions or admonitions regarding attorney research, "following" or monitoring of jurors' social media accounts and/or advising jurors that their social media communication may be "public" and reviewable by others, including trial counsel, should be given.

Nevertheless, in the event that a court, after consulting with counsel, determines that either or both of these instructions are warranted by the facts of the case or is otherwise appropriate, the Section provides suggested revisions to the Pattern Jury Instructions in order to provide judges with "model" language they can choose to use when instructing jurors in connection with these issues.

1. Advising Jurors That Their Social Media Communications May Not Be "Public"

The Section suggests that consideration be given to generally informing jurors, without going into the issue of the security settings in any particular social media platform, that their social media communications may be "publicly" viewable or that juror posts may be shared in ways that make "private" posts "public," even if it means that such admonition may increase the likelihood that certain jurors may make their previously "public" social communications "private," and thus not easily discoverable or "monitorable," or potentially cause them to engage in now "undetectable" misconduct they may not have otherwise considered.

As such, courts should consider an instruction that jurors be "advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case."

2. Monitoring Jurors' "Public" Social Media Communications

Case law is developing that shows that it is not only permissible for trial counsel to conduct Internet research on prospective jurors, but that it may even be expected. In Carino v. Muenzen, 2010 N.J. Super. Unpub. LEXIS 2154 (N.J. Super. Ct. App. Div. Aug. 30, 2010), an appellate court held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using the Internet to research potential jurors during *voir dire*. During jury selection in a medical malpractice case, plaintiff's counsel used a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff's attorney could not use his laptop during jury selection because he gave no notice of his intent to conduct Internet research during jury selection. Although the appellate court found that the trial court's ruling

was not prejudicial, the appellate court stated that “there was no suggestion that counsel’s use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of ‘fairness’ or maintaining ‘a level playing field.’ The ‘playing field’ was, in fact, already ‘level’ because Internet access was open to both counsel.”²² See Cannedy v. Adams, 706 F.3d 1148, 1164-66 (9th Cir. 2013) (grant of *habeas corpus* petition affirmed where a lawyer’s failure to locate and use an abuse victim’s recantation on her social networking account constituted ineffective assistance of counsel).

In Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010), a jury verdict was vacated where a juror had denied falsely any prior jury service. In holding that the juror had acted improperly, the court observed that a more thorough investigation of the juror’s background would have obviated the need to set aside the jury verdict and conduct a retrial. The trial court chided the attorney for failing to perform Internet research on the juror, and granted a new trial, observing that a party should use reasonable efforts to examine the litigation history of potential jurors.

Given the new realities of juror social media communication, the American Bar Association Standing Committee on Ethics and Responsibility in Formal Opinion 466 stated in April 2015²³ that:

judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their [electronic social media] and websites. If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers’ review of juror websites and [electronic social media], including on [electronic social media] networks where it is possible or likely that the jurors will be notified that their [electronic social media], is being viewed, the judge should formally instruct the lawyers in the case concerning the court’s expectations.

²² In Khoury v. Conagra Foods, Inc., 368 S.W.3d 189 (Mo. Ct. App. 2012), the court and counsel for both parties agreed to conduct a search on Case.net prior to *voir dire* to ascertain whether potential jurors might be disqualified based upon discrepancies between their responses during *voir dire* and Case.net’s report on the jurors’ history of litigation. However, the following day after the jury had been empaneled, defense counsel moved to strike one of the jurors based upon information that counsel had found on a juror’s Facebook page that allegedly indicated prejudicial bias and the failure to disclose that bias. The trial court granted a motion to strike the juror. The appellate court affirmed, noting that the trial court had not abused its discretion and commented further “Neither Johnson nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that any and all research - Internet based or otherwise - into a juror’s alleged material nondisclosure must be performed and brought to the attention of the trial court before the jury is empanelled or the complaining party waives the right to seek relief from the trial court. *While the day may come that technological advances may compel our Supreme Court to rethink the scope of required “reasonable investigation” into the background of jurors that may impact challenges to the veracity of responses given in voir dire before the jury is empanelled - that day has not arrived as of yet.*” *Id.* at 193, 202-03 (emphasis added). *See also Dubois v. Butler*, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005) (noting that “the widespread use of the Internet ha[s] sent the investigative technique of a call to directory assistance the way of the horse and buggy and the eight track stereo”).

²³ *See supra* note 7.

The Association of the Bar of the City of New York Committee on Professional Ethics in Formal Opinion 2012-2²⁴ further noted that:

Just as the Internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, **and clients now often expect that attorneys will conduct such research.**

* * * *

It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

(emphasis added).

However, lawyers should use caution when conducting jury research or monitoring to ensure that no communication occurs in any manner with the prospective or sitting juror. Association of the Bar of the City of New York Committee on Professional Ethics Formal Opinion 2012-2 makes clear that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice sent by a social media service (and not directly by counsel) may be considered a technical ethical violation of the ethical rule prohibiting contacting a juror.²⁵

In addition to trial counsel's ability to research jurors by performing search engine searches, and viewing individual jurors' "publicly" accessible Facebook or LinkedIn accounts,²⁶ counsel now can track and monitor social media in "real-time" originating from a certain designated geolocation or neighborhood, including around a courthouse. Relatively inexpensive software can permit counsel to identify and monitor all "public" tweets and other "public" social media posts made, for instance, within a two block radius of the courthouse, and cull them down to identify potentially improper social media communications made by jurors and then, through identifying metadata, "follow" the social media communications sent or received for instance, on such juror's way home from jury service concerning the trial.

²⁴ See *supra* note 10.

²⁵ Such inadvertent contact can occur by an attorney by merely clicking on the results of a Google search and viewing a juror's LinkedIn profile if the attorney is at the same time logged into his or her LinkedIn account utilizing normal security settings.

²⁶ For instance, during the trial of George Zimmerman for the death of Trayvon Martin, although one of the potential jurors questioned during *voir dire* stated that he had little knowledge of the Zimmerman case, that same juror posted on Facebook exclaiming, "I CAN tell you THIS. 'Justice' ... IS Coming." That individual was dismissed. See Elicia Dover, *Did Potential Zimmerman Juror Lie to Court?*, ABC NEWS BLOG (June 13, 2013, 10:09 AM). <http://gma.yahoo.com/blogs/abc-blogs/did-potential-zimmerman-juror-lie-court-034710693.html>.

To this end, the Section has included a “model” jury instruction and admonition addressing the above in the event that a court concludes that such an instruction is warranted.²⁷

3. Alerting the Court to Juror Misconduct Resulting from Social Media Communications

Motions for mistrials have been occurring with more frequency as jurors increasingly use social media during trial in ways that potentially adversely interfere with a party’s right to receive a fair trial. It is incumbent upon counsel to promptly alert the court to such possible juror misconduct.

The NYCLA Committee on Professional Ethics in addressing whether it is ethically proper for an attorney to review jurors’ social media communications, stated:

Any lawyer who learns of juror misconduct, such as substantial violations of the court’s instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court.²⁸

²⁷ Richard Vanderford, *LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial*, LAW360 (Sept. 27, 2013 8:10 PM)(“A first-year associate on Friday came close to derailing the high-profile Manhattan fraud trial over a Bank of America Corp. unit’s mortgage lending practices, after a juror complained that the attorney had cyberstalked him on LinkedIn. U.S. District Judge Jed S. Rakoff admonished defense attorneys after a juror sent him a note complaining ‘the defense was checking on me on social media.’”).
<http://www.law360.com/articles/476511/linkedin-search-nearly-upends-bofa-mortgage-fraud-trial>.

²⁸ Formal Op. 743 (2011). https://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf.

V. SUGGESTED REVISIONS TO NEW YORK'S PATTERN JURY INSTRUCTIONS

The Section does not seek to incorporate all of its suggestions into its proposed model New York Pattern Jury Instructions. Rather, respectfully, the Section first sparingly revised existing instructions and, only where it viewed it as necessary, did the Section make suggested revisions to the existing Pattern Jury Instructions to address some of the more important issues raised above. The Section suggests that courts consider all the issues raised in this report, and consider tailoring its instructions to address each of them. Below is the revised version of the existing Pattern Jury Instructions containing annotations, where applicable, to the sources of the revisions,²⁹ and the Section's revised version redlined to show changes to the existing Pattern Jury Instructions can be found at Appendix "A." The bracketed language in the Section's proposed model instructions seeks to address the issues of jurors' social media communications being "public" and the viewing and monitoring of such juror communications by attorneys.

PJI 1:10. Do Not Visit Scene

Since this case involves something that happened at a particular location, you may be tempted to visit the location yourself. Do not do so. Even if you happen to live near the location, avoid going to it or past it until the case is over. In addition, do not attempt to view the scene by conducting any Internet or social media research or using computer programs such as Google Earth. Viewing the scene either in person or through a computer program would be unfair to the parties, since the location as it looked today or at any time, including the time of the accident, and as it looks now may be very different. This case involves a location as it existed at the time of the accident, not as it exists today. Thus, you should rely on the evidence that is presented here in court to determine the circumstances and conditions under which the accident occurred. Also, in making a visit without the benefit of explanation, you might get a mistaken impression on matters not properly before you, leading to unfairness to the parties who need you to decide this case based solely upon the evidence that is relevant to this matter.

PJI 1:11. Discussion With Others - Independent Research

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

Do not discuss this case either among yourselves or with anyone else during the course of the trial. This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any

²⁹ See Thaddeus Hoffmeister, *Google, Gadgets, And Guilt: Juror Misconduct In The Digital Age*, 8 Univ. of Colorado. L. Rev. 411 (2013). http://lawreview.colorado.edu/wp-content/uploads/2013/11/8.-Hoffmeister-FINAL_s.pdf

information about this case or your experience as a juror.³⁰

Do not do any independent research on any topic you might hear about in the testimony or see in the exhibits, whether by consulting others, reading books or magazines or conducting an Internet search of any kind. All electronic devices including any cell phones, iPhones, Android-based devices, or other types of smartphones, iPads or other tablet devices, [update as appropriate] laptops or any other personal or wearable electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [*In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice*]

It is important to remember that you may not use any Internet services, such as Google, Bing, Facebook, LinkedIn, Instagram, YouTube, Snapchat [insert any new major social media examples], Twitter or use any other electronic applications or tools³¹ to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers, witnesses, experts or the judge. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means. For now, and as long as you are a juror in this case, be careful to remember these rules whenever you use a computer or other personal electronic device anywhere.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case having to be retried.

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.³² Accordingly, I expect that you will seriously and faithfully abide by these instructions.

³⁰ Judicial Council of California Civil Jury Instructions (2015), 100 Preliminary Admonitions.

³¹ Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management (June, 2012).

³² New Jersey Model Civil Jury Charges - Civil 2d 1.11C Preliminary Charge.

Jury Admonitions In Preliminary Instructions
(Revised May 5, 2009)

(Note: Statutory law requires that certain admonitions be given to the jury as part of the court's preliminary instructions. See CPL 270.40. This charge sets forth those admonitions and provides appropriate explanations.)

Our law requires jurors to follow certain instructions in order to help assure a just and fair trial. I will now give you those instructions.

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.
2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.
3. 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.
4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use the Internet, including maps, Google Earth, social media or any other program or device to search or research or look at the places involved, or at descriptions, pictures, videos or Internet maps related to the events, discussed in the testimony.³³
5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the Internet, online reports, social media, blog posts or podcasts³⁴ or any other media.
6. In recent years, because of the growth in electronic communications, an increasing number of cases have had to be retried, at great expense, because of juror misconduct in obtaining outside information from the Internet, blogs, e-mail, electronic messaging, social networking sites, and other sources. I need to be assured that each of you will do everything you can to prevent such an unfortunate outcome from happening in this case.³⁵ Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or electronic source. In this age of

³³ Arkansas Supreme Court Committee on Jury Instructions, AMI 101 Cautionary Instructions (iv).

³⁴ *Id.*

³⁵ Alaska Criminal Pattern Jury Instruction 1.02.

instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, instant messaging, email, Internet chat or chat rooms, photographs, videos, blogs, or social websites, such as Facebook, YouTube, Snapchat, LinkedIn, or Twitter or any online service.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the electronic or online posting of information about the case, or what you are doing in the case, on any device, or Internet site, including blogs, chat rooms, social websites or any other means.

If you feel a need to post on social media for personal reasons that you are on jury duty simply say “I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it.” You do not want to do anything that will invite others to communicate with you about your jury duty.³⁶

You must also not use search engines like³⁷ Google, Bing or sites such as Wikipedia³⁸ or otherwise search electronically, digitally or online for any information about the case, or the law which applies to the case, or the people involved in the case, including any party, the witnesses, the lawyers, the experts or the judge. You must not try to find the definition of any word or phrase or concept by looking it up in any book, dictionary, encyclopedia, or on the Internet, or through social media or any other source. It would be highly improper for you to do so.³⁹

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse among themselves about the case until the Court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony either in person or via the Internet or over social media or virtually using, for instance, Internet mapping tools. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Our law does not permit jurors to communicate with anyone about the case, or to permit anyone to communicate with jurors about the case, because only jurors are authorized to render a

³⁶ Washington Pattern Jury Instructions 1.01 Advance Oral Instruction – Beginning of Proceedings.

³⁷ Alaska Criminal Pattern Jury Instruction 1.02.

³⁸ Arkansas Supreme Court Committee on Jury Instructions, AMI 101 Cautionary Instructions (iv).

³⁹ Alabama Pattern Jury Instructions 2d. 1.22 Jurors Must Not Refer to Outside Materials.

verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.

Just as the Internet has affected many aspects of life, it has brought changes to the jury process.

[Be advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case.]

[The attorneys involved in this case, or people working with them on this case may conduct research on or monitor you. Specifically, attorneys may look at a juror's public website, public social media posts or blogs that you may maintain, or a social media profile of yours that is publicly accessible. Such monitoring of public social media communications about you may have occurred during jury selection and during the course of this trial, and also may occur during deliberations, and after the trial has ended.

There is nothing at all improper about attorneys researching or monitoring jurors or potential jurors in connection with a case.]

As I mentioned, nobody involved in this case may communicate with you for any reason in any manner during the course of this trial, including during the time you are deliberating. However, some Internet or social media services may automatically notify you if a person has looked at your social media, and such notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Just as no one should be communicating orally, in writing or electronically with you about this case other than me or court personnel, you should not communicate orally, in writing or electronically with anyone other than me or court personnel about the case.

Some of you may use social media and the Internet to share many aspects of your lives. While you are a juror, do not share, publicly or privately, any information, facts or your thoughts about this case. [This prohibition applies regardless of how restrictively you set your privacy settings for your social media.]

I also expect you will inform me as soon as you become aware of another juror's violation of these instruction.⁴⁰ Let me know if there are any questions regarding these instructions.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and, our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

⁴⁰

See supra note 31.

JURY SEPARATION DURING DELIBERATIONS
(Revised December 17, 2009)

Members of the jury, today's court session is drawing to a close and I am about to excuse you for the day. You must return [*specify time and place for jurors to reassemble*].

The law requires that, before I excuse you, I review with you the rules that you must follow over the course of this recess. These rules are designed to guarantee the parties a fair trial, and are generally the same ones you were required to follow prior to deliberations. But the law requires that I restate them at this stage in order to emphasize their importance.

The reason for the emphasis is that you are in a critical stage. You are in the process of deliberations and you are not being sequestered. That means you are not being kept together overnight where we can have greater assurance that you are following the rules.

You are being permitted to go home after deliberations have begun. There may now be a greater temptation, for example, to discuss the case with someone else, or to go to the scene. You must resist that temptation. To discuss the case with someone else, or to visit the scene, would not only violate my order, but would also violate the oath you took to follow the rules.

The rules are as follows:

1. Deliberations must be conducted only in the jury room when all jurors are present. Therefore, all deliberations must now cease and must not be resumed until all of you have returned and are together again in the jury room.
2. During the recess, do not converse, either among yourselves or with anyone else, about anything related to the case.
3. You remain under obligation not to request, accept, agree to accept, or discuss with any person the receiving or accepting of any payment or benefit in return for supplying any information concerning the trial.
4. You must promptly report directly to me any incident within your knowledge involving an attempt by any person to communicate with you in writing, orally or electronically or improperly to influence you or any member of the jury.
5. You must not visit or view the premises or place in person or electronically where the charged crime was allegedly committed, or any other premises or place involved in the case.
6. You must not read, view or listen to any accounts or discussions of the case reported in or on newspapers, television, radio, the Internet, social media or any other media.
7. You must not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or by using the Internet, social media or by any other means or source.

Again, in this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, chat rooms, photograph, video, blog, or through social media websites, such as Facebook, YouTube, Snapchat, LinkedIn, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case other than being a juror, on any device, or Internet site, including blogs, chat rooms, social websites or in any other way.

You must also not use Google or Bing or search online or otherwise for any information about the case, or the law which applies to the case, or the people involved in the case, including any party, the witnesses, the lawyers, experts or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media, outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.⁴¹

⁴¹ New Jersey Model Civil Jury Charges - Civil 2d 1.11C Preliminary Charge.

Further, be advised that a single juror's Internet or social media search or research could improperly affect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings, and/or potentially a mistrial.

Our law requires that you not read or listen to any news accounts of the case, even in electronic or digital form, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

Finally, no one [including the attorneys involved in this case] may communicate with you in any manner for any reason during the course of this trial, including during the time you are deliberating concerning the case. Some Internet or social media services may automatically notify you if a person has looked at your information, and the notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if any anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Violation of these instructions could cause a mistrial, meaning all of our efforts over the course of the trial would have been wasted and we would have to start all over again with a new trial before a new jury.⁴²

Again, I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise to me, I know you will do so.

⁴² Jury Instructions from U.S.D.J. Christine M. Arguello (D. Colo.).

VI. DISPLAY OF A MODERN SOCIAL MEDIA USAGE POSTER IN JURY ROOMS

We have reviewed three posters used by courts to advise jurors of the risks of using social media during trial: the Washington State Pattern Jury Instructions Committee Poster, which is also the United States Federal Court poster;⁴³ (the “Washington/Federal Poster”); the National Center for the State Courts (the “NCSC”) poster (the “NCSC Poster”); and the Western Australia poster (the “Australian poster”).

The Washington/Federal Poster is being used in state courts in Washington, Massachusetts, Minnesota and California as well as in the Federal Courts. Our understanding is that in states using that poster that it has found general adoption and is posted in many courthouses across each state. The NCSC sent its poster free copies to interested courts. These states have requested copies of such posters: Connecticut, Colorado, Kansas, Maryland, Minnesota, New Jersey, and Pennsylvania. Overall, NCSC has distributed approximately 3,500 copies of the poster. There is also a version of the NCSC poster in Spanish. The adoption of the NCSC poster and increasing incidents of juror misconduct resulting from the improper use of social media in New York demonstrate the need for a direct message to be sent to jurors in the jury deliberation room.

The Section suggests the adoption of a poster that we believe will significantly improve upon the existing posters. It focused on graphic design and images predominating over words as the current posters are not easily readable. Graphic images are well received by today’s typical Internet user and follow the trend of ever more visual communication on the Internet. Displaying an ever-present poster is arguably more memorable than oral admonitions and instructions and a graphic poster would ameliorate some problems associated with language limitations. Thus, the Section, with the assistance of the graphic designers of the New York State Bar Association (“NYSBA”), designed the attached social media juror poster which the Section believes appropriately addresses the issues raised above. See Appendix at “B.”

While the specific language used seeks to succinctly address the issues raised in this report, the Section appreciates that alternative language might accomplish the desired goals and that judges may differ on the specific wording used. The Section believes that the NYSBA’s header on the poster, however, should be downplayed somewhat, as it makes the poster appear as if it is coming from the NYSBA and not from the court system, and thereby potentially lessening its effectiveness.

⁴³ *See supra* note 6. Federal trial judges have been “provided with a poster stressing the importance of jurors making decisions based on information presented only in the courtroom. The poster is designed to be displayed in the jury deliberation room or other areas where jurors congregate. . . . ‘The Committee believes that the more frequently jurors are reminded of the prohibition on social media, whether the reminders are visually or orally given, the more likely they are to refrain from social media use during trial and deliberations,’ said Judge Julie A. Robinson, Chairperson, Conference Committee on Court Administration and Case Management.” <http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial>.

APPENDIX A

Redlined Proposed Revisions to New York's Pattern Jury Instructions

V. SUGGESTED REVISIONS TO NEW YORK'S PATTERN JURY INSTRUCTIONS

The Section does not seek to incorporate all of its suggestions into its proposed model New York Pattern Jury Instructions. Rather, respectfully, the Section first sparingly revised existing instructions and, only where it viewed it as necessary, did the Section make suggested revisions to the existing Pattern Jury Instructions to address some of the more important issues raised above. The Section suggests that courts consider all the issues raised in this report, and consider tailoring its instructions to address each of them. Below is the revised version of the existing Pattern Jury Instructions containing annotations, where applicable, to the sources of the revisions, and the Section's revised version redlined to show changes to the existing Pattern Jury Instructions can be found at Appendix "A." The bracketed language in the Section's proposed model instructions seeks to address the issues of jurors' social media communications being "public" and the viewing and monitoring of such juror communications by attorneys.

PJI 1:10. Do Not Visit Scene

Since this case involves something that happened at a particular location, you may be tempted to visit the location yourself. **Please** Do not do so. Even if you happen to live near the location, **please** avoid going to it or past it until the case is over. In addition, **please** do not attempt to view the scene by conducting any Internet or social media research or using computer programs such as Google Earth. Viewing the scene either in person or through a computer program would be unfair to the parties, since the location as it looked today or at any time, including at the time of the accident, and as it looks now may be very different. This case involves a location as it existed at the time of the accident, not as it exists today. Thus, you should rely on the evidence that is presented here in court to determine the circumstances and conditions under which the accident occurred. Also, in making a visit without the benefit of explanation, you might get a mistaken impression on matters not properly before you, leading to unfairness to the parties who need you to decide this case based solely upon the evidence that is relevant to this matter.

PJI 1:11. Discussion With Others - Independent Research

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

Please Do not discuss this case either among yourselves or with anyone else during the course of the trial. This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror.

Do not do any independent research on any topic you might hear about in the testimony

or see in the exhibits, whether by consulting others, reading books or magazines or conducting an Internet search of any kind. All electronic devices including any cell phones, ~~Blackberries, iPhones, iPads or other tablet devices,~~ [update as appropriate] laptops or any other personal or wearable electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. *[In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice]*

It is important to remember that you may not use any Internet services, such as Google, Bing, Facebook, LinkedIn, Instagram, YouTube, Snapchat [insert any new major social media examples], Twitter or ~~any others~~ use any other electronic applications or tools to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers, witnesses, experts or the ~~court~~ judge. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.

For now and as long as you are a juror in this case, be careful to remember these rules whenever you use a computer or other personal electronic device ~~during the time you are serving as a juror but you are not in the courtroom~~ anywhere.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this ~~case's~~ case having to be retried.

~~Accordingly, I expect that you will seriously and faithfully abide by this instruction.~~

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case. Accordingly, I expect that you will seriously and faithfully abide by these instructions.

Jury Admonitions In Preliminary Instructions
(Revised May 5, 2009)

(Note: Statutory law requires that certain admonitions be given to the jury as part of the ~~court's~~court's preliminary instructions. See CPL 270.40. This charge sets forth those admonitions and provides appropriate explanations.)

Our law requires jurors to follow certain instructions in order to help assure a just and fair trial. I will now give you those instructions.

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.
2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.
3. 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.
4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use ~~internet~~the Internet, including maps ~~or~~, Google Earth, social media or any other program or device to search ~~for and view any location~~or research or look at the places involved, or at descriptions, pictures, videos or Internet maps related to the events, discussed in the testimony.
5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the ~~i~~Internet, online reports, social media, blog posts or podcasts or any other media.
6. In recent years, because of the growth in electronic communications, an increasing number of cases have had to be retried, at great expense, because of juror misconduct in obtaining outside information from the Internet, blogs, e-mail, electronic messaging, social networking sites, and other sources. I need to be assured that each of you will do everything you can to prevent such an unfortunate outcome from happening in this case. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or electronic source. In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, instant messaging, email, ~~i~~Internet chat or chat rooms, photographs, videos, blogs, or social websites, such as Facebook, ~~MySpace,~~ YouTube, Snapchat, LinkedIn, or Twitter or any online service.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the electronic or online posting of information about the case, or what you are doing in the case, on any device, or Internet site, including blogs, chat rooms, social websites or any other means.

If you feel a need to post on social media for personal reasons that you are on jury duty simply say “I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it.” You do not want to do anything that will invite others to communicate with you about your jury duty.

You must also not use search engines like Google, Bing or sites such as Wikipedia or otherwise search electronically, digitally or online for any information about the case, or the law which applies to the case, or the people involved in the case, including ~~the defendant~~ any party, the witnesses, the lawyers, the experts or the judge. You must not try to find the definition of any word or phrase or concept by looking it up in any book, dictionary, encyclopedia, or on the Internet, or through social media or any other source. It would be highly improper for you to do so.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse ~~with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair—no one else has been so qualified.~~

~~also does not permit jurors to converse~~ among themselves about the case until the Court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony: either in person or via the Internet or over social media or virtually using, for instance, Internet mapping tools. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

~~nally,~~ Our law ~~requires that you does~~ not ~~read or listen~~ permit jurors to any news accounts of communicate with anyone about the case, or to permit anyone to communicate with jurors about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified. ~~and~~

Just as the Internet has affected many aspects of life, it has brought changes to the jury process.

[Be advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case.]

[The attorneys involved in this case, or people working with them on this case may conduct research on or monitor you. Specifically, attorneys may look at a juror's public website, public social media posts or blogs that you may maintain, or a social media profile of yours that is publicly accessible. Such monitoring of public social media communications about you may have occurred during jury selection and during the course of this trial, and also may occur during deliberations, and after the trial has ended.]

There is nothing at all improper about attorneys researching or monitoring jurors or potential jurors in connection with a case.]

As I mentioned, nobody involved in this case may communicate with you for any reason in any manner during the course of this trial, including during the time you are deliberating. However, some Internet or social media services may automatically notify you if a person has looked at your social media, and such notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to ~~research any fact, issue, or~~ communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Just as no one should be communicating orally, in writing or electronically with you about this case other than me or court personnel, you should not communicate orally, in writing or electronically with anyone other than me or court personnel about the case.

Some of you may use social media and the Internet to share many aspects of your lives. While you are a juror, do not share, publicly or privately, any information, facts or your thoughts about this case. [This prohibition applies regardless of how restrictively you set your privacy settings for your social media.]

I also expect you will inform me as soon as you become aware of another juror's violation of these instructions. Let me know if there are any questions regarding these instructions.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case.~~related to the case.~~ Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and, our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

JURY SEPARATION DURING DELIBERATIONS (Revised December 17, 2009)

Members of the jury, ~~today's~~today's court session is drawing to a close and I am about to excuse you for the day. You must return [*specify time and place for jurors to reassemble*].

The law requires that, before I excuse you, I review with you the rules that you must follow over the course of this recess. These rules are designed to guarantee the parties a fair trial, and are generally the same ones you were required to follow prior to deliberations. But the law requires that I restate them at this stage in order to emphasize their importance.

The reason for the emphasis is that you are in a critical stage. You are in the process of deliberations and you are not being sequestered. That means you are not being kept together overnight where we can have greater assurance that you are following the rules.

You are being permitted to go home after deliberations have begun. There may now be a greater temptation, for example, to discuss the case with someone else, or to go to the scene. You must resist that temptation. To discuss the case with someone else, or to visit the scene, would not only violate my order, but would also violate the oath you took to follow the rules.

The rules are as follows:

1. Deliberations must be conducted only in the jury room when all jurors are present. Therefore, all deliberations must now cease and must not be resumed until all of you have returned and are together again in the jury room.
2. During the recess, do not converse, either among yourselves or with anyone else, about anything related to the case.
3. You remain under obligation not to request, accept, agree to accept, or discuss with any person the receiving or accepting of any payment or benefit in return for supplying any information concerning the trial.
4. You must promptly report directly to me any incident within your knowledge involving an attempt by any person to communicate with you in writing, orally or electronically or improperly to influence you or any member of the jury.
5. You must not visit or view the premises or place in person or electronically where the charged crime was allegedly committed, or any other premises or place involved in the case.
6. You must not read, view or listen to any accounts or discussions of the case reported ~~by~~in or on newspapers, television, radio, the Internet, social media or any other media.
7. You must not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or ~~on~~by using the Internet, social media or by any other means or source.

Again, in this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, ~~internet chat or~~ chat rooms, ~~blogs, or~~ photograph, video, blog, or through social media websites, such as Facebook, ~~myspace~~ YouTube, Snapchat, LinkedIn, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case other than being a juror, on any device, or Internet site, including blogs, chat rooms, social websites or in any other ~~means~~ way.

You must also not use Google or Bing or search online or otherwise ~~search~~ for any information about the case, or the law which applies to the case, or the people involved in the case, including ~~the defendant~~ any party, the witnesses, the lawyers, experts or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

~~nally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case.~~ Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media, outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.

Further, please be advised that a single juror's Internet or social media search or research could improperly affect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings, and/or potentially a mistrial.

Our law requires that you not read or listen to any news accounts of the case, even in electronic or digital form, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

Finally, no one [including the attorneys involved in this case] may communicate with you in any manner for any reason during the course of this trial, including during the time you are deliberating concerning the case. Some Internet or social media services may automatically notify you if a person has looked at your information, and the notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if any anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Violation of these instructions could cause a mistrial, meaning all of our efforts over the course of the trial would have been wasted and we would have to start all over again with a new trial before a new jury.

Again, I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise to me, I know you will do so.

APPENDIX B

Proposed Social Media Usage Poster

Jurors **MUST NOT** use the Internet or Social Media relating to this trial.

USE OF THE INTERNET OR SOCIAL MEDIA BY JURORS IS
UNFAIR TO THE PARTIES AND CAN HURT FELLOW JURORS.

- ▶ **Don't research** the parties, witnesses, attorneys, judge or any case issues.
- ▶ If you would not say it in front of the judge, **don't share it or post it.**
- ▶ **Tell the judge or court personnel** if these, or any, rules are violated so they may address it.



**SOCIAL MEDIA USE VIOLATIONS MAY RESULT IN SERIOUS
PENALTIES FOR JURORS AND A LOSS OF JUROR PRIVACY.**

ENSURE THE PARTIES RECEIVE A FAIR TRIAL!

This Poster is Provided by The Commercial and Federal Litigation
Section of the New York State Bar Association

