Worlds Collide:
The Digital Native Enters the Jury Box

By Judge Dennis M. Sweeney (Ret.)[1]

Using my experience of handling two high-profile cases twenty years apart, this article looks at how the role of the judge has changed in managing jury trials, especially ones with intense public interest, since the advent of the Internet, new media, social media, and the virtually universal availability of portable electronic devices that allow instant communications and access to amazing amounts of information of varying quality at the click of a mouse or the touch of a smartphone or tablet.

Today, trial judges, even those who have ignored or resisted the technology and would never visit a social media website, must grapple with how this new world affects the judge's role in presiding over a trial, based on constitutional standards of due process and fairness. The many aspects of the problem have begun only recently to be dealt with by scholars[2] as well as by court administrators.[3] This article presents some suggestions about how the trial judge can manage a trial and its participants – particularly "the digital native" juror – without compromising a fair trial by jury for the litigants. It also discusses some of the related issues that judges, lawyers and the media will encounter in this new era.

The Basu Case[4]

When I was a new trial judge in 1992, I was assigned to try a case that received national attention. On September 8, 1992, Pamela Basu, a research chemist, was taking her 22-month-old daughter, Sarina, to her first day of nursery school. After putting Sarina into the car seat in her BMW automobile, Mrs. Basu drove a block from her suburban Maryland

1. Judge Sweeney would like to thank Blake F. Quackenbush, a student at the University of Nevada, Las Vegas' Boyd School of Law, who assisted in the preparation of this article.

2. *See, e.g.*, Caren Myers Morrison, *Jury 2.0*, 62 Hastings L.J. (forthcoming 2011), *available at* http://ssrn.com/abstract=1669637; and Thaddeus Hoffmeister, *Jurors in the Digital Age*, 59 Drake L. Rev. (forthcoming 2011), *available at* http://ssrn.com/abstract=1668973.

3. Conf. of Ct. Public Info. Officers (CCIPO), New Media and the Courts: The Current Status and a Look at the Future. (presented at CCPIO 19th Annual Meeting, 2010), *available at* http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf.

4. Ordinarily, cases are known by the name of the defendants, but perhaps because of the horrific death of the victim, Pamela Basu, the cases involving her death are commonly referred to by her name. The official case captions were State v. Miller, Crim. No. 13K92027164. (Md. Cir. Ct., Howard County 1993); and State v. Solomon, Crim. No. K-93-1340 (Md. Cir. Ct., Baltimore County 1993).

home and stopped at a stop sign. At that point, two men who had run out of gas at a nearby rest stop on Interstate 95 approached Mrs. Basu's car, pulled her from the car and beat her, then jumped into the car and began to drive off.

Tragically, as the car sped off, Mrs. Basu – who was still entangled in the seat belt – lost her balance while reaching for her child. She was dragged along the road for over a mile until, in an apparent attempt by the driver to dislodge her from the car along a farm fence, her body became wrapped in the barb wire fencing, detached from the car and came to rest on the road. Shortly thereafter, the driver stopped the car and tossed the car seat, with the child still in it, to the side of the road. The car then sped off. But later that day, the police stopped the car along a country road and arrested the two occupants, who attempted to flee on foot. The suspects – Rodney Eugene Solomon, 26, and Bernard Eric Miller, 16 – were indicted for murder, kidnapping and other crimes.

Given the brazen and gruesome nature of the crime, and the timing at the start of the school year, there was extensive news coverage of Mrs. Basu's death, both in Maryland and around the nation.[5] Later that month, President George H.W. Bush – who was running for re-election – referred to the tragedy in a speech in St. Louis, saying: "[w]e cannot put up with this type of animal behavior. These people have no place in decent society...and they can rot in jail for crimes like that."[6] Within a few weeks, the crime became the impetus for the enactment by Congress of a new Federal car-jacking law.[7] The new law went into effect by the end of October,[8] less than two months after Ms. Basu's death.

As the trial judge assigned to the case of the first defendant to be tried,[9] I became aware of the difficulty of trying such a high-profile case with intense media coverage, and prepared accordingly. Before trial, jurors were extensively questioned about the news reports they had been exposed to in newspapers and on television and radio. Despite the extensive publicity both locally and nationally, very few prospective jurors claimed that they could not be fair and impartial jurors if selected. Jurors were selected, and were cautioned in very simple form as follows:

> There may be news coverage of this case. For that reason, do not watch or listen to any television or radio news broadcasts. Do not read anything from any source about this case, about crime in general or about criminal sentencing. If anything occurs contrary to these instructions, please write me a note, as soon as possible, and do not discuss it with anyone else.[10]

5. *See, e.g., Auto Hijackings Shake Washington*, N.Y. Times, Sept. 13, 1992, http://www.nytimes.com/1992/09/14/us/auto-hijackings-shake-washington.html; and Ted Gup, *A Savage Story*, Time, Sept. 21, 1992, http://www.time.com/time/magazine/article/0,9171,976504-1,00.html.
6. Remarks by President George Bush, St. Louis, Missouri, Fed. Info. Sys., Fed. News Serv., Sept. 28, 1992, *available at* Lexis Nexis Library, Fed. News File; *see also* Gwen Ifill, *The 1992 Campaign: The Republicans; Bush Cites Arkansas Crime in Attack on Clinton Record*, N.Y. Times, Sept. 29, 1992.
7. Anti-Car Theft Act of 1992, Pub. L. 102–519, 106 Stat. 3384 (1992), *codified at* 18 U.S.C. § 2119 (1992).
8. *See* Susan Gerling, *Louisiana's New "Kill The Carjacker" Statute: Self-Defense or Instant Injustice?*, 55 Wash. U. J. Urb. & Contemp. L. 109, 113-14 (1999), http://law.wustl.edu/journal/55/109.pdf (describing the history of the federal law and the role the death of Mrs. Basu played in its enactment). *See also* Rachel Brand, *Making It a Federal Case: An Inside View of the Pressures to Federalize Crime*, 30 Legal Memorandum (Heritage Found.) 1 (2008).
9. Miller was the defendant in the first trial, while Solomon was the defendant in the second trial. Both were eventually convicted of first degree murder and received life sentences. *See* Solomon v. State, 101 Md. App. 331, 646 A.2d 1064 (Md. Ct. Spec. App. 1994) (affirming conviction of second defendant), *cert. denied*, 337 Md. 90, 651 A.2d 855 (1995).
10. Md. Crim. Pattern Jury Inst. 1:02 (1993), *in* Rosalyn B Bell, Maryland Civil Jury Instructions And Commentary (1993).

At the end of the trial days, I told the jurors not to discuss the case with anyone or to let anyone discuss the case in their presence, including friends, relatives, spectators and reporters.[11]

No issues of juror violations of my instructions arose during the course of the trial, and there was no indication that the jurors did not follow my instructions. In informal discussions with the jurors after the trial, I was convinced that the jurors had religiously followed my instructions not to discuss the issues in the trial or engage in any outside research.

This was despite extensive coverage of the trial by both local and national media. Forty-three press representatives received press credentials to cover the trial, all of which were what we now call "legacy media": *i.e.*, newspapers, television or radio stations, or networks.[12] The reporters and journalists covering the trial were mostly veteran court reporters and were careful to adhere to restrictions that were either stated (no photos of the jurors coming into or leaving the courthouse) or implied (juror's names not to be published during the trial).

The Dixon Case

Almost two decades later, I presided over another high-profile case which also received intense public interest. By comparison, the complications in this trial due to the advent of the Internet and social media – and the habits of a new type of juror – made the trial and resolution of the charges a daunting challenge that at one point threatened to derail the case.

In January 2009, Baltimore City Mayor Shelia Dixon was indicted on political corruption charges by Maryland's State Prosecutor.[13] In one case, she was charged with using gift cards donated by local businesses to the City of Baltimore for Christmas presents for poor children for her own benefit.[14] In another case, Ms. Dixon was charged with accepting gifts including a fur coat and vacation trips from a developer who was doing business with the City and with whom the Mayor had been romantically linked.[15] Under the Maryland Constitution, if the Mayor was convicted she would automatically be removed from office upon sentencing.[16]

When the first case came to trial in November 2009, interest was intense in the Baltimore region and throughout Maryland. There was much speculation in the media that it would be unlikely for the state prosecutor to obtain the conviction of Mayor Dixon, who

11. *See* Md. Crim. Pattern Jury Inst. 1:03 (1993), *id.*
12. The only media issue of any note that arose during the trial was one where I denied the press access to a video taken by Mrs. Basu's husband that morning, which showed Mrs. Basu and their child leaving the house but also showed two men in the background who the prosecution claimed were the men who minutes later would carjack Mrs. Basu's car. I denied access to a copy of the videotape until after the other defendant, who was facing the death penalty for the offense, would be tried. *See* Maryland v. Miller, 1993 WL 216705, 21 Media L. Rep. 1402 (Md. Cir. Ct. Apr. 15, 1993). The decision was affirmed on appeal. *See* Group W Television, Inc. v. State of Maryland, 96 Md. App. 712, 626 A.2d 1032, 21 Media L. Rep. 1697 (1993).
13. State v. Dixon, Case Nos. 109009009, 109210015 and 109210016 (Md. Cir. Ct., Baltimore City indictments filed Jan. 9, 2009). The indictments, pleadings, memoranda and court orders pertaining to the Dixon trial can be found online at http://www.baltocts.state.md.us/highlighted_trials/pressroom_state_v_lipscomb_dixon_holton.html.
14. Case No. 109210015, *id.*
15. Case No. 109210016, *supra* note 13.
16. *See* Md. Const., Art. XI, § 6 (2008); *see also* Annie Linskey, *It's difficult to remove a Md. mayor from office*, Balt. Sun, Jan. 10, 2009, http://www.baltimoresun.com/news/maryland/politics/bal-md.ci.mayor10jan10,0,2941348.story.

was a popular politician and the first African-American woman mayor of Baltimore; a predominantly African-American city. As with the Basu case, picking a jury was going to be a challenge due to the publicity the case had received in the Baltimore area.

With counsel, I developed a questionnaire that prospective jurors would complete on the first day of jury selection. After the written questionnaires were completed and distributed to counsel, the jurors were interviewed at the bench on an individual basis by myself, with counsel and the defendant present. At that point, I began to understand how modern technology is changing the way that trials will be handled and the difficult issues that such technology can present for judges, lawyers, the parties, the media and the public. It soon became clear that managing this trial would be substantially more difficult than what I had experienced in the Basu case.

Given that the courtroom where the case was tried was equipped with wifi access and counsel in the case were permitted to use their laptops, they were able to access whatever information was available over the Internet. Ms. Dixon's legal team, composed of a half dozen lawyers and paralegals, had prepared an organized program to research the jurors in real time, based on the information they had received from the jury lists and questionnaires.[17] They particularly made use of the public information provided in the on-line Maryland Judiciary Case Search system[18] to see if there were any civil or criminal cases that the jurors had ever been involved in. The information was effectively used to challenge several jurors who gave answers to *voir dire* questions that were at odds with the public records.

By the use of various search engines, the defense lawyers were also able to determine whether jurors had Facebook pages or were involved in other social media sites. In one case, the defense was able to determine that a prospective juror had been twittering from the courtroom while awaiting her turn to be individually questioned. She had expressed to her "followers" her adamant desire not to be picked as a juror. When asked about it, the prospective juror at first denied doing so, but when confronted with the evidence on the laptop, the prospective juror admitted that she had lied and was dismissed from the panel.[19]

The trial was also novel in that it had become difficult to determine who was a member of the media and whether there remains, if there ever was, a bright line distinction between journalists covering the courts and citizens interested in observing and commenting on trial proceedings. Not only was the trial covered by the Baltimore newspapers, television and local radio stations,[20] but there were also several blogs or internet sites that covered the trial on a daily basis.[21] Even the mainstream newspapers went beyond standard news

17. Such searches online by lawyers during jury selection have become even more frequent in the past year. *See* Ana Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, Wall St. J., Feb. 22, 2011, http://online.wsj.com/article/SB10001424052748703561604576150841297191886.html; *see also* Brian Grow, *Internet v. Courts: Googling for the perfect juror*, Reuters Legal News, Feb. 17, 2011, http://www.reuters.com/article/2011/02/17/us-courts-voirdire-idUSTRE71G4VW20110217.

18. This system allows public access online to the dockets and certain other records of all of the trial courts in Maryland's state judiciary, and is available at http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp.

19. When confronted with one of her Tweets during voir dire, the woman said that "I [tweeted] about that it was a long process, I was ready to go. I really didn't want to be picked for this. Three weeks sounds like a long time to me." Transcript of Voir Dire, State v. Dixon, Case Nos. 109009009, 109210015 and 109210016 (Md. Cir. Ct., Baltimore City (Nov. 19, 2009).

20. Maryland does not allow audio or video recording of court proceedings in trial court except with the consent of all parties, which was not given in this case. *See* Md. R. of Proc. 16-109.

21. Two of the sites that were most active were Baltimore Brew (http://www.baltimorebrew.com/), whose motto is "Stirring Up News and Views," and Investigative Voice (http://www.investigativevoice.com/),

coverage of the trial to run items speculating on such issues as who would play the roles of the trial participants if a movie were later made.[22] Several television stations ran ongoing reports on the trial via Twitter, which not only reported on what was actually said in court but also expressed opinions and comments about Ms. Dixon, witnesses, and the trial participants, including jurors.[23]

Individuals pretending to be jurors and other participants in the Dixon case also anonymously ran Twitter accounts under names such as "fakedixonjuror," and "FakeSheilaDixon," issuing various opinions and comments about the trial that were intended to be absurd or humorous.[24]

I began to understand how modern technology is changing the way that trials will be handled and the difficult issues that such technology can present.

Most days of the trial, there were two law school professors and several veteran criminal defense lawyers who attended and observed the proceedings and then appeared on newscasts to freely comment on the tactics of the lawyers, the rulings of the court, the attentiveness of the jury and the prospects for conviction or acquittal.

After a two-week trial, the case was submitted to the jury for deliberations. The jury engaged in lengthy deliberations that lasted over a period of seven days, suspended mid-course for the long Thanksgiving weekend. After returning to the court and several more days of deliberations, the jury was able to reach verdicts on three of the four counts against Ms. Dixon. She was convicted on one misdemeanor count of fraudulent misappropriation by a fiduciary and acquitted of two counts of theft and one count of misconduct in office; a mistrial was declared on the final count of fraudulent misappropriation by a fiduciary, a misdemeanor.

Throughout the course of the trial, I had kept the identities of the jurors confidential. The main reason for doing this was to insulate the jurors from anyone in the public who might try to influence them while they were serving on the jury. While the parties and counsel knew the names and addresses, they were was not disclosed to anyone else. A motion was filed by certain media organizations for access to the identities of the jurors. The request was denied, but the order indicated that the names would be released the day after the trial.

The Facebook Five

When the names were released the day after the verdicts were rendered, a reporter for the *Maryland Daily Record*, a legal and business newspaper, began checking Facebook

which describes itself as "The Voice of the People."

22. Jean Marbella, *Casting Call: Picking Stars for Dixon Trial Movie*, Balt. Sun, Nov. 22, 2009.
23. One station's feed from the trial is still available at http://www.wbaltv.com/mayor-dixon-trial/index.html.
24. One such observation by FakeSheilaDixon was: "Have you ever seen that movie '12 Angry Men'? Total fiction. We're more like the Justice League of American in here!" *See "Fake Shelia Dixon" reporting from the jury room: Tweets as Satire*. Baltimore Brew (Nov. 24, 2009), http://www.baltimorebrew.com/2009/11/24/fakesheiladixon-reporting-from-the-jury-room-tweets-as-satire/. The creation of fake Twitter accounts imitating messages from persons involved in public events is now a common occurrence. *See, e.g.*, Richard Roeper, *Fake Twitter Rahm has Thousands of Fans Including Real Rahm*, Chi. Sun-Times, Feb. 16, 2011 (fake account purporting to be mayoral candidate Rahm Emanuel had 25,000 followers on Twitter, compared to 7,100 for the candidate's real Twitter stream).

accounts for the names of the jurors and discovered that five of the jurors had become Facebook "friends" during the course of the trial and had communicated with one another over the Thanksgiving weekend.[25] Not coincidently, the five jurors who became "friends" were the five youngest jurors, all under the age of 35.

In the *Daily Record* article, one of the jurors is quoted as defending the jurors' actions as just being a matter of keeping in touch with one another. She said there were "no broken rules," and she was quoted as saying: "I think it is harmless if you're using Facebook as a social network and I believe that's how it was being used, and keeping it within the limits of what Judge Sweeney asked."[26]

Another person saying that he was "juror #11" posted a comment to the article on the *Daily Record* website, castigating the media for reporting on the Facebook issue:

> This is the furthest stretch I have seen thus far at an attempt in journalism. Brendan Kearney (the author) called me and asked leading questions, trying to force me to admit to something that was not true about myself and/or other jurors. How do you even have my number? Go write about Tiger Woods or the likes. Better yet, go work for the Enquirer.[27]

These reports quickly became the basis for a motion for a new trial filed by Mayor Dixon, accusing the jurors of misconduct. I ordered the five jurors to appear for an evidentiary hearing and to bring with them printouts of the Facebook pages showing all communications during the course of the trial and deliberations. I denied without prejudice a request from defense counsel to subpoena the Facebook website to obtain the communications, believing that such a subpoena was not yet shown to be necessary and that obtaining compliance[28] would unduly delay the ultimate resolution of the case. At that moment, of course, a resolution was of intense public interest and importance, since the governance of the city of Baltimore was dependent on whether the conviction of Mayor Dixon would stand.

On the day set for the hearing, the jurors appeared with their printouts and were placed in separate, secure rooms guarded by sheriff's deputies. Each of the jurors was going to be examined on the record, but in chambers to protect their privacy. Several experienced trial lawyers, who I had recruited, were standing by to provide *pro bono* representation for the jurors should that become necessary.

Fortunately, the thorny issues presented by the jurors' actions did not have to be resolved that day, since over the course of several hours the State Prosecutor and the Mayor's lawyers hammered out an agreement to dispose of both criminal cases against Mayor Dixon – the one before me and the other, which was still pending – by a plea encompassing both indictments and an agreed sentence, which I assented to. The plea resulted in the Mayor resigning from her office and receiving a probationary disposition, with a fine and community service.

Thus the trial was concluded without having to confront the issue of the alleged juror misconduct in using Facebook during the recess in deliberations. But it became apparent

25. Brendan Kearney, *Despite judge's warning, Dixon jurors went on Facebook*, [Md.] Daily Rec., Dec. 2, 2009, http://thedailyrecord.com/2009/12/02/despite-judge%E2%80%99s-warning-dixon-jurors-went-on-facebook/ (subscription required).

26. *Id.*

27. *Id.* This is comment number 2 to the article.

28. While not knowing it at the time, a subpoena to Facebook could have triggered litigation over whether a juror's Facebook private postings could be obtained without the juror's consent in light of the federal Stored Communications Act of 1986, 18 U.S.C. §§ 2701, et seq. This question has now arisen in several cases including one in Sacramento, California where a juror under investigation has resisted the judge's demands that he grant consent. *See* Andy Furillo, *Sacramento Judge Chides Facebook for Ignoring Two Orders to Release Postings*. Sacramento Bee, Jan. 8, 2011.

to me and other trial judges that the issues raised in the Dixon trial will be ones that courts, lawyers, parties, prospective jurors, and the media will have to face again and again.

The Connected Community

Compared to their predecessors in the Basu case, the Dixon trial participants – whether they were jurors, lawyers, witnesses, or media – were in a world of instant communications and immediate access to unlimited information from virtually any place in the world.

At the time of the Basu case, few people had cell phones. Those that did had bulky models that would at best send or receive calls and do little more. A few had pagers that might receive a short message from an employer. Most people relied exclusively on landline phones. Jurors who came to the courthouse would have to wait in line at pay telephones to make calls to family, friends, and co-workers. Lawyers did the same.

If a juror had a personal computer, it was probably a desktop one and, at that time, likely not connected to the Internet. Even if a juror had a laptop there would have been no way for the juror or lawyer to have connected to the Internet from the courthouse.

If a juror wanted to visit the scene of an event mentioned in the case, he would have had to physically make a trip to the location. If a juror wanted to research technical or scientific information mentioned in the case, he likely would have had to visit the local library. If the juror avoided television newscasts at 6 p.m. and 11 p.m. and reports in the morning paper about the case, there was little chance that the juror would receive information concerning the case from outside sources.

At the time, the media were still covering trials using notebooks and pencils. Reports on the trial would wait for the next day's newspapers or for the stand-up reports on the evening newscasts. At the Basu trial, there were no law professors providing instant commentary on the moves of the lawyers, the evidentiary rulings of the court or the apparent mood of the jurors.

By the time of the Dixon trial, the world had changed dramatically. Virtually all of the jurors had cellphones with the capability to send text messages. Many of these were smartphones, able to access the Internet on command.[29] As noted above, defense counsel had laptops, tablets, or smartphones in the courtroom connected to the Internet. The media were connected by these same devices to their newsrooms, and in some cases were able to post immediately to the public the goings on in the courtroom and courthouse, as well as the sender's opinions and views.

The Dixon jurors had much greater opportunities than the Basu jury to obtain information outside the courtroom had they chosen to do so. In a few seconds, their smartphones or their computers at home would have given them maps or pictures of any place mentioned in the case. Any person mentioned in the case could be researched in a few seconds on an electronic device. Any technical or legal term used in the courtroom could similarly be defined instantly from an array of sites.[30]

Similarly, the jurors could have instantly accessed the various Internet sites that were re-

29. A survey published in 2009 by the Pew Internet & American Life Project found that 85 percent of adults had cell phones and that 59 percent of adults access the Internet wirelessly using a laptop or cellphone. *See* Pew Internet & American Life Project et al., Teens and Mobile Phones Over the Past Five Years: Pew Internet Looks Back (2009), at 3, *available at* http://pewinternet.org/~/media/Files/Reports/2009/PIP%20Teens%20and%20Mobile%20Phones%20Data%20Memo.pdf.

30. Another Pew study found that 53 percent of adult internet users use Wikipedia to look for information. The site is most popular with those with a college education, 69 percent of whom use the site. *See* Pew Internet & American Life Project et al., Wikipedia, Past and Present (2011), at 2, *available at* http://www.pewinternet.org/~/media//Files/Reports/2011/PIP_Wikipedia.pdf.

porting or blogging on the trial, including those providing running commentary about the parties, lawyers and witnesses and those commenting, describing, and speculating about the jurors and alternates.

The "Facebook Five" from the Dixon case represent this new type of juror. They have been described as "digital natives": people who were born and raised in the Internet age and have never known another way of acquiring information or communicating with others.[31] This group is in contrast to an older cohort called the "digital immigrants," who are not native to the Internet and digital age but who, with varying degrees of success, have come to understand the new age and learn its ways and devices. Perhaps, there is still a third group which I will call the "digital alien." It is composed of those who have never learned the new language or accepted the culture of the digital native and have little understanding or tolerance for the world the digital native inhabits.

Google Mistrials

Given such immediate potential access of jurors and prospective jurors to information and to ways to communicate their views and receive those of others, it is not surprising that trials around the country and even overseas have been derailed by such activity.[32] Virtually every day there are new reports of jurors – whether they be digital natives or digital immigrants – imperiling trials through unauthorized or unwise use of electronic devices on the Internet. This sampling is only illustrative of the many problems that have arisen from the use of the internet or social media.

• In Fresno, California, a Superior Court Judge found himself sitting as a juror on a murder case, and was, indeed, designated to be the Foreman. Throughout the trial, the juror-judge sent e-mails to his 22 colleagues on the bench, including the judge presiding over the case, giving them periodic updates on the progress of the case. His first e-mail announced: "Here I am, livin' the dream, jury duty with Mugridge [the defense lawyer] and Jenkins [the prosecutor]." After conviction, counsel for the defendant discovered the e-mails and moved for a new trial.[33] The motion was denied,[34] although an appeal of the conviction is pending.[35]

• In a state-court civil trial in Arkansas, a $12.6 million verdict in favor of investors against a building material company was attacked because the company alleges a juror sent eight messages or "tweets" via his cellular phone to his "followers" about the trial. One of the "tweets" read: "oh and nobody buy Stoam [the building material at issue]. Its [sic] bad mojo and they'll probably cease to exist, now that their wallet is 12 m lighter." [36]

31. The terms "digital native" and "digital immigrants" were first popularly used in a 2001 article by Marc Prensky, which argued that students who were born into the Internet age were no longer the people the educational system was designed to teach. Marc Pensky, *Digital Natives, Digital Immigrants*, 9(5) On the Horizon 1 (October 2001), http://www.emeraldinsight.com/journals.htm?issn=1074-8121&volume=9&issue=5&articleid=1532742&show=pdf; *see also* Sylvia Hsieh, '*Digital Natives' Change Dynamic of Jury Trials*, Mass. Law. Wkly., Nov. 17, 2010.
32. Brian Grow, *As jurors go online, U.S. trials go off track*, Reuters Legal, Dec. 8, 2010, http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208.
33. Debra Cassens Weiss, *Lawyer May Cite Judge-Juror's 'Livin' the Dream' E-Mails in New Trial Bid*, ABA J. Law News Now (Apr. 16, 2010), http://www.abajournal.com/news/article/lawyer_may_cite_judge-jurors_livin_the_dream_e-mails_in_a_new_trial_request/.
34. *Fresno judge's jokey jury chatter ruled immaterial*, Associated Press (Aug. 10, 2010), *available at* http://www.ksby.com/news/fresno-judge-s-jokey-jury-chatter-ruled-immaterial/.
35. The People v. Ortiz, Case No. F060792 (Cal. App., 5th Dist. appeal filed Aug. 11, 2010).
36. *What a Twit! Twitter Using Juror May Cause $12.6 Million Mistrial*, Associated Press (Mar. 13, 2009), *available at* http://articles.nydailynews.com/2009-03-13/news/17918343_1_juror-new-trial-postings.

• A Maryland appellate court overturned a felony-murder conviction because a deliberating juror conducted an on-line search for the terms "livor mortis" and "algor mortis" on Wikipedia, printed out the pages, and brought them in to the jury room during deliberations. The juror's action was discovered when the jury bailiff found the print-outs in the jury room after the jurors were excused for the day. When asked about it, the juror said, "To me that wasn't research. It was a definition." [37]

• In Luzerne County, Pennsylvania, a juror in a "shaken baby" murder case was facing contempt charges for doing Internet research on the symptoms that the child had, including the term "retinal detachment," and offering to share the research with her fellow jurors. A mistrial was declared. In defending the contempt charges, the juror's defense lawyer told the judge, "She just wanted to be the best juror possible."[38]

• In May, 2010, a judge in Michigan fined a juror $250 and ordered her to write a five-page essay about the constitutional right to a fair trial after the juror, during a trial, posted the following on her Facebook page: "Gonna be fun to tell the defendant they're GUILTY."[39]

• These issues are not limited to American courts. In England, a juror was dismissed from a child abduction and sexual assault trial after she posted details of the case on her Facebook page, including her reactions to the testimony. At one point, she solicited the views of her Facebook friends, telling them: "I don't know which way to go, so I'm holding a poll." Luckily, her actions were discovered before deliberations began, and she was dismissed as a juror. [40]

The Values Represented by a Trial

Given that so-called "Google mistrial"[41] claims appear to be increasing, trial courts should examine what they are doing and whether there are ways we can adjust the trial process to meet these new challenges. In doing so, however, we cannot sacrifice the essentials of what a trial by jury means.

Trials, whether civil or criminal, are predicated on some fundamental assumptions that may not make immediate intuitive sense to a "digital native."

In a trial, the parties present the evidence – item by item, and witness by witness – to establish a claim or a defense. Each piece of evidence or testimony is vetted by the parties and the judge, and is only allowed to be presented for the jurors' consideration if it meets the standards established by the rules of evidence.

If necessary, documents are redacted to keep non-relevant information from appearing on them. In criminal cases, even highly relevant evidence may be "suppressed" if the court determines that legal requirements were not met in obtaining it. Frequently jurors do not even see the exhibits when they are admitted into evidence, but are told that they will be given to them at the end of the case at the time of deliberation.

37. Allan Jake Clark v. State of Maryland, No. 0953/08 (Md. Ct. Special App. Dec. 3, 2009) (unreported); *see* Steve Lash, *Maryland Jury's Wikipedia search voids murder conviction*, [Md.] Daily Rec., Dec. 6, 2009.
38. Brian Grow, *Juror could face charges for online research*, Reuters Legal, Jan. 19, 2011, http://www.reuters.com/article/2011/01/19/us-internet-juror-idUSTRE70I5KD20110119.
39. Martha Neil, *Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict*, ABA J. Law News Now, Sept. 2, 2010, http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in.
40. Guy Patrick, *Juror Axed for Verdict Poll on Net*, The Sun (U.K.), Nov. 24, 2008, http://www.thesun.co.uk/sol/homepage/news/article1963544.ece.
41. The apparent first use of this term was in a *New York Times* article on the phenomenon. *See* John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. Times, March 17, 2009, http://www.nytimes.com/2009/03/18/us/18juries.html.

In criminal cases there are constitutional issues raised under the Sixth Amendment and similar state constitutional provisions if evidence is considered at a trial that the defendant did not have an opportunity to confront and cross-examine.

To the extent that evidence is not clear or there are missing steps in a factual chain or scenario, the jury is instructed to decide the case based only on what it has before it. The jury is directed to consider who has the burden of proof in resolving any deficiencies, but not to take any action to cure the deficiency. It is strictly forbidden for the jury to take any action to make up for the perceived missing evidence, even if the jury knows that more information likely exists and is easily attainable.

Jurors are also told that they can make reasonable inferences from the evidence, decide the credibility of witnesses, and use their own common sense.

Historically, the role of juror until deliberations has been intentionally passive. They listen to evidence, but they are told to neither make up their minds nor discuss the case with anyone, even their fellow jurors. Questions posed by jurors during the trial are often discouraged, and frequently not allowed at all.

Jurors are also told by the judge that certain witnesses are "experts," who go through lengthy qualifications on the stand. If the judge decides that the witnesses are experts, then those witnesses – but only those witnesses – can express certain opinions.

Finally, the judge tells the jury what the law is in the judge's instructions. These instructions are not advisory in most cases, but are mandates that the jury must follow in evaluating the evidence.

Look at this process from the jurors' point of view. They are presented in a courtroom with the only evidence they are allowed to consider. This evidence has been vetted, filtered, and mediated by the judge and lawyers. Jurors are forbidden from taking initiative and finding out information on their own. In fact, they are told to be largely passive and, until deliberations begin, they usually are told that they cannot discuss the evidence or the case even with each other. They likely have been told not to ask questions during the trial. At the close of the case, they are told to deliberate, but they cannot obtain or be supplied any new information or evidence, even where they find significant gaps in what they have before them. Finally, they are told to decide this case on the legal rules the judge has provided and not to use their own values or moral sense.

The trial system is closed, contained by strict rules, discourages initiative and activism by jurors, and is premised on the assumption that jurors will accept the authority of the court to guide them and are willing to base their decision only on what the lawyers present. How does this model mesh with the experience and values of the digital native juror, or even his older brother or sister, the digital immigrant who shows up for jury duty?

Values of the Internet and the Digital Age

One of the early slogans of the Internet and digital age was the cry that "information wants to be free."[42] This referred not only to the cost of obtaining information, but to the concept that information – especially information on the Internet – should not be controlled by governmental or corporate sources, and should not be reserved for a privileged few. In this view, the ultimate user of the information is fully capable of being able to sort through divergent sources of varying quality and make his own decisions about what to use and rely on, and what to discard.

42. The comment is attributed to writer and futurist Stewart Brand at the first Hackers Conference in 1984. The full background and context can be found at Brand's homepage, http://web.me.com/stewartbrand/SB_homepage/Info_free_story.html.

One seeking information on the Internet can and likely will cast a broad net to capture information. Then it is for the requester to sort through the results returned, pick and choose which results to skim or read, and then choose which to give weight to and rely upon. For example, if a medical term or diagnosis is put into a search engine, hundreds of thousands of results will likely be returned. Some will be from respected medical sources such as the Mayo Clinic; some will be from patients who suffered from the conditions and report on their feelings or beliefs; and some will be from companies or individuals suggesting new or alternative treatments that may or may not have any scientific validity. It is up to the individual to sort through these results and decide for him or herself what to value and explore and what to discount and disregard.

Unlike information in a trial, where the juror may not be able to examine the exhibits until deliberations, the Internet user with electronic devices can access information immediately from virtually any location, bookmark it and review it over and over again as desired, and immediately link to other related information.

The Internet also allows the user to discuss any subject, public or private, at any time with other people, any time of day or night, regardless of where the other people may be located. The user can find people who are interested in a subject in chat rooms, blogs, Facebook pages, or by using Twitter or similar sites.

There is also little limit on what a person can say and no need to have one's opinion backed up by data, evidence, or facts. If a person chooses, their comments and opinions can be posted anonymously with the expectation that there will be little accountability for what is said, no matter how wrong or outrageous.[43]

The proponents of this new age believe that people are well served by this system and that the process of truth-finding is advanced by this information and communication system. They also believe that authority figures – whether they be government officials, scientific experts, or corporate executives – should not be accepted merely based on their status or position.

It should not be surprising that for a digital native, one used to the world of the Internet and social media, that the methods and form of acquiring information in a trial may seem stifling, inefficient, and unduly restrictive. For persons who are used to darting among many different devices, websites, blogs, social media sites on a continual basis, updating information, opinions and contacts many times each hour, sitting in a jury box hour after hour, waiting for the slow presentation of each item of testimony or document, with interruptions for objections and bench conferences, will likely be an excruciating ordeal that is almost intolerable; especially if they cannot use their own electronic devices.[44]

43. The courts have aided the feeling of a lack of accountability on the Internet by finding that significant thresholds must be reached before anonymous posters on Internet sites are required to have their identities revealed, even when the comments are alleged to be defamatory. *See, e.g.*, Independent News v. Brodie, 407 Md. 415, 966 A.2d 432 (2009); *see also* Ben Holden, *Who Was That Masked Man?*, 1 Reynolds Cts. & Media L. J. 33 (2011).

44. Some psychologist and psychiatrists assert that some people suffer from "Internet addiction" that should be recognized as a disorder requiring treatment. For a discussion of the subject and the state of the research on it, *see* Sookeun Byun, *et al.*, *Internet Addiction: Metasynthesis of 1996 -2006 Quantitative Research*, 12 CyberPsychology & Behavior (2009), *available at* http://www.liebertonline.com/doi/pdfplus/10.1089/cpb.2008.0102; *see also*, Matt Rictel, *The Lure of Data: Is it Addictive?*, N.Y. Times, July 6, 2003, http://www.nytimes.com/2003/07/06/business/the-lure-of-data-is-it-addictive.html. Some have narrowed the field to suggest the existence of a "Facebook addiction disorder." *See* Katie Hafner, *To Deal with Obsession, Some Defriend Facebook*, N.Y. Times, Dec. 20, 2009, http://www.nytimes.com/2009/12/21/technology/internet/21facebook.html.

Worlds Collide[45]

What happens when these two worlds collide, when jurors, either digital natives or fully immersed digital immigrants, enter the courtroom? Should the jury trial, which has only marginally changed in centuries, be refashioned to recognize the new environment that surrounds it? Is there a way that the values of due process and fairness embodied in a trial can – or should – recognize or accommodate the new juror? Can the new juror, enmeshed in the internet and social media sites, be trusted to accept and work under the constraints of a trial system that to some will seem archaic and inefficient, and which seems to operate to keep potentially valuable and relevant information from the jurors? These are the questions that will face judges, lawyers and litigants in the coming years.

The trial judge is the one that has to try to reconcile these two worlds.

It is unlikely – and certainly not desirable – that the core values and basic rights inherent in our jury trials be changed. Parties are entitled to have a trial based on evidence they know about. They are entitled to confront the evidence, cross-examine witnesses and have only legally relevant evidence be considered by the jury. In a country that values the rule of law as a fundamental principle, parties are also entitled to have their cases decided based on the law applicable to their case, which should be the same law applicable to others equally situated.

While the core values of our court system will not change, there are ways that courts can recognize the new era.

But while the core values of our court system will not change, there are ways that courts can recognize the new era that we are in without unduly compromising the important rights of the parties in a jury trial.

The Road Ahead

Hopefully, there are ways that would work to reasonably insure that parties before the court are receiving fair jury trials based only on the evidence presented in the court and without the intrusion of outside information, advice, or opinion, but that also, where possible, accommodate the new type of juror. In my view, courts should take an approach that educates prospective jurors as early as possible about the responsibilities of a juror, the nature of a trial and the reasons for the court's process and rules. The message should be re-enforced throughout the process of jury selection, trial and deliberation.

We should seek to get jurors to affirmatively "buy in" to the rules that are required, but also respect and accommodate their requests for more information where possible. We should also explain to jurors why we cannot provide more information than what they have received. If prospective jurors do agree to follow the rules for a trial, we should then hold them accountable if they violate these rules and serious harm is done to the litigants and the trial process.

Some steps to implement this approach are discussed below, but before discussing what judges can do there are some possibilities that seem like tidy solutions, but which I don't think will work in the long run.

45. The concept of worlds colliding comes from a blog post by Robert Gezelter, who wrote about social media and juries after attending a presentation I gave with two other judges at the Legal Tech conference in New York on Jan. 31, 2011. *See* Robert Gezelter, *Colliding Worlds: Pervasive Connectivity and Social Media*, InfoSec Island, Feb. 11, 2011, https://www.infosecisland.com/blogview/11637-Colliding-Worlds-Pervasive-Connectivity-and-Social-Media.html.

Complete Ban on Electronic Devices

One solution would be to simply ban all electronic devices from the courthouse, creating a zone where no visitor – whether party, lawyer, prospective juror, witness, journalist, or mere observer – could communicate by smartphones, laptops or other electronic devices. While this would stop the prospective juror and others from communicating from the courthouse, there would be no way to prevent the prospective juror going to his car in the parking lot at lunch and using a device or logging on at home during a recess in a multiple-day trial.

This solution also does not recognize the importance that such devices play in the modern world. Jurors in their daily lives are now used to being in touch with their families, friends, and co-workers by cellphones or texting. Caregivers of children, the aged, or the disabled are often only able to serve as jurors because they are able to keep in regular touch with those for whom they are responsible.

There also may no longer be reasonable substitutes at the courthouse for basic communication, since pay-phones in courthouses are disappearing from the landscape because they are no longer profitable to the companies that supply them.[46] Jurors will feel stranded and isolated if there is no way to communicate with family, friends, and co-workers during a jury trial. Prospective jurors will resent even more the time spent waiting if they cannot use the time productively by working on laptops or reading books on tablet-type devices.[47]

While it could help to deal with the problem of the misbehaving juror, a total ban on electronic devices in the courthouse has so many downsides, including increasing frustration for prospective and sworn jurors, that other options should be considered and tried first.

Sequestration of Juries

When the "Facebook Five" issues arose in the Dixon trial, comments were made in the news media and blogs that I should have sequestered the jury during the trial and deliberations. In the Luzerne County, Pennsylvania "shaken baby" case discussed above,[48] the prosecuting attorney said, after the mistrial was declared, that sequestering the jury could be the only solution to trying such cases in the future.[49] A New York trial judge, faced with misconduct by jurors using the Internet in a criminal trial, concluded in his opinion on the subject that sequestration might be the only solution to the temptation jurors faced.[50]

While sequestration during trial or deliberation remains a tool that courts will perhaps use in a particularly sensitive case, the procedure has fallen into disuse because of its many downsides of housing jurors overnight and totally insulating them from any contact with non-jurors, including family members. In an influential article on the use of sequestration by courts, Professor Marcy Strauss concluded that sequestration should be avoided for

46. *See* Alon Avdi, *AT&T to Phase Out Pay Phones by 2009*, Switched, Dec. 4, 2007, http://www.switched.com/2007/12/04/atandt-to-phase-out-pay-phones-by-2009/3.
47. For an informal survey of Texas state trial judges reaction to the idea of banning jurors from having cellphones or other devices. *See* Tricia Deleon & Janelle Forteza, *Is Your Jury Panel Googling During the Trial?*, 52 The Advocate (Tex. State Bar Lit. Rep.) 36, 38-39(2010) (finding that most judges in an informal survey did not favor banning cellphones from the courthouse).
48. *See supra* text accompanying note 38.
49. Terrie Morgan-Besecker, *Handling of Jurors May Be Modified*, (Wilkes-Barre, Pa.) Times Leader, Jan. 18, 2011, http://www.timesleader.com/news/Handling_of_jurors__may_be__modified_01-17-2011.html.
50. People v. Jamison, 24 Misc.3d 1238 (A), 899 N.Y.S.2d 62 (table), 2009 WL 2568740 (text) (Aug. 18, 2009).

many reasons, including the financial cost to the government and the potential psychological harm to the jurors if the sequestration period is long.[51] Professor Strauss also found that sequestration can be counter to truth seeking because it can lead to a non-representative jury, can cause jurors to rush to judgment and can lead to possible prejudice against parties if the jury perceives the sequestration as being caused by one side or the other.[52]

While sequestration is available in the exceptional case, there are probably less Draconian and more juror-friendly ways to guard against possible juror misconduct.

The Juror Education and "Buy In" Approach

Here are some modest suggestions that will hopefully help to educate jurors about the values inherent in trials and insure that selected jurors have "bought in" to the need to abide by fair trial rules before selection. This approach also encourages courts and lawyers to accommodate jurors' needs for more information and explanations.

Better Education of Prospective Jurors

Many court systems have programs that educate the public, including students, about jury trials, their value, and how they are conducted. These programs should include a section that explains why the only evidence that can be considered at a trial is that evidence presented in court that the parties have an opportunity to examine, confront, and contest. Such a program could begin the process of explaining to jurors why the habits they use to acquire information in their daily lives will have to be suspended if they are picked for a jury.

When it comes time to summons prospective jurors, trial courts should inform them in the first information they receive from the courts – before reporting for service – that restrictions will be placed on their access to information and communications while serving.[53] Courts should also caution potential jurors not to speculate about which cases they may be called to sit on, or to do any research in advance on the cases they might be called to sit on.[54]

The American College of Trial Lawyers has prepared a notice that they recommend be included with each jury summons. It reads:

> [I]n order to assist the court in providing litigants with a fair trial, it is important that you refrain from conducting any research which might reveal any information about any case pending before the court, or any of the parties involved in any case. Therefore, you should avoid any attempts to learn which cases may be called for trial during your jury service, or anything about the parties, lawyers

51. Marcy Strauss, *Sequestration*, 24 Amer. J. Crim. L. 65 (1996).
52. *Id.* at 112-17; *see also* Neil Vidmar & Valerie P. Hans, American Juries: The Verdict (2007), at 115 ("Jury sequestration has fallen out of favor largely because of the extraordinary stress and disruption it causes for jurors.").
53. This is part of the recommendations of the National Conference of State Trial Judges of the Judicial Division of the American Bar Association contained in their best practices paper. *See* A.B.A. Judicial Div. Nat'l Conf. of State Trial Judges A Fair Trial: Jurors Use of Electronic Devices & the Internet (2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/state_trial_judges/fair_trial_handbook.authcheckdam.pdf.
54. An example of how juror information learned through internet research before trial can create a problem is Russo v. Takata Corp., 774 N.W.2d 441 (S.D. 2009). In this wrongful death case against a seat belt manufacturer, upon receiving his jury summons that included the name of the parties, a prospective juror undertook research about the case listed on the summons and went to the defendant's company's website and perhaps others related to it. The prospective juror concluded from his research that the company was not involved in other litigation over defective products, and later conveyed this information to fellow jurors during deliberations. After a verdict in favor of the company, a new trial was ordered.

> or issues involved in those cases. Even research on sites such as Google, Bing, Yahoo, Wikipedia, Facebook or blogs, which may seem completely harmless, may lead you to information which is incomplete, inaccurate, or otherwise inappropriate for your consideration as a prospective juror. The fair resolution of disputes in our system requires that jurors make decisions based on information presented by the parties at trial, rather than on information that has not been subjected to scrutiny for reliability and relevance.[55]

The court's web site should similarly include cautions of this nature in its sections directed at prospective jurors.

Juror Orientation

During orientation on the first day of jury service, written and oral instructions should be given to jurors about not doing any Internet research or discussing their jury service with others until their service is completed. Jurors should be told upon arrival for jury service that they should not engage in any communication about their impending jury service and should be advised about the need to respect the privacy of other jurors.[56] The orientation films that many courts use should contain a section on this subject and explain the reasons the rule is important and necessary for our system of justice.

Jury Selection

During jury selection, the judge should ask *voir dire* questions about whether prospective jurors use the Internet and social media sites and whether they would be able to abide by the necessary restrictions during trial. If a trial is going to be lengthy or high-profile, the questioning should be more detailed, particular and probing, since the temptation to stray from the requirements will be more intense in such cases.

This is a *voir dire* question that I prepared for a recent trial that was going to receive significant media coverage:[57]

> Until you retire to deliberate and decide this case, you may not discuss this case with anyone, even your fellow jurors. You should not express any opinion about the case or discuss the case with anyone including courtroom personnel, spectators or anyone participating in the trial.
>
> Many of you, like me, use cellphones, Blackberries, smart-phones, tablets or computers or other devices to communicate with family, friends, co-workers or others. You may also be involved in social media or networking sites such as Facebook, MySpace, LinkedIn, YouTube or Twitter, and be accustomed to communicating your views, observations or opinions on these sites.

55. Amer. Coll. of Trial Lawyers, Jury Instructions Cautioning against Use of the Internet and Social Networking (Sept. 2010), at 1, *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213.
56. An example of the type of violation to try to avoid for jury privacy purposes is one committed by NBC's Today Show weatherman, Al Roker, who sent Twitter messages while serving on jury duty in Manhattan Criminal Court, and took pictures of fellow potential jurors that he posted to his account. *See* Dareh Gregorian, *Oh What a Twit: Tweeting Roker Sorry for Taking Juror Pix*, N. Y. Post, May 29, 2009, http://www.nypost.com/p/news/regional/item_orPeW3RKHabFGbsbXOYCXI.
57. The instruction was prepared for the trial of State of Maryland v. Helen L. Holton, Case No. 109209024 (Baltimore City indictment filed July 28, 2009). Ms. Holton, a Baltimore city councilwoman who was charged with violations of the Maryland campaign finance laws, entered a plea of *nolo contendere* on the morning that jury selection was set to begin. Ms. Holton was also charged in a separate case (No.109007007) with bribery; I dismissed some of the charges in the bribery case in the grounds of legislative immunity, 2009 WL 6366158 (Trial Order) (Md. Cir. Ct. May 28, 2009), *aff'd*, 193 Md. App. 322, 997 A.2d 828 (Md. Ct. Spec. App. 2010), a ruling that has been appealed to the Maryland Court of Appeals. *See* State v. Holton, Case No. 91 (Md. argued March 3, 2011).

> During this trial, you must not use these sites or ones like them to communicate anything about this case or the individuals participating in it. During this trial, you cannot communicate to anyone any information about this case or your opinions or views about it or the individuals participating in it by any method or means.
>
> Is there any member of the panel who believes they could not abide by this requirement during the trial or would have trouble doing so?

Such questions and the dialogue that the prospective juror may have with the court in response are part of the "buy-in" approach of getting prospective jurors to understand what is required and having them agree that they will abide by what is needed for the trial. The judge's approach to this questioning is important. The juror who is very active in the social media world should not receive the impression that his activities are seen as unworthy by the judge or lawyers or that she will be necessarily disqualified from jury duty because of their online habits.[58] The purpose is to have a discussion with the prospective juror that gauges whether the juror will be able to adhere to the requirements for trial and, if so, get the agreement of the juror to do so.

Some attorneys have proposed having jurors in high-profile cases sign written pledges that they will not use social media.[59] One attorney in the Barry Bonds trial in California wanted the jurors to sign a document saying: "I don't go on Facebook, I don't Twitter. I don't tweet. I don't read anything between the time I sign this questionnaire and the end of this process. And [if] I did, the court has indicated that I would be in contempt of court and subject to a fine or a jail sentence."[60]

While a written pledge has some superficial attraction, there is danger in separating out one aspect of jury service and its obligation and elevating it above all the others by including it in a written statement, while leaving out the other requirements.

It is probably more effective to discuss the issue in *voir dire* questioning and fully vet the juror's willingness to abide by trial requirements, and then rely on the jurors' responses made under oath. If a juror cannot be trusted to be candid in *voir dire* questioning under oath, having that juror sign a written statement probably adds little more confidence.

Introductory Instruction

Once the jury is selected, at the beginning of the trial the judge has another opportunity to explain the rules and impress again on the jurors what they have promised to do.[61]

This is an instruction I drafted after looking at and borrowing from other proposals from around the country:[62]

58. While prospective jurors should not be excluded from jury service solely because of heavy social media use, there may be some jurors who will find it very difficult to limit their activities. Some may find it virtually impossible. *See* Byun et al., supra note 44, concerning internet addiction. Individual judgments will need to be made based on the totality of the prospective juror's responses and the informed judgment of the trial judge.
59. This is included in the proposed instructions of the American College of Trial Lawyers as a "Statement of Compliance" that each juror would sign; *see* Amer. College of Trial Lawyers, *supra* note 55.
60. Ginny LaRoe, *Barry Bonds Trial May Test Tweeting Jurors*, The Recorder, Feb. 15, 2011, http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202481944364.
61. A recent survey of trial judges found that 56 percent of responders were giving jurors some instructions on new media use. *See* CCPIO, *supra* note 3, at 9.
62. Excellent compilations of jury instructions from state and federal courts around the country pertaining to the internet and social media can be found on the web site of the National Center for State Courts; *see*, Nat'l Ctr. for State Cts., Social Media and the Courts, http://www.ncsc.org/topics/media-relations/social-media-and-the-courts/state-links.aspx?cat=jury%20instructions%20on%20social%20media; *see also* Eric P. Robinson, Esq., *Juror Use of Social Media: A State-by-State Guide*, Blog Law Online, http://bloglawonline.blogspot.com/2010/02/juror-use-of-social-media-state-by.html.

Model Admonition
(for delivery to veniere at earliest possible point post-summons)

> You as jurors must decide this case based solely on the evidence presented in this courtroom. The evidence you will consider for this case has been reviewed by the parties and the court, and is the evidence that is relevant to this case and the issues you must decide.
>
> You must not conduct on your own any research or investigation about the case or the individuals involved in it. I mean "research" in the boradest possible meaning of the word. That is, you cannot use a public library, a dictionary, or a simple Google search to clarify or obtain, for example, even something as simple as the definition of a word you do not understand. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain or correct it.
>
> You may not consult any dictionaries or reference materials. You should not search the Internet, web sites, social media sites, blogs, or any other source for information about the case or the persons involved in the case.
>
> Places or locations may be mentioned, but you should not visit any place or location related to the case. You should also not seek any information about the place or location on the Internet or through web sites such as MapQuest or Goggle maps.
>
> Until you retire to deliberate and decide this case, you may not discuss this case with anyone, even your fellow jurors. You should not express any opinion about the case or talk about the case with anyone, including courtroom personnel, spectators or anyone participating in the trial.
>
> Most, if not all, of you use cell phones, Blackberries, smart phones or computers to communicate with family, friends, co-workers or others. During this trial, you cannot communicate to anyone any information about this case, or your opinions or views about it or the individuals participating in it by any method or means.
>
> You may also be involved in social media or networking sites such as Facebook, MySpace, LinkedIn, YouTube or Twitter, and be accustomed to frequently communicating your views, observations or opinions on these sites. During this trial, you must not use these sites to communicate anything about this case or the individuals participating in it.

Jurors should be reminded of the opening instruction frequently during the trial, before any recess and particularly when the jury separates at the end of the day. This reminder could be in the form of a shorter version of the Admonition, such as the following:

Model Short Form Admonition
(For delivery prior to recesses or breaks)

> You will recall that previously I instructed you in great detail that you must decide this case solely on the evidence presented in this courtroom. Because we are about to take a break, I am now reminding you of that warning, and I want you to once again to fully commit to your fellow jurors, to the parties in this case and to the court, that you will not use cell phones, smart phones, Blackberries, iPhones, Facebook, text messaging, Google, or any other form of communication to send or receive messages about this case, even with close friends or family.

An interesting additional proposal was made in the *Florida Bar Journal* by a judge and two litigators. They suggested that sworn jurors be told at the beginning of the trial that they should send to all of their e-mail contacts, Facebook friends and Twitter followers the following message:

> I am sending this note to you as instructed by Judge_____. I am now a sworn juror in a trial. I am sequestered. This means I am not allowed to read or comment upon anything having to do with the subject of the trial, the parties involved, the attorneys, or anything else related to my service as a juror. Please do not send me any materials; don't e-mail, text, or tweet me any questions or comments about this case or my service as a juror. Please do not text or e-mail me during the course of this trial

except in an emergency. I will send you a note when I am released from my duty as a juror. [63]

The authors further suggest that jurors could leave a variation of this message as the greeting in their voice mail during their service.[64]

This approach could perhaps work with those contacts who are responsible and sober citizens, but it likely would tempt less serious contacts to respond in a way that might create more problems for the fairness of the trial than the warning would prevent.

Judge and Lawyer Awareness

The "buy in" approach is not a one-way street. In the new environment of juror access to instant information and communication, judges and lawyers should be aware throughout the trial that placing information before jurors in an incomplete, confusing or haphazard fashion will understandably tempt even conscientious jurors to seek outside information to complete the picture. While we should strictly instruct jurors to resist the temptation, it is prudent for counsel to prepare their cases to answer the obvious questions that will arise and to do so as early in the case as possible. Judges should prompt counsel to consider answering the obvious questions presented, such as having a witness fully explain the use of technical terms instead of leaving them open. If more explanation will come with later witnesses, that should be emphasized to the jurors.

Obviously, the judge must be careful not to become an advocate for one side or the other, but prompting counsel to have witnesses fully explain technical or scientific terms or to present their cases with an eye to the information that is readily available to jurors by a click of their smartphones is well within the judicial role of managing the trial. Counsel should prepare their cases with awareness of what jurors who are used to instantly obtaining information on any subject from the World Wide Web may expect and plan their presentations and examinations accordingly.

One device that can be helpful to engage a juror with the case is to supply jurors with trial notebooks, prepared by counsel and the court, which may include such items as the court's instructions, selected exhibits, stipulations of the parties, and a glossary of terms used, especially if there is technical or scientific evidence involved.[65]

The notebook can be supplemented as the trial progresses. The jurors can write their notes in the book and highlight exhibits. Where I have used juror notebooks, the jurors are more engaged and universally feel that it made the trial more interesting.

It certainly will only be a short time before such information will be supplied not by a traditional three ring binder but by giving each juror a tablet type device for their use at trial. The exhibits will be loaded on to this device, which will also contain searchable databases of evidence that the juror can use and mark pages or type margin notes.

Questions by Jurors

During the trial, there should be some opportunity for jurors to bring up questions or issues of major concern to the attention of counsel and the court. The inquiry can be vet-

63. Ralph Artigliere, Jim Barton & Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, 84(1) Fla. Bar J. 8 (Jan. 2010). This recommendation is also made in the American College of Trial Lawyers' proposed instructions. *See* Amer. Coll. of Trial Lawyers, *supra* note 55, at 5.

64. *Id.*

65. This is a recommendation of Principle 13 of the American Bar Association's Principles for Juries & Jury Trials (Aug. 2005). *See* A.B.A. Amer. Jury Proj., Principles for Juries & Jury Trials (Aug. 2005)., *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.pdf-2011-02-04.

ted by the court and counsel, and can either be addressed by the parties, or the judge can explain to the jury why the question cannot be answered.

The traditional view is that jurors should be neutral, passive, and silent, allowing the adversarial system to present to them what they need to resolve the case. As one commentator observed, "while evidence is being adduced, [jurors] sit silent, cast – one might say – into the role of potted courtroom plants."[66] Under this view, allowing jurors to raise questions during the trial should not only be discouraged; it should be disallowed entirely by the trial judge, and the jurors should be admonished to keep their questions to themselves.

As jurors have become better educated, more assertive, and less willing to automatically and meekly accept absolute fiats about their role, judges and lawyers have reexamined the proposition that jurors should be seen but never heard during the trial. Some courts have tried to find ways to allow jurors under tightly controlled circumstances to have their questions reviewed and, in some cases, even asked and answered. This procedure has been successfully introduced in many state[67] and federal courts,[68] including the U.S. district courts within the Seventh Circuit.[69]

Counsel should prepare their cases with awareness of what jurors who are used to instantly obtaining information on any subject from the World Wide Web.

Understandably, there is a greater reluctance to allow jurors to propose questions in criminal trials, where the prosecutor has the burden to prove the defendant's guilt beyond a reasonable doubt and establish each and every element of the offense. In such cases a juror's question may assist the prosecutor by removing potential doubt that he otherwise failed to address in his presentation. Thus some jurisdictions bar or limit questions from jurors in criminal cases, while allowing them in civil cases.[70] Other jurisdictions allow juror questions to be considered in criminal trials and have rejected contentions that such a pro-

66. Mirjan R. Damaska, Evidence Law Adrift (1997), at 90, *quoted in* Vidmar & Hans, *supra* note 52, at 343.

67. A review of the law in 2003 found that at least 31 jurisdictions permit some type of juror questioning. Sarah West, *"The Blindfold of Justice Is Not a Gag": The Case for Allowing Controlled Questioning of Witnesses by Jurors*, 38 Tulsa L. Rev. 529 (2003). A 2007 survey of judicial personnel and attorneys found that respondents in all but four states – Delaware, Mississippi, North Carolina and South Carolina – reported that their courts allowed jurors to submit written questions to witnesses, in at least some proceedings. Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, The State-Of-The-States Survey Of Jury Improvement Efforts: A Compendium Report (2007), at 85, *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/juries&CISOPTR=112.

68. The Federal Circuit courts that have considered the issue have held that allowing jurors to submit questions for review by the trial judge is within the discretion of the trial judge, but many of the opinions discourage the routine use of the procedure especially for criminal cases. *See* 29 Fed. Prac. & Proc. Evid. § 6235 (supp. 2010).

69. The Seventh Circuit Bar Association's American Jury Project, chaired by Chief Judge James F. Holderman of the U.S. District Court for the Northern District of Illinois, conducted a study of juror questions and strongly recommended the procedure for state and federal trials. *See* Seventh Circuit American Jury Project: Final Project (Sept. 2008), *available at* http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf; *see also* S.E.C. v. Koenig, 557 F.3d 736 (7th Cir. 2009) for a discussion of the procedures used in the Seventh Circuit and an explanation of why it is better for the court to listen to juror's questions rather than merely instructing them not to ask them.

70. A 2005 article reported that Texas, Georgia and Minnesota had taken this approach. Terry Carter, *The Verdict on Juries*, 91 A.B.A. J. 41 (April 2005).

cedure violates a defendant's constitutional rights.[71]

When questions from jurors are considered, there should be an orderly screening process that makes certain that inappropriate questions are not allowed. A format for handling juror's questions is included in the American Bar Association's *Principles for Juries and Jury Trials*, adopted in 2005:

• Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses.

• Upon receipt of a written question, the court should make it part of the court record and disclose it to the parties outside the hearing of the jury. The parties should be given the opportunity, outside the hearing of the jury, to interpose objections and suggest modifications to the question.

• After ruling that a question is appropriate, the court may pose the question to the witness, or permit a party to do so, at that time or later; in so deciding, the court should consider whether the parties prefer to ask, or to have the court ask, the question. The court should modify the question to eliminate any objectionable material.

• After the question is answered, the parties should be given an opportunity to ask follow-up questions. [72]

It may seem that informing jurors that they can propose questions for witnesses will produce an endless string of questions that will delay the trial and divert the attention of jurors from the information that the attorneys are presenting through their questioning. It has not been my experience that this is the case, especially if the jury is instructed in advance that the lawyers will be doing the questioning and that jurors should propose questions only if they think an important matter is not being addressed. In many cases where I have given an instruction regarding juror questions at the beginning of trial, no questions were, in fact, proposed. In those cases where questions were proposed, I generally found them to be appropriate and relevant to the subject matter of the case.[73]

While lawyers are understandably nervous about allowing jurors to pose questions, even under the constraints envisioned by the ABA Principles, I have found that when they do hear the jurors' questions, the attorneys often appreciate the insight into what at least one juror is thinking, so that mid-trial adjustments in the case presentation can be considered.

It should be remembered that if a juror has a question it does not necessarily evaporate if the juror is told that it cannot be dealt with during trial. The juror is likely to carry it into deliberations, when the parties and the judge then have no opportunity to correct a misimpression, clarify a point, or explain that some issue is not relevant. As Chief Judge James Holderman, the chair of a Seventh Circuit study of jury practices of the courts within the Circuit,[74] put it, "When the question is off-base, that's when you really want jurors to be asking questions because they are already thinking off-base, and then I as the judge can bring them back."[75]

If the human urge to ask a question is totally stifled, it may become an irresistible temptation for the juror to turn to his smartphone or tablet during a recess in the trial or delib-

71. *See, e.g.*, Medina v. People, 114 P.3d 845 (Colo. 2005).

72. *See* A.B.A. Amer. Jury Proj., *supra* note 65, Principle 13.

73. My experience is consistent with the findings of two researchers who found that in cases where jurors were explicitly told they could propose questions, no questions were asked in many cases and that in cases where jurors did ask questions, the median number of questions per trial was two. Larry Heuer & Steven Penrod, *Juror Notetaking and Questions Asking During Trials: A National Field Experiment*, 18 Law & Hum. Behav. 121, 141 (1994).

74. Seventh Circuit American Jury Project, *supra* note 69.

75. Rachel M. Zahorsky & James Holderman, *Jury Duties*, ABA Journal's Legal Rebels: Remaking the Profession (Nov. 9, 2009), http://www.legalrebels.com/profiles/james_holderman_jury_duties.

erations for a quick explanation from whatever website the juror's search engine presents.[76]

Final Instructions

Prior to deliberations, the jury should be instructed again, as part of the instructions for deliberations, about the need to not communicate with others or to obtain information from other persons or sources. Each juror should be given a written copy of this instruction during deliberations and perhaps be reminded of their "buy-in" to these restrictions when they were first selected. At this point, if not even earlier, it would probably make sense to instruct the jurors to report any violations of the rule by other jurors. Here is an instruction that I drafted, again after looking at proposals from around the country:

> During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You must decide this case based only on the evidence that you and your fellow jurors heard together in the courtroom. You must not consider any other information.
>
> You must not do any outside research or investigation on your own. Do not use any books, electronic devices, computers or phones to do research on the internet or otherwise about this case even if you believe that the information would be helpful to you.
>
> While you are deliberating about the case you must not have in your possession any computers, cellphones, or other electronic communication devices and you must not communicate with anyone outside the jury room. We have collected these devices from you and will hold them under custody of the court. If there are breaks in deliberations, I may allow you to communicate on your electronic device to your family or friends, but there must be no communications about the case or the deliberations that you are engaged in.
>
> If you have any questions about this instruction or the restrictions that apply to you, please send me a note and I will respond to it. If you become aware that any other juror has violated this instruction, please also let me know by a note.

Deliberations

During deliberations, as indicated in the above instruction, all electronic devices should be removed from the jurors' possession and held by court staff. During breaks in the deliberation day, the devices can be returned, but only to make calls to family, jobs, or other necessary contacts. The temporary return of the devices should be preceded by a reminder from the judge about the rules for their use. The jurors would be forbidden from accessing web sites of any type, except with the court's permission and oversight.

Overnight separation of the jurors while in the midst of deliberations will require the court to forcefully remind the jurors of these directives and the court's instructions.

Juror Sanctions

Most judges – correctly, in my view – are loath to impose sanctions upon jurors even when "misconduct" has occurred. It may, however, be necessary that a juror receive a sanction that would serve as an example to others in particularly egregious cases, where the directives to the juror were clear and there is no reasonable excuse for a violation. This would be particularly appropriate where the misconduct resulted in a mistrial or the granting of a motion for new trial, where parties, victims, attorneys, and others are greatly inconvenienced and where substantial expenses were incurred in the trial process.

76. In the Luzerne County shaken baby case, the juror who was cited for doing Internet research on retinal detachment during deliberation had earlier in the trial asked the judge if she could pose a question. She was told she could not. *See* Grow, *supra* note 38.

Anonymous Juries

In high profile cases where there is intense public interest, it is a good precaution to have the jurors' names and identifying information shielded from the public and the media during trial. This helps to insulate jurors from people, whether they be friends or total strangers, attempting to influence the trial by contacting the jurors or their family members, electronically or by other means.

Traditionally, anonymous juries have been mostly used where there was concern about the jurors' safety, or where there were concerns about attempts to intimidate jurors. Even before the issues of social media were so pressing, some commentators had argued for expanding the use of anonymous juries to encourage jurors' willingness to participate in jury service and ensure fairer verdicts.[77] In this new age when, with just a bit of information, even just a name and a geographical location, one can find an individual and potentially access the person's social media profiles, courts should take care to insulate jurors from such scrutiny and contacts during the trial[78]. The attempts to contact may not have malicious intent, but they could still be troubling if the person making the contact communicates any information, views, or opinions about the case.

In the Dixon trial, I kept the jurors' names and addresses from public disclosure during the trial to insulate them from such contacts, given the high public interest in the case. I was also concerned that even innocently intended contacts by members of the public could compromise the jurors' ability to serve. Several media organizations intervened into the proceedings to argue that it was improper for the court to withhold the names during the trial. I held a hearing the day after the verdict and agreed at that point to release the names, because the jury was discharged and the harm I was guarding against – interference with the jury's work – was no longer relevant.

These issues are currently front and center in the extortion and bribery trial and appeals of former Illinois Governor Rod Blagovich, where the trial judge ordered an anonymous jury for the first trial. This ruling was appealed, which led to a sharp division among the appellate judges who reviewed the media's challenge.[79] On re-trial, the trial judge has again concluded that an anonymous jury is required to avoid potential interference with the jurors.[80]

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77. *See, e.g.*, Nancy J. King, *Nameless Justice: The Case for Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123 (1996).

78. In Maryland, these concerns have recently been recognized in a court rule proposed by the Standing Committee on Rules of Practice and Procedure which would allow jurors' names and home location to not be disclosed during trial if the trial court determines that disclosure would likely subject the jurors to "coercion, inducements, other improper influence, or undue harassment." Proposed Rule 4-312, 168th Report of the Standing Committee on Rules of Practice and Procedure (letter dated March 16, 2011), at 34-41, *available at* http://www.mdcourts.gov/rules/reports/168thReport.pdf. The proposed rule would allow an anonymous jury in "high profile cases where strong public opinions about a pending case is evident...." Committee note to Proposed Rule 4-312, *id.* at 38.

79. U.S. v. Blagojevich, 612 F.3d 558, 38 Media L. Rep. 1929 (7th Cir. 2010), (opinion by Judge Easterbrook vacating and remanding trial court's order withholding juror information), *reh'g en banc denied*, 614 F.3d 287 (7th Cir. 2010) (Posner, J., dissenting); *see also* Thaddeus Hoffmeister, *Judges Posner and Easterbrook Disagree Over Anonymous Jury Issue, Juries* (blog) (July 16, 2010), http://juries.typepad.com/juries/2010/07/judges-posner-and-easterbrook-disagree-over-anonymous-jury-issue.html. Upon remand, the trial court reached the same decision to withhold the jury information. *See* U.S. v. Blagojevich, --- F.Supp.2d ----, 2010 WL 2934476, 38 Media L. Rep. 2089 (N.D. Ill. July 26, 2010).

80. U.S. v. Blagojevich, 2011 WL 812116 (N.D. Ill. Feb. 28, 2011). A similar determination was made in the perjury trial of Barry Bonds. U.S. v. Bonds, No. C 07-00732 SI, 2011 WL 902207 (N.D. Cal. Mar. 14, 2011); *see* Juliet Macur, *Jurors' Names to Be Kept Secret in Bonds Case*, N.Y. Times (March 15, 2011); *see also Jurors' Privacy, Public's Rights To Know Collide*, Associated Press, Mar. 22, 1011, *available at*

Standards for New Trials

The Maryland appellate courts, like other appellate courts around the country, have found new trials to be required whenever, in the words of one case, juror misconduct suggests "even the hint of possible bias or prejudice."[81] This is the rule even where the case appears to be otherwise error-free and the trial judge made findings that the misconduct was not material to the fairness of the verdicts reached.

These strict appellate standards should be reviewed in light of the modern realities facing jurors and trial judges.

For example, in evaluating claims of juror "misconduct," casual and non-serious postings made by a juror or potential juror in the atmosphere of a social media site should be evaluated with an understanding of the culture found there and courts should not overreact by voiding trials where the overall record reflects that a fair trial was held.

For example, in the Dixon case, one of the jurors, a 24-year-old male posted the following on his publicly available Facebook page, after the verdict and before the new trial hearing: "If you see me on the news, remember you don't know me. Fuck the judges and the jury pimpin."

The media seized on the comment as showing great hostility by the juror.[82] After the Dixon case was fully resolved, I spoke to the juror who posted the remark and asked him about it, since he had always been very friendly and polite during the trial. He smiled sheepishly and said, "Hey judge, it means nothing. That's just Facebook. We're cool."

While allegations of juror misconduct involving the Internet should be explored and taken seriously, it is probably a good idea for those not used to the culture of the digital native to not overreact, and to judge the supposed violation in the context of the entire trial.

This article has focused on the role of jurors in this age of new media. There are others involved in jury trials who will need to consider how their roles in jury trials will be affected by the Internet and social media world. Judges will also need to figure out whether new rules will be needed for these participants as well as themselves.

Regulating Lawyers

Courts and trial judges also have to think about whether they should take steps to regulate how lawyers use the Internet and devices in the trial process, particularly as to how it may affect the rights of jurors and the provision of a fair trial.

There are already various jury selection apps for smartphones, laptops or tablet type devices that lawyers use to help them organize information about jurors to aid in selecting a jury that favors their side. [83] If these programs do not already do so, it can only be a matter of time before such apps also contain an Internet searching capability to instantly obtain online information available on each juror and update it throughout the trial.

A whole range of issues are presented that require thought and careful collaboration between the bench and bar in developing a common understanding of what is appropriate

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http://www.npr.org/templates/story/story.php?storyId=134753777 (noting that the judge in the Bonds case "alluded to the media crush surrounding Blagojevich's trial when she ruled that she would keep the jurors' names secret until after their verdict").

81. Wardlaw v. State, 185 Md. App. 440, 451, 971 A.2d 331, 337 (2009).
82. *Dixon Jurors Ignore Judge, Continue Facebook Posts*, WBALTV.com (Jan. 4, 2010), http://www.wbaltv.com/r/22117438/detail.html.
83. iJuror, Jury Tracker and Jury Duty are three apps that currently are available at low cost. *See* Ted Brooks, *iPad Apps for Lawyers: iJuror, Jury Tracker, Jury Duty, WordPerfect Viewer*, Ct. Tech. & Trial Presentation Blawg (Jan. 24, 2011), http://trial-technology.blogspot.com/2011/01/ipad-apps-for-lawyers-ijuror.html.

conduct. Among the issues are the following:

1) Should lawyers be allowed to use electronic devices in the courtroom to help screen prospective jurors during jury selection?

2) Should lawyers be allowed to continually check on sworn jurors during the trial by continuing to do Internet searches of jurors' social media sites to see what activity, if any, is occurring.

3) If review or monitoring is done, what is the obligation of the lawyer during the trial to let the court know about it?

4) What is the obligation to disclose information discovered by such searches to opposing counsel?

5) Does the court have a role in protecting jurors from what jurors may perceive as intrusions into their private lives?

6) Does it make a difference if the review and investigation is being done by a non-lawyer, such as a party to the case, rather than a lawyer?

7) To what degree can lawyers interview jurors after trial without court knowledge and try to discover social media violations that can be turned into reasons to request a new trial?

These issues have serious implications and deserve attention from the bench and bar.

Media in the Courtroom

There will also need to be consideration given to whether social media and the advances in electronic devices are changing the way that courts should regulate media and others in the courthouse and the courtroom, especially during high-profile trials. The issues are difficult because, with the advent of personal blogs and websites that are concerned with public issues, it is becoming ever more difficult to distinguish between those who are "journalists" and those who are "interested citizens".

In the Dixon case, there was a media protocol order issued for the trial that worked well, but issues did arise.

For example, tweeting from the courtroom by journalists became an issue. At first, it was banned. After a while it seemed a little senseless, because the reporter would merely leave the courtroom and tweet from the hallway or courthouse steps and then return. Allowing journalists reporting on the case to tweet from the courtroom seems to make sense and should not be unduly disruptive of the proceedings.[84] But how to fashion a rule limited to journalists presents a challenge for the courts, because other observers of a trial may also wish to use their electronic devices and may not see a valid distinction between their needs and desire to communicate and those of more traditional reporters.

The on line activity of trial attendees who are not mainstream journalists can create issues that threaten to disrupt trials. In Texas, a trial attendee and environmental activist blogged that she had inside information on what the jury was thinking in a federal environmental case and wrote on her blog that she knew how the jury was split during deliberations. While the court felt that her blog entries "appeared to incorporate fantasy," it allowed the corporate defendant to take her deposition because the court felt further investigation was warranted.[85]

84. Some judges around the country seem to be allowing tweeting from the courtroom in high profile cases, even when the parties object. *See Judge Allows Twitter in Conn. Home Invasion Trial*, Associated Press, Feb. 22, 2011, *available at* http://abcnews.go.com/Technology/wireStory?id=12973244.

85. United States v. Citgo Petroleum Corp., 2007 WL 4116066, 2007 U.S. Dist. Lexis 85341 (S.D. Tex. Nov. 19, 2007) (unreported).

Limits on Judges

Judges have to not only figure out how to control the use of social media and the Internet by jurors, lawyers, and the media; they also have to determine the limits that they should impose on themselves. The dangers inherent in the new age do not disappear when one assumes the bench, and judges will have to make sure that their use of social media does not detract from the standards they must adhere to or impair the rights of litigants to obtain a full and fair trial.[86]

Courts are now beginning to address these issues, either in general guidance given to trial judges or in adjudications by ethical committees or boards.[87] The Ohio Supreme Court's Board of Commissioners on Grievances & Discipline recently set out extensive guidelines for Ohio state court judges to follow.

Among the restrictions that the opinion noted judges must observe:

• To comply with Jud. Cond. Rule 1.2., a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site.

• To comply with Jud. Cond. Rule 2.9 (A), a judge should not make comments on a social networking site about any matters pending before the judge – not to a party, not to a counsel for a party, not to anyone.

• To comply with Jud. Cond. Rule 2.9 (C), a judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge.

• To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court.

• To comply with Jud. Cond. Rule 2.11 (A)(1), a judge should disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice concerning the lawyer or party. There is no bright-line rule: not all social relationships, online or otherwise, require a judge disqualification.

• To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. [88]

The opinion concludes: "To ensure compliance with all of these rules, a judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site."[89]

Besides judges having to be careful about their own social media use, they will also have to pay attention to their own liability to the extent that they attempt to get jurors or others involved in trials to disclose details of their social media sites as part of the *voir dire* process. A leading indicator of such a trend, perhaps, is a (now-dismissed) lawsuit in federal court in California by a former juror claiming that a trial judge violated his privacy by threatening to hold him in contempt unless he allowed Facebook to disclose

86. To traditionalists it may seem oxymoronic to link judges with social media sites, but one recent survey found that 40 percent of responding state court judges were on social media profile sites – about the same percentage as for the general population. *See* CCPIO, *supra* note 3, at 9. This surprising result may have something to do with the prevalence of elections for state court judge positions. Only nine percent of judges from non-elected jurisdictions reported they were on these sites. *Id.*

87. A discussion of judicial ethics advisory opinions on the subject from New York, South Carolina, Florida and Kentucky is included in the CCPIO report. *Id.* at 30-34.

88. *See* Opinion 2010-7 (Ohio Bd. Commr's of Grievances & Disclip. Dec. 3, 2010), *available at* http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010//op_10-007.doc.

89. *Id.*

his Facebook postings made during a trial.[90]

This raises the issue of whether a judge has the authority to order jurors to share with the court their primary email addresses in advance (just as jurors must share their street addresses). And if so, does the judge have the authority to order the juror to turn over passwords upon reasonable suspicion of misconduct? Finally, under what circumstances should the judge be able to order disclosure for examination by the court (and possible reading into the record) of a juror's social media or other electronic communications -- Facebook postings, email exchanges, cell phone text messages, etc.?

Conclusion

The experience from the Dixon trial and the frequency of other trials having so-called "Google mistrial" problems merits our attention and action, but we should not overreact.[91]

The jury system has successfully survived great challenges in the past, including the addition of minorities and women to the formerly all-white male jury pool; the onslaught of prejudicial publicity during trials from newspapers, television, and radio; and the advent of highly complex or technical issues that threatened to outstrip juror competence. Each of these developments was prophesied at the time to be the end of the jury system as an effective instrument of justice. But despite the predictions of dire consequences at each development, the jury system has survived and, in my view, prospered by accommodating itself to these challenges. There is no reason to think that jury trials – with a little care and modest adjustments from the bench and bar – cannot survive the arrival of the digital native, along with her Facebook friends, Twitter followers, bloggers, and other electronic and digital creatures of the early 21st century.

90. Bridget Freeland, *Juror's Facebook Postings During Gang Trial Lead to Legal Morass & Suit Against Judge*, Courthouse News Service, Feb. 15, 2011, http://www.courthousenews.com/2011/02/15/34186.htm. The case, Juror No. 1 v. California, Civil No. 11-00397 (E.D. Cal. Feb. 11, 2011), was dismissed in early April 2011; the complaint is available at http://www.courthousenews.com/2011/02/15/FacebookJuror.pdf

91. Professor Caren Myers Morrison has made this point in her recent law review article pointing out that the media reports on these cases tend to hype the cases beyond their legal significance with what she calls a "Jurors Gone Wild" spin that creates public interest and outrage but may not mean anything fundamental about jurors or the jury system. *See* Morrison, *supra* note 2.