

**PREVENTING & ADDRESSING
INTERNET-RELATED
JUROR MISCONDUCT:**

A JUDICIAL CURRICULUM



Center for Jury Studies

Faculty Guide:

Preventing and Addressing Internet-related Juror Misconduct: A Judicial Curriculum

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Table of Contents

Foreword.....	i
Acknowledgements.....	ii
Curriculum Overview	1
Overall Learning Objectives	1
Suggestions for the Judicial Educator	2
Faculty Selection	2
Modification of the Curriculum	2
Presentation of the Curriculum	2
Equipment Needed	3
Learning Activity Guidelines.....	3
Guidelines for Effective Lectures	3
Guidelines for Large Group Discussions.....	4
Guidelines for Small Group Discussions.....	4
Components of the Curriculum	5
Learning Materials	5
Module 1: The Current State of Jurors and New Media.....	6
Module 2: Preventing Internet-related Juror Misconduct	23
Module 3: Responding to Internet-related Juror Misconduct.....	39
Evaluating the Curriculum.....	49

Foreword

Juror use of Internet technologies causes serious complications for judges presiding over jury trials. Media stories regularly describe disrupted trials or cases in which the verdict was overturned because one or more jurors conducted independent research on the case or communicated with friends or family using social media. Hundreds of written court opinions have been filed in response to allegations of Internet-related juror misconduct. Although courts have developed some tools in recent years to discourage inappropriate juror use of Internet technologies, not all judges are aware of these tools or use them on a consistent basis. And none of the current approaches can guarantee 100% effectiveness. Consequently, judges can anticipate spending more courtroom time deciding motions for mistrials and new trials.

To help judges meet these new challenges, the National Center for State Courts (NCSC) developed and pilot-tested curriculum materials for a judicial education program on *Preventing and Addressing Internet-Related Juror Misconduct*. The curriculum consists of three distinct modules, each of which is designed as a 30-minute educational program. Module 1 is intended to familiarize trial and appellate court judges with both the ubiquity of Internet technologies in contemporary society and jurors' expectations about their access to and use of these technologies during jury service. Module 2 describes techniques that trial judges can employ to discourage inappropriate use of these technologies during trial. Module 3 is designed to summarize applicable law concerning juror misconduct and to provide a checklist of factual issues that trial judges should use to assess the risk of prejudice resulting from juror misconduct. Module 3 also includes a series of hypothetical cases involving juror misconduct for judges to consider how they might respond to allegations of juror misconduct.

The course provides multiple opportunities for judges to interact with faculty in large group discussions and with each other in smaller group discussions. It also provides individual worksheets and action plans as handouts for judges to use during and after the program.

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Curriculum Overview

This curriculum is designed to teach trial judges about juror use of new media including how to discourage jurors from using these technologies inappropriately during trial and how to respond to allegations of Internet-related juror misconduct. The intended audience is trial judges who sit in courts with jury trial jurisdiction. Appellate court judges may also benefit from much of the material presented. The format envisions a large group setting with judges who are subject to the same state law with respect to juror misconduct, but it can be modified for a multi-jurisdictional or national audience.

The curriculum consists of three 30-minute modules entitled (1) juror and jury use of new media: what do we know?; (2) an ounce of prevention; and (3) when prevention fails. Modules 1 and 2 are designed primarily as faculty lecture format with frequent opportunities for interactive engagement with attendees. Model 3 is heavily interactive and can be done in either a large-group or small-group setting.

Overall Learning Objectives

At the conclusion of the curriculum, participants should be able to:

1. Recognize contemporary trends in new media use by prospective jurors;
2. Identify factors that contribute to jurors' interest in using new media during trial;
3. Describe strategies to discourage inappropriate use of new media by jurors during trial;
4. Concisely state key principles of state law and procedure concerning juror misconduct;
5. Develop a checklist for investigating allegations of juror misconduct.

Suggestions for the Judicial Educator

Faculty Selection

The curriculum requires subject matter expertise on both trends in contemporary Internet technologies and common law principles governing judicial responses to juror misconduct. Because few potential faculty members will have sufficient expertise to cover both subjects, the NCSC recommends that two or more faculty be selected to present the course: an experienced and well-respected trial or appellate court judge, and a professional with marketing or communications expertise such as a court public information officer (PIO) with in-depth knowledge about contemporary Internet technologies.

Modification of the Curriculum

The curriculum can be modified as needed to accommodate the size and experience level of the attendees. In particular, the hypothetical cases of possible juror misconduct presented in Module 3 can be adapted as either a small-group exercise or a larger group interaction. For less experienced trial judges, the focus of the curriculum should be the more practical aspects of trial management. A more experienced audience, however, may benefit from discussion of the philosophical questions concerning the development of common law related to juror misconduct in the Internet age.

There is no specific design for the PowerPoint slides. Presenters may use their own designs or a preexisting MS PowerPoint template. When importing design templates, it is important to check the formatting on each slide to ensure that content has not been displaced. The NCSC requests that the curriculum slides retain the NCSC copyright notation in the slide footers.

Presentation of the Curriculum

The PowerPoint presentation contains notes for the presenters within the slides. These notes were developed to assist the presenters with their presentation. Slides # 37 and 38 highlight common legal issues that arise with respect to juror misconduct. When used for an in-state program, the presenters may substitute these slides for one or more slides that summarize state law on these questions. Use Slide # 39 as a template for these summaries. Once the presentation is in its final format, the presenter may wish to print the PowerPoint presentation as a handout for the participants. The best handout format is as follows:

- Select “print”
- Choose “handouts” in the “print what” section
- Select 3 slides per page (this allows for note-taking lines on the right)
- Select “pure black and white” for color/grayscale.

Note: We recommend that the presenters suppress Slides # 2, 20, 36, and 44 (audience polls) in the live presentation and Slides # 2-3, 20, 36, and 44 in the handouts. Conducting these exercises as informal polls of the audience will be more engaging and may prompt more interactive discussion among attendees. To suppress the slides in the handouts:

- Hide the identified slides that the presenter doesn't wish to print by right clicking on the slide in the left navigation pane and selecting Hide Slide;
- Select print in the print dialog box, making sure Print Hidden Slides is not selected on the right hand side of the box;
- Print the slides as defined above.

When the presenter is ready to present the PowerPoint presentation, he or she should unhide Slide # 3 by again right clicking on the slide in the left navigation pane and deselecting Hide Slide. If the presenter does not do this, the presentation will skip past this slide in the presentation.

Equipment Needed

To present the curriculum, the presenter will need the following:

- An LCD projector;
- A computer with Microsoft PowerPoint software;
- A display screen; and
- Audio speakers to project the audio portion of the video clip on social media in Slides # 5 and 26.

Learning Activity Guidelines

Guidelines for Effective Lectures

- *Lecture for relatively short periods.* Adult education research has shown that lectures should generally last no longer than 15 to 18 minutes before another type of learning activity is utilized. See below for examples.
- *Use learning objectives to establish what's in it for the participant.* The learning objectives don't have to be the first thing the presenter discusses. Indeed, in many cases, the presenter may want to begin with an opening that captures the participants' attention, establishes credibility, and/or sets the stage for the remainder of the session. Nevertheless, identifying what the participant will gain from the presentation is quite important for focusing the participants' attention on the learning objectives.
- *Reduce the major points in the lecture to key words that act as verbal subheadings or memory aids.* In PowerPoint, use the 7x7 rule, which suggests having no more than seven phrases on each slide and seven words in each phrase, relying on key words and phrases instead of complete sentences. Maximum is 9x9 phrases and words.
- *Don't read from the slides.* The 7x7 rule for words and phrases helps eliminate this possibility.
- *Provide sufficient time for participants to take notes, if desired.* Although the content on any given slide may be minimal, be sure to allow sufficient time for participants to take notes on the presenter's oral narrative associated with slides.
- *Offer examples.* When possible, provide real-life illustrations of the lecture's main ideas.
- *Use analogies.* If possible, make a comparison between the content of the lecture and knowledge the participants already possess.
- *Use audio-visual aids.* Use a variety of media to enable participants to see as well as hear what is being said. The PowerPoint slides contained in the curriculum are a good beginning.
- *Use vivid language and graphics.* In creating new slides, use vivid language and graphics. The presenter may wish to use mnemonic devices and other aids to memory. Also, storytelling can be quite effective for improving retention.

Guidelines for Large Group Discussions

- Plan key questions.
- Questions should proceed from lower to higher level thinking according to Bloom's Taxonomy:
 - *Knowledge*: The participant is able to identify and recall information: who, what, when, where, how. Example: how is juror misconduct defined in the common law in this state?
 - *Comprehension*: The participant is able to present the information in his or her own words, not a mere mechanical repetition.
 - *Application*: The participant is able to apply theory to specific facts. Example: In Scenario # 1 (Slide # 41), which facts, if supported by competent evidence, would justify a conclusion that the juror had engaged in misconduct?
 - *Analysis*: The participant is able to separate the whole into component parts. Example: If a juror posts information about jury service on Facebook, is the fact of having done so dispositive of the question of prejudice to the litigant?
 - *Synthesis*: The participant is able to construct ideas and concepts from multiple sources to form new, integrated information. Example: Do existing court policies and procedures provide sufficient safeguards against juror misconduct?
 - *Evaluation*: The participant is able to judge or assess ideas on the basis of specific standards and criteria. Example: What policies or procedures could you or your court enact that might minimize the risk of the scenarios outlined in Module 3?

Guidelines for Small Group Discussions

- *Give all instructions before splitting participants into groups.* Otherwise, the participants will begin forming relationships with their group members and miss the instructions.
- *Develop explicit instructions concerning what the presenters want the participants to do.* The presenter may want to try out the instructions on a few colleagues to ascertain if they understand the exercise.
- *Provide a handout with written as well as oral instructions for the activity.* Written instructions can assist the groups while they are working in their groups. This is especially important for large groups.
- *Ask each group to select a reporter (if necessary – for reporting back to the larger class) and a recorder (if necessary – for producing a written product to be reported back to the larger class).* This should be an explicit instruction. Otherwise, the group members will look at one another when the presenters asks for the report back, thereby delaying and likely resulting in less effective and efficient reporting. The reporter and the recorder can be the same person. If so, the presenter should explain the dual role for this person.
- *Set a time limit.* The presenter can be flexible but give the participants some idea of how long the activity is anticipated to take.
- *Before ending the group work, give the participants a one-minute time warning telling them to wrap things up.* This will assist the reporters in knowing they have just a minute to collect their thoughts.
- *If there is a report back, be clear in the instructions about what the reporters are to communicate.* Obviously, the presenter doesn't want to embarrass the reporters as they report, so make the instructions as clear as possible.

Components of the Curriculum

In addition to this faculty guide, the curriculum contains a PowerPoint presentation, written materials for use as handouts, group and individual exercises for participants, learning materials to assist presenters in teaching, and additional materials to provide further background information about the topic.

Learning Materials

The curriculum contains the following written materials for use as program handouts:

- PAULA HANNAFORD-AGOR, DAVID B. ROTTMAN & NICOLE L. WATERS, JUROR AND JURY USE OF NEW MEDIA: A BASELINE EXPLORATION (NCSC 2012).
- *Ohio v. Gunnell*, 973 N.E. 2d 243 (2012).
- *Dimas-Martinez v. Arkansas*, 385 S.W.3d 238 (2011).
- *Cincinnati Ins. Co. v. Omega Flex, Inc.*, Memorandum Opinion and Order (No. 3:10-CV-00670-10)(W.D. Ky., Apr. 10, 2013).
- New York State Civil Pattern Instructions, Jury Admonitions in Preliminary Instructions (2009).
- AARON SMITH, U.S. SMARTPHONE USE IN 2015 (April 1, 2015).

If the presenters discuss applicable state law in Module 3, copies of the relevant court opinions or statutes should be included with the written materials.

The curriculum contains the following group/individual exercises for participants:

- Action Plan: Preventing and Addressing Internet-Related Juror Misconduct
- Small Group Case Scenarios

The curriculum contains several items to help the presenter prepare for the presentation:

- Reference Guide for Case Law on Juror Misconduct
- Nicole L. Waters & Paula Hannaford-Agor, *Jury Impartiality in the Modern Era*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* (2014).
- Julie Blackman & Ellen Brickman, *Let's Talk: Addressing the Challenges of Internet Era Jurors*, *THE JURY EXPERT* (March 2011).
- Dennis M. Sweeney, *Worlds Collide: the Digital Native Enters the Jury Box*, *REYNOLDS COURTS & MEDIA L. J.* 121 (Spring 2011).

Module 1: The Current State of Jurors and New Media

This 30-minute module describes current trends in the use of social media by jurors including key findings from the NCSC study entitled *Juror and Jury Use of New Media: A Baseline Exploration*. The module begins with an icebreaker to illustrate that new media has become so ubiquitous that even large majorities of trial judges now use these technologies on a routine basis. The module continues with a short marketing video that demonstrates the prevalence of new media in contemporary society.

Preventing and Addressing Internet-related Juror Misconduct

[EVENT DESCRIPTION]
[DATE AND LOCATION]

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FACULTY NOTES, SLIDE # 1: If you have not already been introduced, the presenters should briefly introduce themselves. Use the poll on Slide # 2 to introduce the topic, specifically how the role of the Internet, new media, and smart phones affects the lives of nearly all Americans. During this program, participants will learn about the implications these developments have for trial judges.

How wired are you?

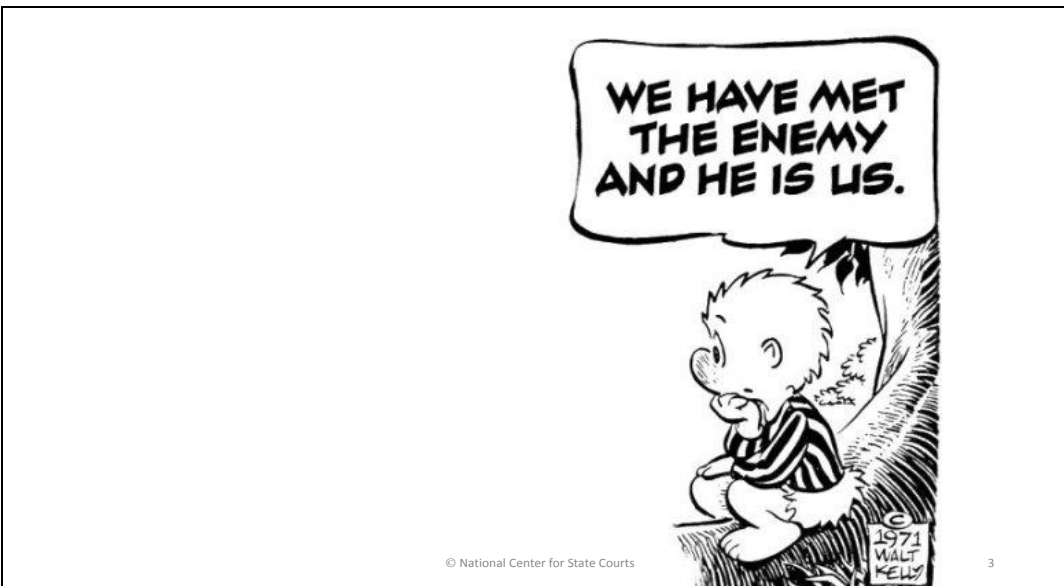
RAISE YOUR HAND IF ...

- You have a cellular telephone, portable computer, or other electronic communication device with you today
- You have used that device to check email at least once today
- You have that device to ...
 - Get directions to this hotel/training facility
 - Google local restaurants or attractions
 - Check your Facebook/Twitter news feeds
 - Post to Facebook/Twitter or other social media accounts
 - Take pictures to send to friends or family
 - Text friends, family, or coworkers

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2

FACULTY NOTES, SLIDE # 2: The presenter may choose to hide Slide # 2 and instead simply ask the participating judges to raise their hands in response to the presenter's questions. Once it becomes obvious that the majority of trial judges now use these technologies on a routine basis, show Slide # 3 (Pogo "we have met the enemy" quote).



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3

FACULTY NOTES, SLIDE #3: Most trial judges will remember Walt Kelly, a political cartoonist who predated Doonesbury by several decades. If busy trial judges are as wired as the participants in this program, how can we possibly expect jurors to be less wired?

Before moving into the substance of Module 1, describe the program objectives. Then show the marketing video on the next slide to demonstrate the prevalence of new media in contemporary society by clicking on the link in Slide # 5.

Program Objectives

1. Describe various ways that jurors may use the Internet during a trial that may be inappropriate;
2. List effective practices that you can use to prevent Internet-based juror misconduct;
3. Identify strategies that you will use to address potential Internet-based juror misconduct when it arises.

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4

FACULTY NOTES, SLIDE # 4: Today's program consists of three components. During the first component, we will give you a brief overview of Internet technologies and their pervasiveness in contemporary society. We will also highlight some of the key findings of a 2012 study by the NCSC that examined juror and jury use of new media.

In the second component, we will describe current techniques and strategies employed around the country that are designed to discourage jurors from using the Internet inappropriately during trial. Most of these techniques emphasize the importance of educating jurors about the underlying rationale for restrictions on the use of Internet technologies, so that they will be motivated to comply with those restrictions.

After the first section, we are confident that you will appreciate just how pervasive these technologies are, and how heavily reliant most people are on these technologies to accomplish routine tasks. Because they are so ubiquitous, it is very unlikely that the strategies and techniques described in the second part will be 100% successful, 100% of the time. The third component of today's program first summarizes the key legal questions that will arise when you are confronted with allegations of Internet-related juror misconduct. We will also walk you through the factual questions that you will need to have answered to make a legally sufficient decision about whether misconduct actually occurred, and if so, whether the misconduct has prejudiced the rights of the litigants, and what remedies might be available to address the situation. Demonstrating on the record that you have conducted an adequate inquiry and have properly applied the applicable law on juror misconduct will greatly reduce the risk of having appellate judges second-guess your conclusions. In this section, we will also discuss some

hypothetical situations (based on actual cases) and ask you to explain how you would address these issues.

[ALT: Toward to the end of that component, we will pose some questions about the long-term implications of juror use of new media for the future of the jury trial.]



FACULTY NOTES, SLIDE # 5: Presenters may show this excerpt of a marketing video produced by Eric Qualman about the importance of the Internet and social media for commercial purposes.

This is a transition slide into the substance of Module 1. Begin the presentation with Slides # 7-10, which describe the growing reliance of nearly all Americans on new media in many, if not most, aspects of their lives. The slides are intended to demonstrate both the availability of social media and the extent to which people are accustomed to rely on new media for information and social contact. Presenters may decide to hide some of these slides if the audience has by other means learned the "facts" about social media.

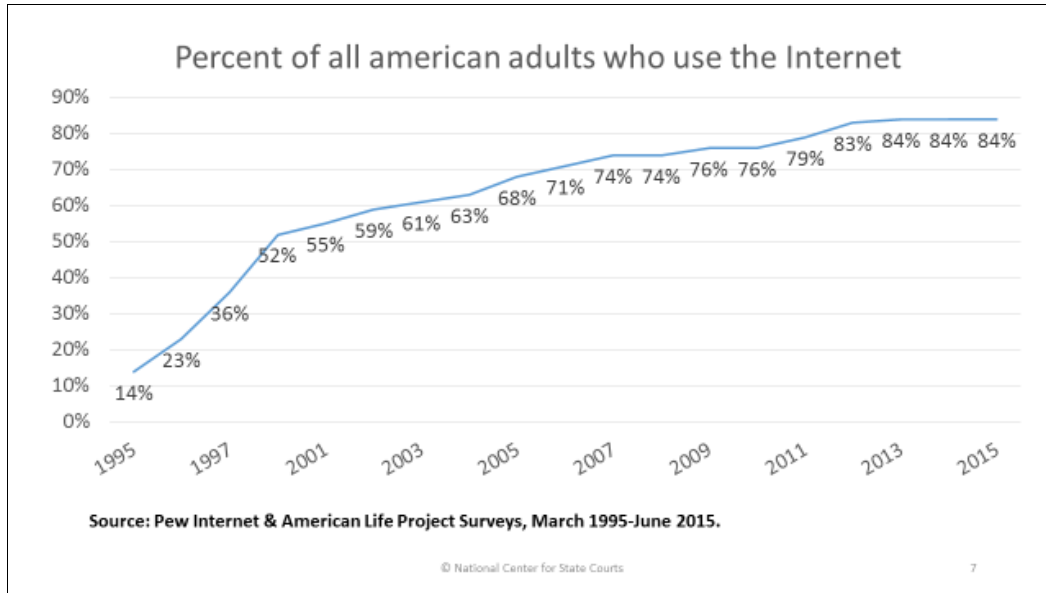
Juror and Jury Use of New Media: What do We Know?

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6

FACULTY NOTES, SLIDE # 6: In a relatively short period of time, the Internet itself and new media specifically have become deeply embedded in the lives of most Americans. We communicate with one another, follow the news, and search for authoritative information online using new media. Social networking sites are how many people organize and pursue their social and work lives. As we just saw, judges are not necessarily exceptions to this pattern. The role and nature of new media is changing rapidly. Jurors come to the court heavily-reliant on new media to navigate their lives and to solve problems. Judges are responsible for persuading jurors to step away from their everyday use of new media and follow the court's rules for what is to be regarded as evidence that can be considered during a trial and to limit communication about the trial.

Slides # 7 and 8 track the rising access to the Internet and then demonstrate the degree to which people use the Internet in their everyday life.



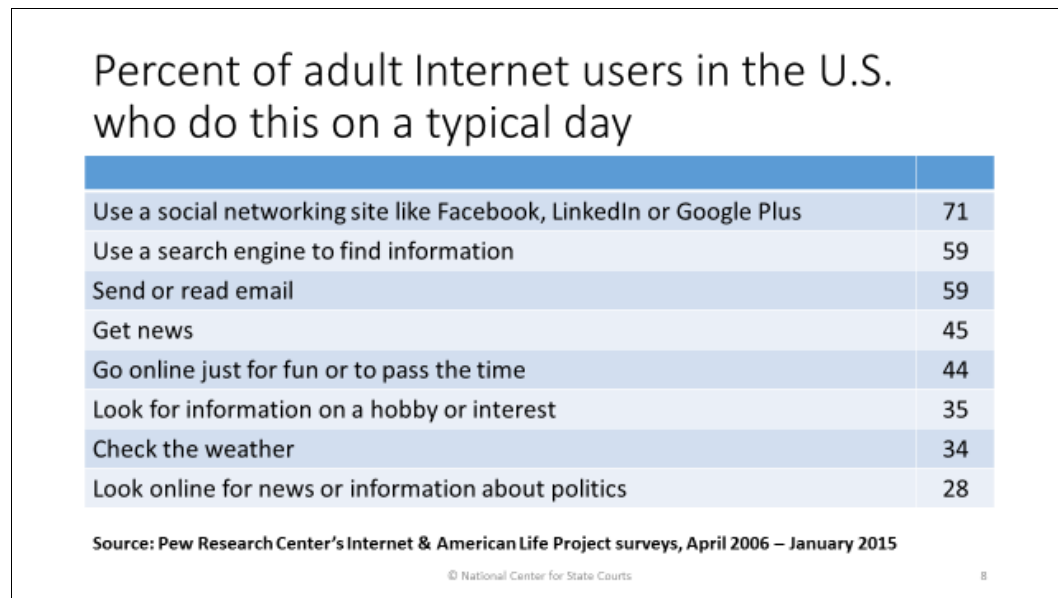
FACULTY NOTES, SLIDE # 7: Nearly all Americans use the Internet. The chart on the screen tracks Internet users among adults from 1995 to 2014. Today, more than 85 % of all adult Americans have access to the Internet.

In recent years, however, the most significant change has been in ownership of smart phones (not shown in the chart). Over a 3-year period (May 2011-14—smartphone ownership among adults rose from 35% to 64% and continues to rise. Smart phones are becoming the method of choice for accessing the Internet.

Smart phones are becoming the gateway to the Internet and to organizing ones work and social lives—

In fact, two-thirds of smart phone users go on-line through their phones, a proportion that doubled since 2009. Today, one out of five cell phone users do most or all of their online browsing from their smart phones.

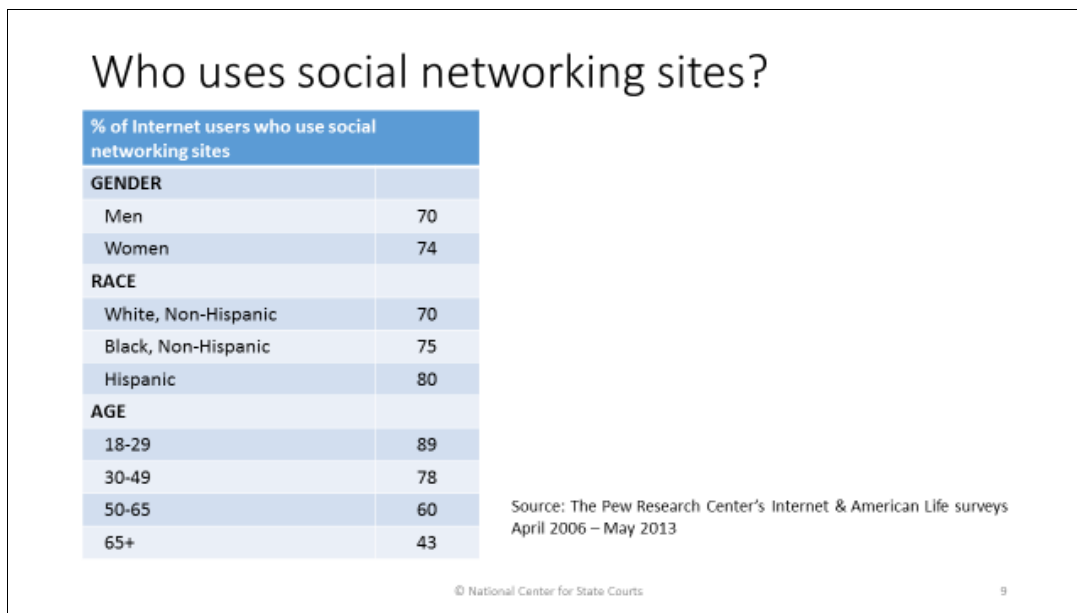
Slide # 8 focuses on people’s growing reliance on new media for basic information. social contact, and entertainment. The main point is that the new media represent the option of choice for many people to search for information of any kind whether it is the news or to pursue their hobbies.



FACULTY NOTES, SLIDE # 8: The Internet is becoming the method of choice for how we carry out many aspects of our lives. The slide you are looking at demonstrates our growing reliance on the Internet by looking at Internet use “on a typical day.” For example, on a typical day 59 percent of Internet users “use a search engine to find information” at least once, 28 percent go on-line “for news or information about politics (the percentage refers to the situation in 2011).

Of particular note is the one-half of all Internet users report on a typical day go to a social networking site or to get the news.

Participation in social networking sites is increasingly commonplace. Slides # 9 and 10 demonstrate (a) the pervasiveness of social networking among Americans and (b) the degree to which that reliance on new media applies across many of the key divisions within American society. The first slide, however, can also be used to bring out the near certainty that use of the social networking will expand by comparing people in their twenties to older age groups.



FACULTY NOTES, SLIDE # 9: Who uses these social network sites?

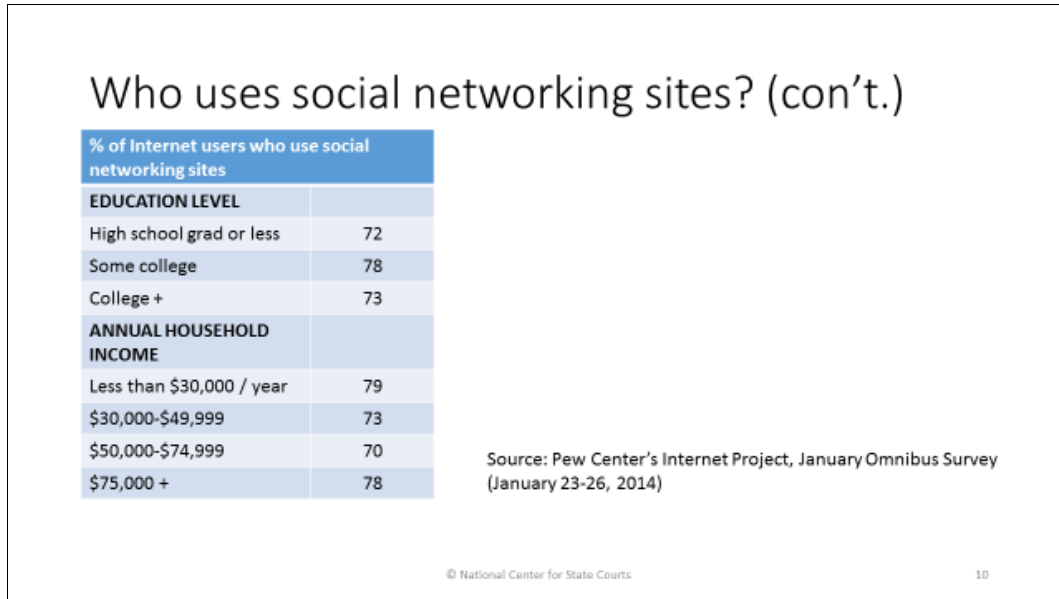
The answer is nearly everyone—the table on the screen looks at the percentage of Internet users who use social networking sites-- 7 out of 10 Internet users also make use of social networking sites.

It is noteworthy that social networking is prevalent in all social groups. The percentages do not differ among men and women or by racial and ethnic group.

There is a generational difference, however. While nearly 9 of every ten persons in their twenties use social networking sites, that is still true, however, for 43 percent of those aged over 65, still a significant proportion.

AND the future jury pool jury is best viewed by the young people for whom social networking an essential part of their lives.

Slide # 10 extends the comparison of social networking sites to show that use does not greatly vary when we compare across educational level, income, or where people live.



FACULTY NOTES, SLIDE # 10: Other than age, the use of social networking does not differ based on educational level or income.

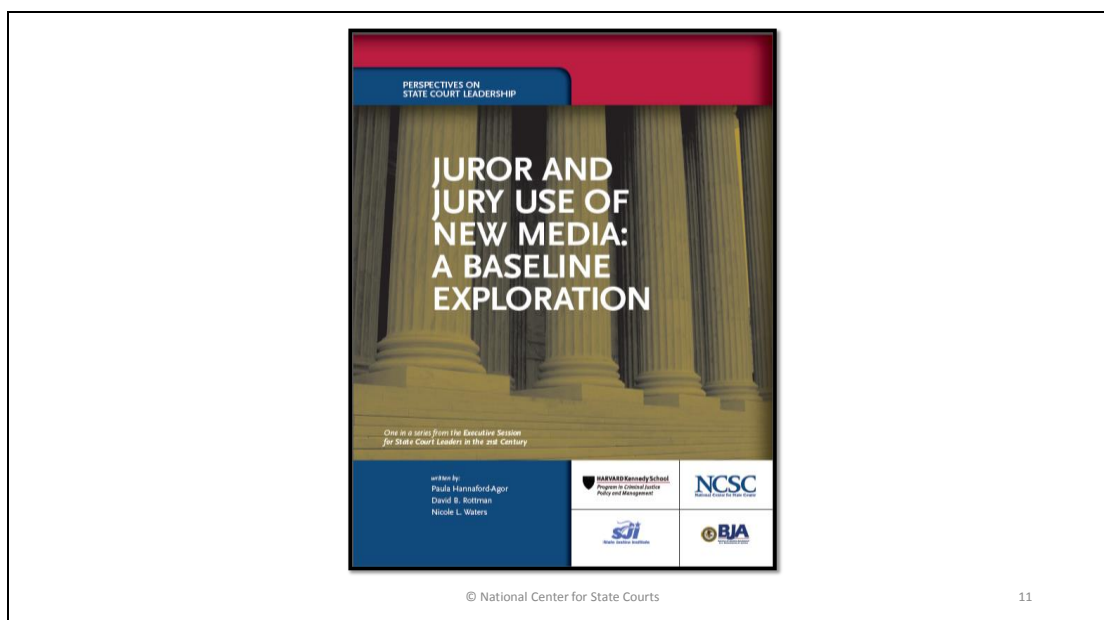
TO CONCLUDE, The use of the Internet, smart phones, and social networking sites is the context within which any discussion about jurors and the new media needs to be grounded: After all, any person with a smart phone can instantly summon up just about every piece of information that exists.

With that background, we turn to what was found in one of the very few research studies to date that can tell us how the Internet and new media are affecting the perceptions and behaviors of actual jurors in a trial.

The rise of new media poses particular concerns for the courts and especially for the jury. In 2013, the NCSC undertook a preliminary study of jurors and new media to inform participants in the NCSC Executive Session on State Court Leadership. During the Executive Session, participants made the following statements about new media:

- “much more than just a set of tools—this is a different way of thinking.”
- “a dilemma for an institution that is used to insisting on its own ways of knowing things.”
- “trouble ... if judges are no longer the gatekeepers for the flow of information into a courtroom, and if jurors no longer accept the legitimacy of restrictions on what is relevant to fact finding, can the adversarial system continue to deliver fairness?”

Presenters can refer to the quotations to illuminate the nature of the challenge. The first quote makes the point that the change is more than new media devices and their capacity to provide information. The second reflects the unique concerns of the courts and the potential that traditional methods will not work. The third quote states the threat to the adversarial system as perceived by some judicial leaders. The presenter can read the quotations when the slide with the report cover is on the screen. The NCSC report is the basis for the remaining slides in Module 1 and is also one of the written materials available for use as handouts.



FACULTY NOTES, SLIDE # 11: The research I will be reporting was carried out by the NCSC. It was requested by the members of the Kennedy School of Govt/NCSC joint Executive Session on State Court leadership in the 21st Century. One member, a magazine editor and new media expert took the judges and lawyers aback when he informed them that the new media is not merely a new convenience or even a revolutionary tool. The Executive Session members asked NCSC jury researchers to conduct a study to inform their consideration of the implications of that trend.

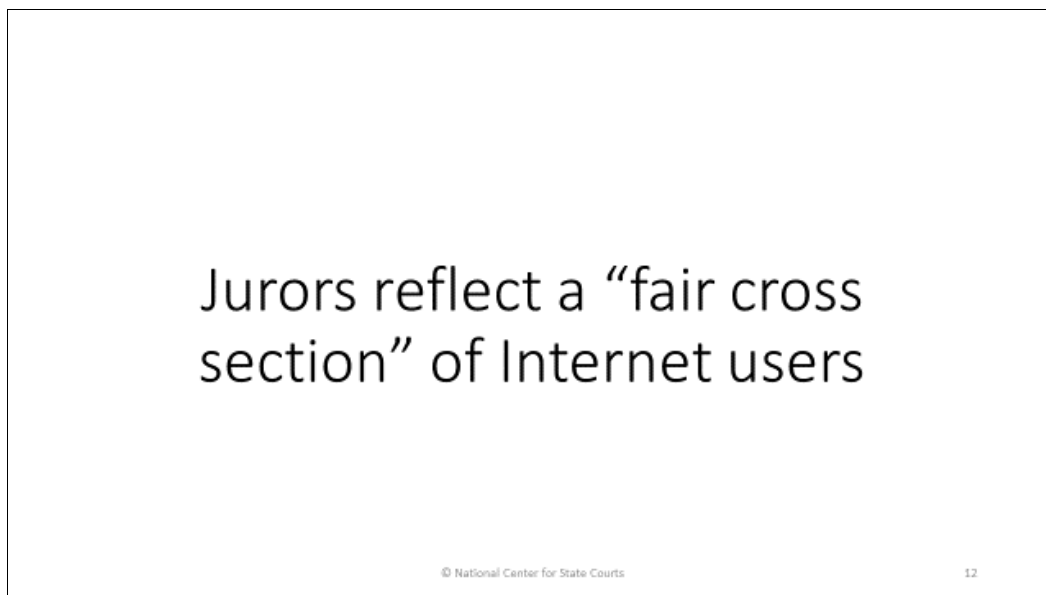
The result was a baseline study of the situation in 2012 that surveyed jurors, judges, and lawyers involved in 15 jury trials and prospective jurors from 20 trials. All judges in the study clearly admonished jurors not to use the Internet or new media to search for information related to the case.

Surveys were distributed at the end of each trial or in the jury assembly room.

Because the study was not nationally representative and covered only a small number of trials, the results reported should be regarded as tentative. However, the findings are the best evidence available on how American jurors think about the relevance of new media to their responsibilities.

Here are some of the highlights.

Slide # 12 is an opportunity for presenters to talk about the strengths and weaknesses of the research. One strength is that the participating jurors represented the previously presented profile of Internet and new media users.



FACULTY NOTES, SLIDE # 12: First, jurors in the NCSC study used the Internet at the same levels and for the same purposes as do American adults generally. Specifically, two-thirds of the jurors reported belonging to one or more social networking site, while 6 percent had their own blog

The slides that follow each highlight a key finding from the research on juror and jury use of the Internet and new media. Slide # 13 emphasizes that jurors by and large would like to conduct their own case-related research using the Internet.

Jurors WANT to use the Internet to research and communicate about the case

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13

FACULTY NOTES, SLIDE # 13: There are two main findings about juror willingness to use the Internet during the trial to collect information related to the case.

First, jurors were asked to indicate whether and how they would have liked to have used the Internet during the trial. Six options for Internet use were included in the survey:

RESPONSES: 44% would have liked to use the Internet to get definitions of legal terms, 26 % on the case itself, 23% on the parties to the case, 20% on the lawyers and also on the judge, while 7% would have liked to do research on their fellow jurors.

The percentage of jurors who wanted to use the Internet became larger when the case was seen as “complex” and also among younger jurors.

The jury instructions on Internet use given by judges were not clear to a substantial minority of jurors.

Nearly 1/3 of jurors
misunderstood or weren't
sure about restrictions on
Internet use

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14

FACULTY NOTES, SLIDE # 14: A second key finding was that even though the attorneys in the case reported that they believed the judge's instructions on Internet use were very clear:

Two-thirds of the jurors correctly reported that using the Internet to do research on a case would violate the instructions given by the judge. However, another 15 percent believed that some types of independent research would not violate instructions. The remaining 20 percent said that they were "not sure."

So one-third of the jurors misunderstood, did not hear, or gave their own interpretation of what the judge had admonished them not to do.

This information comes from a survey carried out immediately after jury service was completed.

Some jurors were uncertain if they could adhere to jury instructions even if they were clear on what they could and could not do while serving on the jury.

1 in 7 jurors said they
wouldn't be able to refrain
from using the Internet for
the duration of a trial

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15

FACULTY NOTES, SLIDE # 15: Another concern raised by the study was the self-reported inability of some prospective jurors to refrain from Internet use during a trial even if admonished by the judge that they could not do so. A small but significant proportion of the prospective jurors—14% or 1 in 7—reported that they believed it would not be possible for them to refrain from all Internet use for the duration of a trial *even* if instructed to do so by the judge.

The presenter can use Slides # 16 through 18 to summarize the main findings from the jury research. The first of the slides indicates that it appears jury misconduct based on the Internet remains rare.

Good News:

Few jurors reported misconduct

None reported Internet-based misconduct

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FACULTY NOTES, SLIDE # 16: The bottom-line for the NCSC study was whether jurors reported having used the Internet to gather case-related information. The juror survey also asked about other types of misconduct, such as engaging in pre-deliberation discussions with fellow jurors or discussing the case with family or friends.

Jurors did report old-fashioned types of misconduct:

Premature discussions: 10 %

Discussion with family or friends: 6%

BUT NONE REPORTED USING THE INTERNET

Based on these research findings about juror use of new media, we find three types of patterns that provide indications of how successful courts will be in keeping Internet-based information from entering into jury deliberations.

First, there is some good news for those dedicated to maintaining the adversarial system in which the judge and attorneys decide what jurors will know about a case. Although the NCSC study involved only a small sample of trials, the findings are consistent with past research that suggests that juror misconduct of any type is rare. No juror included in the NCSC study reported using the Internet to gather information. The fact that some jurors were willing to admit to other kinds of misconduct suggests that the reports concerning Internet use are truthful.

Slide # 17 is used to summarize research findings that raise concerns about the ability of the "good news" to continue. Presenters can describe the slide as containing "troubling" news if they are more comfortable with that label.

Bad News:

- Many do not understand admonitions
- Many express the desire to use the Internet
- Some say they could not refrain from using the Internet

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17

FACULTY NOTES, SLIDE # 17: Another pattern identified in the research is potentially bad news for the future of the jury informed only by admissible evidence.

First, current jury pattern instructions related to the Internet are not understood or not heard by a significant proportion of jurors—1 in 3

Second, there is a clear desire to use the Internet to collect information or to engage in ex parte communications about the case.

Third, some jurors are skeptical about their own ability to stop using the Internet even if they know it would represent misconduct.

Slide # 18 presents the survey findings that suggest perhaps the traditional role of the juror in the adversarial process may be unsustainable unless the courts introduce changes that persuade jurors that the manner in which they have come to look for the truth is not appropriate in deciding a court case. Presenters may prefer to label the title of the slide to be less dramatic (e.g., "The main challenge" or "Possible Future Trends"). The three slides together should make the case that judges cannot assume that traditional methods of jury instructions and admonitions will be adequate to present individual jurors or juries to limit their information gathering to what is sanctioned by the court. The next module describes ways in which judges can dissuade jurors from conducting independent fact-finding.

Potentially Ugly News:

Young jurors are least likely to refrain from Internet use

Can we convince jurors that courtroom testimony is sufficient to decide verdicts?

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18

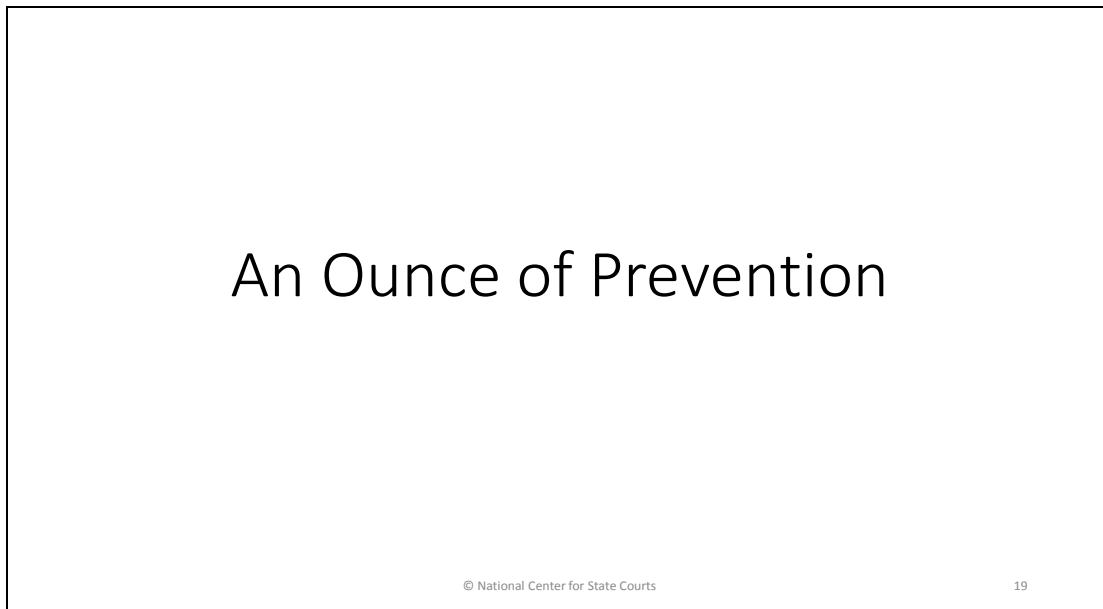
FACULTY NOTES, SLIDE # 18: Finally, there are some findings that point to a growing challenge to traditional understandings of what evidence should be used by jurors in reaching decisions.

One indication of the likelihood of such a challenge is in the difference between younger and older jurors in how they regard the use of the Internet during jury trials. It is likely that the next cohort of young jurors will be even less likely to believe they can refrain from using their new media to do their own fact-finding about a case or other participants in the trial.

Another indication is more speculative. It appears that if the traditional adversarial system is to continue judges must be able to persuade jurors that justice is best achieved—or indeed requires—using only such evidence that is admissible in court.

Module 2: Preventing Internet-related Juror Misconduct

This 30-minute module discusses techniques that trial judges can employ to discourage jurors from using the Internet inappropriately while on jury service. Most of these techniques are common-sense strategies, but have not undergone rigorous empirical study to test their effectiveness. In some jurisdictions, some of these techniques may be discouraged or even prohibited. If so, the presenter(s) should suppress or delete those slides.



FACULTY NOTES, SLIDE # 19: In this module, we will discuss strategies that courts generally, and trial judges specifically, can adopt to minimize the risk that jurors will use the Internet inappropriately while serving on jury duty.

Presenters may hide Slide # 20 and instead administer the poll orally to program attendees. The purpose of the poll is to illustrate for judges how few courts have developed formal policies and procedures to address Internet use by jurors. If courts have not developed formal policies and procedures, or if judges do not know the substance of those policies and procedures or how policies and procedures are communicated to jurors, it will be more difficult to enforce those policies.

RAISE YOUR HAND IF ...

- Your court has a written policy on juror access to and use of Internet devices in the courthouse;
- You know what that policy is;
- You know how that policy is communicated to jurors.
- You have a written policy on juror access to and use of Internet devices in your courtroom;
- You personally communicate that policy to jurors in your courtroom.

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20

FACULTY NOTES, SLIDE # 20: As we saw in the previous module, Internet technologies are now used in virtually every aspect of contemporary life. People often use these technologies without conscious thought. One of the challenges that courts have in minimizing the inappropriate use of the Internet by jurors is simply getting people to stop using those technologies long enough to convey information about why they should not automatically pick up their smart phones and iOS devices to learn more about jury service. Part of the challenge is a lack of consistency, both in the policy details about what is permitted and not permitted, and in how those policies are communicated to prospective jurors.

Slide # 21 offers some common variations on court policies vis-à-vis electronic devices. Presenters should discuss the ramifications of those variations.

What is your court's policy?

- Are electronic devices permitted in the courthouse?
 - Any restrictions based on device?
 - Any restrictions based on person?

- Is the courthouse wired for public Internet use?

- Are jurors allowed to use/have electronic devices ...
 - In the jury assembly room?
 - During voir dire?
 - During trial?
 - During deliberations?

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FACULTY NOTES, SLIDE # 21: The first question to consider is what policies should the court follow generally. Keep in mind that many courts have been working to increase public access to the courts, and that Internet technologies are an important piece of those efforts. So there may be some trade-offs involved in preventing inappropriate use of the Internet by jurors – e.g., limiting Internet use by some or all court users.

Some of the first issues involve who may bring an electronic device into the courthouse and what types of devices are permitted. Most state courts permit court users to bring cellular telephones into the courthouse, but some place restrictions on phones with cameras (which includes most smart phones). Some courts permit court staff and licensed attorneys to use electronic devices, but prohibit their use by members of the public for security purposes. In crafting these policies, it is important to consider how they affect other court users. If some or all members of the public are permitted to bring electronic devices into the courthouse, what policies should apply to jurors specifically at different stages of their jury service? Keep in mind that if restrictions are imposed, the court should also have procedures/facilities in place to protect jurors' property – e.g., lockers, bailiffs.

Communication about juror use of Internet technologies should begin with the jury summons and be repeated at every reasonable opportunity. Waiting until jurors are sent to a courtroom for jury selection to be instructed by the trial judge may already be too late.

What have jurors already been told?

- Jury summons
- Court website
- Orientation

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22

FACULTY NOTES, SLIDE # 22: Once any policies have been determined, it is important that they are communicated to prospective jurors in a timely and clear manner so that jurors have sufficient notice to make arrangements as necessary before reporting for jury service. In particular, any restrictions on Internet use should be described in any educational materials included with the jury summons and on the court's web pages with information for jurors.

Jury orientation is also an excellent time to educate jurors not only about the court's policies concerning the use of Internet devices, but also to communicate the underlying rationale for those policies. Increasingly courts are including this information in juror orientation videos, but at the very least it should be covered in the live juror orientation. If you are unsure about what information is communicated to jurors before they arrive in your courtroom for jury selection, review these materials (jury summons, website) and watch a juror orientation.

Voir dire provides an excellent opportunity both to educate jurors about permissible and impermissible use of electronic devices and to identify jurors who could not comply with restrictions on Internet use during trial. Presenters may prefer to label the title of the slide to be less provocative (e.g., “Screening jurors during voir dire”).

Identify and Remove Internet Addicts

- One in 7 jurors reported that they wouldn't be able to follow the judge's restriction on Internet use for the duration of the trial.

- Use voir dire questions ...
 - To educate prospective jurors about permissible and impermissible uses of electronic devices
 - To identify and remove jurors who cannot follow instructions concerning Internet use

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FACULTY NOTES, SLIDE # 23: In the study of jurors and new media, the NCSC found that a significant proportion of jurors said that they wouldn't be able to refrain from Internet use for the duration of the trial. The reality today is that some people are just wired to the Internet – they could no more refrain from using the Internet to look up information or post updates to Facebook or Twitter, than they could stop breathing. And nothing short of complete sequestration will prevent that. As trial judges, you need to know who those jurors are so they can be removed for cause. These individuals will not be able to follow your instructions concerning appropriate juror conduct during the trial, so you are better off removing them from the panel before they have an opportunity to jeopardize the integrity of the trial process.

Voir dire is an excellent opportunity to both educate jurors about permissible and impermissible use of electronic devices and to identify jurors who could not comply with restrictions on Internet use. Note that frequent Internet use should not automatically be grounds for removing jurors for cause. Doing so would likely exclude younger jurors disproportionately, which may violate Equal Protection standards. Instead, if a juror indicates that s/he is a frequent Internet user, it should prompt a more focused inquiry about the juror's willingness and ability to adhere to instructions.

Some factors that the judge should keep in mind in determining whether a juror should be excused for cause is the anticipated trial length and the amount of information available online about the case or litigants that might be prejudicial. All jurors may have difficulty adhering to a complete ban on Internet use during longer trials, but it is particularly risky in high profile trials or trials in which there is a lot of potentially prejudicial information posted online.

Brief, but frequent, reminders of the admonition sends the message that this is an extremely important rule of trial procedure that may prompt jurors to think before logging on to the Internet to look up trial-related information or to post updates to social media accounts.

Repetition is a good thing ...

- Introduce Internet restrictions in jury summons
- Remind jurors during orientation
- Provide explicit information during voir dire
- Remind jurors of the admonitions
 - At trial recesses
 - Before deliberations
- Confirm juror compliance when reconvening trial
- Visual aids
 - Include Internet instructions in juror notebooks
 - Post instructions in jury deliberation rooms

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FACULTY NOTES, SLIDE # 24: Don't assume that because you've told jurors once about restrictions on Internet use that they have heard and understood those instructions completely. Particularly when information is counter-intuitive, such as instructions that jurors not use the Internet during trials or deliberations, people may need to hear the information several times to have it really sink in. Repetition also emphasizes the importance of instructions to refrain from Internet use, and keeps that message directly in front of jurors for the duration of the trial.

We've talked about providing information about Internet use in the jury summons, during juror orientation, and during voir dire. This information will become increasingly case-specific with each retelling. When the jury is sworn, you should briefly remind jurors about the instruction at every trial recess, or at least daily before jurors leave for the day. When doing so, be sure to speak in a conversational voice, rather than droning through boilerplate language. Upon recommencing the trial, take a few minutes to confirm that jurors have complied with the admonitions during the trial recess.

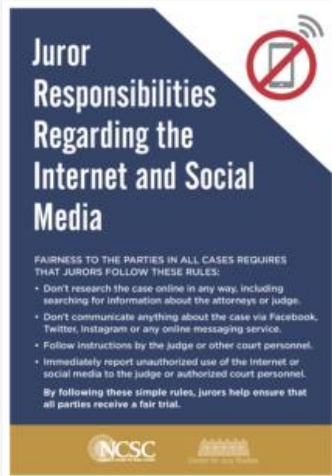
Visual reminders can also be helpful. If the parties have prepared juror notebooks, include the Internet instructions in a prominent place.

Show example of poster designed by NCSC for jury assembly rooms and deliberation rooms. The poster is available free from the NCSC. Contact Greg Hurley at ghurley@ncsc.org for information.

Visual Aids

Poster designed by NCSC
for jury assembly room
and deliberation rooms

Contact NCSC Center for
Jury Studies for free
copies



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FACULTY NOTES, SLIDE # 25: This poster was developed by the National Center for State Courts that judges can put up in the jury deliberation rooms to remind jurors during trial recesses. Contact the NCSC Center for Jury Studies for free copies.

Jurors are unlikely to abide by rules if everyone around them is flagrantly violating those rules. Slide # 26 shows a news account of a judge who engaged in Internet-related misconduct that would have violated standard juror admonitions. The URL to the local television story is embedded in the slide. If time permits, presenters may play the video as an example of what not to do. Otherwise, simply describe the case facts to the attendees.

Set a good example



The screenshot shows a news article on the abc11.com website. The article is titled "Judge Oppliger Accused of Potential Juror Misconduct" and is dated Thursday, April 15, 2010. The main image is a photograph of a nameplate for "Honorable James R. Oppliger" in Department 72. Below the image is a video player with a play button and a progress bar showing 00:00 / 00:00. The article text below the video reads: "FRESNO, Calif. — A Fresno County judge is under fire for what he did in court, but as a juror, not as a judge. Judge Jim Oppliger served on the jury in a murder trial that wrapped up on Monday." The article is attributed to the National Center for State Courts.

FACULTY NOTES, SLIDE # 26: in Fresno, California, a judge who was empaneled as a trial juror repeatedly emailed his colleagues on the bench with his assessment of the performance of the trial lawyers.

Set a good example – Applies to both judges AND courtroom staff

- Do not say/post anything online that you would censure a juror for
- Understand and use privacy controls on personal social media accounts
- Explain to jurors that judges are bound by the same rules concerning ex parte contact that jurors are
- If you or courtroom staff use computers or iOS devices to perform professional tasks, explain to jurors how and why you are using those tools

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27

FACULTY NOTES, SLIDE # 27: It may feel a little awkward to tell experienced trial judges that they shouldn't do things that they should already know not to do. But enough of these types of stories come up every year that a little reminder is still appropriate. Due to the number of bullets, this slide includes animation such that the presenter will need to click to reveal each new bullet.

Judges, like everyone else, are entitled to use the Internet for professional and personal business. But the Internet is a very public forum, and you should be mindful that many people will be able to see how you are using it. With that in mind, follow these basic guidelines:

1. Do not say/post anything online that you would censure a juror for;
2. Understand and use the privacy controls on your personal social media accounts so that casual webservers cannot view your posts.
3. Explain to jurors that judges are bound by the same rules concerning ex parte contact that jurors are (this will help bolster your credibility when placing restrictions on jurors' Internet use); and
4. If you or your courtroom staff use computers or iOS devices to perform professional tasks during trial, explain to jurors what you are doing (so they don't mistakenly believe that you are engaging in the same conduct that you just told jurors not to do). If you have the authority to do so, admonish courtroom staff to avoid using Internet devices during trial for reasons other than trial-related tasks.

Jury instructions are the formal articulation of the rules for juror conduct with respect to Internet and social media use. Presenters should call attention to examples of jury instructions in the written materials.

Effective Jury Instructions

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28

FACULTY NOTES, SLIDE # 28: We can offer some practical steps that have the potential to make your jury instructions more effective.

Being specific implies that judges are sufficiently familiar with popular Internet platforms and social media sites to be credible. For example, MySpace is a social media service that was ranked as the most visited social networking site in early 2008, but has steadily lost market share. As of 2015, it ranked 1594 worldwide, and 1296 in the United States. In the meantime, Instagram, which didn't even exist until 2010, has rapidly gained popularity and now has more than 300 million users.

Be Specific

- Explain / give examples of prohibited technologies ...
- Don't assume that jurors understand what you mean by "research" and "communication"

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29

FACULTY NOTES, SLIDE # 29: It's important that you be very specific about what is permissible and what is impermissible. It helps to give specific examples – for example, if jurors are permitted to check their personal or business email accounts while on jury service, explain that they can inform people that they are jury duty, but that they cannot tell the person anything about the trial. If you discuss specific types of technology platforms, be sure that you are reasonably up-to-date. In 2006, for example, MySpace was the most visited website in the United States (surpassing Google), but by 2015, it ranked 1594. So if your jury instructions still mention MySpace by name, you are overdue for revising it.

Don't assume that jurors understand what you mean when you tell them not to do "research" or to "communicate" with others online. For many jurors, the term research connotes a very deliberate effort to obtain information, whereas "Googling" something is much more informal, so jurors may not understand that Googling an issue related to the trial or a legal term is prohibited. In much the same way, many jurors equate posting on Facebook or Instagram, or tweeting, as merely thinking out loud; they don't view this as communication per se.

Jurors WANT to make good decisions. However, it is counterintuitive to many jurors that they should refrain from using the tools that they normally rely on to make informed decisions in every other area of their lives. It is important that judges explain the underlying rationale for restrictions on Internet use.

Jurors want to make fair, informed decisions

- **COGNITIVE DISSONANCE:** If the rule doesn't make sense, jurors won't understand it and won't follow it.

- Explain the underlying rationale:
 - *Ex parte* research and communications is UNFAIR
 - Jurors may rely on inaccurate or biased information, leading to poorly informed decisions

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FACULTY NOTES, SLIDE # 30: One of the defining characteristics of Americans is an instinctive reluctance to abide by arbitrary government rules. Today, jurors are even less likely to accept “because I said so” as a persuasive rationale for Internet restrictions than previous generations. Part of the difficulty is that many people rely heavily on the Internet to inform decision-making on a host of important issues such as health care, finances, and education. So it is counter-intuitive for jurors to learn that they should avoid the Internet when making important decisions as jurors. Psychologists refer to this problem as “cognitive dissonance” – when a new rule (don't use the Internet) conflicts with a person's previously held beliefs or practices (use the Internet to obtain information needed to make good decisions).

To overcome this cognitive dissonance problem, it is important that jurors understand the rationale for the restrictions on Internet use. Acknowledge that jurors want to be good jurors – they want to be fair, and they want to make good decisions. Then explain how *ex parte* information from online sources or friends may influence their opinions about the evidence, which would be UNFAIR to the litigants. The information may be inaccurate or biased, which would lead jurors to make poorly informed decisions.

Explanations of the underlying rationale should include descriptions of the potential consequences of violating the prohibition on Internet use. Presenters should note in the slide that potential punishment for the juror is the last, and likely least significant, consequence. Of greater consequence are the impacts on litigants, crime victims, the court system, and fellow jurors.

Describe Consequences

- For litigants
 - Unfair verdict, possible mistrial or overturned verdict with delay and increased litigation costs
- For victims
 - Costs associated with attending court hearings, delayed “day in court”
- For court system
 - Costs associated with post-trial hearings, retrial, delays for other cases on calendar
- For other jurors
 - Jury service is a collective effort that is undermined by individual research or communication
- For individual jurors
 - Contempt proceedings, fine/fees, imprisonment

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FACULTY NOTES, SLIDE # 31: Simply threatening jurors with contempt of court for violating the instruction may not have a great impact. For some jurors, it’s important that they understand the consequences of their behavior in a larger context. Specify the consequences to litigants, to victims/witnesses, to the court, and especially to other jurors. Explain that jury service is a uniquely collective effort, so it is unfair to the other jurors if one juror does his/her own research online or is communicating with others outside of the trial.

Note that due to the number of bullets, the content on this slide is animated such that the presenter must click to reveal each new bullet.

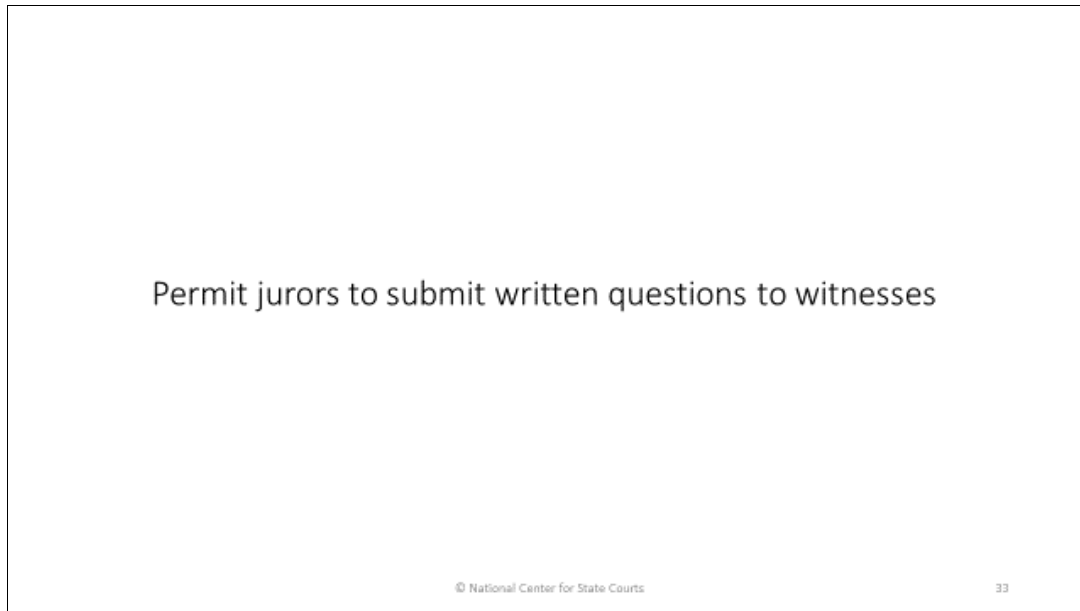
BE ALERT FOR UNDEFINED TERMS, UNEXPLAINED CONCEPTS

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32

FACULTY NOTES, SLIDE # 32: Judges should be on the alert for important things that come up in trial that may go unexplained, especially in situations in which leaving it hanging may prompt jurors to try to find out more. In Maryland, for example, a medical examiner who was testifying as an expert in a murder trial used the term “algor mortis”, but never defined or explained its significance in the context of the testimony. A juror looked up the term online, which led the verdict to being overturned on appeal. If a technical term is not being explained, the judge should ask the witness to elaborate or point it out to the lawyers for them to do so.

The vast majority of states permit jurors to submit written questions to witnesses, although the NCSC *State-of-the-States Survey of Jury Improvement Efforts* found that in 2007 only 14% of judges were routinely permitting this practice due to concerns about the practice's effect on the strategic decision-making of the lawyers. Nevertheless, judges and lawyers may view this practice as the lesser of two evils when the alternative is for jurors to go online independently seeking answers to trial-related questions.



FACULTY NOTES, SLIDE # 33: Most states permit jurors to submit written questions to witnesses.

“In the sound discretion of the trial court”: AR, CA, CT, DC, FL, IA, HI, KS, KY, MA, MO, MT, NC, NJ, NM, NV, NY, OH, OK, PA, SC, TN, UT, VA, VT, WA, WI, WY —27 states + DC

Mandated by court rule or statute: AZ, CO, IN, MI—4 states

Prohibited: GA, MN, MS, NE, TX—5 states

Offer this option to jurors as an alternative to seeking conducting independent research

If permitted in the local jurisdiction, presenters may provide information about a technique recommended by Judge Amy St. Eve, a federal trial court judge in the Northern District of Illinois. One criticism of this technique is that by emphasizing the importance of complying with Internet restrictions, other equally important admonitions – such as being impartial, following the law, paying attention, showing up on time, etc. – may be discounted.

Elicit Promises from Jurors

- Ask each juror **INDIVIDUALLY** to **PROMISE** not to seek out information about the case or communicate with others during trial
- Promise can be oral or written
- Differentiate the promise from the standard juror oath

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FACULTY NOTES, SLIDE # 34: Judge Amy St. makes each juror **PROMISE** in writing not to go online during trial. Other judges ask for oral promises. In either case, the underlying theory is that the requirement to affirmatively agree to abide by restriction on Internet use will be viewed as a more serious commitment by jurors than simply listening passively to the instructions or taking a more general collective oath.

One criticism of this technique is that by emphasizing the importance of complying with Internet restrictions, other equally important admonitions – such as being impartial, following the law, paying attention, showing up on time, etc. – may be discounted.

Module 3: Responding to Internet-related Juror Misconduct

This 30-minute module provides an overview of the law governing juror misconduct and outlines an checklist that judges can consult when confronted with allegations of Internet-related juror misconduct. Following this presentation, faculty can conduct either a large-group or small-group exercise to permit attendees to work through how they would address allegations of juror misconduct based on actual cases. If time permits and there is sufficient interest by attendees, faculty may also wrap up the session with a discussion of the longer term implications of juror use of Internet technologies on the American justice system.



FACULTY NOTES, SLIDE # 35: The strategies and techniques that we just discussed are currently the most widely recommended practices for minimizing the risk of Internet misconduct by jurors, but none of these are guaranteed to work 100% of the time in 100% of the cases. As more and more people become accustomed to using the Internet for their routine daily activities, you can expect to be confronted with allegations of Internet-related juror misconduct at some point in your judicial career. In this module, we'll discuss how to address these allegations when they occur ... because they will occur.

Slide # 36 can be hidden and presenters can pose the questions as a short discussion.

POLL:

- Have you PERSONALLY encountered juror misconduct in one of your trials in the past?

- At what stage of the trial was the misconduct discovered?
 - Voir dire
 - Trial
 - Deliberations
 - Post-trial

- What happened?
 - Curative instructions
 - Removed juror(s), replaced with alternate
 - Mistrial
 - New trial

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36

FACULTY NOTES, SLIDE # 36: This slide can be hidden and presenters can pose the questions as a short discussion with attendees. Use the responses to provide context about the frequency with which these situations arise, whether judges should anticipate learning about the situations during trial or as post-trial motions, and what remedies are available. Note that the case law concerning juror misconduct may differ depending on the jurisdiction, on the stage of trial when the allegations arise, and the available remedies.

Case law governing judicial decision-making concerning juror misconduct varies dramatically from state to state with respect to the definition of juror misconduct, its effect on the legitimacy of the verdict, and the degree of discretion accorded to trial judges to craft remedies. Presenters may use Slides # 36 and 37 to illustrate the kinds of questions that are likely to arise in any legal analysis involving juror misconduct, or they may hide these slides and continue directly to the summary of state law on this topic in Slide # 38.

Know Your State Law

- How is juror misconduct defined?
- Does your state differentiate the definition of misconduct based on whether it took place online or was done “the old-fashioned way”?
- When juror misconduct occurs, is there a presumption of prejudice? Must there be some evidence supporting the presumption?
- Is prejudice based on the information obtained? Or on the juror’s failure to abide by the instructions?
- Which party has the burden of showing that the misconduct resulted in prejudice?
- Does it matter whether the misconduct occurred in a civil or criminal trial?
- What remedies are available to address the misconduct?

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37

FACULTY NOTES, SLIDE # 37: Use this slide for multi-jurisdictional audiences. If the audience is from the same state, you may skip to Slide # 39 and provide an overview of the existing law for the jurisdiction. Due to the number of bullets on this slide, the content is animated such that the presenter must separately click to reveal each new bullet.

The case law on Internet-related juror misconduct is currently in flux because many courts are still playing catch-up, trying to understand the implications of applying well-settled law on juror misconduct to novel technologies. (Note that this is not unique to this area of law – consider the cases now coming before the U.S. Supreme Court concerning, e.g., warrantless searches of computer devices, the scope of NSA data gathering, etc.). As a starting place, it is critically important that you know your own state law. States differ tremendously with respect to their level of tolerance for juror misconduct – some view any type of juror misconduct as presumptively prejudicial if not per se prejudicial, while other states tend to focus on the prejudicial impact of the information obtained or communicated.

Juror misconduct generally involves a juror’s (1) intentional (2) violation of a court rule (3) while the trial or deliberations are underway. But there may be nuances of how some of these terms are defined. Other variations in state law involve whether the law differentiates between Internet-related misconduct and “old fashioned” misconduct; whether there is a presumption of prejudice, or whether there must be some evidence supporting an allegation of prejudice.

Slide # 38 shows remedies that are typically available to address instances of Internet-related juror misconduct, but not all remedies will be available in all jurisdictions. For example, some states do not permit the trial judge to replace a juror with an alternate after deliberations have commenced. Presenters may edit Slide # 38 to reflect state law and practice concerning available remedies.

Know the Available Remedies

Stage of Trial	Potential Remedies
During Jury Selection	Curative Instructions
	Remove Juror for Cause
	Mistrial
During Evidentiary Portion of Trial	Curative Instructions
	Replace Juror with Alternate
	Mistrial
During Deliberations	Curative Instructions
	Replace Juror with Alternate
	Mistrial
Post-Trial	New Trial

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FACULTY NOTES, SLIDE # 38: It is also important to know what remedies are available to address the misconduct. These may differ depending on the stage of the trial – generally you have more remedies available while the trial is underway than after deliberations have begun or after a verdict has been delivered. As a general rule, choose the least disruptive remedy that effectively addresses the prejudice resulting from the misconduct. Declaring a mistrial or ordering a new trial should not be the default option.

Use the template in Slide # 39 to summarize state law on juror misconduct when presenting to judges in the same state. Use no more than one case per slide. Keep the written description of the case facts, holding, and issues as brief as possible—ideally, a few words, at most. Include copies of the actual opinions in the handouts provided to participants.

[State v. John Doe]

- [Key facts involving juror misconduct]

- [Opinion holding]

- [Additional legal/practical issues to consider]

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FACULTY NOTES, SLIDE # 39: If the program attendees are all from the same jurisdiction, omit Slides #37-38, and replace with slides that summarize the case law concerning Internet-related juror misconduct in that jurisdiction. If multiple slides are needed, begin with the most basic case law (defining misconduct and the judge’s obligation to remedy any prejudice to the parties), then case law that differentiates misconduct (e.g., based on the nature of the misconduct, the type of case, the stage of the trial, etc.), the remedies available, and any other nuances to which trial judges should be attuned. Ideally, there should be no more than 4 cases discussed.

Presenters should highlight the importance of creating a good trial record in case of appellate review. In most states, the standard on review for a trial judge's determination of whether juror misconduct resulted in prejudice to the litigant(s) is abuse of discretion. It is therefore incumbent on the trial judge to demonstrate that he or she conducted a sufficient examination of the facts related to juror Internet use and properly applied the governing law. If additional resources on creating a trial record exist, presenters should include them in the written materials and refer to them in the presentation.

Conduct an Adequate Inquiry

- What is the alleged behavior?
- When did it occur?
- Is the information/communication restricted to a single juror? Or has it been shared with other jurors?
- What impact has the information/communication had on the juror(s)? What impact would the information/communication have on a "reasonable juror"?
- Can the juror(s) put aside the information?

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FACULTY NOTES, SLIDE # 40: Due to the number of bullets, the content on Slide # 40 has been animated such that the presenter must click to reveal each new bullet.

Generally speaking, the trial judge has a great deal of discretion in determining whether juror misconduct has occurred, whether it is prejudicial to the parties, and how to remedy prejudice. That decision is usually subject to the "abuse of discretion" standard on review. In many of the recent cases in which the trial judge's decision has been overturned or criticized by the appellate bench, the trial judge failed to demonstrate on the record that he/she had conducted an adequate inquiry into the allegations of juror misconduct and the impact of the misconduct on the juror's ability to decide fairly. If the state has resources for trial judges on how to create the trial record, encourage the participants to review those materials when allegations of juror misconduct are made so they can assure the appellate bench that they have thoroughly considered all of the relevant facts. These may include the questions presented on the slide. Note that when judges are asked to make a determination about a juror's ability to participate fairly and impartially after being exposed to ex parte information, they may be asked to look past the juror's facial responses to questions posed, and decide whether a "reasonable juror" could be fair and impartial; an explanation on the record of this nuance may be necessary to overcome appellate concerns.

The three hypothetical scenarios involve allegations of Internet-related juror misconduct. They are loosely based on actual cases (see written materials). For each scenario, presenters should use information presented in Slides # 37 through 40 to determine (1) whether the juror engaged in misconduct; (2) whether the misconduct was prejudicial to the litigant(s); and (3) the appropriate remedy. In a large-group setting, this should be done with the presenter stating the facts (bullet points in the slide), then posing the analytical questions and asking attendees explain their responses. If there is a difference among attendees with respect to the conclusions to be drawn from any scenario, be sure to explore those differences during the discussion. In a small group setting, use the “Small Group Exercise” included in the program materials. See p. 4 for the guidelines on small group discussions.

Scenario # 1: Products Liability Case

- While in Jury Assembly Room, prospective juror surfs the court’s website, learns name of defendant pharmaceutical company
- Juror Googles the defendant, learns that a jury in another state awarded a sizeable damage award to a plaintiff in a products liability case
- Juror shares information with two other jurors while waiting to be sent to the courtroom for voir dire.

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FACULTY NOTES, SLIDE # 41: The first scenario is based on a situation that arose during voir dire in *Cincinnati Insurance Company v. Omega Flex, Inc.* (No. 3:10-CV-00670-M, W.D. Ky.)(*Memorandum Opinion and Order* filed Apr. 10, 2013). See written materials. In this scenario, the judge learns while conducting voir dire that the juror had learned about a verdict against the defendant in another state and discussed the case with other jurors in the jury assembly room.

For each of the scenarios, pose the following questions:

1. Did the juror engage in misconduct? If you’re not sure, what additional information is needed to make an informed decision?
2. Was the behavior prejudicial to the parties? Why or why not?
3. What is the appropriate remedy in this case?

In a large-group setting, state the facts (bullet points in the slide), then pose the analytical questions and ask attendees to explain their responses. If there is a difference among attendees with respect to the conclusions to be drawn from any scenario, be sure to explore those differences during the

discussion. In a small-group setting, ask the group reporter to summarize the reasons for the group's conclusions. As the groups report their conclusions, explore differences.

Scenario 2: Vehicular Homicide Case

- During deliberations, jury sends out a request for a definition of a term used in the jury instructions. Judge instructs jury to review the instructions, but declines to provide a more specific definition of the term.
- Juror comes to court the next day with 2 pieces of paper:
 - A hand-written definition of the term;
 - A computer printout with an explanation of "Involuntary Manslaughter."
- During a hearing with the judge, juror explains that she just wanted to have the concept of involuntary manslaughter clear in her mind, and all of the jurors struggled with the meaning of the term in the jury instructions.
- Juror has not shared the information with other jurors.

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42

FACULTY NOTES, SLIDE # 42: This case is based on *Ohio v. Gunnell*, 973 N.E.2d 243 (2012).

Scenario # 3: Capital Murder

- During jury deliberations, judge learns that a juror has posted status updates about the case to her Facebook account.
- First post (entered before voir dire): “I have jury duty today – hope I get chosen for an interesting case, not a stupid slip-n-fall like last time.”
- Second post (entered after opening statements): “Be careful what you wish for – this is definitely more interesting, maybe too much so.”
- Third post (entered just before jury sent into deliberations): “This is going to be really tough – I don’t know what to believe.”

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43

FACULTY NOTES, SLIDE # 43: This scenario is based on *Dimas-Martinez v. Arkansas*, 385 S.W.3d 238 (2011)

If time permits and the sophistication of the attendees is appropriate, presenters can conclude the program with an open-ended discussion of the longer term implications of juror use of Internet technologies. The poll/discussion questions can frame the discussion, but the key philosophical question is whether the attendees can envision a future in which juror impartiality is not wholly premised on and synonymous with juror isolation from ex parte information. If so, what does that future look like? Does it necessarily imply a justice system that is less fair?

POLL/DISCUSSION QUESTIONS

- Of the approaches offered to prevent/remedy instances of Internet-related juror misconduct, which do you think will work well for your court?
- Do you believe that these approaches will continue to work into the foreseeable future?
 - If not, what more can/should be done?
- Do you believe that courts will ultimately have to re-conceptualize the meaning of “impartiality” in the context of jurors exposure to online information/communication?

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44

Can a juror be both impartial and wired to the Internet?

Questions and Answers

Evaluating the Curriculum

The NCSC strongly encourages presenters to seek feedback from participants on any programs that use this curriculum. An evaluation survey is included with the written materials. The NCSC requests that those who use this curriculum distribute the evaluation survey, compile the results, and forward them to the following email address: phannafor@ncsc.org. Alternatively, we ask that you forward the raw evaluations to the following address, and the NCSC will tabulate the results:

National Center for State Courts
Attn: Paula Hannaford-Agor, Director, Center for Jury Studies
300 Newport Avenue
Williamsburg, Virginia 23185

The NCSC will use the evaluations to modify future versions of the curriculum.