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Emily M. Janoski-Haehlen

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THE COURTS ARE ALL A 'TWITTER': THE IMPLICATIONS OF SOCIAL MEDIA USE IN THE COURTS

Emily M. Janoski-Haehlen*

I. INTRODUCTION

Tweet, poke, post, friend, like, blog, link, comment, and share – the opportunities to communicate electronically using social media tools seem never ending. Facebook,¹ Twitter,² YouTube,³ MySpace,⁴ and LinkedIn⁵ – these are just a few of the social media sites that allow people to communicate and “connect” with others across the world in seconds. E-mail and text messaging are two other ways to communicate electronically, but neither e-mails nor text messages can keep up with the speed, accessibility, and popularity of social media. Social media is entrenched in our lives as evidenced by the fact that adult profiles on online social media sites are up from eight percent in 2005 to forty-seven percent in 2009.⁶ Similarly, the legal profession jumped aboard the social media bandwagon with forty percent of judges reporting that they use

* Emily Janoski-Haehlen, J.D., M.S.L.S, is the Associate Director for Law Library Services and Assistant Professor of Law Library Services at the Salmon P. Chase College of Law at Northern Kentucky University. The author would like to thank Associate Dean Michael Whiteman and Jennifer Mart-Rice, J.D. for their guidance and support.

¹ See FACEBOOK, <http://www.facebook.com> (last visited Sept. 18, 2011) (depicting a social networking site that connects people to others who live, study, and work around them). Facebook’s mission is to give people the power to share and make the world more open and connected. *Id.*

² See TWITTER, <http://twitter.com> (last visited Sept. 18, 2011) (depicting a social networking website that encourages users to update their followers, in 140 characters or less, about what they are doing). Twitter is also used to follow the “tweets” of others in order to stay up-to-date on current situations and personal lives. *Id.*

³ See YOUTUBE, <http://www.youtube.com> (last visited Sept. 18, 2011) (depicting a social media site that allows users to discover, watch, and share videos). It also provides a forum for people to connect, inform, and inspire others around the world. *Id.*

⁴ See *About Us*, MYSPACE, <http://www.myspace.com/Help/AboutUs> (last visited Sept. 18, 2011) (depicting a social networking site aimed at the Generation Y audience that allows people to connect, share photos and videos, and view entertainment).

⁵ See *About Us*, LINKEDIN, <http://press.linkedin.com/about> (last visited Sept. 18, 2011) (noting that LinkedIn is the world’s largest professional network on the Internet and that it allows members to connect and network with other professionals in their field).

⁶ Amanda Lenhart et al., *Social Media & Mobile Internet Use Among Teens and Young Adults*, PEW INTERNET & AM. LIFE PROJECT (Feb. 3, 2010), http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf.

social media sites⁷ and fifty-six percent of attorneys reporting that they are on social media sites.⁸ Technology has made communication instantaneous no matter which “social networking” or communication method is chosen. Unfortunately, social media communication can be dangerous to the integrity of the courts.

The jury is still out on whether social media will have a positive or negative impact on the legal community. There are many different uses for social media aside from personal use and networking. The courts argue that it interferes with the trial process—even though they have created their own social networking sites—while attorneys argue that it is pivotal to jury selection and evidence. Besides, what better way is there to communicate with the twenty-first century public than through Facebook and Twitter? Some courts have already recognized the utility of Facebook and Twitter to keep court users informed and they are doing so in an effective manner.⁹ Attorneys also view social media as a method for advertising and discovery while bar associations and courts view it as another area to regulate. This Article will examine social media and how it impacts the courts, including the judiciary’s response to the use and abuse of social media by jurors, judges, and other court personnel. This Article will also examine ways in which the judiciary can regulate or attempt to control the use of social media sites in courtrooms.

II. SOCIAL MEDIA TOOLS IN THE COURTS: IMPACT ON THE TRIAL COURTS

Courtrooms across the country are affected daily by the Internet and social media. Social media creates a challenge for courts because a simple “tweet” or “comment” can be posted, copied, and republished around the world within seconds. If the tweet, post, or comment relates to an ongoing case or trial, the availability of such information can cause

⁷ Christopher Davey et al., *New Media and the Courts: The Current Status and a Look at the Future*, CONF. CT. PUB. INFO. OFFICERS (Aug. 26, 2010), <http://www.kms.ijis.org/db/attachments/public/4338/1/New-Media-and-the-Courts-Report.pdf>.

⁸ Adrian Dayton, *ABA Survey: Lawyers Profiting From Web 2.0*, ABOVE THE LAW (Sept. 30, 2010, 12:22 PM), <http://abovethelaw.com/2010/09/aba-survey-lawyers-profiting-from-web-2-0/>.

⁹ See Press Release, N.J. Judicial Branch, Judiciary Uses Social Media to Keep Court Users Informed (Aug. 18, 2009), available at <http://www.judiciary.state.nj.us/pressrel/2009/pr090818a.htm> (explaining that the New Jersey Judicial Branch is utilizing SMS, Twitter, Facebook, and YouTube to communicate with court users); see also Davey et al., *supra* note 7, at 10 (reporting that a survey stated that “[a] very small fraction of courts (6.7 percent) currently have social media profile sites like Facebook; 7 percent use microblogging sites like Twitter; and 3.2 percent use visual media sharing sites like YouTube”).

serious complications for the courts.¹⁰ With the creation of smartphones, access to social media applications has become rampant because most jurors, attorneys, judges, and other court personnel have cell phones, personal computers, or tablets with the ability to text, tweet, or post at any time. The unregulated access to social media in the courts can cause ethical problems for judges as well as attorneys.¹¹ As a result, the judiciary has begun to regulate the use of social media tools.

The use of social media in the courtroom leads to mistrials, and it is beginning to have an impact on the integrity of the trial courts and the right to a fair trial.¹² As Dr. Douglas L. Keene, a psychologist and past-president of the American Society of Trial Consultants, noted, “[i]f a burglar can’t resist checking his Facebook status while in the high-adrenaline process of burglarizing your home, what’s to stop a juror during courtroom tedium?”¹³ Along those same lines, what’s to stop a judge from networking with other attorneys on social media or vice versa? There are no signs of decreasing social media usage. Thus, the judiciary—and the legal system in general—need to take a hard look at how social media affects the trial process.

A. *Jurors Using Twitter and Facebook*

Imagine a judge’s surprise when a jury verdict is posted on a social media site and is subsequently published by a newspaper before the verdict is handed down by the court.¹⁴ Or, contemplate what might result when a juror is discovered sending updates on the case to his Twitter and Facebook accounts.¹⁵ A lawyer understands that

¹⁰ See Davey et al., *supra* note 7, at 24–26 (discussing the effect social media has on court proceedings).

¹¹ See generally Angela O’Brien, Comment, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away from Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 518–19 (2010) (explaining ex parte communications via social networking).

¹² See Denise Zamore, *Can Social Media Be Banned from Playing a Role in Our Judicial System?*, LITIG. NEWS, http://apps.americanbar.org/litigation/litigationnews/practice_areas/minority-jury-social-media.html (last visited Sept. 18, 2011) (discussing the different ways social media can affect the outcome of trials).

¹³ Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, THE JURY EXPERT, Nov. 2009, at 15, available at <http://www.thejuryexpert.com/wp-content/uploads/KeeneTJENov2009.pdf> (footnote omitted).

¹⁴ Martha Neil, *Judge Linked to ‘Lawmiss’ Web Comments Removed from Case*, A.B.A. J. (Apr. 22, 2010, 4:32 PM), http://www.abajournal.com/news/article/i_did_nothing_wrong_judge_linked_to_lawmiss_post_tells_ohios_top_court/.

¹⁵ *Committee Suggests Guidelines for Juror Use of Electronic Communication Technologies*, THE THIRD BRANCH (Apr. 2010), http://www.uscourts.gov/News/TheThirdBranch/10-04-01/Committee_Suggests_Guidelines_for_Juror_Use_of_Electronic_Communication_Technologies.aspx. [hereinafter *Committee Suggests Guidelines*].

communications dealing with a case made outside the courtroom are strictly prohibited under the rules of professional conduct, but jurors are not held to the same standards.¹⁶ There is no standard, other than perhaps the court rules or judicial guidelines, for monitoring or punishing a juror who tweets, posts, or blogs about case information online. If this juror misconduct begins to affect the trial process and a person's right to trial by an impartial jury, the possibilities of mistrials, motions to dismiss, and motions for new trials could become endless.

Take, for example, the added time the court in *United States v. Fumo* was required to use in deciding the following issues: whether a juror's conduct on Facebook and Twitter constituted grounds for removal of the juror; and whether refusing to remove the juror constituted grounds for a new trial.¹⁷ The court in *Fumo* issued a separate order addressing the defendant's request to remove a juror and his motion for a new trial after Juror Eric Wuest posted comments about the case on Facebook and Twitter.¹⁸ Specifically, Juror Wuest posted comments about the trial on his Facebook and Twitter accounts that were picked up by the local media.¹⁹ After reviewing the juror's online comments, the court held that they were innocuous and provided no information about the trial, much less his thoughts on the trial. Therefore, the juror's statements were not prohibited.²⁰ Fortunately, the court in *Fumo* was able to examine the juror's conduct and decide what to do about it before the trial ended.

Similarly, in an Arkansas products liability case, the defendant tried to get a \$12.6 million verdict overturned because a juror used Twitter to send updates during the trial.²¹ The juror claimed that the tweets were sent after the trial ended, and he was no longer obligated under the court instructions to keep quiet about the trial.²² The company's appeal, based on the juror's tweets, was unsuccessful.²³ But how could his comments not affect the judicial system, or the defendant's rights in some way or another? One tweet sent by the juror stated "oh and nobody buy Stoam. Its [sic] bad mojo and they'll probably cease to [e]xist, now that their

¹⁶ MODEL RULES OF PROF'L CONDUCT R.3.5 (2010).

¹⁷ 639 F. Supp. 2d 544 (E.D. Pa. 2009).

¹⁸ *United States v. Fumo*, CR No. 06-319, 2009 WL 1688482, at *65-66 (E.D. Pa. June 17, 2009).

¹⁹ *Id.* at *58.

²⁰ *Id.* at *67.

²¹ John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, N.Y. TIMES (Mar. 17, 2009), <http://www.nytimes.com/2009/03/18/us/18juries.html>.

²² *Id.*

²³ Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 ILL. B.J. 366, 367 (2010).

wallet is 12m [sic] lighter.”²⁴ Depending on who follows this juror’s tweets and how accessible his Twitter feed is to the public, this seemingly harmless tweet could wreak havoc on the integrity of the judicial system and the company’s rights. If the juror’s tweets affected the outcome of the trial in the slightest way, then a mistrial might be declared or a new trial granted, which would ultimately cost the court and interested parties time and money. The judicial system simply cannot afford to re-try cases or declare mistrials after eight weeks of trial; if these types of problems continue to occur, society will begin to question the power and integrity of the courts. The judiciary must operate with a high level of concern for the rights of individuals or it fails to perform its basic function in society: interpreting and applying the laws with fairness, equality, and integrity.²⁵

Juror misconduct on social media sites often goes unnoticed by the courts, but it can undermine an individual’s right to trial by an impartial jury.²⁶ Juror misconduct is often not discovered until after the trial is over, and courts are hesitant “to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.”²⁷ In *Wilgus v. F/V Sirius*, a Maine federal district court case, a juror sent the plaintiff’s attorney an e-mail four days after the trial asking whether he knew that the “plaintiff[s] advocated the use of mushrooms and weed smoking, and binge drinking all over the [I]nternet[.]”²⁸ When the judge asked the juror in a separate inquiry proceeding how he knew such information about the plaintiffs, the juror

²⁴ Schwartz, *supra* note 21 (internal quotation marks omitted).

²⁵ See generally BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T JUST., TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 28–30 (1997), available at <http://www.ncjrs.gov/pdffiles1/161570.pdf> (explaining that “[t]he most common method of measurement in this performance area is the review and analysis of case-related information”).

²⁶ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

²⁷ *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983); see *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (explaining the court’s reluctance to conduct post-verdict inquiries due to the potential “evil consequences” that may occur as a result) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)) (internal quotation marks omitted); see, e.g., *United States v. Anwo*, 97 F. App’x 383, 387 (3d Cir. 2004) (holding that the district court did not abuse its discretion by declining to conduct a post-verdict voir dire of the jurors); *United States v. Barshov*, 733 F.2d 842, 850 (11th Cir. 1984) (citing *United States v. Williams*, 716 F.2d 864, 865 (11th Cir. 1983) (holding that the district courts have broad discretion in deciding whether to interrogate jurors regarding alleged misconduct)).

²⁸ *Wilgus v. F/V Sirius, Inc.*, 665 F. Supp. 2d 23, 24 (D. Me. 2009).

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said he learned these facts from Facebook.²⁹ The juror gained access to the plaintiff's Facebook pages by sending friend requests that were accepted by the plaintiff.³⁰ Ultimately, the judge decided that the juror who sent the e-mail did not discover the information about the plaintiff until after the trial had ended, so the plaintiff's motion for a new trial was denied.³¹

In some instances, however, juror misconduct on the Internet during a case leads to a mistrial. In a Florida federal drug case, after eight weeks of trial, a juror admitted to the judge that he had been researching the case on the Internet.³² Perhaps what was most shocking was that, after questioning the rest of the jury, the federal judge presiding over the case found that eight other members of the jury had been doing the same thing.³³ Judge Zloch decided that he had no other choice than to declare a mistrial (popularly coined the "Google mistrial").³⁴ Imagine the public and private resources wasted, not to mention the delays caused, after eight weeks of trial. Given these problems, it is not hard to conceive why judges have started banning the use of smartphones in the courtroom. However, a juror on a break can easily search Google, Facebook, Twitter, or Wikipedia for information about the case or laws involved.

Jury members are not taking this issue seriously as evidenced by the fact that even when judges give strict instructions to jurors not to communicate with each other outside of the jury room, they still do so. For example, in 2009, Baltimore Mayor Sheila Dixon sought a new trial after five of the jurors became Facebook "friends" and chatted on the social networking site.³⁵ The judge had given the jurors strict instructions not to communicate with each other outside of the jury room.³⁶ Prosecutors argued that the jury members' "friend[]" requests and subsequent comments on Facebook were innocuous because the jurors

²⁹ *Id.* at 26.

³⁰ *Id.* For a person to become a "Facebook . . . 'friend,'" that person must send a friend request to the other person. *Id.* Then the person receiving the friend request must confirm the person is actually their friend. *Id.* Once confirmation is complete, the two parties are friends and can view each other's profiles. *Id.*

³¹ *Id.* at 27-28.

³² See Schwartz, *supra* note 21 (discussing a federal drug case on distribution of pharmaceuticals on the Internet).

³³ *Id.*

³⁴ *Id.*; see also Brief for Petitioner for Writ of Certiorari, *Rodriguez v. FedEx Freight East, Inc.*, 131 S. Ct. 3028 (2011), dismissed (No. 10-1226), 2011 WL 1356669.

³⁵ Debra Cassens Weiss, *Jurors' Wikipedia Research, Friending at Issue in Two Md. Cases*, A.B.A. J. (Dec. 14, 2009, 8:01 AM), http://www.abajournal.com/news/article/jurors_wikipedia_research_friending_at_issue_in_two_maryland_cases/.

³⁶ *Id.*

did not discuss details of the case.³⁷ Ultimately, a plea agreement was reached that included Dixon's resignation.³⁸ The court then imposed a blanket ban on "the use of any device to transmit information on Twitter, Facebook, Linked In [sic] or any other current or future form of social networking from any of the courthouses within the Circuit Court for Baltimore City."³⁹

Interestingly, no court has specifically defined what comments on social media sites would be considered grave enough to warrant a mistrial or new trial. Courts handle these issues on a case-by-case basis, but with the increase in social media site usage, a uniform standard for determining what types of comments are prohibited is necessary. A simple model rule or amended jury instruction that includes language prohibiting the use of electronic communication devices and software during jury selection and jury service might solve the problem of juror misconduct on social media sites. If a straight prohibition on the use of social media sites does not work, then specific language could be added to the rule or instructions defining what types of comments would be inappropriate. Courts could specifically define the term "[s]ocial [m]edia" to ensure there is no confusion about its meaning. Social media profile sites are categorized by the ability to "allow users to join, create profiles, share information, and view still and video images with a defined network of 'friends.'"⁴⁰ Using this general categorization, courts could develop a working definition of social media sites that would be prohibited during the course of a trial including, but not limited to, Facebook, Twitter, YouTube, Wikis, blogs, MySpace, and chat rooms. Courts could also require jurors to sign a declaration indicating that they will not communicate about jury selection, the case, members of the court, or jury duty on social media sites or any other means of electronic communication.

A last resort could be to require jurors to report other juror misconduct that occurs both inside and outside the courtroom. However, making jurors responsible for reporting the misconduct of other jury members places the burden of recognizing such misconduct on the juror who might resent jury duty even more with this type of rule in effect. What incentive do jury members have to report the misconduct

³⁷ Daniel Guzman, *Lawyers: Facebook Warrants New Trial For Baltimore Mayor*, 9 NEWS NOW (Jan. 6, 2010, 6:27 AM), <http://www.wusa9.com/news/local/story.aspx?storyid=95614&provider=top>.

³⁸ *Id.*

³⁹ Mary Massey, *Twitter in the Court*, THE BALTIMORE SUN (Feb. 15, 2010), http://articles.baltimoresun.com/2010-02-15/news/bal-ed.twitter15feb15_1_social-media-twitter-proceedings.

⁴⁰ Davey et al., *supra* note 7, at 8.

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of their fellow jurors? The outcome of reporting juror misconduct on social media sites could be more time spent in the jury box, which is enough to make jurors wary of relaying such information.

The problem of jurors posting on social media sites before, during, and after trial is not going to go away. What currently happens when a juror disobeys the court's instructions and communicates about a case using social media? Unfortunately, the only avenues available to courts to deter juror use of social media sites are threats of harsh punishments, such as contempt charges.⁴¹ The problem with contempt charges is that instructions on the use of social media tools are not expressly addressed in all courts. Further, if jurors face charges of contempt for discussing specific details of the case on social media sites, some attorneys would argue that there is an issue of free speech (citing the *Schenck* case),⁴² while others would argue that it interferes with the right to privacy.⁴³ Jurors have also been asked to produce copies of the comments posted on Facebook and Twitter or to sign consent forms for social media sites to release the information. In California, a juror noted on his Facebook

⁴¹ See Keene & Handrich, *supra* note 13, at 16-17 (discussing juror misconduct via social networking sites and potential jury instructions to alleviate the problem); see also Molly McDonough, *Juror Faces Contempt for Watching YouTube Video Before Deliberations*, A.B.A. J. (Apr. 23, 2010, 9:06 AM), http://www.abajournal.com/news/article/juror_faces_contempt_for_watching_youtube_video_before_deliberations/ (reporting that after the verdict two jurors came forward to report that one juror admitted to watching an A&E report on the case on YouTube). Louisville, Kentucky Circuit Court Judge Gibson upheld the conviction, but called the juror in to appear to face contempt charges. *Id.*; see also Martha Neil, *Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict*, A.B.A. J. (Sept. 2, 2010, 2:28 PM), http://www.abajournal.com/news/article/oops_juror_calls_defendant_guilty_on_facebook_ok_though_verdict_isnt_in (reporting that a Michigan juror was sentenced to pay a \$250 fine and write an essay on the Sixth Amendment right to a fair trial and impartial jury after posting the verdict on her Facebook page). The defense attorney stated the conduct "compromises the integrity of the system." *Id.*; Raul Hernandez, *Juror Held in Contempt for Blog of Murder Trial*, VCSTAR.COM (Jan. 23, 2008, 12:00 AM), <http://www.vcstar.com/news/2008/jan/23/juror-held-in-contempt-for-blog-of-murder-trial> (explaining that Juror number 7 wrote a daily blog about the details of the case during trial and even posted a photo of the murder weapon). The judge charged the juror with contempt of court and the defendant appealed his conviction. *Id.*

⁴² See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (stating that there must be a determination of whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about . . . substantive evils"). This topic is a separate issue than the one being discussed in this Article and could warrant a separate article.

⁴³ See *Katz v. United States*, 389 U.S. 347 (1967) (listening to and recording defendant's conversation on a public telephone booth violated his privacy). This topic is a separate issue than the one being discussed in this Article and could warrant a separate article.

page that “he was ‘still’ on jury duty and ‘bored’ during the case.”⁴⁴ He also posted other comments regarding evidence of the case.⁴⁵ The California trial court ordered the juror to issue a consent form to Facebook to release the comments (Facebook was originally asked to release the comments, but declined to be involved due to the terms and conditions of the agreement the juror had signed with Facebook); the juror filed a complaint in California federal court for a temporary restraining order, but this was denied.⁴⁶ The juror then appealed to the California Supreme Court arguing that supplying the postings would violate his privacy rights.⁴⁷ If Juror Number One is required to consent to the search and release of his records by Facebook, then prospective jurors in California and other states who post on social media sites during jury duty might be faced with the real possibility that their personal information and communications could be obtained by defendants to get new trials or overturn verdicts.⁴⁸ This is the argument against requiring jurors to consent to the reproduction of their personal Facebook comments and tweets. Ultimately, threatening contempt charges or requiring jurors to produce consent forms for access to their personal social media sites will only create more legal issues and will not lead to a sustainable solution.

Drafting a model rule on the use of social media for courts to use when instructing jurors would begin to alleviate the problems of juror misconduct on social media sites, but it might not stop jurors from communicating electronically outside the courtroom. Short of punishing juror misconduct on the Internet, the only way to ensure that jurors are not engaging in online communication about a trial on social media sites is a court-entered gag order or sequestration.⁴⁹

B. Judges Using Twitter and Facebook

Jurors are not the only ones taking heat for using social media tools in the courtroom. Judges are using social media sites to connect with “friends” and post comments. Whether they are allowed to do so in their personal or professional capacity is still under scrutiny in many

⁴⁴ Juror Number One v. California, No. CIV. 2:11-397 WBS JFM, 2011 WL 567356, at *1 (E.D. Cal. Feb. 14, 2011); *Civil Procedure – Discovery: Younger Bars Federal Relief for Juror on Facebook*, 79 U.S.L.Wk. 2200 (Mar. 15, 2011).

⁴⁵ *Civil Procedure – Discovery*, *supra* note 44.

⁴⁶ *Id.*

⁴⁷ Complaint at 7, Juror Number One v. California, No. CIV. 2:11-397 WBS JFM (E.D. Cal. Feb. 11, 2011).

⁴⁸ *See id.* at 6.

⁴⁹ Zamore, *supra* note 12.

states. Several states are interpreting judicial canons to apply to communications on, and the use of, social media tools, while other states are remaining silent on the issue until a situation calls for an advisory opinion or public reprimand.⁵⁰

Most judges know better than to communicate on Facebook, Twitter or blogs before, during, or even after a trial, but there are always exceptions. In Ohio, Cuyahoga County Common Pleas Judge Shirley Strickland Saffold was accused of posting comments about a serial murder case on the Internet.⁵¹ Anonymous internet comments by “Lawmiss,” concerning Attorney Rufus Sims and his client Anthony Sowell, were linked to Judge Saffold’s personal email account and court computer. After discovering the posts, the attorney asked for the judge’s recusal from the case even though Judge Saffold denied writing them.⁵² A similar situation occurred in England where a magistrate and former mayor, Professor Steve Molyneux, got in trouble for tweeting about his cases.⁵³ After tweeting details of cases week after week, the magistrate found himself in trouble over tweets about a bail application when a fellow magistrate discovered them.⁵⁴ Ultimately, the magistrate resigned, stating, “I did nothing wrong, I did nothing illegal. I didn’t mention any names or write about anything in the retiring room. All I wrote was in the public domain already.”⁵⁵

The Federal Courts are not immune to the issue of judges using social media sites either. In *Purvis v. Commissioner of Social Security*, Judge Susan Davis Wigenton used Facebook to investigate a witness.⁵⁶ Judge Wigenton expressed her doubts about the merits of the plaintiff’s claim in a footnote stating:

⁵⁰ See *Judicial Ethics Advisory Committee Op. 2009–20*, FLORIDA SUPREME COURT (Nov. 17, 2009), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html> (citing Fla. Code of Judicial Conduct Canon 2B); In re Terry, No. 09-234 (N.C. Jud. Standards Comm’n Apr. 1, 2009) (stating a judge violated the judicial standards posting comments on an attorney’s Facebook “wall” during and regarding an active lawsuit); Advisory Comm. on Standards of Judicial Conduct, No. 17-2009 (S.C. Jud. Dept. Oct. 2009); see also MODEL RULES OF JUDICIAL CONDUCT R. 2.11(A) (2010) (stipulating when a judge must “disqualify himself or herself”).

⁵¹ Martha Neil, *‘Lawmiss’ Comment on Accused Serial Killer Is Linked to Judge Overseeing His Case*, A.B.A. J. (Mar. 26, 2010, 4:46 PM), http://www.abajournal.com/news/article/is_lawmiss_post_on_accused_serial_killer_by_judge_overseeing_the_case.

⁵² *Id.*

⁵³ Simon Hardy, *Magistrate quits in Twitter row*, SHROPSHIRE STAR (Apr. 25, 2009, 4:00 PM), <http://www.shropshirestar.com/latest/2009/04/25/magistrate-put-case-thoughts-on-internet/>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Purvis v. Comm’r of Soc. Sec.*, No. 09–5318 (SDW) (MCA), 2011 WL 741234, at *7 n.4 (D.N.J. Feb. 23, 2011).

[a]lthough the Court remands the ALJ's decision for a more detailed finding, it notes that in the course of its own research, it discovered one profile picture on what is believed to be Plaintiff's Facebook page where she appears to be smoking. . . . If accurately depicted, Plaintiff's credibility is justifiably suspect.⁵⁷

If jurors are researching the case details and attorneys are researching potential jurors, it is not at all shocking that judges are investigating parties and witnesses on social media sites. These outside research situations pose the question: Is it appropriate to access social media sites for use in trial and decisions? If so, attorneys should start advising clients to take down their social media sites.

Professional codes of conduct are written and enforced for a reason.⁵⁸ Judges should be aware of the repercussions of dishonoring the judicial system and should try to avoid doing so at all costs.⁵⁹ That is not to say that judges cannot participate in social media sites in their personal capacity, but they must be cautious in what they post, share, comment, and tweet on social media sites. If violations of the professional codes of conduct continue, then the judiciary will need to examine what can be done to decrease violations including meting out harsher punishments for violators.

III. THE RESPONSE TO THE USE AND ABUSE

Questions and concerns regarding social media site usage in the courts have seen an overwhelming response, yet confusion remains due to the lack of uniformity in the courts. Federal courts have created some sample guidelines,⁶⁰ but have set no clear precedent. The Judicial Conference has issued reports and articles on social media use guidelines for judges and court personnel.⁶¹ At the state level, some states have amended court rules and model jury instructions, calling for jurors to

⁵⁷ *Id.*

⁵⁸ See MODEL CODE OF JUDICIAL CONDUCT SCOPE (2010) (explaining that the Model Code establishes a set of ethical cannons to which all judges should strive).

⁵⁹ See generally MODEL CODE OF JUDICIAL CONDUCT (2010) (establishing ethical guidelines judges should follow in order to maintain the integrity of the judiciary).

⁶⁰ See *Committee Suggests Guidelines*, *supra* note 15 (suggesting specific jury instructions to deter jurors from using electronic devices during the trial and jury deliberations).

⁶¹ See Comm. on Codes of Conduct, *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, THE JUD. CONF. OF THE UNITED STATES (2010), available at http://www.ce9.uscourts.gov/jc2010/references/mjep/Use_of_Social_Media_by_Judicial_Employees.pdf.

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refrain from using electronic media and social media in the courtrooms while serving on juries.⁶² Other states remain silent on the issue.

A. *Judicial Ethics*

Given the prevalent use of social media sources by lawyers and laypeople, one must consider how judges themselves are using social media. Should judges make a distinction between their personal and professional lives? In most cases, there does not seem to be a distinction on social media sites between personal and professional profiles. If a judge posts or tweets about his career or work on his personal profile or Twitter feed, like most users do, does the social media site usage affect the judicial system? The State of Florida says that this type of conduct does affect the judicial system and is prohibited. Judges in Florida are not allowed to be “friends” with practicing attorneys in Florida.⁶³ Citing Canon 2B of the Florida Code of Judicial Conduct, the Supreme Court emphasized the need to avoid giving the impression that certain lawyers were in a “special position to influence the judge.”⁶⁴ This is an understandable outcome as judges often recuse themselves from proceedings due to personal relationships with the parties, but what judge doesn’t interact with attorneys that he or she went to school with or knew in a personal capacity before becoming a judge? Judges in every state would benefit from a judicial ethics guideline that outlines the boundaries of participation in online social media sites. For example, the judiciary could issue an ethical guideline suggesting that judges not participate in social media sites at all, be extremely cautious if doing so, or be required to set privacy settings on social media sites to the highest level and refrain from remarking about their professional lives. Adopting this type of ethical guideline would mean that judges would not be left to define their own boundaries regarding their participation on social media sites.

Judges might not be left on their own regarding this issue for long. The Conference of Court Public Information Officers (“CCPIO”) is beginning to address social media and the courts.⁶⁵ In August 2010, the

⁶² See CONN. CIVIL JURY INSTRUCTION 1.1-1; REV. ARIZ. JURY INSTRUCTION (CRIM.) 3RD (2009), PRELIM. INSTRUCTION 13; FLA. STAT. ANN. STANDARD CRIMINAL JURY INSTRUCTION 3.13; MICH. COURT RULE 2.511(H)(2); NEB. SUPREME COURT RULE § 2-118; WIS. JURY INSTRUCTION, CRIM. NO. 50; *In re* Standard Jury Instructions in Criminal Cases—Report No. 2010-01 and Standard Jury Instructions in Civil Cases—Report No. 2010-01, No. SC10-51 (Fla. Oct. 21, 2010) (per curiam).

⁶³ *Judicial Ethics Advisory Committee Op. 2009–20*, *supra* note 50.

⁶⁴ *Id.*; FLORIDA CODE OF JUDICIAL CONDUCT CANON 2B (2008).

⁶⁵ Davey et al., *supra* note 7, at 7–10.

CCPIO released a report on new media and the courts, which included a section on social media.⁶⁶ At the beginning of the report, the CCPIO used the performance standards implemented by the National Center for State Courts and the Bureau of Justice Assistance of the U.S. Department of Justice to examine the impact of new media on the courts.⁶⁷ These standards stress the importance of “public trust and confidence” in the courts.⁶⁸ This public trust and confidence judicial performance standard has three main components:

Standard 5.1 requires that the trial court be perceived by the public as accessible. Standard 5.2 requires that the public believe that the trial court conducts its business in a timely, fair, and equitable manner and that its procedures and decisions have integrity. Finally, Standard 5.3 requires that the trial court be seen as independent and distinct from other branches of government at the [s]tate and local levels and that the court be seen as accountable for its public resources.⁶⁹

After considering these components, the CCPIO recognized how social media use could adversely impact the court’s ability to meet Standard 5.2, especially with regard to the integrity of the court.⁷⁰ The CCPIO recognized that social media use by judges allows for collaboration and communication, but also creates the risk that the public will view the judges’ conduct on the sites negatively.⁷¹ Public perception of the courts is an important part of the judicial standards, and judges are required to promote public trust and confidence in the judicial system.⁷² It is obvious from the media attention directed at judges posting on social media sites that they often recklessly post comments on Facebook or Twitter about trials, attorneys, or plaintiffs and defendants.⁷³ This will

⁶⁶ *Id.*

⁶⁷ *Id.* at 23; see BUREAU OF JUSTICE ASSISTANCE, *supra* note 25, at 28–30 (discussing the performance standards that were enacted to stress the importance of “public trust and confidence”).

⁶⁸ Davey et al., *supra* note 7, at 23.

⁶⁹ *Id.* at 24.

⁷⁰ *Id.* at 24–25.

⁷¹ *Id.* at 26.

⁷² *Id.* at 25.

⁷³ See John M. Annese, *Criminal Court Judge to be Transferred: Sciarrino Being Sent from Island to Brooklyn; Sources Cite His Activities on Social Networking Site*, STATEN ISLAND ADVANCE, Oct. 15, 2009, at A1; Adrienne Meiring, *Ethical Considerations of Using Social Networking Sites*, IND. CT. TIMES, Nov/Dec. 2009, at 10–11; Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, A.B.A. J. (Feb. 1, 2011, 5:20 AM), http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of

only serve to undermine the public's trust and confidence in the courts. The CCPIO and the U.S. Department of Justice need to solve this potential problem by creating rules or setting standards for what is to be considered appropriate use of social media sites. In fact, the CCPIO recommends the formation of a standing committee to study and report on new media issues, on an ongoing basis, and the development of tools to help the courts respond to and manage new media.⁷⁴ Judges should be permitted to maintain social media sites to connect and communicate with the public, especially in the case of elected judges, but there must be safeguards in place to protect the integrity of the courts.

The Judicial Conference of the United States has addressed the issue of judicial employees using social media sites, and some federal courts have already implemented rules to safeguard against improper use of social media sites by employees.⁷⁵ In 2010, the Judicial Conference Committee on Codes of Conduct published the *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*.⁷⁶ This guide provides information to help courts develop policies on the use of social media by judicial employees.⁷⁷ The guide also includes sample policy provisions and existing policy examples from U.S. District Courts.⁷⁸ Some of the examples suggest disciplinary actions to be taken, including termination, if an employee of the judiciary violates the rules on social media use.⁷⁹ Using the Canons of Judicial Conduct as guidance, the Committee's resource packet defines social media, lists examples of improper communication, and gives sample policies for its use by employees.⁸⁰ However, this leaves the decision to draft and implement such policies up to each individual court.⁸¹ Why not draft a uniform policy that each court must adopt? A uniform policy would ensure that each judicial employee's conduct on social media sites is

_social_media_is_obvious_dangerous?utm_source=maestro&utm_medium=email&utm_campaign=default_email; Stephanie Francis Ward, *Justice Breyer's on Twitter and Facebook, But Don't Count on him Friending You*, A.B.A. J. (Apr. 14, 2011, 1:46 PM) http://www.abajournal.com/news/article/breyer_on_facebook_but_dont_count_on_him_friending_you/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

⁷⁴ Meiring, *supra* note 73, at 11–12.

⁷⁵ Comm. on Codes of Conduct, *supra* note 61.

⁷⁶ *Id.*

⁷⁷ *Id.* at 5–6.

⁷⁸ *Id.* at 27–42.

⁷⁹ *Id.* at 38. "Employees who participate in online communication deemed not to be in the best interest of the Court may be subject to disciplinary action. . . . Disciplinary action can include termination or other intervention deemed appropriate by Human Resources." *Id.*

⁸⁰ *Id.* at 9–19.

⁸¹ *Id.*

treated in the same manner. It would also safeguard against discrepancies in disciplinary actions and could clearly define what conduct is prohibited on social media sites by judicial employees.

Absent a set of rules or guidelines like the ones provided by the Judicial Conference of the United States, how can a state prevent judges from abusing social media sites? Perhaps existing rules can be used without specifically creating a rule for social media. For example, in North Carolina, a judge was publicly reprimanded for establishing contact with an attorney in an active case through a social networking site.⁸² After an investigation, the Judicial Standards Commission found that the district court judge presiding over a custody matter had become "'friends'" on Facebook with an attorney involved in the custody proceedings.⁸³ During the proceedings, the judge and the attorney commented about the trial back and forth to each other on Facebook.⁸⁴ The Commission found that the judge had violated the canons of judicial ethics by having *ex parte* communications with the attorney of a party in a matter being actively tried before him.⁸⁵ The Commission rather harshly criticized the judge, stating that his actions:

evidence a disregard of the principles of conduct embodied in the North Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the Court (Canon 3A(4)).⁸⁶

In this case, the Commission was able to use an existing rule to attempt to control the use of social media sites by judges. Similar to the CCPIO, the North Carolina Commission focused on promoting the public

⁸² *Public Reprimand B. Carlton Terry Jr. District Court Judge*, Inquiry No. 08-234, N.C. JUD. STANDARDS COMM'N (Apr. 1, 2009), available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

⁸³ *Id.* at 2.

⁸⁴ *Id.*

⁸⁵ *Id.* at 3-4 (citing a violation of North Carolina Judicial Canon 3A(4)).

⁸⁶ *See id.* (noting that the judge was also reprimanded for conducting independent research about the party by looking at the party's photography website).

confidence in the integrity of the judiciary by reminding judges of their standards of professional conduct.⁸⁷ Other states disagree with North Carolina and allow judges to communicate freely on social media sites so long as the conduct does not violate the judicial standards of conduct.⁸⁸

Obviously, tweets and blog posts can land judges in hot water with other members of the judiciary and the public. In some instances, public reprimands or advisory opinions are necessary to set examples of how the rules of judicial ethics can be violated by using these sites. Yet, there are some states that are open to allowing judges to interact online with attorneys, the public, and court personnel on social media sites. For example, in New York, the Advisory Committee on Judicial Ethics issued an opinion prompted by an inquiry from a judge who received an invitation to join a social networking site.⁸⁹ The judge asked the Advisory Committee whether or not it was appropriate for a judge to accept the offer and participate in the social network; the Committee answered in the affirmative, with some qualifications:

Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules.⁹⁰

The Committee also stressed the importance of maintaining the dignity of the judicial office and noted that the judge should “recognize the

⁸⁷ See *id.* Judge Terry’s actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. *Id.* (citing N.C. CONST. art IV, § 17 and N.C. GEN. STAT. § 7A-376(a) (2009)).

⁸⁸ See Bd. of Comm’rs on Grievances and Discipline, SUP. CT. OF OHIO, Op. 2010–07 (Dec. 3, 2010) (explaining that a judge may be a “friend[]” on a social networking site with a lawyer who appears as counsel in a case before the judge); *Judges’ Membership on Internet-Based Social Networking Sites*, ETHICS COMM. OF THE KY. JUDICIARY, Formal Judicial Ethics Op. JE-119 (Jan. 2010); N.Y. ADVISORY COMM. ON JUD. ETHICS, Op. 08-176 (Jan. 29, 2009), available at <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>; see also Meiring, *supra* note 73 (stating that generally judges are allowed to join social networks under rule 3.1 of the Indiana Judicial Code of Conduct).

⁸⁹ N.Y. ADVISORY COMM. ON JUD. ETHICS, Op. 08–176 (Jan. 29, 2009), available at <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>.

⁹⁰ *Id.*

public nature of anything he/she places on a social network page and tailor any postings accordingly.”⁹¹

It appears that, in New York, judges are allowed to interact online with attorneys and members of the public just as they would in a face-to-face social situation. The New York Advisory Committee explained that there is not much of a difference between adding a person’s contact information to your personal address book and adding them as a friend on Facebook.⁹² Similarly, the South Carolina Advisory Committee on Standards of Judicial Conduct in opinion No. 17–2009 concluded that a magistrate judge could have law enforcement personnel and court employees as “friends” on the magistrate judge’s Facebook page.⁹³ The Committee concluded that, “[a] judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge’s position as magistrate.”⁹⁴ The Committee reasoned that the judge should be allowed to be a member of social networking sites to foster good relationships with the community and to give the community a better understanding of their viewpoints.⁹⁵

In the Commonwealth of Kentucky, the Ethics Committee of the Judiciary issued a 2010 opinion concluding that judges may be members of Facebook and “friends” with people who may appear before them in court.⁹⁶ The Committee reasoned that simply listing other people as “friends” does not convey a special relationship between the judge and

⁹¹ *Id.*; see N.Y. ADVISORY COMM. ON JUD. ETHICS, Op. 07–135 (Oct. 18, 2007), available at <http://www.nycourts.gov/ip/judicialethics/opinions/07-135.htm> (stating that it is permissible to provide a link to newspaper articles on a judge’s website provided they are dignified, truthful, and not misleading); N.Y. ADVISORY COMM. ON JUD. ETHICS, Op. 01–14 (Mar. 8, 2001), available at <http://www.nycourts.gov/ip/judicialethics/opinions/01-14.htm> (explaining that a judge should not provide a link on its page for an advocacy group).

⁹² See *supra* note 89 (“The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge’s court through a social network. In some ways, this is no different from adding the person’s contact information into the judge’s Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge’s friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond.”).

⁹³ S.C. ADVISORY COMM. ON STANDARDS OF JUD. CONDUCT, Op. No. 17–2009 (Oct. 2009), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Judges’ Membership on Internet-Based Social Networking Sites*, ETHICS COMM. OF THE KY. JUDICIARY, Formal Jud. Ethics Op. JE–119, at 1 (Jan. 2010).

the “friend[].”⁹⁷ In the Committee’s view, the terms ““friend,” ““fan”” and ““follower”” are terms of art used by the social media sites and are not used in the ordinary sense of the words.⁹⁸ This rationale promotes access to justice by allowing judges to communicate with the public. However, judges should still be cautious when deciding whether to join a specific social media site because participating in the sites could lead to disqualifications in matters pending before the court or to an appearance undermining the judge’s independence or impartiality.⁹⁹

The ethics opinions from Florida, Kentucky, New York, North Carolina, and South Carolina suggest that creating a new rule of judicial conduct may not be necessary to solve the issue of judges using social media sites.¹⁰⁰ The ethics committees in those states relied on established canons of judicial conduct to analyze whether participation in social media sites is appropriate conduct for judges, and they ultimately used the language of the established canons or codes to issue their respective opinions.¹⁰¹ Ethics committees across the country can simply follow the lead of these states and rely on established rules of conduct, interpreting the rules in favor of or against judges using social media sites. It is important to note, however, that all of the opinions mentioned are advisory and not binding under the law.¹⁰² States should consider creating a binding rule or policy for judges and judicial employees or, at the very least, encourage each individual court to implement such a rule or policy. By doing so, states will begin to address the problem of social media affecting the integrity of the judicial system and the public trust and confidence in the courts.

⁹⁷ *Id.* at 2.

⁹⁸ *See id.* (discussing how the Committee also noted that other states have reached conflicting results citing Florida, New York, and South Carolina).

⁹⁹ *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2010) (“A judge shall act at all times in a manner that promotes public confidence in the *independence*, integrity, and *impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.”) (emphasis added).

¹⁰⁰ *See supra* notes 63, 82, 89, 93 & 96 (discussing these states’ ethics opinions).

¹⁰¹ *See* FLORIDA CODE OF JUDICIAL CONDUCT CANON 2B (2008); NORTH CAROLINA CODE OF JUDICIAL CONDUCT CANON 1, 2A, & 3A(4) (2010).

¹⁰² *See* KY. SUPREME COURT R. 4.310(3) (“Both formal and informal opinions shall be advisory only; however, the commission and the Supreme Court shall consider reliance by a justice, judge, trial commissioner or by any judicial candidate upon the ethics committee opinion.”); ARK. R. JUDICIAL ETHICS COMM. R. 6 (“All opinions shall be advisory in nature only. No opinion shall be binding on the Judicial Discipline & Disability Commission or the Supreme Court in the exercise of their judicial discipline responsibilities.”); FLA. STAT. ANN. JUDICIAL ETHICS COMM. R. 5 (“The Committee shall render advisory opinions to inquiring judges relating to the propriety of contemplated judicial and nonjudicial conduct, but all opinions shall be advisory in nature only. No opinion shall bind the Judicial Qualifications Commission in any proceeding properly before that body.”).

B. New Court Rules and Jury Instructions

The question then becomes: "What kinds of binding authority are available to help the courts deal with social media use by jurors and is there a need for binding authority or will clearer jury instructions and court rules be enough to deter jurors and members of the court from discussing cases on social media sites?" Some courts and legislatures have already responded to the use and abuse of social media in the courts by creating amended jury instructions and new rules of civil and criminal procedure relating to electronic communication.¹⁰³

Adopting pattern jury instructions that specifically address the use of social media sites is the most logical place to start. The judicial system as a whole will only benefit from adopting pattern jury instructions on the appropriate use of online social media sites and electronic communication technology. In December 2009, the Judicial Conference Committee on Court Administration and Case Management took the first step in establishing this type of instruction by issuing guidelines for juror use of electronic communication technologies.¹⁰⁴ The guidelines include one set of sample jury instructions that judges could consider reading to jurors before trial and a different set of instructions for the close of the case.¹⁰⁵ The instructions go above and beyond prohibiting the juror from communicating about the case outside of the jury room.¹⁰⁶ In fact, the instructions are pretty clear about what electronic communication is forbidden: "You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube."¹⁰⁷

The model jury instructions were written to help deter jurors from using electronic technologies when hearing testimony and deliberating on a case.¹⁰⁸ Reading these model jury instructions at the beginning and end of a court proceeding is the better alternative, rather than the harsher policy of confiscating all electronic communication devices before entering a courtroom. Some judges are even telling jurors

¹⁰³ See *supra* note 62 (discussing state jury instructions that forbid certain electronic communication).

¹⁰⁴ *Committee Suggests Guidelines*, *supra* note 15.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, JUD. CONF. COMMITTEE ON CT. ADMIN. & CASE MGMT. (Dec. 2009), <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>.

¹⁰⁸ *Committee Suggests Guidelines*, *supra* note 15.

outright that “no tweeting [is allowed] during the trial,”¹⁰⁹ while others are asking during jury selection if anyone has a blog.¹¹⁰ However, would it be better to wait until the jury is selected before asking if any of the jurors have a blog, Twitter feed, or Facebook page, and then prohibit them from communicating about the trial on these sites?

Or should this type of question be a part of voir dire? Dr. Cynthia Cohen, the 2009 President of the American Society of Trial Consultants, believes that the problem could be eliminated, and mistrials could be avoided, by asking about the use of social media sites during voir dire.¹¹¹ The rationale behind Dr. Cohen’s belief is that “[i]f prospective jurors are better scrutinized during voir dire, [it is] more likely . . . to eliminate the problem and avoid a mistrial.”¹¹²

What happens when a juror says he or she posts on Facebook every day and maintains a blog? Do the attorneys disqualify that person as a juror just because he or she is a member of social media sites? Would that not be considered a form of juror bias? With over 350 million users on Facebook,¹¹³ and another 18 million on Twitter,¹¹⁴ who will be left to serve jury duty if having a social media account eliminates you as a juror? The better solution would be to monitor juror use of social media sites. This presents a new type of challenge for the courts: How should jurors be monitored to make sure they are not communicating electronically about the trial without creating an invasion of privacy issue?

To avoid monitoring jurors and members of the court, why not create a rule prohibiting all electronic communication devices in the courtroom? The United States District Court for the Southern District of Florida took the recommendations of the Judicial Conference seriously and issued an administrative order prohibiting electronic transmission and cell phone use inside its courtrooms.¹¹⁵ The Order prohibits “emailing, text messaging, twittering, typing, and using cellular

¹⁰⁹ Robert K. Gordon, *Facebook, Twitter Causing Judges to Amend Jury Instructions*, BIRMINGHAM NEWS (Oct. 20, 2009), <http://www.al.com/news/birminghamnews/metro.ssf?/base/news/1256026558309710.xml&coll=2>.

¹¹⁰ *See id.* (quoting Dr. Cynthia Cohen, President of the American Society of Trial Consultants, when she stated “[w]hat we’re seeing is judges now having to ask during . . . (jury selection) if anyone has a blog”).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ CAROLYN ELEFANT & NICOLE BLACK, *SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER* 6 (2010).

¹¹⁴ *Id.* (citing Mashable.com statistic located at: <http://mashable.com/2009/10/14/twitter-2009-stats/>).

¹¹⁵ S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009).

phones . . . [from] inside . . . courtrooms.”¹¹⁶ The court noted that the prohibited actions “violate the sanctity of the courtroom and disrupt ongoing judicial proceedings,” and any violations will result in contempt of court.¹¹⁷ At the same time, however, this order amended a previous order that specifically allowed news reporters to bring electronic communication devices, including cell phones, into the courtroom as long as they are not used.¹¹⁸ Does this new rule violate the public’s right to know what happens in the court?¹¹⁹ The answer is likely no, because reporters can always revert back to the old pen and paper method. The court policy does not prohibit reporters in the courtroom and ensures that reporters can exit the courtroom to use electronic communication devices if necessary.¹²⁰ Therefore, public access to the court is still available.¹²¹ The strict prohibition of electronic communication devices and social media tools in the courtroom might be considered extreme, but if it solves the problem of jurors, court employees, and the media posting comments about cases on social media sites, then perhaps more courts will take a similar stance.

Another court that has recognized the impact of juror communication on social media sites is the United States District Court

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ S.D. Fla. L.R., Admin. Order 2006–16 (July 28, 2006).

¹¹⁹ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding “that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated”). The Court also noted in footnote 17, “[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.” *Id.*; see also *Presley v. Georgia*, 130 S. Ct. 721 (2010) (noting that the public has a right of access to the courts under the First Amendment). *But see Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (striking down a district court’s local rule that allowed cameras to broadcast the California Proposition 8 non-jury trial to other courts).

¹²⁰ S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009).

To balance the interest in preserving the sanctity and conduct of judicial proceedings against the public’s right to know what occurs inside the District’s courtrooms, this Order amends Administrative Orders 2006–16 and 2008–07 to allow news reporters to bring cellular phones, Blackberries, iPhones, Palm Pilots, and other similar electronic personal digital assistants (“PDAs”) into the courthouse consistent with what is permitted of attorneys, as long as the news reporters agree in writing not to email, text message, twitter, type, or use their cellular phones or other electronic device inside the District’s courtrooms. . . . The Clerk of Court shall also make space available in each courthouse for those listed reporters to use their cellular phones and other electronic devices outside of the courtrooms.

Id.

¹²¹ S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009).

for the Eastern District of Michigan. The Eastern District of Michigan's local rule differs from the Florida rule in that it does not prohibit all electronic communication devices in the courtroom.¹²² The local rule states:

Once summoned to a courtroom for selection and until discharged, jurors must refrain from any outside contact or communication that relates to the case, which includes the use of cell phones, Black[b]erries, iPhones, and other smartphone devices, the Internet, e-mail, text messaging, instant messaging, chat rooms, blogs, or the use of social networking websites such as Facebook, MySpace, LinkedIn, YouTube, or Twitter.¹²³

This local rule is not as strict as the one in Florida, as it does not expressly prohibit the use of electronic communication devices in the courtroom.¹²⁴ Rather, the Michigan rule merely asks jury members to *refrain* from using the technology.¹²⁵ Which method works best: strict prohibition or instructions warning against the use of social media? The answer is unclear, but the federal district and circuit courts have begun to propose jury instructions on the use of electronic communication in the courts.¹²⁶

¹²² E.D. Mich. L.R. 47.1.

¹²³ Compare S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009) (“[E]mailing, text messaging, twittering, typing, and using cellular phones shall continue to be prohibited inside the District's courtrooms.”) with E.D. Mich. L.R. 47.1(b) (“Once summoned to a courtroom for selection and until discharged, jurors must refrain from any outside contact or communication that relates to the case, which includes the use of cell phones, BlackBerries, iPhones, and other smartphone devices, the Internet, e-mail, text messaging, instant messaging, chat rooms, blogs, or the use of social networking websites such as Facebook, MySpace, LinkedIn, YouTube, or Twitter.”).

¹²⁴ See S.D. Fla. L.R., Admin. Order 2009–12 (Mar. 13, 2009) (providing a strict prohibition of communication devices in the courtroom); E.D. Mich. L.R. 47.1(b) (explaining that the local rule merely instructs jurors to “refrain from any outside contact or communication that relates to the case”).

¹²⁵ *Id.*

¹²⁶ See *Committee Suggests Guidelines*, *supra* note 15 (suggesting jury instructions to deter juror misconduct); see also MANUAL OF MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE EIGHTH CIR. § 1.05 (2011), available at http://www.juryinstructions.ca8.uscourts.gov/civ_manual_2011.pdf (providing detailed jury instructions that will deter juror misconduct). Detailing:

You must not communicate with anyone or post information about the parties, witnesses, participants, [claims, charges], evidence, or anything else related to this case. You must not tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. . . . During the trial, while you are in the courthouse and after you leave for the day,

At the state level, each individual court is free to adopt its own set of jury instructions. Some courts, however, have followed the federal judiciary's lead and have released similar model jury instructions to address the issue of jurors using social media sites.¹²⁷ For example, the Florida Supreme Court issued an order authorizing the publication and use of new, amended, and model uniform jury instructions for civil and criminal cases on the issue of electronic communication device use during jury selection and juror service.¹²⁸ The new jury instructions

do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or Website such as Facebook, MySpace, YouTube, or Twitter, or in any other way communicate to anyone any information about this case until I accept your verdict. *Sixth*, do not do any research—on the Internet, in libraries, in the newspapers, or in any other way

Id.; NINTH CIR. MANUAL OF MODEL JURY INSTRUCTIONS CIV. § 1.12 (2007) (explaining how the Ninth Circuit was among the first federal appellate courts to have jury instructions on Internet use). The instruction includes “e-mail, text messaging, or any Internet chat room, blog, [or] Website” in its admonition against jurors discussing the case prior to deliberations, and also explains that:

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over].

Id. The Ninth Circuit Criminal Jury Instruction 1.9 includes the same language. *Id.*

¹²⁷ Supreme Court of Fla., IN RE: STANDARD JURY INSTRUCTIONS IN [CIV. AND CRIM.] CASES No. SC10–51 (Oct. 21, 2010); N.M. UNIF. JURY INSTRUCTION—CRIM. No. 14-101 (2011), available at http://www.nmcompcomm.us/nmrules/NMRules/14-101_1-24-2011.pdf; Indiana, ORDER AMENDING INDIANA JURY RULES (Mar. 1, 2010), available at <http://www.in.gov/judiciary/orders/rule-amendments/2010/0301-jury.pdf> (noting that Indiana Jury Rules 20(b) & 26(b) (eff. July 1, 2010) also prohibit juror use of social media and permit the court to collect electronic devices from jurors during deliberations); CONN., CIV. JURY INSTRUCTIONS § 1.1-1 (Nov. 20, 2009), available at <http://www.jud.ct.gov/JI/Civil/part1/1.1-1.htm>; HAW. PATTERN JURY INSTRUCTIONS—CRIM., No. 2–01 (rev. 2009), available at http://www.courts.state.hi.us/docs/legal_references/jury_instruct6.pdf; MICH. CIV. JURY INSTRUCTIONS § 2.06, available at <http://courts.mi.gov/mciji/general-instructions/gen-instructions-ch2.htm#ji206>; N.Y., JURY ADMONITIONS IN PRELIMINARY INSTRUCTIONS § 6 (rev. May 5, 2009), available at http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf; OHIO STATE BAR ASS'N JURY INSTRUCTIONS, Jury Admonition, available at <http://www.lawriter.net/NLLXML/getcode.asp?statecd=OH&codeseq=UndesignatedJURY%20ADMONITION&sessionyr=2009&Title=i&version=1&datatype=OHOSBAJI&cvfilename=ohohosbajicv2009TopicUnprefixedC.htm&docname=JURY+ADMONITION&noheader=0&njumpmsg=0&userid=PRODSG&Interface=CM>; WIS., JURY INSTRUCTION (CRIM.) § 50, available at <http://www.postcrescent.com/assets/pdf/U014968718.PDF>.

¹²⁸ Supreme Court of Fla., IN RE: STANDARD JURY INSTRUCTIONS IN [CIV. AND CRIM.] CASES No. SC10–51, 4 (Oct. 21, 2010).

stress that a juror or potential juror “must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all.”¹²⁹ This instruction focuses on the problem of jurors using social media sites to communicate electronically and it prohibits the practice during a case, but the instructions also ask jurors to report any violations to the bailiff, which could be problematic.¹³⁰ The odds that another juror will report a violation before deliberations end are slim because the reporting juror would have to explain the violation to the judge, which would ultimately prolong jury duty.¹³¹ If a juror waits to report the violation after the trial has ended, which is typically how the reporting occurs, then a motion for a new trial could be granted.¹³² To avoid mistrials and new trials, why not start monitoring jurors’ social media site usage?¹³³ While this issue remains a challenge, the simplest solution is to draft and implement clearer jury instructions dealing with the issue of social media site use in the courtroom.

What type of jury instruction will work to negate this problem once and for all? The State of Arizona provides a promising example of what a jury instruction should include regarding electronic communication and social media sites.¹³⁴ The Arizona jury instruction, entitled “The Admonition,” stresses to the jury that the instruction is comprised of “mostly don’ts.”¹³⁵ Throughout the instruction the court stresses the importance of the trial process and the established procedures for viewing evidence and deliberating, and it strictly prohibits the use of social media sites for communication:

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones [sic], I-Touches [sic], Google, Yahoo, or any internet search engine, or any

¹²⁹ *Id.* at 6 (citing the Appendix with Amendments to Standard Jury Instructions).

¹³⁰ *Id.*; FLA. STANDARD JURY INSTRUCTIONS IN CRIM. CASES § 3.13 (2011).

¹³¹ Schwartz, *supra* note 21.

¹³² *Id.*

¹³³ See Katz v. United States, 389 U.S. 347 (1967) (explaining that this question cannot be answered without examining the privacy issue, which is outside the scope of this Article).

¹³⁴ PRELIMINARY CRIMINAL INSTRUCTIONS 13 (State Bar of Ariz. 2009), available at http://www.azbar.org/media/58829/preliminary_criminal_instr.pdf.

¹³⁵ *Id.*

other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors.¹³⁶

In addition to specifically laying out what communication and technology are prohibited in the courtroom, the Arizona instructions explain the reasons behind the prohibitions.¹³⁷ This type of jury instruction is an excellent example of how specific language in jury instructions can bring the issue to the attention of the jurors and provide a rationale for the prohibition of discussing details of the case, or jury duty on social media sites.

What more can courts do to deter the abuse of social media sites by jurors? The Arizona jury instruction language provides an excellent starting point, but if the court is going to implement a jury instruction on the use of social media and electronic communication, the impact of using the technology must be clearly written in the instruction. Violations must also be detailed in the instruction, and courts should consider giving the instructions orally as well as in writing at the beginning and end of the case. The courts could also require jurors to read and sign a copy of the instructions indicating that they understand the rules and punishment if violations should occur. Giving the instruction orally and in writing, as well as clearly outlining the punishment for misconduct, could serve to prevent jurors from tweeting, commenting, posting, or blogging about cases. This type of instruction should be given to every person in a potential jury pool before jury selection, before trial, and before deliberations begin in order to avoid mistrials, appeals, and motions for new trials. If such an inclusive

¹³⁶ *Id.*

¹³⁷ *Id.* (explaining why technology prohibitions in the courtroom exist). For example:
One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

Id.

instruction is given to juries, the number of mistrials or new trials due to juror abuse of social networking sites could be diminished drastically.

IV. CONCLUSION

As technology changes and social media sites grow in popularity, courts will continue to face the challenge of adopting new rules to address the problems created by such technology. New court rules and procedures relating to technology need to be in place to protect the right to a fair trial, impartial jury, and the public trust and confidence in the judiciary. Preventative measures such as judicial ethics rules, admonitions for the jury, and clearly laid out punishments for violators are the appropriate measures to address the impact of social media on the judicial system. How much regulation of the use of social media sites is enough? It will be up to each individual state or court to decide, but at the very least, each court should adopt some form of instruction addressing social media or electronic communication.

To protect the integrity of the judicial system, courts should adopt jury instructions that are over-inclusive regarding the use of social media sites and electronic communication. Creating a broad jury instruction that prohibits jurors from using all forms of electronic communication is not enough because the definition of "electronic communication" could mean one thing to the court and an entirely different thing to the members of the jury. For judges, states must encourage judicial ethics rules that address appropriate usage of social media sites. This will prevent any negative backlash or criticism of a judge's conduct by the public or media.

In this technology driven world, jurors and judges will continue to use social media sites to communicate; however, whether they do so appropriately will need to be monitored closely. The necessity of adopting or utilizing judicial ethics rules that adapt to the use of social media sites for communication is just one of the challenges facing the judicial system. The biggest hurdle for the judicial system is stopping jurors from communicating about details of cases on sites like Twitter and Facebook. This will prevent courts from becoming all a *'twitter.'*