Juries and Social Media

A report prepared for the Victorian Department of Justice

> *"In facing the reality of the modern communications revolution, it is crucial that we understand the technology and how it is being used — something lawyers and judges, often castigated as Luddites, may not find easy."*
>
> *Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, 15 September 2011*

Authors: Associate Professor Jane Johnston (Project Leader), Professor Patrick Keyzer (Project Leader), Geoffry Holland, Professor Mark Pearson, Sharon Rodrick and Professor Anne Wallace

Juries and Social Media

Introduction

It is a fundamental principle of law that an accused has a right to a fair trial. An incident of this right is that information relating to prior convictions of an accused should not be made available to the jury as it may bias their verdict. In our legal system, this principle has traditionally been underpinned by the common law offence of sub judice contempt of court. It is also reinforced by legislation, in each State and Territory, which makes it an offence for a juror to enquire about a person who is a party to a trial or any matter relevant to a trial.

The traditional or 'legacy' media are aware of the law of sub judice contempt and as a result do not comment on the criminal history of an accused (although there are exceptions, as *Hinch v Attorney-General (Vic)* demonstrates).[1] In recent times it has become clear that information about trials can be shared via social media, carrying implications for the right to a fair trial. In response to a request from the Victorian Department of Justice made on behalf of the Standing Council on Law and Justice, we were invited to:

1. Conduct a literature review of existing research and studies that discuss the use of social media by empanelled jurors and in particular the purpose and effect of such use and describe this research and these studies.
2. Review any policy implemented in interstate or overseas (Commonwealth) jurisdictions that aims to address potential prejudice caused by a juror's access to and use of social media, and provide details regarding whether any policy has been successful.

The format of this Report is as follows:

1. What is social media?
2. Limitations on the effectiveness of sub judice and suppression orders in the digital era
3. Problems cause by juries using social media during trials
4. The current menu of options
5. Recommendations
6. Appendix One: social media platforms
7. Appendix Two: jury directions in the United States

[1] (1987) 164 CLR 15.

1. What is social media?

1.1 Social media defined Social media is "a group of Internet-based applications that build on the ideological and technological foundations of [the worldwide web] which allows the creation and exchange of user-generated content."[2] As the Chief Justice of New South Wales, the Hon Tom Bathurst has observed "With social media, content is not merely consumed by users, it is also created, organised and distributed by them."[3]

1.2 Characteristics of social media Generally speaking, social media is characterised by the following elements:

- The creator relinquishes control of the message;
- It has a participatory culture;
- It is interactive and two-way;[4] and
- It is easily accessible.

1.3 Social media can be "two-way" or "one-way" Privacy Victoria has described these two varieties of social media in the following terms:

- Two-way communication: broadcasting information and allowing people to converse with the organisation publicly, such as commenting on news articles and articles, or posting on the organisation's 'wall' or profile.
- One-way communication: broadcasting information to the public but not receiving or allowing feedback, such as letting 'followers' or 'fans' know about media releases or latest news, but not permitting individuals to comment .[5]

1.4 Privacy settings Varying degrees of one-way or two-way communication can apply across social media platforms. For example, Facebook requires mutual 'friending' before information can be exchanged (though not to monitor public material that has been posted). Twitter only allows one-way following. Blogs have settings to restrict comments or even to shut out readers entirely.

1.5 Some courts use social media to publish their judgments Courts that have taken up social media tend to have adopted Twitter. A number of courts overseas use Twitter to publish judgments and other communications. For example, many State Supreme Courts in the United States publish links to their judgments and provide information about changes to court procedures and rules via Twitter. The provision of such access can be selective. For

---

[2] Andreas M Kaplan and Michael Haenlein, 'Users of the world, unite! The challenges and opportunities of social media' (2010) 53(1) *Business Horizons* 61.

[3] The Hon Thomas F Bathurst, 'Social media: The end of civilization? The Warrane Lecture, University of New South Wales, Sydney, 21 November 2012, p 7.

[4] While many would see the capacity for interactivity and two-way communications as central to the character of social media, these media can also be exclusionary or "one-way".

[5] See *Social Networking*, Information Sheet 04.11. We would use the word 'distributing' instead of 'broadcasting' because not all material published on social media is broadcast.

example, the Los Angeles Superior Court, the largest trial court in the United States, restricts access to its Twitter account, requiring users to send a 'Follow' request if they wish to do so. This is done to ensure the authenticity of Twitter followers.

1.6 Examples of social media platforms Internationally, the most commonly used social media platforms are Facebook, Blogger, Twitter, WordPress, LinkedIn, Pinterest, Google+, Tumblr, MySpace and Wikia. These forms of social media are accessed equally from personal computers and mobile devices across most cultures and age groups.[6] All provide a range of privacy settings. Descriptions of the key social media platforms used in Australia are provided in Appendix One.

2. Limitations on the effectiveness of sub judice and suppression orders in the digital era

2.1 The fundamental principles at stake in the social media context Traditionally, courts have sought to balance a number of potentially conflicting rights and principles when governing trials. Social media use by jurors can damage the capacity of courts to maintain an appropriate balance between these rights and principles. The challenge was aptly summarised by Lord Chief Justice Judge in the United Kingdom case of *R v Karakaya* in terms worth setting out at length:[7]

> 24. … If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial...
> 25. On analysis these are the principles which govern the first direction which the judge gives to the jury at the beginning of every trial. The jury of course bring their own experience and knowledge of the world with them into court, and far from directing them to ignore everything that life has taught them, the judge encourages the jury to use and share their knowledge and understanding with their colleagues as they examine the evidence and reach informed judgments on it. He also, and most significantly for the purposes of this appeal, gives a clear and unequivocal warning to the jury that they should not discuss the case with anyone outside their own number nor allow anyone who is not a member of the jury to talk to them about the case. Again, the reason is simple. The case is to be decided on the evidence produced

---

[6] Neilsen Media, (2012) *State of the Media: The Social Media Report*, http://blog.nielsen.com/nielsenwire/social/2012/.

[7] [2005] Cr App R 5 at [24]-[25].

> before the jury in court after they have heard counsel's arguments and the judge's directions. If a juror speaks to anyone about the case, even to someone precious and dear to him, indeed the more so if it is an individual whose thoughts and comments are valued, that person may say something which could influence the judgment of the juror and the outcome of the case. It will have happened in the absence of the prosecution and the defence and the trial judge and remaining members of the jury. None of them will know. Neither side will be able to call evidence to deal with the point or direct arguments to demonstrate that the point may be wrong. The verdict is then reached not only on the evidence produced in court, but on the observations and comments of the individual to whom the juror has spoken. That will not be a true verdict according to the evidence. It will be a verdict according to the evidence, as supplemented by the views and comments of outsiders without responsibility for the verdict.

2.2 The traditional approach has been to target the publisher Traditionally, the courts had an effective strategy for dealing with prejudicial publicity that might be accessible by jurors: they could target the publisher of the material. The courts had two main weapons at their disposal. The first, and most significant, was the law of sub judice contempt. For the most part, sub judice contempt operates *ex post facto* by punishing those who have published material that has a real and definite tendency,[8] as a matter of practical reality, to prejudice the administration of justice in a pending proceeding.[9] The second is to issue a non-publication order directed at preventing prejudicial material from being published in advance of a trial.

2.3 Prosecution for sub judice contempt less likely to deter social media users Although many professional journalists communicate via social media, especially Twitter, social media empowers anyone to be a publisher. The ability to publish is therefore readily available to people who do not have a professional background in respect of the matters about which they are communicating and whose thoughts and opinions are not fact-checked by anyone. In a professional media system, checking takes place at multiple levels, eg. sub-editors, production editors and lawyers are often involved. In contrast, 'citizen journalists' do not have their work checked and are less likely to understand the nature of the legal constraints imposed by sub judice contempt. Indeed, they may even be unaware of the very existence of the offence. This lack of appreciation of their vulnerability to a prosecution for contempt means that the law of sub judice contempt does not exert a chilling effect on their willingness to communicate about a pending case. Accordingly, there is a far greater probability that sub judice contempt will be committed via social media than via the traditional media.[10]

---

[8] There are alternative formulations of the test for liability that are based on the notion of substantial risk rather than tendency.

[9] The law of sub judice contempt is concerned to ensure that all the main players in a court case are not improperly influenced or interfered with while the case is pending, including jurors, parties and witnesses. However, since the subject of this paper is jurors, this section will focus on the efficacy of sub judice contempt to deal with prejudicial material disseminated to jurors via social media.

[10] See, eg., Andrew Heslop, 'Ignorance Isn't a Defence Against Sub Judice' <http://www.abc.net.au/unleashed/4285856.html>; Julie Posetti, '"Trial by Social Media" in Australia Prompts Clash Over Accused Murderer' <http://www.pbs.org/mediashift/2012/10/trial-by-social-media-in-australia-

2.4 Sub judice prosecutions more difficult Despite the propensity of social media to generate a greater amount of prejudicial publicity about a pending case, there are a number of reasons why prosecutions for sub judice contempt are less likely to be brought (or, if instituted, to succeed) in relation to prejudicial material disseminated on the Internet, including via social media. Some are purely pragmatic; others concern the difficulty in proving certain elements of the offence.[11]

- Firstly, while it is possible to isolate a particular newspaper article or a specific television or radio program and find that it is prejudicial,[12] the effect of prejudicial publicity on social media is more likely to be cumulative. That is, it will often be the collective effect of commentary on a case that will constitute the prejudice, rather than any individual comment. If the prejudice cannot be attributed to a particular blog, tweet or post, a prosecution is not likely to succeed.
- Secondly, for the purposes of sub judice contempt, publication is generally taken to have occurred where prejudicial material is disseminated to the general public, 'a section of the public which is likely to comprise those having a connection with the case'[13] or to an individual who is likely to communicate the material to a wider audience.[14] Material that is disseminated by the mainstream media is clearly 'published' for the purposes of contempt law. The same might be said of public blogs, tweets and Facebook pages, if they can be accessed by anyone.[15] Examples include social media use by mainstream media or by police media liaison units. However, the position is less clear in respect of protected social media communications which can be accessed by only approved followers and friends.[16] How many followers or friends constitute publication? Would more than 1000 friends suffice? In its recently issued

---

prompts-clash-over-accused-murderer285.html>; Matthew Knott, 'Jill Meagher case: Bolt, Twitter users warned on comment' http://www.crikey.com.au/2012/09/28/jill-meagher-case-bolt-twitter-users-warned-on-comment/?wpmp_switcher=mobile.

[11] Many of these issues are raised in: United Kingdom Law Commission, *Contempt of Court: Consultation Paper* (2012).

[12] It should be noted, however, that courts are sometimes required to grapple with situations where one media organisation is prosecuted for contempt in circumstances where other media organisations have generated a lot of similar prejudicial publicity. On occasions this has led to a finding that the publication singled out for prosecution was not contemptuous on the basis that it carried no greater risk of prejudice than already existed as a result of the impact of past publicity. See, for example: *Attorney-General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695; *Attorney-General v MGN Ltd* (1997) 1 All ER 456; *R v Herald and Weekly Times Ltd* [2007] VSC 482.

[13] Lowe & Sufrin, *Borrie & Lowe's Law of Contempt* (3rd ed, 1996) 85. This is to be compared with defamation, where communication of defamatory material to one person other than the plaintiff is regarded as a publication.

[14] This proposition was developed and applied in *DPP v Wran* (1986) 7 NSWLR 616. In that case, Premier Wran made prejudicial statements about a forthcoming re-trial during an interview given to several journalists, who then disseminated the material to the wider public. Wran was held to have published the material when he gave his interview, on the basis that the journalists were likely to put the material before a large number of people, including persons who might become jurors in the retrial, whether or not they in fact did so.

[15] Public tweets are the default setting: http://support.twitter.com/articles/14016-about-public-and-protected-tweets#

[16] http://support.twitter.com/articles/14016-about-public-and-protected-tweets#; http://www.facebook.com/help/325807937506242/

Contempt of Court: Consultation Paper, the United Kingdom Law Commission provisionally recommended that courts should be left to resolve publication issues on a case by case basis.[17]

- Thirdly, although courts take the view that anyone who is involved in publishing prejudicial material is liable to be prosecuted for sub judice contempt, the question of who is a publisher of material that is accessible over the Internet is a complex one that is still in the process of being resolved.[18] Clearly, a person who posts or tweets prejudicial material on social media is a publisher (subject to what is said above regarding the extent of their audience), but they may be difficult to identify. They may, for example, post material under a pseudonym. Also, if the prejudicial material concerns a high profile case, hundreds, if not thousands, of prejudicial comments may have been posted on social media sites and prosecuting authorities may be reluctant to single out individual offenders for prosecution. It is also unclear whether a person who affirms, 'likes' or otherwise expresses agreement with prejudicial material posted by another thereby becomes a publisher. It may be easier for a prosecuting authority to target intermediaries, such as those who 'store content on behalf of users and enable them to make content accessible to others, such as social networking sites like Facebook and Tumblr'.[19] Whether Internet content hosts (ICHs) and Internet service providers (ISPs) are properly regarded as 'publishers' is an issue yet to be resolved by the courts. It would appear that ICHs or ISPs cannot be liable for contempt unless and until the problematic content is brought to their attention. This is because clause 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth) renders State law ineffective if it subjects an ICH or an ISP to liability in respect of content of which it was unaware or which requires an ICH or ISP to monitor or make inquiries about Internet content hosted by the ICH or carried by the ISP.
- Finally, there is the problem of jurisdictional reach. If a publisher has no presence in the court's jurisdiction,[20] a prosecution is practically impossible. Of course, this problem is not peculiar to social media; it affects any cause of action that involves publication on the Internet.

2.5 Material on the Internet is in a continuous state of publication There is one sense in which prejudicial material that appears on the Internet, including social media, may be more amenable to prosecution than material published in traditional media. 'Publication' in relation to the traditional media was, practically speaking, a one-off phenomenon. Accordingly, prejudicial material that was published in a newspaper or broadcast on radio or television prior to the commencement of a case could not be held contemptuous since it was not published while proceedings were sub judice.[21] However, the weight of authority suggests that material that continues to be accessible on the Internet is in a continuous

---

17 United Kingdom Law Commission, n 11, [3.29].

18 The issue arises in contexts other than contempt and cases decided in one context will not necessarily be applicable in another.

19 United Kingdom Law Commission, n 11, [3.34].

20 This will be the case if the publisher does not reside or carry on business in the jurisdiction.

21 This gave the traditional media a window of opportunity to publish what would otherwise be contemptuous material in the lead up to an arrest or charge.

state of publication.[22] If so, prejudicial material that was blogged, posted or tweeted prior to the commencement of a case, but which remains accessible after it has commenced, can be held to be in contempt. This includes material that is removed by the originator but has been copied.

2.7 Conclusion: sub judice prosecution less likely to be effective On balance it would appear that the law of sub judice contempt may prove to be less effective in dealing with prejudicial material disseminated via social media than it has been in dealing with prejudicial material published in newspapers or magazines, or broadcast on television and radio.

2.8 Issuing non-publication orders Another remedy deployed by courts in a number of recent cases is to make non-publication orders (NPOs) which are directed at preventing the commission of a sub judice contempt ahead of a trial. These orders, known as 'general NPOs',[23] target material that has 'no connection with court proceedings except its capacity to affect current or future proceedings'.[24] General NPOs may take one of two forms when directed at information on the Internet: they may be made in anticipation of material being published that will prejudice a forthcoming trial; or they might order the removal of material that is already available on the Internet (take down orders).

2.9 The courts have an inherent jurisdiction to make NPOs, but there are limits on their effectiveness It has been held that superior courts have inherent jurisdiction to make general NPOs to secure the fair trial of an accused, provided they are necessary.[25] However, in two recent cases - *Digital News Media Pty Ltd v Mokbel* and *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* – orders of this nature were set aside on appeal because the law constrains the circumstances in which they can be made and the form which they can take.[26] Some of these constraints present obstacles to the effective control of what is published on the Internet, including via social media.

2.10 Firstly, NPOs cannot be made in extensive terms against the world at large The weight of Australian authority favours the view that, while the courts' inherent powers will support an order preventing access to existing publications on the Internet, general NPOs

---

22 *Her Majesty's Advocate v William Beggs Opinion No 2 of Lord Osborne* [2002] SLT 139; *Digital News Media Pty Ltd v Mokbel* (2010) 30 VR 348; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125.

23 These types of NPOs were dubbed 'general NPOs' by the Victorian Court of Appeal in *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 348, [33] in contradistinction to 'proceedings NPOs', which prohibit the publication of material that has been generated within the courtroom. While proceedings NPOs derogate from open justice, the countervailing principle in the case of general NPOs is that of free speech.

24 *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [51].

25 In New South Wales, courts have statutory power to make such orders. The *Court Suppression and Non-publication Orders Act 2010* (NSW) ss 7, 8(1)(a) permit an order 'prohibiting or restricting publication of information not merely tending to reveal the identity of a party or witness, but also information "otherwise concerning"' any party or witness or person associated with a party or witness': *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [36].

26 *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [99].

cannot be made in extensive terms against the world at large.[27] Orders that are too wide may have to be recast in narrower terms so that they are directed at specific persons and identify prejudicial material under their control.[28] It is unlikely that a court would make a general NPO directed at private individuals in respect of their conduct on social media. This is because there is unlikely to be evidence before the court that would justify an anticipatory order, since information is generally posted by private citizens in an unplanned, random and indeterminate manner. The position may be otherwise if the order is made against a traditional media organisation which has a social media presence.

2.11 Secondly, general NPOs can be made only if they are necessary to prevent prejudice to the proper administration of justice. While the concept of necessity is not to be given an unduly narrow interpretation,[29] the NPO must be more than just reasonable or sensible.[30] This concept presents a problem regarding material on the Internet, including social media, because there are a number of factors that might operate to render a general NPO 'unnecessary':

- The general principles of sub judice contempt must be regarded, in the particular circumstances, 'to be inadequate in themselves' to prevent prejudice.[31]

- In *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim,*[32] the Court indicated that the necessity test will not usually be satisfied unless a request has been made to the parties thought to be in breach to take the material down, and they have either failed to do so, having been given a reasonable opportunity to do so, or have indicated that they do not intend to do so.[33]

- However, even if the entity at whom an order is directed takes the prejudicial material down, the material may be cached elsewhere. This material may remain available even when the original webpage has been removed and may just 'move up the ladder' in the search hierarchy and take their place.[34] If the court believes that the order is deprived of any practical utility, it cannot be said to be 'necessary'.[35] As

---

27 See, for example, *General Television Corporation Pty Ltd v Director of Public Prosecutions* [2008] VSCA 49; 19 VR 68.

28 This occurred in *General Television Corporation Pty Ltd v Director of Public Prosecutions* [2008] VSCA 49; 19 VR 68 where the initial order pertaining to the broadcast of the television program was altered so that it was confined to Channel Nine. See also *R v Perish* [2011] NSWSC 1102, [44]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [63].

29 The order need not, for example, be 'essential': *R v Perish* [2011] NSWSC 1102, [42].

30 *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [8].

31 Ibid, [99].

32 [2012] NSWCCA 125.

33 Ibid, [98].

34 *R v Perish* [2011] NSWSC 1102, [22].

35 However, it should be noted that there are divergent views on this. In *R v Perish* [2011] NSWSC 1102 it was held that an order is not necessarily futile just because the court cannot remove all offending material: Ibid, [44]. Although the orders in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* were set aside, the New South Wales Court of Criminal Appeal suggested that the mere existence of cached material will not automatically make an order futile; it would depend on whether it had a high priority in a search result. If it

noted earlier, this is likely to be the case if the publisher is outside the court's jurisdiction, since it would be virtually impossible to enforce the NPO, even though the prejudicial material is published within the court's jurisdiction.[36]

- Finally, an order may not be regarded as necessary if the court regards it as improbable that a juror would search for the material. One reason the general NPOs in question were set aside In *News Digital Media Pty Ltd v Mokbel*, was because the majority took the view that jurors will adhere to their oaths and obey the directions of the trial judge not to conduct Internet searches. On this view, a take down order was not necessary, as a fair trial could be secured without it.[37] Other courts have regarded themselves as bound to do what they can to make the task of jurors as easy as possible. In *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim*, the New South Wales Court of Criminal Appeal opined that the likelihood of jurors abiding by judicial directions will vary according to the circumstances and is a matter for the consideration of each judge asked to make such an order.[38]

2.12 Conclusion: sub judice has less utility in the era of social media Attempts to prevent or punish the publication of prejudicial material while proceedings are sub judice are less feasible in the social media era, as contempt laws may prove to be unequal to the technology.[39] It therefore seems inevitable that efforts to deal with the problems that prejudicial publicity poses for fair trials will be redirected to the jurors and to the manner in which the trial itself is conducted. The nature and viability of these alternatives is considered in section 4 of this Report.[40]

3. Problems caused by juries using social media during trials

3.1 A serious issue that has led to aborted trials In research conducted by the authors in February 2013, 62 Australian judges, magistrates, court administrators and other stakeholders identified the potential for juries to misuse social media during trials as, by far,

---

only has low priority, the order might not be futile: [2012] NSWCCA 125, [76]. By contrast, in *Mokbel*, Warren CJ and Byrne AJA held that since 'the removal of the offending material did not prevent a determined searcher from accessing the same material from a cached website, it could not be said that the order was necessary for the protection of the court process with respect to Mokbel's pending trials:' see also *East Sussex County Council v Stedman* [2010] 1 FCR (UK) 567. Similar issues may arise in relation to prejudicial material that has been re-tweeted or re-posted by others.

36 *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [78].

37 Note that these comments were directed at archived material which could only be found if a juror actively searched for it.

38 *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [77].

39 See eg. *Dagenais v Canadian Broadcasting Corp* (1994) 120 DLR (4^{th}) 12, 44a-c. It should be noted that the UK has not given up on contempt laws and has made several provisional recommendations for their amendment in order that they might adapt to the Internet environment: see, for example, United Kingdom, Law Commission, above n 11.

40 It should be noted that in 2003, the New South Wales Law Reform Commission evaluated these alternatives to sub judice contempt and concluded that sub judice contempt was still the most effective way of dealing with prejudicial publicity: *Contempt By Publication*, Report 100 (2003). However, that report was issued before the advent of social media and it is unclear whether the same view would be taken today.

the single most significant challenge that social media poses to the courts. In 2010, Reuters Legal, using data from the Westlaw online research service, compiled a tally of reported US decisions where judges granted a new trial, denied a request for a new trial, or overturned a verdict, in whole or in part, because of juror actions related to the Internet. They identified at least 90 verdicts between 1999 and 2010 were challenged due to juror Internet misconduct. They counted 21 retrials or overturned verdicts in the 2009-2010 period.[41] The Law Commission identified at least 18 appeals in the UK since 2005 related to juror misconduct during criminal trials, some of which involved Internet access or social media use. The section below is an attempt to classify these types of cases, with examples, according to the degree of potential prejudice they pose to a trial.[42]

3.2 Jurors using social media to communicate with parties to the case Perhaps the most notorious example of misuse of social media during a trial was the case of *A-G v Fraill*.[43] Joanne Fraill was sentenced to eight months prison for contempt of court by London's High Court in 2011 for exchanging Facebook messages with the accused in a drug trial while she was serving on the jury. Fraill also searched online for information about another defendant while she and the other jurors were still deliberating. These activities were undertaken in contravention of a judicial instruction to avoid using the Internet during the trial. While use of social media by jurors to communicate with parties to a case appears to be rare, it is not unheard of.[44]

3.3 Jurors using social media to divulge details of an ongoing trial This activity appears to be more common. In California, a lawyer who had failed to disclose his profession was suspended from practice for 45 days for blogging about a burglary trial while serving as a juror.[45] In an Arkansas case, a juror used his smartphone to send eight tweets from a court during a case brought by investors against a manufacturer of building materials. He tweeted: "oh and nobody buy Stoam [the building product]. Its bad mojo and they'll probably cease to exist, now that their wallet is 12M lighter".[46] Another juror in the Los Angeles Superior Court tweeted "Guilty! He's guilty! I can tell!" during a criminal trial in that court.[47]

3.4 Jurors commenting about trials on social media after a trial has concluded While juror misconduct after a trial has ended is less likely to impact negatively on the due administration of justice, it can result in appeals that raise legitimate concerns and which consume legal resources that would not have been consumed but for the misconduct. In

---

41 Brian Grow, 'As jurors go online, US trials go off track', December 8, 2010. Reuters. http://www.reuters.com/article/2010/12/08/internetInternet-jurors-idUSN0816547120101208

42 Law Commission, above n 11, p 62.

43 [2011] EWCA Crim 1570, [2011] 2 Cr App R 21.

44 Grow, above n 41. See now *Courts and Other Legislation Further Amendment Act 2013* (NSW).

45 *California Bar v Wilson*, 23 January 2009, cited at the Digital Media Project website, http://www.dmlp.org/threats/california-bar-v-wilson.

46 Sweeney, D.M. (2010). 'The Internet, social media and jury trials: lessons learned from the Dixon trial'. Address to the litigation section of the Maryland State Bar Association, April 29, 2010. Available: http://juries.typepad.com/files/judge-sweeney.doc.

47 Grow, above n 41.

Commonwealth v Werner,[48] three jurors "friended" each other and two jurors posted comments to Facebook about their jury service. One juror also blogged about the case after the trial. The Massachusetts Appeals Court refused to set aside the conviction because of overwhelming evidence of the guilt of the accused; however the case illustrates the difficulties courts face attempting to regulate the formation of friendships in the jury room via social media.

3.5 Jurors using social media to seek responses or advice about the case A UK juror was dismissed from a child abduction and sexual assault trial after she asked her Facebook 'friends' to help her decide on the verdict. "I don't know which way to go, so I'm holding a poll," she wrote. This was discovered prior to the jury starting its deliberations. The trial continued in her absence.[49]

3.6 Jurors 'friending' each other on Facebook during trial Retired Circuit Court Judge Dennis M Sweeney told the Maryland State Bar Association of an episode during the political corruption trial of Baltimore Mayor Sheila Dixon, over which he presided in 2009. Five jurors had 'friended' each other on Facebook and had mentioned the case in their postings, despite his explicit direction not to use Facebook.[50] After he admonished the rogue jurors, a young male juror posted the remark "F*** the Judge" on his Facebook page Judge Sweeney asked the juror about the offensive comment and was told: "Hey Judge, that's just Facebook stuff".[51] The notion that discussions between friends on Facebook might be considered less seriously than other publications was reinforced in a 2012 Western Australian Supreme Court case where Hall J refused to relocate a trial because prejudicial and threatening statements about the accused had been posted to Facebook. He stated:

> The nature of the Internet is that it now records indefinitely what might once have been transient and ill-considered statements said in the heat of the moment. Such statements should not necessarily be seen as any expression of real intent. The postings were made on personal Facebook pages and were clearly intended for a group of friends and not as public statements. Foolish, exaggerated or emotional comments made between friends should not be taken out of context.[52]

Each of the circumstances in paragraphs 3.2 to 3.6 would be caught by amendments to the *Court Security Act 2005* (NSW) effected by the *Courts and Other Legislation Further Amendment Act 2013* (NSW), which will, upon commencement, regulate use of personal digital assistants (including via social media) during and/or after proceedings.

3.7 Jurors searching the Internet for information on the accused ("Trial by Google") The Attorney-General of the United Kingdom used the expression "Trial by Google" in a

---

48 81 Mass App Ct 689 (2012), February 1, 2012.

49 Daily Mail, 'Juror dismissed after asking Facebook friends how she should vote on trial: available <http://www.dailymail.co.uk/sciencetech/article-1089228/Juror-dismissed-asking-Facebook-friends-vote-trial.html#ixzz2NSrQaSOu>

50 Sweeney, above n 46.

51 Grow, above n 41.

52 *Boyd v The State of Western Australia* [2012] WASC 388 (19 October 2012), [24].

recent speech to criticise juror use of Internet search tools and social media to conduct their independent investigations into a case. The Attorney referred to a number of cases where jurors had been convicted of contempt, including *Attorney General v Dallas*.[53] In that case, a juror was sentenced to six months' jail for contempt of court for conducting research on the Internet, including definitions of the word 'grievous' and a newspaper report of an earlier rape allegation against the accused, and had shared this with fellow jurors.

Broadly speaking, the courts in common law countries will allow an appeal from a jury verdict when extraneous information has been accessed by a juror or jurors and it would be unsafe to allow the verdict to stand. Two decisions that illustrate the type of considerations involved are *R v Karakaya* and *Benbrika v The Queen*.

- ***A strict approach: a juror must not be allowed to introduce entirely new evidence when neither party had been provided with an opportunity to examine it*** In *R v Karakaya*,[54] Karakaya was convicted by a judge and jury of several counts of indecent assault and rape of his 17 year old daughter. At the conclusion of the evidence the judge directed the jury not to discuss the case overnight. The jury reconvened the next day, deliberated, and reached verdicts on various counts. After the jury left court, the jury bailiff discovered a number of documents downloaded from the Internet in the jury room. The Court of Appeal allowed an appeal by Karakaya on a number of interrelated grounds: 1. that the downloading and use of this material contravened the well-established principle of open justice that the defendant and the public were entitled to know the material considered by the decision-making body; 2. both the prosecution and defence were entitled to a fair opportunity to address the material considered by the jury when reaching their verdict; and 3. the principle that, once the summing-up had been concluded, no further evidence ought be given.[55]

---

[53] [2012] EWHC 156. The judgment provides a contemporary extended account of how the British courts brief juries about Internet use and manage transgressions. See the Hon Dominic Grieve (2013, February 6). 'Trial by Google? Juries, social media and the Internet', 6 February 2013, available: https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-internet.

[54] [2005] 2 Cr App R 5; [2005] EWCA Crim 346.

[55] A number of United States courts have also been unwilling to countenance research by jurors. A Washington State Superior Court judge declared a mistrial in a child sex case after a juror admitted researching on the Internet about witness coaching (Hefley, D. (December 12, 2012). 'Juror's 'research' forced mistrial in child rape case', HeraldNet. Available: http://www.heraldnet.com/article/20121212/NEWS01/712129975?page=single). The Maryland Court of Special Appeals overturned a murder conviction because a juror had searched Wikipedia for the terms "livor mortis" and "algor mortis" and had taken printouts to the jury room, later discovered by the bailiff. The juror did not consider the action wrong: "To me that wasn't research. It was a definition" (Sweeney, above n 43). A US District judge in Florida ordered the search of a former juror's computer hard drive in 2013 after the juror revealed she had done Internet research each evening while hearing a federal criminal drug trial of reggae star Buju Banton. The juror had told a newspaper: "I would get in the car, just write my notes down so I could remember, and I would come home and do the research" (P Ryan, 2013, March 5, 'Judge wants to know if Banton juror typed any of these 21 words'. *Tampa Bay Times.* Available: http://www.tampabay.com/news/courts/criminal/judge-wants-to-know-if-banton-juror-typed-any-of-these-21-words/2107088

- ***A more relaxed approach: where there has been use of extraneous information, even contrary to a judicial direction, but not such as to endanger a fair trial*** In *Benbrika v The Queen* [56] the Victorian Court of Appeal dismissed an appeal in which it had been argued that Internet searching by jurors had tainted the trial. Justice Bongiorno warned jurors who had used Internet sites including Wikipedia and Reference.com seeking definitions of terms related to the terrorism trial. The judge noted that these definitions were not substantially different from those stated in court. The Court of Appeal court said the trial judge had found that "it was distinctly possible that they had interpreted his directions as meaning that they should not seek information about the case, rather than using the Internet for more general purposes" (at para 199). They noted the important difference between this kind of search and searching for "information that is both inadmissible at trial, and prejudicial to the accused", which might prompt the discharge of a jury (at para 214).[57]

In the United Kingdom, a court can direct its registrar to ask the Criminal Cases Review Commission to conduct an investigation of a jury and its deliberations to inform itself on appeal, should that be required.

4. The current menu of options

4.1 Judicial directions Judicial directions concerning extraneous and prejudicial information characteristically try to achieve two outcomes: suppressing information about the trial (or its participants) obtained prior to the trial and deterring inquisitive jurors from seeking out information not presented as evidence. First, jurors are directed to suppress the influence of any previously acquired information, particularly pre-trial publicity. Reliance on this form of direction assumes that jurors are conscious of how that information has or may influence them and are motivated to disregard that influence. Secondly, jurors are also directed to refrain from accessing material of any nature relating to matters concerning the trial. This type of direction assumes that jurors will be motivated to actively refrain from accessing information that may be readily available.

4.2 The High Court endorses jury directions In *Dupas v The Queen*,[58] the High Court considered the effectiveness of judicial directions that aim to prevent contamination by prejudicial information and concluded that there was nothing remarkable or singular about extensive pre-trial publicity especially in notorious cases, such as those involving heinous acts.[59] The High Court found the directions given by the trial judge were sufficient to relieve against the unfair consequences of the pre-trial publicity.[60] The Court's approach in *Dupas*

---

56 [2010] VSCA 281.

57 See, to like effect, *R v Marshall and Crump* [2007] EWCA Crim 35; *R v Thakrar* [2008] EWCA Crim 239; *R v McDonnell* [2010] EWCA Crim 2352; *R v Thompson* [2011] 1 WLR 200; *R v Mpelenda* [201] EWCA Crim 1235 at [31] (appeal allowed); *R v Starling* [2012] EWCA Crim 743.

58 *Dupas v The Queen* (2010) 241 CLR 237.

59 Ibid 250.

60 Ibid 247.

is consistent with the observation made in many cases, such as by the United Kingdom Court of Appeal in *R v Fuller-Love*, that: "Where jurors are instructed to act only on evidence that they hear and see in court, they can be taken to be faithful to that responsibility in the absence of any evidence to the contrary".[61]

4.3 The States and Territories have developed model directions. In New South Wales, *Model Directions* contained in the NSW Judicial Commission's *Criminal Trial Courts Bench Boo*k were amended in light of the High Court's decision in *Dupas v The Queen* (2010) 241 CLR 237 and now include a warning to jurors to not use the Internet to research any matter related to the trial:

> If you have read or heard or have otherwise become aware of any publicity about the events with which this trial is concerned, or about the accused, it is of fundamental importance that you put any such publicity right out of your minds. Remember that you have each sworn an oath, or made an affirmation, to decide this case solely upon the evidence presented here in this courtroom and upon the basis of the legal directions I give to you. You would be disobeying that oath or affirmation if you were to take into account, or allowed yourself to be influenced by, information that has come to you from some other source. …[Y]ou must not, during the course of the trial, use any material or research tool, such as the Internet, or otherwise, to access legal databases, earlier decisions of this or other courts, and/or any other material of any kind relating to any matter arising in the trial.

The Bench Book suggests that the judge can add the following if he or she considers it appropriate:

> That includes Googling for information or using sites such as Facebook, Twitter, blogs, MySpace, LinkedIn, You Tube and other similar sites]. [62]

The Victorian model directions also contain a warning on Internet usage, although, like the NSW directions, they do not specifically require the judge to address the issue of social media usage[63]:

> When you retire to consider your verdict, you will have heard or received in court, or otherwise under my supervision, all the information that you need to make your decision…You must not use any research tools, such as the Internet, to access legal databases, earlier decisions of this or other courts, or other material of any kind relating to the matters in the trial. You must not search for information about the case on Google or conduct similar searches. You also must not consult with any other people about these matters, or ask anyone else to undertake such investigations.

---

[61] [2007] EWCA Crim 3414, [16].

[62] Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (September 2011), s 1-440 <http://www.judcom.nsw.gov.au/publications/benchbks/criminal/the_jury.html#p1-440>. Accessed March 11 2013.

[63] Judicial College of Victoria, Criminal Charge Book, part 1.5.2 http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1286.htm Accessed March 11 2013.

By way of comparison, the United States directions contain explicit instructions about social media. A selection of these directions is provided in Appendix Two.

4.4 Is the Australian approach flawed? The model of jury decision making favoured by Australian courts assumes that jurors pay attention to the proceedings, reserve judgment until all evidence is presented, give consideration to opposing arguments and suppress the influence of irrelevant information when directed. Research into human cognition indicates that this model is flawed. To help them make sense of the complex and confusing situation that is a trial Jurors, jurors will almost certainly use any information they perceive to be relevant and useful.[64]

4.5 Studies examining the efficacy of judicial directions indicate that, in general, judicial directions have limited effectiveness. In Australia, the study by Chesterman, Chan and Hampton also found that directions to avoid or suppress media coverage of proceedings and other prejudicial information were of limited effectiveness.[65] The conclusions of the Chesterman study are consistent with the findings of the New Zealand Law Commission's 1999 study of juries[66] and research conducted for the UK Ministry of Justice in 2010.[67] The UK study, by Professor Cheryl Thomas, found that jurors admitted checking the Internet even though they were told not to by the judge. Thomas found that written guidelines were twice as effective as oral directions, and recommended that research "should be carried out to determine what form of written guidelines and judicial directions are most comprehensible to jurors and are most likely to be taken seriously".[68] These findings have been replicated in Australia.[69] Recent related research in Australia by Professor Ian Coyle has confirmed that cognitive heuristics and other psychological factors interact with the way in which judicial directions are presented when venire jurors are assessing witness demeanour and credibility.[70]

4.6 "Reactance" Research has demonstrated that jurors are often unwilling, or even unable, to set aside information that they regard to be relevant, irrespective of a judicial direction to the contrary. Jury researchers describe this as "reactance".[71] Reactance, in this

---

64 Saul Kassin and Samuel Sommers, 'Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations' (1997) 23 (10) *Personality and Social Psychology Bulletin* 1050.

65 *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales*, M Chesterman; J Chan; S Hampton, Law and Justice Foundation of NSW, 2001, 144-145.

66 Young, Cameron & Tinsley, 'Juries in Criminal Trials: part Two', vol 1, ch 9, para 287 (New Zealand Law Commission preliminary paper no 37, November 1999).

67 Cheryl Thomas, Are juries fair?, Ministry of Justice Research Series 1/10, February 2010.

68 Ibid p ix. Researchers from the University of Queensland reached the conclusion that jury directions need to be simplified if they are to be understood: see Queensland Law Reform Commission, *A Review of Jury Directions*, Vol 1, Report No 66, October 2009, para 5.90-5.93 and references there cited. This research was not specifically focused on social media use by juries.

69 Jill Hunter, Dorne Boniface and Donald Thomson, D. 'What jurors search for and what they don't get', UNSW Pilot Jury Study, Law & Justice Foundation, Sydney, 2010.

70 Ian R Coyle, 'How do decision makers decide when witnesses are telling the truth and what can be done to improve their accuracy in making assessments of witness credibility?' Report to the Criminal Lawyers Association of Australia and New Zealand, Centre for Law Governance and Public Policy, 2013.

71 Jack W Brehm, *A Theory of Psychological Reactance*, Academic Press, NY, 1966, 378.

context, refers to a reaction to rules that eliminate the freedom of jurors to decide matters on their own common-sense view of justice. As Finkel has observed, this view of justice is:[72]

> embedded in the intuitive notions jurors bring with them to the jury box when judging both a defendant and the law. It is what ordinary people think the law ought to be. These common-sense notions are at once legal, moral, and psychological. They provide the citizen on the street and the juror in the jury box with a theory of why people think, feel, and behave as they do, and why the law should find some defendants guilty and punishable and others not.

Similarly, Horan has argued against relying on instructions on the basis that increasing incidents of reports of 'online detective juror' show that juries will defy these instructions where they consider there is a gap in the information they need to do their job properly.[73]

4.7 Supplementing jury directions? Eichorn has suggested taking steps to facilitate a view of the court procedures 'as less arbitrary and more reasonable' to reduce feelings of resentment and reactance.[74] This could be achieved by the judge providing an explanation of why the decision of the jury is to be based on evidence presented in court and not extraneous information. Giving directions that place a strong emphasis on procedural fairness and the presumption of innocence at the beginning of the trial may also be useful for controlling the effects of reactance.[75] It may also be helpful to provide an explanation behind the limiting instruction.[76] We return to these points in the Recommendations section below.

4.8 Judge alone trials Increasing the use of judge-alone trials would overcome the risk of juror bias resulting from exposure to material on social media (either prior to or during a trial) and would also offer a solution to the problem of jurors using social media to disseminate information relevant to the trial.[77] Four Australian jurisdictions have legislation that currently permits a right to trial by judge alone in indictable matters.[78] In a fifth, the ACT, trial by judge alone is now only available to an accused charged with less serious indictable matters (excluding murder, manslaughter, sexual assaults).[79] The accused's

---

[72] Norman J Finkel, 'Commonsense Justice and Jury Instructions: Instructive and Reciprocating Connections', *Psychology, Public Policy, and Law,* 2000, Vol. 6, No. 3, 591-628, 591.

[73] Jacqueline Horan, *Juries in the Twenty First Century*, Federation Press, 2012, 167.

[74] Lisa Eichhorn, 'Social Science Findings and the Jury's Ability to Disregard Evidence under the Federal Rules of Evidence' (1989) 52 *Law and Contemporary Problems* 341-353, 353.

[75] Ibid, 353.

[76] Ibid, 353. "Such an explanation would eliminate some of the conflict experienced by jurors ... and [they would be] less likely to view their options as limited" and as a result they would view the court procedures "as less arbitrary and more reasonable".

[77] *John Fairfax v District Court* [2004] NSWCA 324 [65] per Spigelman CJ; *R v Burrell* [2004] NSWCCA 185 [39] per Spigelman CJ.

[78] *Criminal Procedure Act 1986* (NSW) s 132, *Criminal Procedure Act 2004* (WA) s 118; *Supreme Court Act 1933* (ACT) s 68B; *Juries Act 1927* (SA) s 7; *Criminal Code Act 1899* (Qld) ss 614-615.

[79] *Supreme Court Act 1933* (ACT) s 68B. See also Jodie O'Leary, 'Inspiring or Undermining Confidence? Amendments to the Right to Judge Alone Trials in the ACT', (2011) 10 *Canberra Law Review* 30.

consent is generally required,[80] except in Queensland, where the legislation allows the court discretion to make such an order of its own volition if it considers it necessary to do so in the 'interests of justice.'[81] In exercising their discretion the legislation enjoins courts to consider whether the trial will involve 'a factual issue that requires the application of objective community standards',[82] the length or complexity of the trial,[83] and any risk that the jury will be corrupted or intimidated.[84] The danger of pre-trial publicity that may affect jury deliberations is only adverted to as a specific risk factor in one jurisdiction.[85]

4.9 The test whether a judge alone trial may be heard is, generally, whether there is 'a public climate of hostility or prejudice' against the accused.[86] The existence of relevant material on social media is clearly a factor that could be taken into account in making such a determination.

4.10 Reasons why trial by jury should be preserved. Trial by jury has been a part of the common law justice system since the 14th century.[87] Its rationale rests on a view that jurors serve important social function by enabling community participation in the criminal justice process to ensure that outcomes reflect social values. In 2010, Lord Chief Justice Judge observed:[88]

> Everything in my own personal career, both at the Bar and then on the Bench, has served to demonstrate the value of our jury system, and the reason for its pre-eminence in our constitutional arrangements for the administration of criminal justice. The jury system ensures that in our jurisdiction no one can be convicted of a serious crime or subjected to a lengthy term of imprisonment unless he has admitted his guilt in open and public court or a body of his fellow citizens has considered the evidence and satisfied itself on the basis of that evidence that they are sure of guilt.

An increase in judge-alone trials would diminish this role. There has also been judicial criticism of judge alone trials, particularly for serious crimes.[89] Concerns about the high rates of judge-alone trials in the ACT prompted that jurisdiction to restrict their use quite recently.[90]

---

80 Except in NSW where the court is satisfied that there is a substantial risk of corruption or intimidation of jurors: *Criminal Procedure Act 1986* (NSW) s 132(7); and in South Australia in the case of serious and organised crime offences, where such a risk may also be an issue: *Juries Act 1927* (SA) ss 7 (3a)-(3d).

81 *Criminal Code Act 1899* (Qld) ss 614(4) & 615(1).

82 *Criminal Procedure Act 1986* (NSW) s 132(5); *Criminal Code Act 1899* (Qld) s 615(5); *Criminal Procedure Act 2004* (WA) s 118(6).

83 *Criminal Procedure Act 2004* (WA) s 118(5)(a); *Criminal Code Act 1899* (Qld) s 615(4)(a).

84 *Criminal Procedure Act 2004* (WA) s 118(5)(b): *Criminal Code Act 1899* (Qld) s 615(4)(a).

85 *Criminal Code Act 1899* (Qld) s 615(4)(c).

86 *State of WA v Rayney* [2011] WASC 326 (30 November 2011) [34], and authorities cited there.

87 *Cheatle v The Queen* (1993) 177 CLR 541.

88 The Rt Hon Lord Chief Justice Judge, 'Jury Trial', Judicial Studies Board Lecture, Belfast, 16 November 2010, p 1.

89 *R v Marshall* (1986) 43 SASR 448 at 497.

90 *Criminal Proceedings Legislation Amendment Act 2011* (ACT) s 10; see The Hon Simon Corbell, *Reform to Judge Alone Trials, Australian* Capital Territory Department of Justice and Community Safety, Media Release (12 February 2011) for a discussion of the background.

4.11 The Queensland compromise A compromise may be to allow the defendant the option to request for trial by judge-alone (with the consent of the judge) in circumstances of prejudicial pre-trial publicity, and to include that circumstance among a specific list of factors the court can consider. Queensland legislation does this.[91] This solution preserves the defendant's right to trial by jury. It should be noted, though, that given the longer 'shelf life' of material available online and on social media, it could well be argued that there will be circumstances where a defendant may simply feel that they have no choice but to opt for a judge-alone trial, so that their right to trial by jury becomes otiose.

4.12 Penalising independent jury research A juror who disobeys judicial instructions would be guilty of contempt of court, and jury legislation already contains provisions making it an offence for jurors to disseminate information about their deliberations.[92] As a result of increased concerns about jurors conducting their own research on the Internet, several jurisdictions have gone a step further by making independent jury research a punishable offence[93] (a form of statutory contempt) and it has been suggested that others should follow their lead.[94] Whether this is likely to be effective is another matter. Research with actual jurors demonstrates that it is impractical to think that the Internet will not be used.[95]

4.13 Prohibiting social media use Although the existing provisions make mention of Internet searches, only NSW has specifically legislated to prevent social media use by jurors, and there are significant differences in their coverage.[96] For example, while the Queensland provision is confined to inquiries 'about the accused,'[97] the New South Wales provision also includes 'any matters relevant to the trial',[98] and the Victorian provision also prohibits the making of inquiries about any 'party' to the trial (a term that is not defined, but which could potentially encompass research about the victim, the lawyers or the judge.) [99]

4.14 Limited effectiveness It has been argued that these provisions have not proved very effective in deterring juror use of the Internet, given continuing instances of jurors disobeying 'don't research' instructions.[100] Of these instances, there has been only one

---

91 Roxanne Burd and Jacqueline Horan, 'Protecting the right to a fair trial – has trial by jury been caught in the world wide web?' (2012) 36 *Criminal Law Journal* 103, 122.

92 *Jury Act 1977* (NSW) s 68B; *Jury Act 1995* (QLD) s 70(4); *Juries Act 2000* (VIC) s 7; *Jury Act 1967* (ACT) s 42C; *Juries Act* 1*962* (NT) s 49A; *Juries Act 2003* (Tas) s 58. For further discussion of the Australian cases see Peter Lowe 'Challenges for the Jury System and a Fair Trial in the Twenty-First Century', [2011] *Journal of Commonwealth Criminal Law* 175, 185; Peter Lowe, 'Problems faced by modern juries', *Bar News: The Journal of the Bar Association of New South Wales*, 2012, 46.

93 *Jury Act 1977* (NSW) s 68C(5)(b); *Juries Act 2000* (VIC) s 78A; *Jury Act 1995* (QLD) s 69A.

94 M Krawitz, 'Guilty As Tweeted: Jurors Using Social Media Inappropriately During the Trial Process' (University of Western Australia-Faculty of Law Research Paper No 2012-02, 2012) 43.

95 Hunter, Boniface and Thomson, n 69.

96 *Jury Act 1977* (NSW) s 68C(5)(b); *Juries Act 2000* (VIC) s 78A; *Jury Act 1995* (QLD) s 69A. The New South Wales legislation is the *Courts and Other Legislation Further Amendment Act 2013*. The 2013 legislation is cast in terms wide enough to proscribe social media use by jurors.

97 *Jury Act 1995* (QLD) s 69A (1).

98 *Jury Act 1977* (NSW) s 68C(1).

99 *Juries Act 2000* (VIC) s 78A (5)(b).

100 Horan, above n 73, 116-7. It may be observed that this critique predated the 2013 legislation enacted in New South Wales.

reported prosecution to date.[101]

4.15 Reluctance to prosecute The apparent reluctance of courts to refer cases of juror research for prosecution is perhaps indicative of a view that jurors should not be punished where they are genuinely trying to do their best.[102] It has also been argued that imposing punishment is contrary to the notion that jury duty is a civic responsibility and jurors should be encouraged and supported to do it to the best of their ability.[103] It has also been suggested that punishment may be counterproductive, in that other jurors may be less likely to report such juror misconduct if they know that this might result in the other jury going to jail.[104]

4.16 It is important to distinguish the different types of information use However, in considering these issues it is important, as we noted previously in this paper, to distinguish the different purposes for which social media is used in different cases. There is a great deal of difference between a juror conducting a forbidden search with the genuine intention of obtaining information to assist them in performing their role, and one who exchanges messages with the accused on Facebook,[105] or asks their Facebook friends to help them decide their verdict.[106]

4.17 Managing addiction to social media There are particular challenges in preventing people from using social media 'when authorities can't even stop some people from risking their lives by sending text messages while driving.'[107] There are indications that social media use has become so habitual that it may now be instinctive for many users, and possibly addictive.[108] Peter Lowe has argued that 'precisely because of its anonymity and immediacy, the siren song of the web encourages transgressions' and a disinhibited approach to seeking further information.[109] In these circumstances, an offence provision may not be effective, unless it is accompanied by other measures.

4.18 Delaying the start of the trial A traditional device for dealing with the possible prejudicial effects of pre-trial publicity has been to delay the commencement of a trial. The rationale for this is that memory of prejudicial material might fade in the minds of potential jurors before the start of trial, so as to negate the risk of bias. The test for determining

---

101 Burd and Horan, n 91, 117.

102 See, for example the comment by one trial judge in relation to juror disobedience of his instructions:

> There is something faintly ridiculous about criticising lay people who go to a standard reference source for assistance on a question of fact such as the meaning of an ordinary English word when that is exactly what any reasonable person would expect them to do – perhaps especially after the Judge has told them they would need no assistance from him!

- *R v Benbrika* [2009] VSC 142, Bongiorno J at [114].

103 Horan, above n 73, 165.

104 Ibid.

105 *A-G v Fraill* [2011] 2 Cr App R 21.

106 Sweeney, above n 43.

107 Steve Eder, 'Jurors' Tweets Upend Trials', *Wall Street Journal* (online), 5 March 2012 http://online.wsj.com/article/SB10001424052970204571404577255532262181656.html accessed 8 March 2013.

108 Jessica Lee and Lorana Bartels, 'Jurors using social media in our courts: Challenges and responses', (2013) 23 *Journal of Judicial Administration*, in press (copy on files with the authors).

109 Lowe, n 93, 48, citing Caren Myers Morrison', 'Jury 2.0', (2011) 62 *Hastings Law Journal* 1579, 1613.

applications to stay or adjourn a trial on the grounds of pre-trial publicity is generally whether such a course of action is necessary in the interests of securing a fair trial[110] It has recently been observed that such applications are rarely successful, because of the risk of 'serious repercussions of unfairness' to the State and witnesses. [111] Instead, courts generally prefer to place their faith in the efficacy of judicial instructions to the jury to disregard the prejudicial material.[112]

4.19 Delay orders are less and less likely to work The effectiveness of delay orders is arguably diminished in the era of digital and social media. The capacity of social media to facilitate the rapid transmission of material, and jurisdictional issues, make it unlikely that 'take down' orders can ever be fully effective in removing prejudicial material in electronic form. As a former Chief Justice has noted, 'the ability of a stay or adjournment to ensure a fair trial has been substantially attenuated by the immediate accessibility of information on the Internet with an efficiency that overrides the practical obscurity of the past.'[113] Unlike print material (newspapers) that has a fairly transient shelf life, prejudicial material on these sources is likely to remain available, thus making the 'fade' effect increasingly unlikely.[114]

4.20 Changing venue Another traditional device for dealing with the dangers posed by pre-trial publicity has been to move the venue to a location where potential jurors are less likely to have been exposed to the prejudicial material. This approach is becoming less realistic. Given the widespread reach of material on the Internet and social media[115] coupled with the expansion of digital networks and use of mobile computing devices operating on digital networks, the feasibility of moving trials to more isolated areas where potential jurors may not have ready access to such material is increasingly problematic. It also raises concerns about juror representativeness.

4.21 Application for change of venue dismissed, reliance on jury directions instead In a recent case that considered the existence of prejudicial postings on Facebook as one of a number of grounds for an application for change of venue, the court was dismissive of their potentially prejudicial effect in the absence of any evidence that they had been read by persons other than the friends of family members of the victim. Although it noted that this material was open to the public, the court preferred to place its faith in a jury acting in accordance with proper instructions to disregard any such prejudicial material.[116]

4.22 A juror hotline to report misconduct? As an alternative to an offence provision, or in association with it, courts might create a hotline or email service that that could be used to report cases of jurors accessing social media, or other prohibited research.[117] Potential

---

110 *State of WA v Rayney* [2011] WASC 326 (30 November 2011) [34], and cases cited there.

111 Ibid.

112 Ibid.

113 *John Fairfax v District Court* [2004] NSWCA 324 [64] per Spigelman CJ and cases cited there; see also *R v Burrell* [2004] NSWCCA 185, [39] per Spigelman CJ. See also *HMA v Biggs (No 1)* 2002 SLT 135; Arlidge, Eady and Smith on Contempt, Sweet and Maxwell, Fourth Edition, 2011, para 1-51.

114 Burd and Horan, above n 89, 118.

115 Ibid.

116 *Boyd v The State of Western Australia* [2012] WASC 388 (19 October 2012), [22]-[26].

117 Krawitz, n 94.

disadvantages with this approach include the risk that it might cause resentment and tension within the jury that could inhibit frankness in deliberations, there is a risk of vexatious reports, and there would be administrative implications and costs involved.[118]

4.23 Changing the jury model – the 'mixed jury' A more radical solution may lie in the concept of the 'mixed jury', that is the 'form of jury involves lay assessors sitting alongside professional arbitrators and reaching a verdict together. The professional arbitrators may be trained jurors, assessors, facilitators or judges.'[119] The use of mixed juries has a long history in civil law countries, and was recently adopted in Japan.[120] In this model, the professional jury member would play a role in policing the jury, by ensuring that other jury members did not bring into the jury's deliberations material they had gleaned from their own research, or from exposure to publicity about the case.[121] The professional jury member could also provide procedural guidance to jury members, making it less likely that they would turn to forbidden sources of information.[122]

4.24 There are concerns about the use of mixed juries. Firstly, it is feared that the 'professional' member or members of the jury may exert undue influence on the lay members.[123] Other concerns relate to an increase in costs associated with remunerating professional jury members, and to a risk that professionalizing the jury might undermine community confidence in the jury system.[124] Reconstituting the form of the jury would also be a major change to trial by jury and one that, at least in the case of Federal offences, would have constitutional implications.[125] As such, it is unlikely to be a viable short-term solution, but may be worthy of longer-term investigation.[126]

4.25 Internet screening Routine screening of the Internet, including social media, is another option to identify potentially prejudicial content and make an application to the court for take down orders.[127] Horan suggests that while this could be crucial in high profile trials, given the pervasiveness of the Internet material, it would also be prudent to undertake such monitoring in all trials.[128] Such screening would be a wise precaution and should certainly now include all commonly used forms of social media.

4.26 Internet screening may not be effective However, screening may not detect material that may not be obviously prejudicial, but could still have the potential to influence jurors. For example, a defendant may have a social media profile, as may their family member, or lawyer. There may be material accessible on social media about the type of

---

118 Lee and Bartels, above n 108; Emily Janoski-Haehlen, 'The Courts are All a 'Twitter': The Implication of Social Media Use in the Courts' (2011) 46 (Fall) *Valparaiso University Law Review* 43, n 105, 49.

119 Burd and Horan, above n 91, 119.

120 Ibid.

121 Ibid, 120.

122 Ibid.

123 Ibid, 119.

124 Ibid, 120.

125 Ibid. In light of s 80 of the Constitution.

126 Ibid.

127 *R v Burrell* [2004] NSWCCA 185, [39] per Spigelman CJ; Jacqueline Horan, *Juries in the 21st Century* (2012, The Federation Press) 165.

128 Horan, above n 73, 165.

offence for which he or she is charged. For this reason, screening on its own is unlikely to be a full solution to the problem. Continually monitoring social media and the Internet could be a time-consuming and expensive exercise, particularly for defendants who are indigent or legally-aided. Another option would be the creation of an independent monitoring role.[129]

4.27 Taking the personal digital assistants (PDAs) away from the jurors Removing jurors' access to all electronic communication devices is another avenue to prevent them accessing social media. Many United States courts confiscate these devices from jurors, both in the courtroom and the deliberation room.[130] Practices in Australian courts differ, but our inquiries indicate that while it is ultimately a matter for the judge in the individual case, jurors are not given access to such devices in the courtroom and while deliberating.[131]

4.27 Removing PDAs will not prevent research via other means Removing juror access to such devices is unlikely to prevent juror research or dissemination of material, as unless the jury is sequestered for the length of the trial, or the trial is less than a day, it will not prevent them accessing such devices out of court sitting hours. Such restrictions may also deter people from undertaking jury service.[132]

4.28 Sequestering the jury Sequestering the jury for the duration of the trial would provide another method of restricting access to prejudicial material and preventing jurors disseminating material about the trial on social media. It has been flagged as something that courts may need to consider, and those jurisdictions where it is not currently available as an option (Western Australia, Tasmania and the Northern Territory) may wish to consider legislation to amend this position.[133]

4.29 Sequestering the jury would be expensive and unpopular This is an expensive option, and may be unpopular, given the restrictions it imposes on the liberty of jurors.[134] Its efficacy, for the purposes of deterring social media use by jurors, would also depend on arrangements being able to be made to ensure that jurors were unable to access electronic communication devices for the duration of their confinement; something that may prove difficult where, for example, jurors are accommodated in hotels with wi-fi access.

4.30 Greater scrutiny of jurors during selection Greater scrutiny of jurors in the selection process has largely been rejected in Australian research into prejudicial publicity and its effect on jurors' decisions.[135] Judges, academics and legislators in Australia and the United

---

129 Burd and Horan, above n 89, 165-6.

130 M Dunn, *Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management* (Federal Judicial Centre, 2011) ('CACM'); Janoski-Haehlen, above n 118.

131 Jurors in the ACT, NSW & ACT and QLD are not normally permitted access to their phones or other portable electronic communication devices while in court, although this remains in the discretion of the judge in the particular case: Lee and Bartels, n 105; In Western Australia, jurors' phones are only taken away while they are considering the verdict: Krawitz, above n 94, 13.

132 Lee and Bartels, n 108.

133 *John Fairfax v District Court* [2004] NSWCA 324 [65] per Spigelman CJ; *R v Burrell* [2004] NSWCCA 185 [39] per Spigelman CJ.

134 Lee and Bartels, n 108.

135 NSW Law Reform Commission, Report 48 (1986) *Criminal Procedure: The Jury in a Criminal Trial*, Part 4 ; NSW Law Reform Commission, Report 11 (2007), *Jury Selection*, Part 10.

Kingdom have been critical of the use of the jury selection process to detect juror bias, largely because of cost, delay and perceived ineffectiveness. It is interesting to note that Justice George Fryberg of the Supreme Court of Queensland recently authorised the polling of jurors in the Patel manslaughter case to determine, among other things, whether the jurors had been affected by pre-trial publicity, whether they had prior knowledge of the allegations against the former surgeon, as well as the jurors' attitudes towards people of Indian heritage.[136]

4.31 This approach could provide the judge with an opportunity to explain the jury process Limiting questioning of members of the jury on their access to, and use of, social media to the judge may offer one means of identifying potential problems. It would provide judges with the chance to identify any jurors whose use of social media may create problems of conflict before final empanelment, whilst at the same time affording the judge the opportunity to introduce to the jury the issues of the potential bias from pre-trial access and the problems that may arise from access to social media during the course of the trial. This can then be reinforced by judicial instructions on both prejudicial publicity and social media use.

4.32 Expanded juror training While there is always the risk that jurors will not be motivated to obey judicial directions, the provision of a simple training session for jurors (individually or as a group) would create another opportunity to reinforce prohibitions on social media use, particularly if used in conjunction with methods of facilitating juror understanding of directions. There a various ways in which the orientation process for empanelled jurors could be expanded to include training specific to social media use. In addition to the provision of written materials, consideration should be given to the development of programs or applications that would allow electronic devices to be used in this process. Jurors could be given access to computers, iPads or other PDAs to complete a short training session on their role as jurors and the reasons for not using the Internet or social media for the purpose of receiving or communicating information about the trial or its participants. Expanded training of jurors would ensure that jurors fully comprehend the scope of prohibitions on social media use and allow them to acknowledge the restrictions and agree to follow them.[137]

5. Recommendations

5.1 We note that the governance of a criminal trial is an exclusively judicial function and for that reason there may be constitutional limits on the capacity of legislatures to restrict the power of judges to manage trials.[138] We are mindful that the High Court, in *Dupas v The Queen*, has endorsed the use of jury directions, and of the statements made in eminent superior courts that juries can be expected to discharge their duties effectively if they have

---

136 Mark Oberhardt, 'Patel trial jury to be polled for bias', *The Daily Telegraph*, February 4, 2013.

137 Sarah Tanford and Steven Penrod, 'Social Inference Processes in Juror Judgments of Multiple-offense Trials' (1984) 47 *Journal of Personality and Social Psychology* 749–65

138 *R v Quinn; Ex parte Consolidated Foods* (1977) 138 CLR 1 at 11; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

been properly directed and there is no evidence that prejudicial material has infected their deliberations.

5.2 Taking these matters into account, and in light of the research we have conducted which is outlined in the preceding pages of this Report, our recommendations are as follows:

Recommendation 1: 'Don't research' jury directions[139]

- Jury directions should specifically refer to social media;
- Jury directions should be written, and not just oral;
- The written materials incorporating jury directions should incorporate simple diagrams to indicate the limits on the use of social media using smart phones, iPads, and other electronic devices;
- Jury directions should be written in plain language and include reference to specific types of commonly used social media;
- Jurors should have jury directions with them throughout the trial;
- Jury directions should clearly explain to jurors the rationale for the prohibition on doing their own research;
- Jury directions should clearly explain the possible consequences of failing to comply with the directions, including the possibility of the trial being aborted and the risk of criminal sanctions for disobeying directions;
- Jurors should be reminded of these directions on a daily basis;
- Jury rooms should be equipped with signage that explicitly prohibits digital and social media use in words and pictures; and
- Jury liaison personnel should remind jurors on a daily basis, using a scripted message, that digital and social media use are forbidden.

5.4 Recommendation 2: Jury research

We recommend, as Professor Thomas did in the United Kingdom in 2010, that research should be undertaken to determine what form of written guidelines and judicial directions relating to social media are most comprehensible to jurors and most likely to be taken seriously. We recommend this research be undertaken with focus groups incorporating elements of recommendation 1 above.

5.3 Recommendation No 3: Jury training

We recommend that a brief pre-trial jury training module be developed which would be administered in the courthouse once the jury has been empanelled. This could be offered 'live' by qualified court personnel who have undertaken a 'train the trainer' course or (less expensively) in the form of a one hour online module where jurors would complete the package on desktop computers, laptops or tablet devices under the supervision of court personnel. Content would not be trial-specific, but would cover the role of the juror, the tasks each juror must perform, their statutory obligations, fundamental legal principles like 'beyond reasonable doubt' and strong guidelines on access to mainstream and social media

[139] See also Horan, n 73, 170-171.

as well as the Internet both during the trial and after the trial. Examples of misconduct and the consequences would be given. The module would include a self-test of jurors' understanding of these principles by seeking their responses to 'rogue juror' scenarios. Jurors who selected incorrect answers, would receive a response that advised them why their answer was incorrect, be informed of the correct answer and the rationale for the rule or principle they misunderstood and its importance. This training would supplement, rather than replace, the judge's directions to the jury. We recommend that this package be developed under the auspices of the National Judicial College of Australia, the Victorian Judicial College and/or the New South Wales Judicial Commission, with the involvement of key stakeholders.

Appendix 1

Definitions: Key social media platforms

Facebook has approximately one billion registered users worldwide.[140] Users create a personal profile, upload photos and videos, make announcements, and send messages via either instant messaging or an email-like platform. Users need to approve 'friendships' to allow individuals to see their timeline and posts. Privacy options are set by the user who can opt to make their communications visible to everyone, just friends or friends of friends. The user has the option to block other members and can define which friends see specific posts. Facebook is not just for personal information – businesses, celebrities, clubs and organisations use Facebook Pages for publicity, promotion and sales. Facebook is free for users and generates revenue from advertising.

Twitter has 500 million registered users worldwide.[141] It is a free social networking microblog site, which allows members to broadcast short messages (up to 140 characters). These messages are called tweets. Unlike Facebook or LinkedIn, where members approve their social connections, the privacy settings for Twitter are automatically set to public, which means that all users and non-users can search and access tweets and communication you have had with others. By default, users can follow other users without seeking permission, unless the privacy settings are manually changed to 'protect my tweets'. Twitter uses hashtags to help categorize topics of conversation.

Pinterest (pronounced pint-rest) has 25 million registered users worldwide[142] who organize and share photo collections. The free photo sharing website is currently the fastest growing social media platform. Images uploaded by users are called pins and they are organized into pinboards which can be followed by other users. Users can like or 're-pin' content shared by other users. Around 80% of user activity is re-pinning.[143] Pinterest is predominantly used by women aged between 25 and 45. Home, arts and crafts, style, fashion and food are the most popular categories on Pinterest.[144] The platform includes the option of making private 'secret boards' which may only be viewed by the creator and nominated users. These boards do not show up anywhere else on Pinterest including in search results, your followers' home feed or the users home feed. [145]

YouTube attracts 800 million users each month. [146] It is a free video sharing website where users upload and share videos. Unregistered users can watch videos, however you need to be registered in order to upload movies or videos. Registered users set up a home page, called a YouTube channel which displays their public videos, user information, favourite videos from other users, activity streams, comments, subscribers and links with other social networking platforms. More than 4 billion hours of video are watched each month on

---

140 www.businessweek.com/.../**facebook**-the-making-of-1-**billion**-**users**

141 http://expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/

142 http://expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/

143 http://www.pinterestinsider.com

144 http://mashable.com/2012/03/12/pinterest-most-popular-categories-boards/

145 http://about.pinterest.com/privacy/

146 http://www.youtube.com/yt/press/statistics.html

YouTube. Users have the option of making their video available for public or private viewing. Private viewing means you can nominate to share it with up to 50 other users.[147] By default all videos, comments and ratings are publicly shared. Users have the option of approving comments, disabling embedding features and applying a rating classification to their video.[148] The sale of YouTube to Google raised privacy concerns about tracking viewing history search histories. Registered users have the option to disable this tracking.

Google+ (pronounced Google Plus) has 500 million registered users.[149] The social networking platform is second in popularity to Facebook and has similar features to other social networks. Some users find strong similarities to Facebook (profile picture, friends list ability to like (+1) comments), while others draw parallels to Twitter (share links, make announcements, hashtags, update info stream via SMS) and others use it as a blogging platform to share posts with photos and videos and allow other users to comment.[150] Privacy options on Google+ include the ability to restrict the visibility of user's Google+ circles (friends), removal of global access to parts of personal profiles, and the restriction of visibility of individual posts in Google+ streams.[151]

LinkedIn has 200 million registered users.[152] It is a social networking site for the business community. The user's page showcases employment history, education and news feeds. Unlike other social networking sites, LinkedIn centres on users (called connections) having a pre-existing relationship in the real world. A member will usually establish connections with someone they have worked with, know professionally or have gone to school or university with, by nominating one of these links in their connection. Once a connection is sought, members must accept it, similarly to 'friending' on Facebook. Privacy is maintained with members only being able to view other members up to three degrees of separation away, however they are not allowed to contact them through LinkedIn without an introduction.[153]

Instagram has 100 million registered users posting 4 billion pictures. The photo-sharing app allows members to take photos, apply digital effects and share on a variety of social networking platforms such as Facebook or Twitter as well as with their own followers on Instagram. The platform uses hashtags to help categorize images and attract new followers.[154] By default, anyone (registered user or not) can view your profile on Instagram.[155] Profiles and photos can, alternatively, be kept private by adjusting the privacy settings.

---

147 http://support.google.com/youtube/bin/answer.py?hl=en&answer=157177

148 http://www.youtube.com/watch?v=uExvZr6XyOI

149 http://en.wikipedia.org/wiki/Google%2B

150 http://techie-buzz.com/social-networking/how-do-you-define-google-plus.html

151 http://netsecurity.about.com/od/security101/a/Google-Plus-Security-Privacy-And-Safety.htm

152 http://en.wikipedia.org/wiki/LinkedIn

153 http://whatis.techtarget.com/definition/LinkedIn

154 http://help.instagram.com/365080703569355/

155 http://help.instagram.com/116024195217477/

Appendix 2

Jury instructions in the United States

The following are excerpts from selected jury instructions in jurisdictions in the United States, relating specifically to prohibitions in social media usage. Further detail is available from the National Center for State Courts. http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Social%20Media%20and%20the%20Courts

California

Civil Jury Instructions, (Dec. 15, 2009).

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

Connecticut

Civil Jury Instructions, (Nov. 20, 2009).

Criminal Jury Instructions, (June 12, 2009).

Do not go to the scenes where any of the events that are the subject of this trial took place or use Internet maps or Google Earth or any other program or device to search for or view any place discussed during the case. The same thing is true of any media reports you may come across about the case or anybody connected with the case. If you do come across any reports in the newspaper or a magazine, on TV, or any Internet site or "blog," you may not read or watch them because they may refer to information not introduced here in court or they may contain inaccurate information.

Florida

Standard Jury Instructions (Civil) and (Criminal), (2010).

In this age of electronic communication, I want to stress that you 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. Do not send or accept any messages, including e-mail and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case.

New York

Jury Separation During Deliberations, (Rev. Dec. 17, 2009).

In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text

messages, email, internet chat or chat rooms, blogs, or social websites, such as Facebook, MySpace or Twitter.

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

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

Ohio

Ohio State Bar Association Jury Instructions.

WARNING ON OUTSIDE INFORMATION. The ban on sources outside the courtroom applies to information from all sources such as family, friends, the Internet, reference books, newspapers, magazines, television, radio, a computer, a Blackberry, iPhone, smart phone, and any other electronic device.

WARNING ON OUTSIDE CONTACT. Finally, you must not have contact with anyone about this case, other than the judge and court employees. This includes sending or receiving e-mail, Twitter, text messages or similar updates, using blogs and chat rooms, and the use of Facebook, MySpace, LinkedIn, and other social media sites of any kind regarding this case or any aspect of your jury service during the trial.

South Carolina

Juror use of Personal Communication Devices, (July 20, 2009).

The court shall instruct jurors selected to serve on a jury that until their jury service is concluded, they shall not:

(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during lunch breaks, but may not be used to obtain or disclose information prohibited in subsection (d) below;

(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court.