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# BRINGING A WORLD OF LIGHT TO TECHNOLOGY AND JUDICIAL ETHICS

*David Hricik\**

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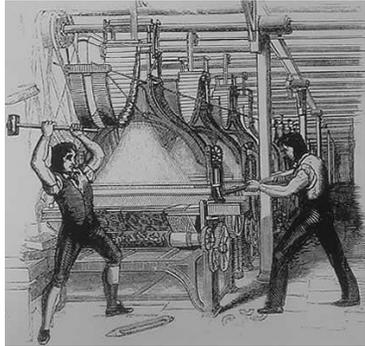
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\* Professor of Law, Mercer University School of Law, Macon, Georgia. This article was made possible, in part, by a research grant from the law school. I would like to thank my research assistant, Lee Ann Hughes, for her assistance with the article. The title is from the song, "World of Light" from the CD "Swings and Roundabouts" by John Wesley Harding.

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INTRODUCTION: WHY EVEN LUDDITE JUDGES NEED TO KNOW ABOUT TECHNOLOGY	

The Luddites thought that by smashing machines in early 19th Century England, they could eliminate the threat that those machines presented to them.<sup>1</sup>



Of course, they were wrong. As was the case during the Luddites' time, technology continues to march inexorably onward in today's society.<sup>3</sup> As a result, those within the legal community—judges in particular—have no choice but to begin using technology. Although judges are currently using

<sup>1</sup> Nelson P. Miller & Derek S. White, *Helping Law Firm Luddites Cross the Digital Divide—Arguments for Mastering Law Practice Technology*, 12 SMU SCI. & TECH. L. REV. 113, 113 (2009) (describing a group of British workers in the early 1800s who destroyed machinery in the hopes of saving jobs, as well as those who generally oppose changes in technology).

<sup>2</sup> Frame-breakers, or Luddites, smashing a loom, HISTORICALBRITAIN.ORG, <http://historicalbritain.org/2013/07/18/the-luddites/> (last visited Nov. 14, 2014).

<sup>3</sup> See CHRISTOPHER J. DAVEY ET AL., *NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE* 11 (2010), available at <http://ccpio.org/wp-content/uploads/2012/02/2010-ccpio-report-summary.pdf> (noting how social media has the potential to upset the balance between openness and fairness in the judicial system).

technology, they sometimes do so without understanding what they are doing.<sup>4</sup>

Already, today's "new-fangled" contraptions have ensnared judges. Perhaps the most widely known example is Judge Kozinski of the United States Court of Appeals for the Ninth Circuit.<sup>5</sup> While he was sitting by designation in district court and presiding over an obscenity trial, it came to light that he had stored photos on the Internet including a pornographic image and a video depicting a man in the act of bestiality.<sup>6</sup> Judge Kozinski said he thought the information was not publicly available.<sup>7</sup> Although pornographic photos make Judge Kozinski's failure to appreciate technology perhaps the most memorable, he is certainly not alone in failing to appreciate technology.<sup>8</sup> As this Article shows, judges have created embarrassing posts, made awkward statements, set permanent examples of poor judgment, and done worse.<sup>9</sup>

Even if a judge chooses to avoid using "new-fangled" contraptions like e-mail, social media, cloud storage, and other modern inventions, those around him or her are likely using all sorts of new technology. Court staff, law clerks, interns, jurors, and attorneys are using various new tools for surprising and sometimes unintuitive purposes. For example, jurors have been caught posting information about trials on Twitter and Facebook, and they have sometimes formed groups to talk among themselves prior to submission of the case.<sup>10</sup> Of course, jurors are also using various online resources to conduct factual investigation.<sup>11</sup> Additionally, "friendships" between a judge and attorney have caused mistrials, and lawyers are

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<sup>4</sup> See Trevor Timm, *Technology Will Soon Be Reshaped by People Who Don't Use Email*, THE GUARDIAN (May 3, 2014, 7:30 AM), <http://www.theguardian.com/commentisfree/2014/may/03/technology-law-us-supreme-court-internet-nsa>.

<sup>5</sup> Dan Slater, *Judge Kozinski on Sexually Explicit Material He Posted: "It's Part of Life."*, WALL ST. J. (June 11, 2008, 2:34 PM), <http://blogs.wsj.com/law/2008/06/11/report-judge-alex-kozinski-maintained-porn-on-personal-web-site/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* Part VII.B.

<sup>9</sup> See, e.g., Slater, *supra* note 5; Matt Volz, *Federal Judge Sent Hundreds of Bigoted Emails*, YAHOO NEWS (Jan. 17, 2014, 8:18 PM), <http://news.yahoo.com/federal-judge-sent-hundreds-bigoted-emails-001239518--election.html> (discussing a federal judge who sent hundreds of racist e-mails from his federal e-mail account); *infra* Part VII.B.

<sup>10</sup> Jacqueline Connor, *Jurors and the Internet: Jury Trials and Millennials* [sic], CAALA ADVOCATE MAGAZINE, (Sept. 2011), available at <http://www.adrservices.org/pdf/Jurors%20and%20the%20Internet.pdf>; see also *Dimas-Martinez v. State*, 385 S.W.3d 238, 248–49 (Ark. 2011) (recognizing the impact social media by juror can have on a case).

<sup>11</sup> NPR Staff, *For Modern Jurors, Being on a Case Means Being Offline*, NPR (June 24, 2013, 4:09pm), <http://www.npr.org/blogs/alltechconsidered/2013/06/24/195172476/JURORS-AND-SOCIAL-MEDIA> (reporting that jurors regularly look up legal terms on the Internet and share about trial details on social media).

using social media while picking juries in the courtroom to research jurors in ways that could concern the judiciary.<sup>12</sup>

Of course, judges are also subject to ethical restrictions.<sup>13</sup> These restrictions may vary depending upon whether the judge is a state or federal judge and, if he is a state judge, what state rules apply to him. Generally, however, a Luddite judge who is unaware of what other participants in the judicial system are doing may be acting at his or her own peril. This unawareness is at least problematic because of common provisions of judicial ethical codes such as the following rules from the ABA Model Code of Judicial Conduct upon which many state codes are based:

- “A judge shall act *at all times* in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety”;<sup>14</sup>
- “A judge shall not abuse the prestige of judicial office to advance the personal or economic interest of the judge or others, or allow others to do so”;<sup>15</sup>
- “A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge”;<sup>16</sup> and
- “A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.”<sup>17</sup>

This Article discusses various issues that judges must be aware of in the Digital Age—even if they personally choose not to use “new-fangled” technology. Judges must keep abreast of conduct that implicates applicable ethical rules.

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<sup>12</sup> Ed Silverstein, *Social Media Can Cause Problems for Lawyers When it Comes to Ethics, Professional Responsibility*, INSIDECOUNSEL.COM (Apr. 29, 2014), <http://www.insidecounsel.com/2014/04/29/social-media-can-cause-problems-for-lawyers-when-i>; Jenna Gant, *Lawyers' Use of Social Media for Jury Selection OK'd by ABA*, COURTNEWSOHIO.GOV (Oct. 1, 2014) [http://www.courtnewsohio.gov/happening/2014/ABASocialMedia\\_100114.asp#.VDDB8PldWSp](http://www.courtnewsohio.gov/happening/2014/ABASocialMedia_100114.asp#.VDDB8PldWSp).

<sup>13</sup> See, e.g., *infra* notes 14–17 and accompanying text.

<sup>14</sup> MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007), (emphasis added) (footnotes omitted).

<sup>15</sup> *Id.* R. 1.3 (footnote omitted).

<sup>16</sup> *Id.* R. 2.4(C).

<sup>17</sup> *Id.* R. 2.10(A) (footnotes omitted).

## I. ETHICAL ISSUES ARISING FROM FACEBOOK AND SOCIAL NETWORKING SITES

### A. *Why a Judge May Not Be Able to Have Friends . . . on Facebook, at Least*

As of January 2014, 74% of people who use the Internet also use social networking sites.<sup>18</sup> Even among Internet users aged 50 to 64, 65% were active on social media sites in 2013.<sup>19</sup> Although statistics for the judiciary's use of social media are less reliable, a 2012 Conference of Court Public Information Officers' survey showed that 46.1% of the responding judges used social media with 86.3% of those that were doing so using Facebook and another 32.8% using LinkedIn.<sup>20</sup> Those judges were also aware of the potential ethical issues their activities implicated: 45.4% "disagreed or strongly disagreed" with the statement that "[j]udges can use social media . . . in their professional lives without compromising . . . ethics."<sup>21</sup>

These issues are getting bar counsels' attention. In a recent Georgia Bar Journal column, Paula Frederick—general counsel for the State Bar of Georgia—stated that "[e]ven maintaining a social media presence that is strictly personal with no hint of one's status as judge is not foolproof."<sup>22</sup> To illustrate her point, she gave the hypothetical example of a judge who had simply disclosed in a Facebook post that a dog had bitten him when he was a child—information which turned out to have extraordinary value to a plaintiff's lawyer who dropped the jury demand and instead went with a bench trial before that judge for a dog-bite case.<sup>23</sup> Some of the formal authorities have addressed if and to what extent a judge may participate in social media like Facebook. For instance, the American Bar Association (ABA) and several states allow judges to use social media,<sup>24</sup> but they have

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<sup>18</sup> Pew Research Internet Project, *Social Networking Fact Sheet*, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited Nov. 14, 2014).

<sup>19</sup> *Id.*

<sup>20</sup> DAVEY ET AL., *supra* note 3, at 5, 65.

<sup>21</sup> John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487, 488 (2014).

<sup>22</sup> Paula Frederick, *To Friend or Not to Friend*, 19 GA. BUS. J. 44, 44 (2014).

<sup>23</sup> *Id.*

<sup>24</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013). Examples of states that allow judges to use social media are: California, Connecticut, Florida, Kentucky, Massachusetts, Michigan, New York, Ohio, Oklahoma, South Carolina, and Tennessee. See California Judges Ass'n Judicial Ethics Comm., Op. No. 66 (2010), available at <http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>; Connecticut Comm. on Judicial Ethics, Informal Op. 2013-06 (2013), available at <http://www.jud.ct.gov/committees/ethics/sum/2013-06.htm>; Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>; Kentucky Ethics Comm. of the Kentucky Judiciary, Formal Op. JE-119 (2010), available at <http://courts.ky.gov/>

taken various positions on the extent of this privilege. Tennessee simply suggests that judges be constantly aware of ethical issues,<sup>25</sup> but other authorities are more specific. Some of these authorities allow judges to “friend” any lawyer on social media regardless of whether the judge knows that the lawyer will likely appear before him.<sup>26</sup> Although this approach appears lenient, the privilege of social media does not come without warning.<sup>27</sup> Additionally, some states may require a judge to consider disclosing a particular friendship or recusing himself from the case.<sup>28</sup> For example, authority from California advises judges to consider all the circumstances, but it focuses on the four following factors:

- the nature of the particular page, such as whether it discloses personal information or instead is a page for an organization like an alumni group;

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commissionscommittees/JEC/JEC\_Opinions/JE\_119.pdf; Massachusetts Comm. on Judicial Ethics, Op. 2011-6 (2011), *available at* <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-opin-2011-6.html>; New York Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), *available at* <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>; Supreme Court of Ohio Bd. of Comm’rs on Grievances & Discipline, Op.2010-7 (2010), *available at* [http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/2010/Op\\_10-007.doc](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/Op_10-007.doc); Oklahoma Judicial Ethics Advisory Panel, Op. 2011-3 (2011), *available at* <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147>; South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>; Tennessee Judicial Ethics Comm., Advisory Op. 12-01 (2012), *available at* [http://www.tncourts.gov/sites/default/files/docs/advisory\\_opinion\\_12-01.pdf](http://www.tncourts.gov/sites/default/files/docs/advisory_opinion_12-01.pdf); Lorie Savin, *Friend Requests and Beyond: Judicial Ethics in the Social Networking Sphere*, MICH. BUS. J., Aug. 2014, at 18, 18–19, *available at* <http://www.michbar.org/journal/pdf/pdf4article1959.pdf> (discussing judicial ethics relating to social networking in an article endorsed by the Michigan Committee on Judicial Ethics).

<sup>25</sup> Tennessee Judicial Ethics Comm., Advisory Op. 12-01.

<sup>26</sup> See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462; California Judges Ass’n Judicial Ethics Comm., Op. No. 66; Kentucky Ethics Comm. of the Kentucky Judiciary, Formal Op. JE-119; New York Advisory Comm. on Judicial Ethics, Op. 08-176; Supreme Court of Ohio Bd. of Comm’rs on Grievances & Discipline, Op. No. 2010-7; South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009; Savin, *supra* note 24, at 18–19 (discussing judicial ethics relating to social networking in an article endorsed by the Michigan Committee on Judicial Ethics).

<sup>27</sup> See Kentucky Ethics Comm. of the Kentucky Judiciary, Formal Op. JE-119 (warning that using social networks is “fraught with peril”); Supreme Court Ohio Bd. of Comm’rs on Grievances & Discipline, Op. No. 2010-7 (suggesting that the judge be constantly vigilant); South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (warning judges who use Facebook not to discuss their position); Savin, *supra* note 24, at 18–19 (warning judges, in an article endorsed and reviewed by the Michigan Committee on Judicial Ethics, to be cautious in their use of social networking).

<sup>28</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462 (requiring judges to carefully evaluate whether disclosure or recusal is necessary); California Judges Ass’n Judicial Ethics Comm., Op. 66 (imposing various limitations); New York Advisory Comm. on Judicial Ethics, Op. 08-176 (explaining how a judge may need to disclose a relationship and recuse himself if that relationship is a “close social relationship”).

- the number of friends the judge has, with a lower number suggesting that each friend is somehow more special;
- the judge's method of accepting friend requests such as whether he or she accepts some or all friend requests or whether there is a pattern such as exclusively including plaintiffs' lawyers or all lawyers from a certain firm; and
- the regularity of a particular attorney's appearances before the judge.<sup>29</sup>

A different approach is evident in other states that allow judges to friend any lawyer on social media as long as the judge does not know that the lawyer will appear before him.<sup>30</sup> For instance, Massachusetts requires a judge to recuse himself if he faces a friended lawyer.<sup>31</sup> Other restrictions on social media may also apply in these states.<sup>32</sup> For example, even if a Florida judge includes a disclaimer on a social network page that explains how friend on social media does not mean friend in the traditional sense, the disclaimer will not be enough to cure any "impermissible impression that the judge's attorney 'friends' are in a special position to influence the judge."<sup>33</sup> However, a Florida judge may belong to a non-legal organization's Facebook page even if lawyers who appear before him participate in that organization.<sup>34</sup> Further, Florida allows a judicial candidate to friend lawyers who, if the person is elected, will appear before him.<sup>35</sup>

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<sup>29</sup> California Judges Ass'n Judicial Ethics Comm., Op. 66.

<sup>30</sup> See Connecticut Comm. on Judicial Ethics, Informal Op. 2013-06 (2013), *available at* <http://www.jud.ct.gov/committees/ethics/sum/2013-06.htm>; Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2012-12 (2012), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2012/2012-12.html>; Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>; Massachusetts Comm. on Judicial Ethics, Op. 2011-6 (2011), *available at* <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-opin-2011-6.html>; Oklahoma Judicial Ethics Advisory Panel, Op. 2011-3 (2011), *available at* <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147>.

<sup>31</sup> Massachusetts Comm. on Judicial Ethics, Op. 2011-6.

<sup>32</sup> See Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06; *see also* Connecticut Comm. on Judicial Ethics, Informal Op. 2013-06 (imposing twelve limitations on using social media); Oklahoma Judicial Ethics Advisory Panel, Op. 2011-3 (warning that judges' use of social media is "fraught with peril").

<sup>33</sup> Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06.

<sup>34</sup> *Id.*

<sup>35</sup> Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2010-05 (2010), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html>. For restrictions on campaigns, see Florida Supreme Court Judicial

Despite these various positions, some common warnings and admonitions are evident among the various rules and opinions. One of these admonitions appears in New York's requirement that every comment, post, and photograph maintain the dignity of the bench.<sup>36</sup> Other examples of these common warnings and admonitions are clearly evident in the following opinions of the Connecticut Committee on Judicial Ethics that require judges using social media to:

- Use communication that does not “erode confidence in the independence of judicial decision-making”;<sup>37</sup>
- Refrain from posting “any material that could be construed as advancing the interests of the judge or others,” such as “liking” a commercial or advocacy website;<sup>38</sup>
- Avoid relationships with people or organizations that may give the impression that these people or organizations are able to influence the judge;<sup>39</sup>
- Keep from friending social workers or “any other persons who regularly appear in court in an adversarial role”;<sup>40</sup>
- Ensure their comments do not discuss any pending or impending court issues;<sup>41</sup>
- Refrain from viewing parties’ or witnesses’ social networking pages;<sup>42</sup>
- Avoid giving legal advice to others;<sup>43</sup>
- Stay away from political activities on social networking sites such as public endorsements or oppositions to a candidate for public office, liking a political organization’s Facebook page or linking to political organization websites, and commenting on

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Ethics Advisory Comm., Op. 2010-28 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-28.html>.

<sup>36</sup> New York Advisory Comm’n on Judicial Ethics, Op. 08-176 (2009), available at <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>.

<sup>37</sup> Connecticut Comm. on Judicial Ethics, Informal Op. 2013-06 (2013), available at <http://www.jud.ct.gov/Committees/ethics/sum/2013-06.htm>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

proposed legislation or controversial political topics;<sup>44</sup> and

- Remain “aware of the contents of his/her social networking profile page, be familiar with the site’s policies and privacy controls, and stay abreast of new features and changes.”<sup>45</sup>

In contrast to the various authorities’ approaches, an author recently argued that all of these authorities take an unrealistic view of the word “friend” in the context of social media, and he called for them to take a more “digitally enlightened” view.<sup>46</sup> As the minority members of the Florida Supreme Court Judicial Ethics Advisory Committee noted, “the term ‘friend’ on these pages does not convey the same meaning that it did in the pre-internet age.”<sup>47</sup> Which approach will “win” this view of what exactly “friend” means remains to be seen, but caution is obviously the operative word.

### *B. Policies to Consider Beyond Friending*

Whether a judge decides to friend lawyers or not, judges need to ensure that court personnel understand that their posts about a judge’s schedule, pending matters, or court business generally can reflect poorly on the court. Additionally, these posts may provide an unfair advantage to a litigant or counsel. For example, knowing that a judge is taking a vacation may prove to be valuable information in some instances such as mediation. If parties are mediating while a summary judgment motion is pending, one party’s knowledge that the judge will not be ruling on the motion any time soon could affect settlement positions. Thus, judges should carefully consider what they do on the Internet and social media.

## II. ETHICAL ISSUES ARISING FROM PERSON-TO-PERSON COMMUNICATIONS

### *A. Confidentiality of E-mail*

Most lawyers use e-mail without encrypting the text or attachments. This seems to comply with the standard of care—at least with respect to routine communications—even though e-mail can be intercepted and misdirected.<sup>48</sup> Nonetheless, some communications among lawyers and

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Browning, *supra* note 21, at 490, 532–33.

<sup>47</sup> Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

<sup>48</sup> See Kristin J. Hazelwood, *Technology and Client Communications: Preparing Law Students and New Lawyers to Make Choices That Comply with the Ethical Duties of Confidentiality, Competence, and Communication*, 83 MISS. L.J. 245, 259, 261 (2014). For a

clients present a greater risk of harm than others. Thus, they may require encryption.

The same is no doubt true of communications among court staff. Security over e-mail can take various forms, but court staff can use it in its simplest form. They can agree to use “security” features in Microsoft Word to require a password to open attachments, and the password would be the same for every document (e.g., a sports’ team’s name, the county in which the court sits, the judge’s middle name, and so on). While the attachment won’t be encrypted, only someone with expert skills will be able to easily open it.

When e-mail is encrypted, only the most determined user could possibly open it. The technology to encrypt the content of an e-mail and its attachment is built into most e-mail software. While the particular details vary, there is often an option to simply encrypt all e-mails or a particular e-mail and its attachment. A Google search of “encryption” along with the software’s name, its version number, and the operating system will likely result in a simple set of instructions for encryption.

Judges should consider whether to permit transmission of all or only some judicial documents. If a judge decides to permit this transmission, he should then decide whether encryption or at least password protection should be required. Having a uniform policy among courthouse personnel is critical because the protection is largely illusory if all but one person does not use encryption.

### *B. The Permanency of Text Messages*

Text messages have become evidence in many high- and low-profile cases, but the most recent case was the “bridge scandal” involving Governor Christie of New Jersey.<sup>49</sup> People text much more informally than they would write. While texts feel ephemeral, the content of a text message can, in fact, persist for a long time. Various high-profile cases involving alleged abuse or discrimination make that point clear.<sup>50</sup>

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recent argument to the contrary, see Rebecca Bolin, *Risky Mail: Concerns in Confidential Attorney-Client Email*, 81 U. CIN. L. REV. 601, 652–54 (2012) (stating that common sense tells attorneys that some information requires special effort to protect in an e-mail).

<sup>49</sup> Heather Haddon, *Subpoena Hunts for Bridge Scandal Text Messages Between Christie, Aide*, WALL ST. J. (Aug. 27, 2014, 12:20 PM), <http://blogs.wsj.com/metropolis/2014/08/27/bridge-scandal-text-messages-between-christie-aide-subpoenaed/>.

<sup>50</sup> See, e.g., Lizette Alvarez, *Defense in Trayvon Martin Case Raises Questions About the Victim’s Character*, N.Y. TIMES, May 24, 2013, at A15 (examining old text messages that raised character questions about Trayvon Martin); Gregory S. McNeal, *Adrian Peterson’s Indefensible Abuse of a 4-Year-Old Likely Violates Texas Law*, FORBES (Sept. 16, 2014, 5:11 PM), <http://www.forbes.com/sites/gregorymcneal/2014/09/16/adrian-petersons-indefensible-abuse-of-a-4-year-old-likely-violates-texas-law/> (discussing various incriminatory picture text messages that allegedly show Adrian Peterson’s abuse of his son).

Unfortunately, court personnel may not be aware of these facts. As a result, embarrassing texts, inappropriate texts, and other awkward communications may become public. Warning court personnel to use texts with the view toward disclosure or inadvertent disclosure may be the best policy.

### *C. The Hidden Dangers of Metadata*

In order to grasp the dangers of metadata, it is important to understand what metadata is. “Metadata is ‘data about data.’”<sup>51</sup> Software often creates metadata and stores it unseen—unless the user knows where to look—in a single file; when that file is transmitted as an e-mail attachment, the metadata often goes with it.<sup>52</sup> However, this often does not matter. Some metadata included in a Word document, for example, consists of information like how many words are in the document or when the document was prepared.<sup>53</sup> In many instances, that information will have very little significance to anyone.

But some metadata may not be so benign. The worst culprit is the “track changes” feature that, when enabled, records who, when, and what changes were made to a document; it also tracks multiple “undo’s,” which allows the recipient to repeatedly “undo” changes to a document and see the edits made over time.<sup>54</sup> Imagine a draft settlement agreement that originally proposed offering \$100,000 to settle the case, but was revised to reflect a \$50,000 initial offer. The recipient may be able to “undo” the changes or “track” them to see that the original offer was intended to be much higher. This can obviously have real-world impact.

The Model Rules require lawyers to use reasonable care in the storage and transmission of confidential information.<sup>55</sup> Thus, a lawyer who knows a document contains embedded information generally has a duty to remove it before transmission where that information could be misused. Although this seems relatively clear, the Model Rules go further than simply requiring the obvious. The comment emphasizes, for example, that lawyers “act competently” to guard against disclosure of confidences.<sup>56</sup> While a few years ago, it may have been that the existence of track changes and other potentially malevolent metadata was not widely known, and could not have been found without reasonable care, the same is probably not true today, at least in relatively sophisticated

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<sup>51</sup> David Hricik & Chase Edward Scott, *Metadata: The Ghosts Haunting e-Documents*, 13 GA. B.J. 16, 16 (2008).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 17–18.

<sup>54</sup> *Id.* at 16–18.

<sup>55</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(C), cmts. 18 & 19 (2014).

<sup>56</sup> *See id.* R. 1.6 cmt. 18.

practice areas. Reasonable care in today's highly technological practice probably does not depend on what special programs an attorney may use to access confidential information.<sup>57</sup> Rather, reasonable care likely means knowing whether the recipient can use the same software in which the document was prepared to view client confidences that were unintentionally included with the file.<sup>58</sup>

Is it ethical for a lawyer who receives a file to check to see if the sender erred and included metadata that might be useful? There is no specific rule that says that a lawyer cannot take advantage of the incompetence of opposing counsel, and zealous representation obviously requires that lawyers regularly do so. Bar associations, however, are still determining whether looking in the opposing client's confidences in transmitted files is "conduct involving dishonesty, fraud, deceit, or misrepresentation."<sup>59</sup> State bar associations that have dealt with metadata are split on how to do so.<sup>60</sup>

Some states—like Alabama, Arizona, Florida, and New York—take the position that it is unethical to purposefully search for metadata.<sup>61</sup> One opinion emphasized that it was not the carelessness of the transmitting lawyer that led to the misuse, but instead, "it is a deliberate act by the receiving lawyer . . . that would lead to the disclosure of client confidences and secrets" in the metadata.<sup>62</sup>

But other bar associations disagree. The ABA, Colorado Bar Association, and Oregon State Bar find nothing unethical with

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<sup>57</sup> See Oregon State Bar, Formal Op. 2011-187 (2011), available at [https://www.osbar.org/\\_docs/ethics/2011-187.pdf](https://www.osbar.org/_docs/ethics/2011-187.pdf) (recognizing that it might be unethical for a lawyer to use specialized software to search for hidden information).

<sup>58</sup> See *id.* ("With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent. What constitutes reasonable care will change as technology evolves."); Minnesota Court Rules, Op. 22 cmt. (2010), available at [https://www.revisor.mn.gov/court\\_rules/rule.php?type=pr&subtype=lawy&id=22](https://www.revisor.mn.gov/court_rules/rule.php?type=pr&subtype=lawy&id=22) (stating "a lawyer must take reasonable steps to prevent the disclosure of confidential metadata").

<sup>59</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

<sup>60</sup> Compare *infra* notes 61–62 and accompanying text (reasoning that purposefully searching for metadata is unethical), with *infra* notes 63–64 and accompanying text (reasoning that searching for metadata is ethical).

<sup>61</sup> See Alabama State Bar Office of Gen. Counsel, Formal Op. RO-2007-02 (2007), available at <https://www.alabar.org/resources/office-of-general-counsel/formal-opinions/2007-02/>; State Bar of Arizona Ethics, Op. 07-03 (2007), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=695>; Professional Ethics of the Florida Bar, Op. 06-2 (2006), available at <https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+06-2?opendocument>; New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 749 (2001), available at <https://www.nysba.org/CustomTemplates/Content.aspx?id=5463>.

<sup>62</sup> New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 749.

deliberately digging for metadata gold.<sup>63</sup> The District of Columbia Bar drew the line in a different place; viewing metadata is only dishonest if, before viewing it, the recipient *actually knew* that opposing counsel had inadvertently sent the document with the hidden information.<sup>64</sup>

Only eighteen states currently have an opinion on metadata.<sup>65</sup> Yet, it is only a matter of time until the other thirty-two states adopt formal ethics opinions that will govern what lawyers must do.

For the judiciary, this means that courts must be particularly careful to avoid transmitting information to litigants or transmitting public documents without ensuring that any metadata has been removed.<sup>66</sup> Lawyers may be mining away. In this regard, at least in federal court and under the Pacer system, files are in PDF format that generally does not contain metadata of any import.<sup>67</sup>

#### *D. Third-Party Storage of Court Data: Storms in the Cloud?*

Court personnel may be using vendors such as Dropbox, Google, and others to store documents so that they can be easily accessed at the courthouse, at home, or through a mobile device. Putting documents “on the cloud” has become common.<sup>68</sup> While extraordinarily convenient, storing data on third-party sites also creates risks.<sup>69</sup> The vendor’s

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<sup>63</sup> See ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006); Colorado Ethics Handbook, Op. 119 (2011), available at [http://www.cobar.org/repository/Ethics/FormalEthicsOpinion/FormalEthicsOpinion\\_119\\_2011.pdf](http://www.cobar.org/repository/Ethics/FormalEthicsOpinion/FormalEthicsOpinion_119_2011.pdf); Oregon State Bar, Formal Op. 2011-187 (2011), available at <https://www.osbar.org/docs/ethics/2011-187.pdf>.

<sup>64</sup> D.C. Bar, Ethics Op. 341 (2007), available at <http://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion341.cfm>.

<sup>65</sup> See American Bar Association, *Metadata Ethics Opinions Around the U.S.*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/charts\\_fyis/metadatachart.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html) (last visited Nov. 14, 2014) (noting that only eighteen states have ethics opinions regarding metadata).

<sup>66</sup> For further information regarding the treatment of metadata, including a step-by-step tutorial on how to remove it from documents, see Hricik & Scott, *supra* note 51, at 16–20, 22, 24.

<sup>67</sup> See Garry R. Appel, *The Practical Paperless Office*, COLO. LAW., Jan. 2008, at 55, 57 (“Federal courts nationwide have moved to electronic filing of pleadings, and PDF is the only format the courts will accept.”); Blake A. Klinkner, *Metadata: What Is It? How Can It Get Me into Trouble? What Can I Do About It?*, WYO. LAW., Apr. 2014, at 18, 20 (explaining how PDF copies of files contain less metadata than original files of documents).

<sup>68</sup> See Quentin Hardy, *The Era of Cloud Computing*, N.Y. TIMES, June 12, 2014, at F1 (“You already work in the cloud, too, if you use a smartphone, tablet or web browser. And you’re using the cloud if you’re tapping online services like Dropbox or Apple’s iCloud or watching ‘House of Cards’ on Netflix.”).

<sup>69</sup> See Brian X. Chen, *Apple Says It Will Add New iCloud Security Measures After Celebrity Hack*, N.Y. TIMES, Sep. 5, 2014, at B2.

obligations of confidentiality may not be as vigorous as the judiciary's,<sup>70</sup> and the documents may become public if security is breached. Thus, courts should ensure that court personnel use only third-party vendors with excellent protective measures if such use is permitted at all.

### III. DATA HELD OR ACCESSIBLE BY DEPARTING COURT PERSONNEL

If court personnel are permitted to store important information on the cloud or on personal devices, the court should ensure that former employees can no longer access that information when they depart. At the same time, the court should also make sure that it maintains access to the information. This may require having employees disclose their username and password for any sites and promptly changing this information when a former employee departs.

### IV. LAWYERS' USE OF THE INTERNET TO RESEARCH JURORS

Judges have encouraged lawyers to research potential jurors for conflicts; for example, the Supreme Court of Missouri noted that because "advances in technology allow[] greater access to information," it could place a "greater burden" on parties to raise improper jury issues to the court.<sup>71</sup> In another recent case, a New Jersey Superior Court held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using his laptop to research jurors during voir dire.<sup>72</sup>

Consistent with these findings, a few bar associations have issued opinions that essentially give lawyers the green light to use social media content to research jurors and potential jurors with a few limitations.<sup>73</sup>

A recent opinion from the New York City Bar is the most comprehensive of these opinions.<sup>74</sup> The opinion first concluded that a lawyer could not *communicate with* a juror or potential juror, and it reasoned that an improper communication occurred if, as a result of the research, the juror would receive a communication such as a friend

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<sup>70</sup> Compare *Dropbox Privacy Policy*, DROPBOX (Mar. 24, 2014), <https://www.dropbox.com/terms#privacy>, with MODEL RULES OF PROF'L CONDUCT R. 1.6(C), cmts. 18 & 19 (2014).

<sup>71</sup> *Johnson v. McCullough*, 306 S.W.3d 551, 558–59 (Mo. 2010).

<sup>72</sup> *Carino v. Muenzen*, No. A-5491-08T1, 2010 WL 3448071, at \*24, \*26–27 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

<sup>73</sup> *E.g.*, ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-466 (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_466\\_final\\_04\\_23\\_14.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf); Ass'n. of the Bar of the City of New York Comm. on Prof'l. Ethics Formal Op. No. 2010-2, available at <http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites>.

<sup>74</sup> See *infra* notes 75–80 and accompanying text.

request on Facebook.<sup>75</sup> The opinion emphasized that any indication to the juror that the lawyer had accessed their information would be improper.<sup>76</sup> Second, it emphasized that a lawyer cannot use deception to obtain access.<sup>77</sup> Finally, the opinion concluded that the same restrictions applied to agents (such as undercover investigators) hired by the lawyer to conduct this research.<sup>78</sup> Significantly, the opinion emphasized that lawyers probably had a duty, within the scope of the opinion, to research the jurors.<sup>79</sup>

Despite the ostensible duty to research the background of jurors and the convenience of using social media sites to do so, “even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives.”<sup>80</sup> Further, lawyers should be admonished to report juror misconduct they discover. In one interesting case, a court granted a new trial, based on juror misconduct, as to three of four defendants, but not to the fourth because his lawyers had reason to know of the misconduct through their Internet searches but had done nothing.<sup>81</sup> Clearly, lawyers’ use of social media to research jurors and potential jurors may be beneficial to litigants, but it may also be awkward for the judge and jury.

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<sup>75</sup> Ass’n of the Bar of the City of New York Comm. on Prof’l. Ethics, Formal Op. 2012-2 (2012), *available at* <http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* See also Ass’n. of the Bar of the City of N.Y. Comm. on Prof. and Judicial Ethics Formal Op. No. 2010-2, *available at* <http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites>; N.Y. St. Bar Ass’n Formal Op. 843, *available at* <http://www.nysba.org/CustomTemplates/Content.aspx?id=5162>; N.Y. County Lawyers’ Ass’n. Formal Op. 743, *available at* [https://www.nycla.org/siteFiles/Publications/Publications1450\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf) (stating only proper to use Twitter, Facebook, and other sites to research potential and actual jurors); San Diego Cnty. Bar Legal Ethics Op. 2011-2, *available at* <https://www.sdcba.org/index.cfm?pg=LEC2011-2> (stating a lawyer cannot friend represented party); Sharon R. Klein, et al., *Ethical Issues that Arise From Social Media Use in Courtrooms*, N.J. LAWYER, [http://www.pepperlaw.com/pdfs/Klein\\_Stio\\_Zurich\\_NJL\\_10\\_2013.pdf](http://www.pepperlaw.com/pdfs/Klein_Stio_Zurich_NJL_10_2013.pdf) (last visited Nov. 14, 2014).

<sup>80</sup> Ass’n. of the Bar of the City of New York Comm. on Prof’l Ethics Formal Op. 2012-2.

<sup>81</sup> *United States v. Daugerdas*, 867 F. Supp. 2d 445, 458, 460–61, 466, 484–85 (S.D.N.Y. 2012).

## V. JURORS' USE OF SOCIAL MEDIA AND THE INTERNET

Another issue that judges should be aware of is jurors' use of the Internet to research and discuss their cases. Interestingly, there is a blog devoted to misbehaving jurors!<sup>82</sup> Every week, its author (a judge) seems to have another example of intentional or inadvertent misconduct.<sup>83</sup> Some recent examples include a mistrial where a juror researched potential sentences in rape a case<sup>84</sup> and a discharge of an entire jury pool due to one juror searching for the defendant's name on Google.<sup>85</sup>

## A. Jurors' Use of the Internet to Research Facts and Law

Jurors are human, and juries have long had access to newspapers, television, and their neighbors. Additionally, jurors are, no doubt, sometimes frustrated by the lack of "relevant" evidence at trial. This often leads jurors to conduct their own Internet research as was the case in *State v. Abdi* where the Supreme Court of Vermont overturned a child sexual assault conviction after learning that a juror performed his own research on the cultural significance of the alleged crime in Somali Bantu culture.<sup>86</sup> The *New York Law Journal* also reported a number of cases where jurors harmed the system by researching facts, law, or general issues.<sup>87</sup> For example, a Washington Court of Appeals overturned a \$4.3 million dollar employment discrimination verdict when the court learned the jury had researched the employer's annual earnings.<sup>88</sup>

The U.S. legal system is not alone, as reports from across the globe show jurors using the Internet to conduct research.<sup>89</sup> Several countries

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<sup>82</sup> See JURORS BEHAVING BADLY, <http://jurorsbehavingbadly.blogspot.com> (last visited Nov. 14, 2014).

<sup>83</sup> *Id.*

<sup>84</sup> Stephen M. Halsey, *Juror Researching Penalty Causes Mistrial of Rape Case*, JURORS BEHAVING BADLY (Jan. 23, 2014, 7:14 PM), <http://jurorsbehavingbadly.blogspot.com/2014/01/juror-researching-penalty-causes.html> (citing Ken Armstrong, *Case of the Curious Juror: When the Web Invades the Courtroom*, SEATTLE TIMES (Jan. 18, 2014, 8:25 PM), [http://seattletimes.com/html/localnews/2022703634\\_jurorsinternetxml.html](http://seattletimes.com/html/localnews/2022703634_jurorsinternetxml.html)).

<sup>85</sup> Stephen M. Halsey, *Entire Jury Pool Discharged After Juror Google-searches Defendant*, JURORS BEHAVING BADLY (Jan. 31, 2014, 11:45 AM), <http://jurorsbehavingbadly.blogspot.com/2014/01/entire-jury-pool-discharged-after-juror.html>.

<sup>86</sup> *State v. Abdi*, 2012 VT 4, ¶ 1, 191 Vt. 162, 45 A.3d 29.

<sup>87</sup> Daniel A. Ross, *Juror Abuse of the Internet*, N.Y.L.J. (Sept. 8, 2009), available at <http://www.stroock.com/SiteFiles/Pub828.pdf>.

<sup>88</sup> *Sheffield v. Goodyear Tire & Rubber Co.*, 151 Wash. App. 1052 (2009) (unpublished opinion).

<sup>89</sup> See, e.g., PAUL LAMBERT, *COURTING PUBLICITY: TWITTER AND TELEVISION CAMERAS IN COURT* 27–28 (2011); Anna Vidot, *Internet Research by Jurors Could Lead More Defendants to Choose Judge-Only Trials*, ABC NEWS (July 31, 2014 12:38 PM), <http://www.abc.net.au/worldtoday/content/2014/s4057822.htm>.

have adopted various electronic countermeasures.<sup>90</sup> Clearly, jurors' use of the Internet to research issues in their case is a significant problem about which judges must be aware.

*B. Jurors' Use of the Internet to Discuss Pending Cases*

Although jurors are told not to discuss a case until it is submitted to them,<sup>91</sup> improper pre-submission communication occurs.<sup>92</sup> The Internet makes this improper communication easier.<sup>93</sup> As one court recently noted, "the widespread availability of the Internet and the extensive use of social networking sites, such as Twitter and Facebook, [has] exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors."<sup>94</sup>

The Third Circuit recently addressed this issue in *United States v. Fumo*: "Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence."<sup>95</sup> In this case, on the eve of the second day of deliberations, a juror posted on Facebook that he was "'not sure about tomorrow."<sup>96</sup> A friend of the juror then posted, "why?" to which the juror responded, "think of the last five months dear."<sup>97</sup>

A recent article cataloged the rising number of controversies arising from jury misconduct.<sup>98</sup> Among other things, the authors note that a guilty verdict in a murder case in Arkansas was overturned because a juror had tweeted during the trial.<sup>99</sup> Other examples of jurors using social media include Al Roker's tweet about reporting for grand jury duty and posting

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<sup>90</sup> See LAMBERT *supra* note 89, at 27–28; see also Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 413 (2012); Jason Deans, *Facebook Juror Jailed for Eight Months*, THE GUARDIAN (June 16, 2011, 6:07 PM), <http://www.theguardian.com/uk/2011/jun/16/facebook-juror-jailed-for-eight-months>.

<sup>91</sup> See, e.g., *United States v. Gianakos*, 404 F.3d 1065, 1073–74 (8th Cir. 2005).

<sup>92</sup> See *United States v. Juror No. One*, 866 F. Supp. 2d 442, 444–45, 448–49, 451, 453 (E.D. Pa. 2011) (holding that a dismissed juror improperly communicated with other jurors about her opinion on the trial before the case was submitted for deliberation).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011).

<sup>96</sup> *Id.* at 298.

<sup>97</sup> *Id.* at 298 n.3.

<sup>98</sup> Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 3, 7, 9 (2012), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1228&context=dltr>.

<sup>99</sup> *Id.* at 2–3 (citing *Dimas-Martinez v. State*, 2011 Ark. 515, at 11–18, 385 S.W.3d 238, 246–49 (Ark. Dec. 8, 2011)).

photographs, and a potential juror tweeting “‘Guilty! He’s guilty! I can tell’” during jury selection.<sup>100</sup> Sometimes, however, courts find blogging and other communication proper as long as the juror does not discuss the case or his opinion on the case.<sup>101</sup>

### C. Courts Fight Back: Model Instructions and Beyond

Courts have responded in various ways to jurors’ Internet research and discussion of their cases. While holding a juror in contempt or declaring a mistrial protects the rights of the litigants, it does not result in efficient litigation. Thus, judges are expanding their use of jury instructions that warn against use of social media, or the Internet, to discuss a case or conduct research.<sup>102</sup> In addition, if the judge has jurors disclose their twitter “handles,” the judge can monitor the jurors’ tweets during trial.<sup>103</sup>

A collection of “model” jury instructions concerning the use of the Internet by jurors to conduct research follows in Appendix A.

## VI. JUDICIAL USE OF THE INTERNET TO CONDUCT FACTUAL RESEARCH

The Internet puts the world at our fingertips; Google Maps and other sites provide pictures of almost every corner of the earth, distances between points can be plotted on Mapquest, and a certain day’s weather can be determined with precision on numerous sites. There is a wealth of information available. Even as to the particular litigants, the Internet might provide access to their personal webpage, their social media page, or various “facts” about them posted hither and yon on the Internet.

In our adversary system, however, judicial research into facts creates some delicate issues. On one hand, consideration of historic facts pertinent to the dispute without adversary presentation can create ethical and due

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<sup>100</sup> See Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>; Corky Siemaszko, *Al Roker Gets Ripped for Snapping Court Pix & Tweeting During Jury Duty*, NY DAILY NEWS (May 28, 2009, 9:00 PM), <http://www.nydailynews.com/entertainment/tv-movies/al-roker-ripped-snapping-court-pix-tweeting-jury-duty-article-1.374749>.

<sup>101</sup> See *State v. Goehring*, No. OT-06-023, 2007-Ohio-58862007 Ohio App. LEXIS 5169, at ¶ 35 (Ohio Ct. App. Nov. 2, 2007).

<sup>102</sup> See Amy J. St. Eve, Charles P. Burns, & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 86–87 (2014), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr>.

<sup>103</sup> See generally Hayes Hunt & Brian Kint, *Trial and Social Media: Researching Potential Jurors*, (Feb. 3, 2014), <http://www.fromthesidebar.com/2014/02/03/trial-and-social-media-researching-potential-jurors-3/> (explaining how defense attorneys should continue conducting Internet and social media research into jurors and immediately disclosing any misconduct to the tribunal).

process concerns. On the other, while a judge “must not independently investigate facts in a case and must consider only the evidence presented,”<sup>104</sup> a judge may take judicial notice as allowed by law.<sup>105</sup> As recently amended in Georgia, judicial notice is governed by statute, which provides:

- (a) This Code section governs only judicial notice of adjudicative facts.
- (b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:
  - (1) Generally known within the territorial jurisdiction of the court; or
  - (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) A court may take judicial notice, whether or not requested by a party.
- (d) A court shall take judicial notice if requested by a party and provided with the necessary information.
- (e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.
- (f) Judicial notice may be taken at any stage of the proceeding.
- (g)
  - (1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.
  - (2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.<sup>106</sup>

At the outset of this analysis, the fact that a judge uses the Internet, rather than some other means of research, does not seem pertinent to whether and to what extent research is permissible. While the Internet certainly makes it easier to find facts, it does not alter the question presented. Thus, a judge should not investigate facts independently, whether on the Internet or not, except to the extent that the fact can be judicially noticed.<sup>107</sup>

In analyzing the breadth of the “exception” to the prohibition against independent factual research, one commentator observed:

By including the reference to judicial notice, however, the Model Code opens a loophole. If the ethics rules are meant to incorporate the totality of federal and state evidence rules’ approach to what judges can “know” on their own, the research prohibition is a narrow one. Judges may *not* independently investigate adjudicative facts—the facts that

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<sup>104</sup> GEORGIA CODE OF JUDICIAL ETHICS CANON 3 (Commentary 2011).

<sup>105</sup> See, e.g., FED. R. EVID. 201.

<sup>106</sup> GA. CODE ANN. § 24-2-201 (Lexis through 2014 Reg. Sess.).

<sup>107</sup> ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2.9(C) (2007).

are at issue in the particular case—unless they are generally known or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” But they *may* independently ascertain and use information that meets the requirements for judicial notice, and they may investigate “legislative facts”—those that inform the court’s judgment when deciding questions of law or policy—to their hearts’ content, bound by no rules about sources, reliability, or notice to the parties.<sup>108</sup>

Courts have used the Internet to take judicial notice of facts, but they have not always done so without dissent.<sup>109</sup> This is rare: for example, the only Georgia case that seems to have used the Internet to take judicial notice involved arbitration rules posted on organization webpages.<sup>110</sup> Courts are split on whether and to what extent judicial notice may be taken about information that originated from the Internet.<sup>111</sup> Even if judicial notice is appropriate, some courts have held that judicial factual investigation on the Internet implicates Due Process concerns<sup>112</sup> and issues concerning the competency of the judge to be a witness.<sup>113</sup>

## VII. MISCELLANEOUS ISSUES

### A. Blogging

Washington has permitted judicial officers to blog, but it has warned that they should be careful that their blogs are not used to question their impartiality.<sup>114</sup> Additionally, Washington has suggested that the judicial officers include a disclaimer stating that the opinions are theirs and not

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<sup>108</sup> Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 136 (2008) (footnote omitted).

<sup>109</sup> See, e.g., *Gent v. CUNA Mut. Ins. Soc’y*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (taking judicial notice of information that came from the Center for Disease Control and Prevention’s website); *Oken v. Williams*, 23 So.3d 140, 148 n.2 (Fla. Dist. Ct. App. 2009) (defending the majority’s use of Internet websites to define “specialist” in a medical malpractice action and contending it fell within the judicial notice exception), *quashed on other grounds*, 62 So. 3d 1129 (Fla. 2011).

<sup>110</sup> *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 686 n.11 (Ga. Ct. App. 2013).

<sup>111</sup> Compare *Gent*, 611 F.3d at 84 n.5 (taking judicial notice of information that came from a website), and *Oken*, 23 So.3d at 148 n.2 (defending use of Internet websites as acceptable under the judicial notice exception), with *United States ex rel. Dingle v. Bioport Corp.*, 270 F.Supp.2d 968, 972–73 (W.D. Mich. 2003) (taking judicial notice of only some pertinent information that originated on the Internet), and *NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co.*, 798 N.Y.S.2d 309, 313 (N.Y. Supp. App. 2004) (holding that independent factual research on the part of judges is error).

<sup>112</sup> *Kiniti-Wairimu v. Holder*, 312 F. App’x 907, 908–09 (9th Cir. 2009).

<sup>113</sup> E.g., *NYC Med. & Neurodiagnostic, P.C.*, 798 N.Y.S.2d at 312–13 (determining that the court was wrong to conduct its own research to reach its conclusion on the case).

<sup>114</sup> State of Washington Ethics Advisory Comm. Op. 09-05 (2009), available at [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=0905](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=0905).

other judges'.<sup>115</sup> Obviously, judges should be concerned about lines being drawn too finely.

### *B. Do Not Do What These Judges Did*

Judges are human. As such, they sometimes do things that might be considered unwise. For example, the Chief Judge of the United States Court of Appeals for the Federal Circuit sent a message to a lawyer commending the lawyer's skills and inviting him to forward the e-mail to his clients—the judge later apologized to the court for this act,<sup>116</sup> and the lawyer was publicly reprimanded.<sup>117</sup> In another situation, a judge friended a lawyer who was appearing in a matter before him, created posts with that lawyer about the pending custody case, reviewed a web page of the wife, and even quoted a poem that the wife had posted on that page.<sup>118</sup> Yet another example arises from Judge Kozinski and the “private” images he believed to be privately stored online (including undressed men appearing with sexually aroused animals) that were actually available publicly because he did not understand the technology.<sup>119</sup> Although these are just a few examples, they illustrate situations judges should avoid.

### CONCLUSION AND SOME PRACTICAL TIPS ON WHAT TO DO

This Article began with the premise that judges likely could not be Luddites in this technology saturated world. Even if they could only use an abacus and typewriter, the attorneys, clerks, staff, and jurors around them would not remain mired in the past. What judges must do is understand technology even if they do not embrace it. Part of that is refraining from using software or devices without knowing the risks they present.

The technology of today can be a significant benefit for judges, but it can also be a significant problem. Yet, there are some practical things that judges can do to ensure that they act in an ethical manner while they are surrounded by technology. One practical tip for judges is understanding Facebook privacy settings. Judges can learn about these settings on a specific Facebook page that helps individuals understand the various potential settings for privacy on Facebook and learn how to adjust

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<sup>115</sup> *Id.*

<sup>116</sup> Letter from Randall R. Rader, Chief Judge, United States Court of Appeals for the Federal Circuit, to the Judges of the United States Court of Appeals for the Federal Circuit, (May 23, 2014), available at [http://www.cafc.uscourts.gov/images/stories/5-23-14\\_RRR%20\\_Letter.pdf](http://www.cafc.uscourts.gov/images/stories/5-23-14_RRR%20_Letter.pdf).

<sup>117</sup> *In re Reines*, No. 14-MA004 14-4, 2014 WL 5649959, at \*2 (Fed. Cir. Nov. 5, 2014).

<sup>118</sup> *In re Terry*, Inquiry No. 08-234 (N.C. Judicial Standards Comm'n Apr. 1, 2009), available at <http://www.aoc.state.nc.us/www/public/coal/jsc/publicreprimands/jsc08-234.pdf>.

<sup>119</sup> Slater, *supra* note 5.

Facebook privacy settings.<sup>120</sup> Judges should also know how to address metadata in Microsoft Word and other documents. How to deal with metadata varies by which version of Word is being used, but helpful resources are available online.<sup>121</sup> Password protection for e-mail attachments is another aspect of technology that judges should consider. How this can be done depends on the version of Microsoft Word, once again, the Internet is a good place to find instructions on this topic.<sup>122</sup> Judges should also be able to encrypt e-mail attachments. This procedure varies depending on which version of e-mail software the judge is using, but online resources are available to explain.<sup>123</sup>

Lastly, when dealing with the potential issues arising from jurors utilizing the Internet, judges should consider the proposed model jury instructions in Appendix A. Mastering these basic techniques and using these various approaches to technology will enable judges to better avoid the many pitfalls that exist in today's technological world.

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<sup>120</sup> *Basic Privacy Settings & Tools*, FACEBOOK, <https://www.facebook.com/help/325807937506242/> (last visited Nov. 14, 2014).

<sup>121</sup> See *Find and Remove Metadata in Your Legal Documents*, MICROSOFT OFFICE, <http://office.microsoft.com/en-ca/word-help/find-and-remove-metadata-hidden-information-in-your-legal-documents-HA001077646.aspx> (last visited Nov. 14, 2014) (explaining how to find and remove metadata in the 2003 edition of Microsoft Office); *Remove Hidden Data and Personal Information by Inspecting Documents*, MICROSOFT OFFICE, <http://office.microsoft.com/en-us/word-help/remove-hidden-data-and-personal-information-by-inspecting-documents-HA010354329.aspx> (last visited Nov. 14, 2014) (discussing how to remove hidden data and personal information in the 2010 and 2013 editions of Microsoft Word).

<sup>122</sup> See *Password Protect Documents, Workbooks, and Presentations*, MICROSOFT OFFICE, <http://office.microsoft.com/en-us/word-help/password-protect-documents-workbooks-and-presentations-HA010148333.aspx> (last visited Nov. 14, 2014) (detailing how to set passwords for documents, workbooks, and presentations in the 2007 edition of Microsoft Office); see also Tony Bradley, *How Can I Protect My Microsoft Office Files?*, ABOUT TECHNOLOGY, [http://netsecurity.about.com/od/frequentlyaskedquestions/f/faq\\_encryptms.htm](http://netsecurity.about.com/od/frequentlyaskedquestions/f/faq_encryptms.htm) (last visited Nov. 14, 2014) (explaining how to protect various types of Microsoft Office files from multiple editions of Microsoft Office).

<sup>123</sup> See *IT Services/Documentation: Encrypt A Microsoft Office Word File (Windows 2010)*, UNIVERSITY OF CHICAGO, <http://answers.uchicago.edu/page.php?id=15910> (last visited Nov. 14, 2014) (discussing how to encrypt a document from the 2010 edition of Microsoft Word); *How to Password Protect or Encrypt MS Word Documents*, LINKER IT SOFTWARE, [http://www.oraxcel.com/projects/encoffice/help/protect\\_word.html](http://www.oraxcel.com/projects/encoffice/help/protect_word.html) (last visited Nov. 14, 2014) (examining how to encrypt Microsoft Word Documents in the 2002 and 2003 edition of Word).

## APPENDIX A

PROPOSED MODEL JURY INSTRUCTIONS  
THE USE OF ELECTRONIC TECHNOLOGY TO  
CONDUCT RESEARCH ON OR COMMUNICATE ABOUT  
A CASE<sup>†</sup>

*Prepared by the Judicial Conference Committee on Court Administration  
and Case Management  
June 2012*

[Note: These instructions should be provided to jurors before trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate.]

## BEFORE TRIAL:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if

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<sup>†</sup> JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2012), *available at* <http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf>.

I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

I hope that for all of you this case is interesting and noteworthy.

AT THE CLOSE OF THE CASE:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.