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The Jury Inside the Trial: Managing Virtual Sequestration, Instructions, Deadlock, and Decision

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As the number of jury trials decreases, there has been an increased interest not only in exploring why that is, but in examining how we conduct jury trials, particularly civil trials. Much of the focus has been on increasing juror comprehension, but as societal rules relax generally in our country, there has also been a renewed discussion about what conduct is appropriate in the jury trial context. This presentation will focus on several topics including virtual sequestration; juror understanding, comprehension, and trial participation; and jury verdicts, including the use of interrogatories.

I. Virtual Sequestration – Preventing Use of Social Media and the Internet by Jurors

A. Introduction – What Really Happens?

"Guilty. Guilty. I say no. I will not be swayed. Practicing for jury duty." – Facebook post

In a death penalty case, after the jury unanimously found the defendant guilty and that aggravated circumstances existed, they hung eleven for death and one for life in prison. The holdout juror later admitted that he went on the DOC Web site and looked at the background of each death row prisoner. He then did his own "proportionality review" and found that the defendant was not as bad as those prisoners, so he held out. The frightening thought is what if it were the other way around and the juror had obtained information that the defendant was worse than the other prisoners and used that to convince the other jurors to vote for death.

Mid-trial Tweets in a criminal case that resulted in a death sentence included comments such as "Choices to be made. Hearts to be broken. We each define the great line."

Jurors have used Facebook to "friend" parties, including criminal defendants, witnesses, lawyers, and even each other during tria1. Others have broadcast disparaging comments about other jurors – like a California juror who posted on Facebook that she "want[ed] to punch" a fellow juror for cracking her knuckles.

A juror frequently, after leaving the courtroom, "logged into her blog and wrote an entry describing the dialogue that took place in the jury room that day." Her blog posts included information about the demographics of the jury, the identity of the witnesses at trial, and the weight of the evidence.

In an Arkansas case, a juror used his smartphone to send eight Tweets from court during a case brought by investors against a building materials manufacturer. He Tweeted: "oh and nobody buy [the building product]. It's bad mojo and they'll probably cease to exist, now that their wallet is $12M lighter."

B. Internet Misconduct Is a Growing Issue

The risk of jurors communicating with others has always been present. Instantaneous communication, however, has further complicated the issue of juror impartiality. Simply by posting information on Facebook, Instagram, or Twitter (or any other social media platform), a

juror can communicate to thousands of people instantly, who can then respond to the juror with their own opinions. Many instances of juror misconduct are likely never reported or discovered. It is probable that many cases have been decided by jurors who conducted outside research but were never caught.

Among the many concerns is that "information" found on the Internet may be inaccurate. Use of such information also prevents the parties from knowing and confronting evidence brought against them – a critical violation of constitutional principles in the case of a criminal defendant. For instance, in researching the background of a suspected criminal, a juror may mistake the defendant for another person with the same name. This introduction of hidden information can also affect the juror's impartiality.

C. Why Jurors Engage in Internet Research

Research has shown that jurors typically conduct their own research because they feel that relevant information has been withheld. Furthermore, despite jury instructions, jurors might think there is nothing wrong with doing a quick Internet search. Finally, jurors turn to the Internet simply because it is an easy and convenient way to access additional information. Jurors get frustrated by the restriction of evidence and a belief that relevant information has been excluded. In a positive sense, jurors want to reach the most accurate result and think they are being helpful by consulting additional resources. Jurors often have no understanding or belief that they are doing anything wrong when they gather and share information via the Internet.

D. Why Jurors Communicate on Social Media Websites

Reuters Legal conducted a three-week study during late 2010 in which they searched for Tweets including the terms "jury duty." Shockingly, the search showed that a Tweet referencing jury duty was made nearly once every three minutes.

Jurors may post status updates in order to brag to others about the control they have over the outcome of a case. They may also be simply "addicted" to social media communication. Many jurors may be so accustomed to updating their Facebook, Twitter, Instagram, and blog posts that they cannot help but include information about their jury duty experience. Those jurors who post trial details on social media or their blog are not attempting to be helpful in aiding deliberations. Rather, they are simply unaware that they have done anything wrong. As one juror who was chastised for posting a comment about a trial explained, "I was just doing what I do every day." Not everyone acts either altruistically or innocently. Some engage in such conduct deliberately for reasons that are indeed detrimental to the process. One juror deliberately sent a "friend request" to the defendant in an auto tort trial in order to spur getting removed from the jury.

Regardless of the motivation, though, most courts have found that there is a presumption that any communication a juror has with someone outside the courtroom is prejudicial.

E. Consequences of Social Media and Internet Use

The two primary consequences of determining that jurors have improperly engaged in social media communications or internet research are dismissing the violating juror and declaring a mistrial. Neither is wholly satisfactory and both contribute to increasing inefficiency.

A California court excused six hundred jurors prior to trial after several potential jurors admitted to engaging in Internet research, causing unnecessary delay in the process. Even with individual juror dismissals, the trial is disrupted as the jurors reconfigure themselves, parties assess the impact, and time is lost on the investigation and decision. Mistrials or overturned verdicts, meanwhile, both decrease efficiency and have no effect, deterrent or otherwise, on the jurors.

F. Approaches to the Issues

A critical component of the jury trial is the court's ability to insulate jurors from information beyond what is intentionally presented at trial. It is imperative that a court immediately attempt to reverse the harmful effects of misconduct at trial — typically arising when jurors conduct their own extraneous research (as noted above) — as swiftly as possible. A court's mechanisms to remedy misconduct can vary by state, but the question comes down to whether the court, with the assistance and approval of the attorneys, is able to salvage the trial with the use of some type of curative instruction.

1. Jury Instructions Referencing Internet Misconduct

Regardless of the trial court's remedial action once the misconduct has already occurred, courts are increasingly attempting to stymie juror misconduct by addressing it at the outset of the trial with preliminary jury instructions. During a three-year study on juries and social media, the Court Administration and Case Management Committee of the Judicial Conference of the United States found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[1] A growing body of research recommends that courts should not only explicitly state what type of extrinsic influence is off-limits to jurors (Facebook, Wikipedia, Google Maps, etc.), but should also discuss the prejudicial and evidentiary grounds behind <u>why</u> this information cannot be considered by the jury, as well as the severe consequences to the judicial system (mistrials as a lost asset), the litigants (financial and emotional burden of a second trial), and to the jurors (exposure to contempt of court and fines). Because pretrial jury instructions can often get long-winded resulting in jurors losing focus, providing a written copy of these instructions that include the prohibited types of online information gathering and contact can benefit the court and all parties involved.

To date, courts have primarily relied upon jury instructions as the solution. California's civil jury instructions, as an example, include a pretrial instruction against using the internet to read about

[1] 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*, USCourts.gov (June 2012), available at <http://www.uscourts.gov/sites/default/files/jury-instructions.pdf>.

the case or anyone in it, as well as a direction to promptly report the receipt of outside information to the court bailiff.[2] A common instruction is on the order of:

> You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer, the internet, any internet service, or any text or instant messaging service; or 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.

Many courts, though, leave it up to the individual judge's discretion to decide whether the instruction should be given. Researchers focusing on instructions have developed some guidelines that may help strengthen their effect. For instance, it is believed that jurors are more likely to realize that their actions are inappropriate if they are told specifically not to use the Internet to research and that limits on communication include social media websites. Those instructions may be more successful if they inform jurors why they are prohibited from such research and communications. In New York, criminal jury instructions include, "I want you to understand why these rules are so important," then explaining the significance of juries isolating themselves from any information or influence that was not deemed admissible in court, the right to confront all evidence being used against a party, the validity of a verdict that is obtained by following the rules, and how the rules guarantee a fair trial. A UK Study by Professor Cheryl Thomas found that providing the jurors with written guidelines on the restrictions was twice as effective as repeated oral warnings.

Most trial lawyers know that the standard instruction is given to jurors at every break to not use social media websites to communicate about the trial. Progressive commentators and courts are also looking at confronting the issue from the very start – at jury selection.

2. Voir Dire Questioning on Susceptibility

Some judges now permit or encourage using the voir dire process to question jurors to determine if they are "at risk" for abusing Internet and social media websites while serving on the jury. Questions can be used to see if jurors are likely to break the rules regarding Internet activity or if they have already engaged in harmful Internet research. Simply asking the jurors if they are willing and able to refrain from conducting Internet research can go a long way in limiting Internet misconduct from the start of the proceedings. After one Kansas City attorney asked potential jurors if they would be able to refrain from engaging in Internet research about the trial, an estimated six to ten jurors admitted that they would not be able to follow the rule. One concern, though, is that eliminating those prospective jurors who engage in high levels of Internet research may result in unbalanced juries.

[2] Preliminary Admonition, California Uniform Jury Instructions, CACI No. 100, available at <http://www.courts.ca.gov/partners/documents/caci_2018_edition.pdf>.

3. Restricting Jurors' Access to Electronic Devices

Restrictions on jurors' use of electronic devices while in the courtroom and during jury deliberation have been mainstays for several years. Some courts have gone so far as taking away jurors' electronic devices while they are serving on the jury. For example, a court in St. Paul, Minnesota began requiring jurors to leave all wireless devices at home after experiencing two mistrials due to electronic communication. These efforts to limit access to electronic devices have several obvious drawbacks, of course. First, even if jurors' use of electronic devices is limited while they are in the courtroom, jurors still have access to the Internet at home. As a result, outside research or communications via social media websites is still likely to occur during the jurors' time away from the trial. Second, jurors will likely respond very negatively to not being able to communicate about ordinary day to day necessities such as child care, work issues, and transportation. The fact is simply that communication devices have become an integral part of how most people conduct their personal and business lives.

4. The "Modern Jury"

Some researchers and commentators have suggested instead that the necessary move is to adjust the role of the jury. B. Michael Dann, a county judge in Arizona, has supported a theory of a more active jury. Judge Dann encourages a courtroom where jurors are able to take notes during trial, ask clarifying questions, discuss the case with their fellow jurors prior to deliberations, and even question the witnesses. The theory is that jurors who are able to take on a more active role will be less likely to seek additional information on the Internet. Specifically regarding the restriction that jurors not discuss the case with their fellow jurors before deliberations, in order to prevent jurors from reaching conclusions before all evidence is in, some see this restriction as an outdated and unnecessary limitation. Others, though, believe that pre-deliberation discussions may in fact cause additional questions to rise, and increase the jurors' frustration about withheld information and propensity to look for answers through another source, the Internet.

5. The Discretionary Spectrum: Curative Instructions Versus Declaring a Mistrial

When presented with juror misconduct and whether to declare a mistrial, state trial courts will examine a variety of factors focused on the juror's misconduct and the influence the misconduct (usually some form of extraneous research) had on the jury, but the level of discretion varies by state. In Oregon, for example, trial judges tend to have wide latitude in deciding whether to declare a mistrial or to try solving the issue with curative instructions. On the other hand, consider Maryland, which now requires new trials whenever juror misconduct suggests "even the hint of possible bias or prejudice." *Wardlaw v. State*, 185 Md. App. 440, 451 (2009). Indeed, most jurisdictions have automatic grounds for mistrial (e.g., a plaintiff raising the issue of a civil defendant's liability insurance; or, in the criminal context, the prosecutor calling the defendant to take the stand). However, for the most part, the determination rests with the trial judge to declare a mistrial and grant a motion for a new trial or instead try to salvage the trial at hand with a

curative instruction; on appeal, this decision is largely reviewed under an abuse of discretion standard.[3]

In the federal realm, when reviewing for error at the district court level, the circuits largely examine the presence of prejudice resulting from misconduct using a two-step approach consisting of (1) what the extraneous information was and (2) how impactful the extraneous information could have been,[4] which appears fixed across the circuits. However, the circuits differ in opinion on who has the initial burden of showing prejudice warranting a new trial.[5] The Second, Fourth, Seventh, Tenth, and Eleventh circuits apply a rebuttable presumption of prejudice when jurors come into contact with potentially influential extraneous information, as outlined in *Remmer v. United States*, 347 U.S. 227 (1954), while the Fifth, Sixth, and D.C. Circuits follow the U.S. Supreme Court's departure from the *Remmer* standard and instead places the burden of demonstrating bias with the defendant, as outlined in *Smith v. Phillips*, 455 U.S. 209 (1982). The First, Third, Eighth, and Ninth Circuits, however, let the severity of the juror's misconduct in question determine whether to apply the *Remmer* presumption of prejudice.

6. Identifying Violators

Because the risk cannot be eliminated, it is more imperative that courts work to find a method to identify jurors who did engage in Internet misconduct. One suggestion that has received varying support is monitoring jurors' social media websites for questionable posts made during the trial. While this may find Tweets or blog or Facebook posts, such searches will often be unsuccessful at tracking down social media communications. Those searches also cannot detect individuals who engage in Internet research. Moreover, jurors who are told their Internet activity is going to be monitored will probably be outraged at what appears to be a significant infringement of their privacy.

Research has found that the surest way to effectively identify violators as soon as the impermissible action has occurred is for the judge to actively question jurors about their Internet activity throughout the trial. Most jurors, particularly those who are unsure or confused about the impermissibility of the conduct, will reveal their actions. Such questioning may also prompt other jurors to reveal conduct of another about which they have learned. As suggested by the South Dakota Supreme Court, jurors should be questioned periodically, after breaks, and before and after deliberations, to ensure that they have not conducted external research or communicated about the case. In one case, a bailiff found copies of printouts from Internet research on the conference table in the jury room, after the verdict had been delivered and the jury

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[3] See, e.g., *Whitley v. Gwinnett County*, 221 Ga. App. 18, 25 (11), 470 S.E.2d 724 (1996); *Dillard v. State*, 415 Md. 445, 454 (2010);

[4] Circuit courts look to (1) whether extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict. *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). *See also United States v. Swinton*, 75 F.3d 374, 382 (8th Cir. 1996).

[5] *See generally* Matthew Fredrickson, *Conformity in Confusion: Applying a Common Analysis to Wikipedia-Based Jury Misconduct*, 9 Wash J.L. Tech. & Arts 19 (2013).

discharged. Repeated questioning heightens the chance to detect a violation as early as possible and prevent a potential waste of resources.

Actively questioning jurors also allows the court to have a better sense of whether the alleged Internet misconduct is severe enough to necessitate a mistrial and/or juror dismissal. Specifically, the court can determine whether the information obtained or outside communication creates a situation where a juror is no longer impartial and whether and how far that impartiality and conduct has infected the rest of the jury.

During this active questioning, the judge should also remind jurors of the importance of their duty, if they are aware of any Internet misconduct, to bring that information to the court's attention. An example of an instruction that would encourage reporting was proposed by the Florida Joint Report of the Committees on Standard Jury Instructions. During closing instructions, the judge is to instruct the jury, "[i]f you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff."

7. The Issue of Punishment

As with explaining to jurors the reasons behind the prohibition on research and communications, another means of limiting the improper conduct is to inform jurors of the legal penalties they face if they engage in these prohibited activities. Judges need to make it clear that Internet misconduct is a violation of law and that there are consequences for these actions. Currently, there is a stark lack of guidance to courts about punishment options and best practices of punishment, meaning that individual judges determine how and whether to punish jurors on a case-by-case basis. Without a clear rule, many jurors go unpunished, resulting in a lack of deterrence. There are numerous examples of egregious misconduct where a judge merely dismissed the juror. Other judges have been less lenient. For example, a Michigan juror who, the day before the verdict was given, posted a Facebook status stating that the defendant would be found guilty, was penalized with a $250 fine and required to write a five-page paper on the importance of the Sixth Amendment. Other examples include:

- In Texas, a juror attempted to "friend-request" the defendant in a tort action. The defendant notified her attorneys who, in turn, alerted the court. The juror told the court he thought he had sent the friend request to another person with the same name as the defendant. The juror was removed from the jury and pleaded guilty to contempt; the juror received a sentence of 16 hours community service.[6] Prior to the juror's misconduct, Texas had added specific language regarding the misuse of social medial to its preliminary jury instructions. This language discussed prohibitions against updating Facebook and Twitter with a trial's details.

- In 2012, a Florida juror was dismissed from duty after he attempted to "friend-request" a defendant in an auto negligence trial. After his dismissal, the Florida juror proceeded to update his Facebook followers, posting: "Score . . . I got dismissed!!

[6] https://www.digitaltrends.com/social-media/juror-gets-caught-adding-female-defendant-to-facebook-friends-list/

Apparently they frown upon sending a friend request to the defendant . . . haha." The trial continued, but a circuit court judge sentenced the dismissed juror to three days in jail for criminal contempt.[7]

- In 2006, a California lawyer blogged about the details of a criminal case that he was serving on as a juror. To make matters worse, the attorney/juror failed to disclose his profession during voir dire, despite a jury questionnaire so pointedly asking. In his blog post, the lawyer quipped about the lack of rules prohibiting him from blogging about the case, despite a preliminary jury admonition prohibiting jurors from discussing "anything concerning [the] case with anyone . . . ." The lawyer's actions resulted in a set-aside of the verdict, and state bar disciplinary actions were brought against the lawyer. He ultimately received a 45-day suspension and paid $14,000 in legal fees.[8]

- In a 2006 federal criminal trial, a juror brought his laptop to deliberations. The juror had not been able to access the wireless internet, but had used his laptop to play an audio CD that had been introduced into evidence. The juror further stated that he had used a program called "Microsoft Map Point" to answer a question that arose during deliberations about the distance between two locations at issue in the trial. On appeal, the Sixth Circuit held that the district court did not err in denying the defendant's motion for a new trial, instead relying on privately admonishing the juror and issuing a curative instruction to the jury to "[s]tick to what you have, the evidence in this case only." *United States v. Wheaton*, 517 F.3d 350, 359 (6th Cir. 2008). In the district court's investigation as to whether the juror's misconduct had tainted the jury, the judge explained that if the discussions about the distance between the locations had "in any way impacted or affected or made its way into your decision-making process one way or the other . . . or to any extent, even minimally, swayed you either way, we have to know about it." *Id.* The jurors responded that the locations did not sway them one way or the other. *Id.*

Punishment can only be appropriate and effective as a deterrent, though, when jurors have been given clear instructions to not engage Internet misconduct. Some judges and jury advocates assert that punishment should also be restricted to cases where the misconduct brings the juror's impartiality into question or has deliberately infected the entire jury. In 2011, the California State Legislature adopted a model for effective punishment and deterrence. Under Assembly Bill Number 141, jurors who communicate or research a case on the Internet face civil or criminal contempt of court charges and may also be confronted with potential misdemeanor charges. Furthermore, the new law requires judges to specifically inform jurors that the research and communication prohibition includes electronic and wireless research and communication.

Punishment, of course, still does little to promote efficiency. Also, many jurors engage in Internet activity without ever being detected. Punishments also may so increase fear that

[7] http://www.abajournal.com/news/article/juror_who_friended_defendant_on_facebook_then_bragged_about_being_booted/

[8] John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. Times, Sept. 13, 2009, at A1.

jurors may resist reporting known violations if they think it will result in a formal punishment. To resolve these concerns, courts should not only be proactive identifying jurors who have obtained or disclosed information about the trial but also make it clear that there is a duty and responsibility for jurors to report known violations.

Additional Sources – Section I

The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights; 2012 Univ. Illinois Law Rev. 577

The Unjust "Web" We Weave: The Evolution of Social Media and Its Psychological Impact on Juror Impartiality and Fair Trials; 36 Law & Psychology Rev. 275 (2012)

Social Media and Juries: Proposed Solutions; Narelle Harris, LaTrobe University (2018)

Social Media and Jurors; Hon. Dennis Sweeney, Maryland Bar Journal (Dec. 2010)

Ensuring an Impartial Jury in the Age of Social Media; 11 Duke Law and Technology Rev. 1 (2012)

Trial by Google: Juror Misconduct in the Age of Social Media; The Federal Lawyer (Jan./Feb. 2018)

Juries and Social Media; Victorian Department of Justice (2015)

A Fair Trial: Jurors Use of Electronic Devices and the Internet; ABA National Conference of State Trial Judges (2010)

II. Jury Pre-Advisement

Pre-advising jurors on burdens of proof, evidentiary standards, or even substantive law applicable to a case can provide a case's legal context and aid in juror comprehension, particularly in cases with unusual facts or complex law.

Some states require judges to pre-instruct jurors to some degree before the evidentiary portion of the trial. One example is Oregon Rule of Civil Procedure (ORCP) 58 B(2), which requires pre-instruction:

> "After the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions to witness if permitted, *and the legal principles that will govern the proceedings*."

(Emphasis added.) Note that this rule does not clearly indicate how extensive the court's instructions must be. Seven other states require courts to pre-instruct jurors on substantive law.[9] The procedural rules governing substantive pre-instruction vary from state to state, and, at least in Oregon, are discussed in local rules and recommended practices. In Multnomah County, for example, the Presiding Court Task Force on Civil Jury Trial Practices (2008) directs the parties to confer and agree on preliminary instructions. This practice guide directs the court to "include the elements of the claims and defenses, [in addition to] definitions of unfamiliar legal terms," but notes that the preliminary instructions should not be as specific as either the pleadings or final instructions.[10]

Aside from pre-advisement on the law, jurors are increasingly receiving pretrial instructions on juror note-taking and their ability to ask questions of witnesses, as well as the ever-expanding area of juror misconduct, all discussed in depth, below.

III. Procedural Tools to Maximize Juror Comprehension and Information Retention: Note-Taking and Juror Questioning

A. Juror Note-Taking

Juror note-taking is now a widely accepted practice in most jurisdictions, as the vast-majority of state courts allow jurors to take notes at trial.[11] Juror note-taking can help immensely with juror information retention, especially in complex civil trials. Four states mandate that trial judges allow juror note-taking, but whether jurors may take notes largely rests with the discretion of the trial court. Because juror note-taking is largely a discretionary function of the court, attorneys in complex civil cases should consider whether it would be beneficial in their case and request the court's allowance of the practice prior to trial, in addition to a preliminary instruction to the jury. Providing a notepad to jurors prior to the evidentiary portion of trial not only serves to help with a juror's retention of information but can also serve as a means for jurors to write down any questions they may have for a witness after that witness's direct and cross.

A few of the main concerns weighing against note-taking is the possibility of jurors with better notes unduly influencing and/or misleading other jurors, or jurors accentuating factual or legal irrelevancies and ignoring the more substantial evidence. *People v. Whitt*, 36 Cal. 3d 724, 746 (1984) (citing *People v. DiLuca*, 448 N.Y.S.2d 730, 734 (1982)). This concern can be tempered by the court providing pretrial instructions on note-taking, as well as a note-taking instruction after the evidentiary portion of the trial but prior to jury deliberations. For example, California civil pattern jury instructions alleviate the above concerns by instructing the jury that note-taking should only serve to remind the jurors of what happened at trial and that a juror's independent recollection of the evidence should govern.[12] Further, these pattern instructions state jurors

[9] Hon. Gregory E. Mize, *et al.*, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (2007), National Center for State Courts, at 36.

[10] Multnomah County Presiding Court Task Force on Civil Jury Trial Practices, *Recommended Practices for Civil Jury Trials* (2008), § VII(B) (available at http://www.mbabar.org/assets/documents/courts/civiljurytrialreportbw.pdf).

[11] *The State-of-the-States Survey of Jury Improvement Efforts*, at 32.

[12] Taking Notes During Trial, California Uniform Jury Instructions, CACI No. 102, available at <http://www.courts.ca.gov/partners/documents/caci_2018_edition.pdf>.

should not allow themselves to be influenced by the notes of other jurors if the notes differ from what that juror remembers.[13]

B. Juror Questions

"Juror questioning is a course fraught with peril for the trial court. No bright-line rule is adopted here, but the dangers in the practice are very considerable." *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 517 (4th Cir. 1985).

While questioning by jurors can be improper and/or prejudicial to the point of requiring a mistrial or reversal on appeal, allowing controlled questioning by jurors is becoming a more prevalent practice that is largely viewed as aiding juror understanding of the case. Oregon procedural rules, for example, explicitly permit juror questioning "with the court's consent," pursuant to ORCP 58 B(9). California also allows trial court discretion in submitting written questions directed at witnesses pursuant to California Rules of Court, Rule 2.1033.[14]

1. Practical Suggestions for Trial With Juror Questions

i. Attorneys should raise the issue of juror-submitted questions prior to trial and request the trial court address and describe the court's policy on this subject with the trial court's preliminary instructions. During the preliminary instructions, the court should include an explanation to the jurors as to why some questions may not be asked. All juror-submitted questions should be retained by the clerk as part of the court record whether or not the questions are asked.[15]

ii. The court should advise the jurors of the opportunity to write questions for witnesses prior to the first witness being called. The court should then allow the jury to ask written questions after the witness has testified but before the witness has left the stand.[16]

a. Counsel should pass the written question amongst themselves and the court should consider a sidebar conference to allow attorneys a chance to object to a juror's question.

i. The court should permit counsel to ask follow-up questions after juror questioning.[17]

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[13] *Id.*

[14] "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury." Cal. Rules of Court, Rule 2.1033.

[15] *9th Cir. Best Trial Practices Handbook* (2013), at 77 (available at <https://www.ca9.uscourts.gov/district/guides/MJTP.pdf>)

[16] Multnomah County Presiding Court Task Force on Civil Jury Trial Practices, *Recommended Practices for Civil Jury Trials* (2008), § VII(D).

[17] *9th Cir. Best Trial Practices Handbook* (2013), at 77.

IV. Verdict Urging ("Dynamite" Charges / "*Allen*"[18] Charges as Applied to Civil Cases)

Verdict urging is a supplemental instruction given by the court if, after an initial deliberation, a jury indicates it is unable to agree on a verdict. In urging verdicts, a court must delicately balance asking jurors to reconsider their initial views while not abandoning their conscientiously-held opinions with not coercing the minority of juror holdouts to join the majority's position. Verdict urging is typically viewed as beneficial to judicial economy, as it saves the court and the litigants from the time and expenses associated with a second trial. However, it simultaneously runs the risk of an urged jury rendering an incorrect verdict because of the potential stress placed on minority-view jurors. A hung jury is, after all, an acceptable jury outcome. Defense attorneys should be wary of a request to urge a verdict and should be mindful of the language used in this type of supplemental charge.

Many states have approved the ABA model language for a supplemental verdict-urging charge, as outlined in the ABA's *Standards for Criminal Justice* § 15-4.4 (2d ed. 1986) (and then as applied to civil cases). The ABA recommends a five-part instruction,[19] which many states have adopted. The Oregon Supreme Court, for instance, has held that verdict-urging instructions are permissible in civil cases if the instruction closely follows an Oregon Supreme Court-approved instruction,[20] which dovetails closely with the model ABA version. *State v. Marsh*, 260 Or. 416, 443 n. 58 (1971). However, some jurisdictions do not allow any alteration to the ABA-approved language when issuing this supplemental charge.

Defense attorneys closely mind the language their jurisdiction requires in issuing these so-called "dynamite charges," so monikered from *Green v. United States*, 309 F.2d 852, 853 (5th Cir. 1962). Further, an attorney should object to any language that could possibly be perceived as coercive to any juror—especially the jurors who might be in a defense-favorable minority—or move for a new trial if the jury renders a coercively-induced plaintiff's verdict after the court urges the jury to deliberate further.

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[18] *Allen v. United States*, 164 U.S. 492 (1896).

[19] The five-part instruction reads: "[T]hat in order to return a verdict, each juror must agree thereto; (ii) [T]hat jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment; (iii) [T]hat each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors; (iv) [T]hat in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and (v) [T]hat no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict."

[20] The Oregon Supreme Court has approved the following language: "It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."

V. Communicating With the Jury During Trial

A. Judicial *Ex Parte* Communication to Jurors

A final concern during trial is *ex parte* communications with members of the jury, whether by the presiding judge or the attorneys. As a general rule, judges should not communicate with the jury on any matter pertaining to the case except after giving notice to litigating parties and allowing reasonable opportunity for the parties' presence and objection.[21] This rule tends to be most commonly violated when jurors send notes to the court seeking clarification on facts or law, or in reporting the jury is deadlocked.

Communications inquiring about the jury's comfort or other non-substantive issues are typically proper and unlikely to result in a mistrial or a remand for a new trial.[22] On the other hand, any jury issue requiring supplementary instructions (such as a supplemental charge urging a verdict), or clarification on an issue of law necessitates the involvement of each side's attorney, in order to afford both parties the opportunity to object and/or to craft a response to the jury that is mutually acceptable.

Likewise, communications by a judge that could potentially coerce a jury into reaching a verdict one way or the other are improper and could be considered inherently prejudicial.[23] In *United States v. U.S. Gypsum Co.*, the Supreme Court did not necessarily take issue with the fact that the trial court had communicated *ex parte* with the jury, despite noting the undesirability of this action; the Court instead reversed the defendant's conviction because after the *ex parte* communication, the jury foreman returned to the jury under the impression that the judge was "after a verdict one way or the other," and could have potentially communicated that misunderstood impression to other jurors. 438 U.S. 422, 432 (1978). The inherent prejudice of this impression—and communicating this impression—was complicated by the fact that counsel was not given a chance to "correct whatever mistaken impression the foreman might have taken from [the *ex parte*] communication" because counsel was not present during the meeting between the judge and the foreman. *Id.* 462.

B. Attorney *Ex Parte* Communication to Jurors

Communication between attorneys and jurors is, as a general rule, prohibited.[24] Interestingly, developing technology and the intricacies of social media may put prohibitions against these *ex parte* communications at odds with other ethical obligations of attorneys. Under ABA Model Rule 1.1, for example, attorneys have a duty to be thorough and prepared for trial, which can include reviewing a juror's internet presence. Some states, like Missouri,[25] may require an online investigation of a prospective juror's litigation history in order for a lawyer to comply

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[21] *See Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919).

[22] ABA, *Standards for Criminal Justice* § 15-3.7 (2d ed. 1986) (a judge "should not communicate with a jury on any aspect of the case itself (as distinguished from matters relating to physical comforts and the like), except after notice to all parties and reasonable opportunity for them to be present").

[23] *See United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978).

[24] ABA Model Rule 3.5(b) ("A lawyer shall not communicate ex parte with [a juror or prospective juror] during the proceeding unless authorized to do so by law or court order.")

[25] *Johnson v. McCollough*, 306 S.W.3d 551 (Mo. 2010).

with her ethical duties. The ABA's Formal Opinion 466 further states lawyers have a duty to investigate prospective jurors' litigation history. This can include reviewing LinkedIn and/or social media profiles. However, the line is drawn at reviewing profiles; the ABA has explicitly stated that "friend-requesting," or requesting access, to a juror's social media material amounts to "communication" and is prohibited under the rule.[26] Simply viewing content made open and available to the general public, however, does not amount to a communication, even when the online platform notifies the juror or potential juror that the attorney has reviewed their profile and online content.[27]

VI. Jury Verdicts and Interrogatories

The use of special verdicts and general verdicts with questions (interrogatories) is not a new phenomenon. Long before the Federal Rules of Civil Procedure were enacted, they were used at common law with their roots in English Common Law. Since 1938, however, the use of special verdicts and general verdicts with interrogatories has been governed by the Federal Rules of Civil Procedure (Fed. R. Civ. P. 49). *See*, https://www.law.cornell.edu/rules/frcp/rule_49. While the two types of verdicts appear similar enough, they are two distinct types of verdicts and have completely different applications.

A. Special Verdicts

(1) *In General*. The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) *Instructions.* The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) *Issues Not Submitted.* A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

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[26] *See* ABA Formal Opinion 466 (2014).
[27] *Id.*

Special verdicts are useful to focus the jury on the facts as opposed to rendering a decision on an emotive basis. "We are aware that it has been said that among the purposes of a special verdict are the emphasis of facts and the removal of elements of personalities and prejudice, and that lack of knowledge by the jury as to the effect of its findings is helpful in the achievement of those purposes." *Lowery v. Clouse*, 348 F.2d 252, 260 (8th Cir., 1965). It is noted, however, that in federal court such is not a matter of right but rather discretionary with the Court. *Id*. State Courts may permit special verdicts as a matter of right though. *Id*. When used, though, "the jury's sole function is to determine the facts; therefore, neither an instruction on the law nor a summary concerning their role in relation to the law [is] necessary." *Portage II v. Bryant Petroleum Co*., 899 F.2d 1514, 1521 (6th Cir., 1990).

Special verdicts are useful to avoid situations similar to that which arose in *Munafo v. Metro. Trans. Auth*., 277 F.Supp. 2d 163, 166 – 167 (E.D.N.Y., Aug. 4, 2003) wherein the Court issued a special verdict form to the jurors for determination of specific facts. Numerous questions and issues were raised by the jurors, which were addressed by counsel and the court thereby enabling the jury to re-convene to continue deliberations. *Id*. The jury was called upon to determine certain facts as reflected in the special verdict form, to which the Court applied the legal conclusion to render a result. *Id*. Some of the jurors disagreed with the ultimate outcome, but they did NOT disagree with their findings of fact that resulted in the legal conclusion. *Id*.

> When considering a motion for a new trial based on an alleged error in the special interrogatories posed to the jury, the court must determine if the interrogatories submitted to the jury, when read in conjunction with the jury charge, fairly and accurately framed the issues to be decided. *Romano v. Howarth,* 998 F.2d 101, 105 (2d Cir. 1993). A new trial should only be granted if the special interrogatories used served to mislead and confuse the jury or inaccurately framed the issues to be resolved. *Cann v. Ford Motor Company,* 658 F.2d 54, 58 (2d Cir. 1981). Plaintiff does not contend that the charge with respect to *Mount Healthy's* dual motive defense was defective in any manner. Nor was any objection raised by either party asserting that the special verdict form was at all unclear or misleading. So long as there is nothing misleading about the special verdict form or the instructions that guided it, a district court is entitled to rely upon the jury's finding and enter a judgment upon it. *Parker v. Sony Pictures Entertainment, Inc.,* 260 F.3d 100, 108 (2d Cir. 2001). Indeed, "the court must assume that the jury followed not only the law as explained to it in the jury charge but also the literal, grammatical meaning of the special interrogatories posed." *Keywell Corp. v. Piper & Marbury LLP,* 2001 U.S. Dist. LEXIS 12835, 2001 WL 967567, *4 (W.D.N.Y. Aug. 22, 2001) (citing *Manufacturers Hanover Trust Co. v. Drysdale Sec. Corp.,* 801 F.2d 13, 27 (2d Cir. 1986)).
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> *Id*. at 171.

Thus, when trying a case to a jury, it is worth considering a request for a special verdict. This is particularly so when a concern arises that the jury may be persuaded to find for a party when the facts do not warrant such a finding. In essence, you will be removing one function of the jury – to determine if the facts support the legal conclusion. The jury will no longer be persuaded by

prejudice and will be limited to a fact-finding mission. The court will then apply those facts to the law to render a verdict.

B. General Verdicts With Interrogatories

> (1) *In General.* The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.
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> (2) *Verdict and Answers Consistent.* When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.
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> (3) *Answers Inconsistent with the Verdict.* When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:
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> > (A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;
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> > (B) direct the jury to further consider its answers and verdict; or
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> > (C) order a new trial.
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> (4) *Answers Inconsistent with Each Other and the Verdict.* When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.
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> Civ. R. 49(b)

Unlike special verdicts, which are fact-finding missions allowing the Court to render a verdict based on the facts, general verdicts with interrogatories involve the jury performing both essential functions. The jury will render a verdict and will answer specific questions. For example, the issue at trial might be whether a defendant infringed on a plaintiff's intellectual property rights. The jury may return a general verdict in favor of the plaintiff, but may also answer questions pertaining to the verdict such as whether the infringement was knowing or reckless. When a general verdict with interrogatories are used, though, the court may not substitute its judgment for that of the jury. *Portage II*, 899 F.2d at 1525.

While courts may not substitute its judgment over the jury's verdict, there are times when issues arise. Answers to the questions might not be consistent with the general verdict. Generally, when "the answer to the special issue [is] inconsistent with the general verdict, the court … must either return the case to the jury for further consideration of its answers, or grant a new trial." *Welch v. Bauer*, 186 F.2d 1002, 1004 (5th Cir., 1951). However, if the answers to the interrogatories are

consistent with each other but are not consistent with the general verdict the court may enter judgment such that it is consistent with the answers. *See, e.g., Fuselier v. Thompson*, 155 F.Supp. 75, 77 (W.D. La., Aug. 2, 1957).

In conclusion, careful consideration should be taken to the use of either special verdicts or general verdicts with interrogatories. In federal court, such use is discretionary with the Court. However, states may have a mandatory requirement for such verdicts upon request of a party. The use of Civ. R. 49 can provide substantial insight into the fact-finding and jury deliberation process to test the verdict (or in the case of a special verdict to form the basis for same by the court). The more complex the case, the more beneficial Civ. R. 49 will be – especially is post-trial motions or appeals are contemplated.