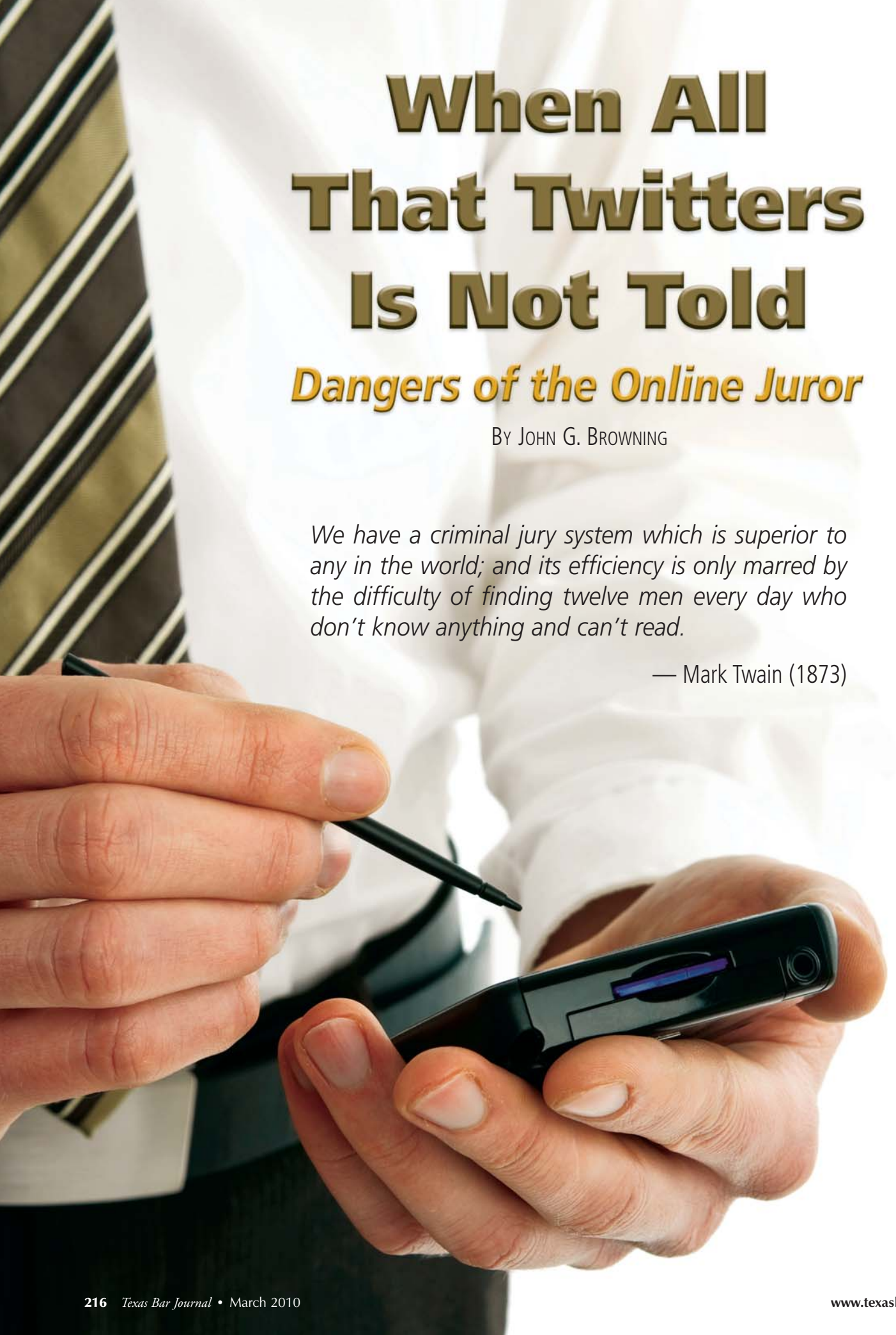

When All That Twitters Is Not Told

Dangers of the Online Juror

By John G. Browning

We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.

— Mark Twain (1873)

Mark Twain's frustrations with the jury system, which he castigated as imposing "a ban upon intelligence and honesty," and demands that a jury be "an intellectual vacuum," have been echoed by many a juror over the years. Of course, neither Twain nor most present-day jurors fully appreciated the importance to the integrity of our justice system of controlling, scrutinizing, and challenging the evidence that comes before a jury. The difference with the modern juror, however, is that the modern juror has technology that enables him or her to access a wealth of information with just a few clicks and to communicate instantaneously with the outside world via Tweets, blogs, texts, and emails.

In an era in which nearly 60 percent of American Internet users have a profile on a social networking site and in which people have grown accustomed to getting everything from news to driving directions from online sources, it is more challenging than ever to ensure that jurors remain unbiased *tabulae rasae*, considering only the information and evidence presented during trial. You don't have to have actually observed panelists called for jury duty, pounding away at BlackBerrys, iPhones, and other web-enabled wireless devices. Just consider the following recent examples:

- In November 2008, a juror on a child abduction/sexual assault trial in Lancastershire, England, was torn about how to vote. So she posted details of the case online for her Facebook "friends" and announced that she would be holding a poll. After the court was tipped off, the woman was dismissed from the jury.
- In March 2009, an eight-week-long federal drug trial involving Internet pharmacies was disrupted by the revelation that a juror had been doing online research about the case, including looking into evidence that the court had specifically excluded. When U.S. District Judge William Zloch questioned other members of the jury, he was astonished to learn that eight other jurors had been doing the same thing, including running Google searches on the lawyers and the defendants, reading online media coverage of the case, and consulting Wikipedia for definitions. After the judge declared a mistrial, defense attorney Peter Raben expressed his shock at the jurors' online activities. "We were stunned," he said. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."[1]
- In June 2007, a California appellate court reversed the burglary conviction of Donald McNeely when it was revealed that the foreman of the jury had committed misconduct and deprived the defendant of a fair trial by discussing deliberations on his blog. The foreman, a lawyer who had identified himself as a project manager for his company because it was "[m]ore neutral than a lawyer," blogged about McNeely, his fellow jurors and their discussions, particularly one juror who was "threatening to torpedo two of the counts in his quest for tyrannical jurisprudence."[2]
- In November 2007, the Supreme Court of Appeals of West Virginia reversed the conviction of Danny Cecil for felony sexual abuse of two teenage girls. Two members of the jury had looked up the MySpace profile of one of the alleged victims and shared its contents with other jurors. Even though it found that the online sleuthing had not necessarily revealed anything relevant, the Court held that "the mere fact that members of a jury in a serious felony case conducted any extrajudicial investigation on their own is gross juror misconduct which simply cannot be permitted." As the Court further noted, "Any challenge to the lack of the impartiality of a jury assaults the very heart of due process."
- In the May 2009 case of *Zarzine Wardlaw v. State of Maryland*, Maryland's Special Court of Appeals looked at the circumstances behind the conviction of a man charged with rape, child sexual abuse, and incest involving his 17-year-old daughter. During the trial, a therapeutic behav-

ioral specialist had testified about working with the victim on behavioral issues such as anger management and had opined that the girl suffered from several psychological disorders, including oppositional defiant disorder (ODD). A juror took it upon herself to research ODD online, discovered that lying was a trait associated with the illness, and apparently shared this knowledge with the other jurors. Another member of the jury sent a note informing the judge about this development. After reading the note to counsel for both sides, the judge denied a defense motion for a mistrial and simply reminded the entire jury of his instructions not to research or investigate the case on their own "whether it's on the Internet or in any other way." The appellate court found that this was not enough, and that since the victim's credibility was a crucial issue, the juror's Internet research and the reporting of her findings to the rest of the jury "constituted egregious misconduct" that could well have been "an undue influence on the rest of the jurors." As a result, the trial judge was reversed and a mistrial was granted.[3]

- In October 2009, U.S. District Judge D. Brock Hornby denied a motion for new trial in a wrongful death case in which a juror admittedly sent Facebook "friend" requests to two of the plaintiffs, learned of their "party animal" ways from their Facebook pages, and emailed plaintiffs' counsel that his client had "advocated the use of mushrooms and weed smoking, and binge drinking all over the Internet." After the attorney brought the allegation of juror misconduct to the court's attention, Judge Hornby's investigation determined that the juror in question had found certain photos and postings on the social networking site "a day or two after" the verdict and that the juror insisted that the Facebook information was never discussed during deliberations. Accordingly, he denied the motion for mistrial.[4]
- After the December 2009 embezzlement conviction of Baltimore Mayor Sheila Dixon, defense attorneys sought a new trial in part because five jurors had become Facebook "friends" during trial and allegedly discussed the case. According to Dixon's lawyers, these Facebook friends had communicated among themselves, writing on each other's Facebook walls, and one even received an outsider's online opinion of what the verdict should be.
- Also in December 2009, the Maryland Court of Special Appeals overturned the 2008 first-degree murder conviction of Allan Jake Clark, based on evidence that jurors had consulted Wikipedia for definitions. Printouts in the jury room revealed that among the information sought were details about how the settling of blood after death can help determine the time and place of death — issues that were raised at Clark's trial. Writing for the Court, Judge Charles E. Moylan, Jr. noted that an "adverse influence on a single juror compromises the impartiality of the entire jury panel."[5]
- Following a December 2009 verdict exonerating a police officer in a Taser-related wrongful death case in federal court in Louisville, Ky., lawyers for the estate of decedent Larry Noles filed a motion to set aside the verdict. They maintain that at least two jurors, including the jury foreman, consulted Taser International's website and used information from the site to persuade other jurors that Tasers are non-lethal.[6]

Jurors going online is not just a recent phenomenon. During the 2001 New York trial of terrorism suspects in the African embassy bombings, a juror allegedly researched the concept of "aiding and abetting" on the Internet. In a Colorado child abuse case, the defendant testified that she was taking the antidepressant Paxil at the time of the child's death. During deliberations, one of the jurors downloaded a description of the drug from the Internet and shared it with his fellow jurors the following day. In overturning the defendant's conviction, the Colorado Court of Appeals noted — in 2003 — that:

> Although the Internet has made information more accessible for the average person, the information obtained thereby may be misleading, taken out of context, outdated, or simply inaccurate … . In view of the problems and dangers associated with the unsupervised use of the Internet, trial courts should emphasize that jurors should not consult the Internet, or any other extraneous materials, at any time during the trial, including during deliberations.[7]

Five years ago, a Georgia criminal defendant appealed his conviction for aggravated child molestation after a juror used his cellphone to MapQuest the distance between a store where the alleged molestation took place and the defendant's home (following the jury's questioning of evidence presented at trial).[8]

Nowadays, lawyers and judges need to be concerned about potential jurors' Googling — even before the trial begins. In *Shawn Russo, et al. v. Takata Corporation* (a Japanese seat belt manufacturer) *and TK Holdings* (its American subsidiary), the plaintiffs claimed that Takata's seat belts were defective and had unlatched during a rollover accident. When one of the would-be jurors received his jury duty summons, he did a Google search for Takata and TK Holdings, examining the web pages for the two companies that were previously unknown to him. During jury selection, the panel member was never directly asked if he'd heard of either company, and he didn't volunteer information about his online searching. He wound up serving on the jury. Several hours into deliberations, he responded to another juror's question about whether Takata had notice of prior malfunctioning seat belts claims by disclosing his earlier Google searches and stated that his cybersleuthing hadn't turned up any other lawsuits. At least five other jurors either

heard his comments directly or were made aware of them during the rest of the deliberations.

After the jury returned a verdict in favor of Takata and TK Holdings, plaintiffs' counsel sought a new trial, arguing that the juror's information should not have been brought into deliberations. The trial judge agreed and granted the motion. The defendants appealed to South Dakota's highest court, arguing in part that the fact that the information was obtained before trial even began, and that this could have been discovered during voir dire, prevents it from being prejudicial. The South Dakota Supreme Court upheld the trial court's decision.[9]

Controlling the flow of information into the jury room isn't the only problem. Equally troubling is the flow of information leaving the jury box. In March 2009, during the federal corruption trial of former Pennsylvania Sen. Vincent Fumo, a juror posted updates on the case on Twitter and Facebook, even hinting to readers of a "big announcement" before the verdict was issued. The judge denied the defendant's motion for a mistrial, but after a guilty verdict was returned, Fumo's lawyers announced plans to use the Internet postings as a basis for appeal.

Building materials company Stoam Holdings and its owner, Russell Wright, recently sought a motion for new trial after an Arkansas jury entered a $12.6 million verdict against them on Feb. 26, 2009. Two investors, Mark Deihl and William Nystrom, accused Wright of defrauding them; Deihl's lawyer, Greg Brown, described the building materials venture as "nothing more than a Ponzi scheme."

Shortly after the verdict, Wright's attorneys found out that a juror, Jonathan Powell, a 29-year-old manager at a Wal-Mart photo lab, had posted eight messages, or "Tweets," about the case on the social networking site Twitter. Although several of the Twitter messages were sent during jury selection, the ones that attracted the most attention were those actually sent shortly before the verdict was announced.

In one such Tweet, Powell wrote, "Ooh and don't buy Stoam. Its bad mojo and they'll probably cease to exist, now that their wallet is 12m lighter." In another, Powell wrote, "I just gave away TWELVE MILLION DOLLARS of somebody else's money."[10] One of the lawyers for Stoam and Wright maintained that the messages demonstrated not only that this juror was not impartial and had conducted outside research about the issues in the case, but also that Powell "was predisposed toward giving a verdict that would impress his audience." The court denied Stoam's efforts to set aside the verdict, saying that Powell's actions didn't violate Arkansas law and that the Twitter messages didn't demonstrate the juror was partial to either side before the verdict.

As it turns out, Powell had nothing to worry about. Noting that Arkansas law requires defendants to prove that outside information found its way into the jury room and influenced the verdict, not that information from the jury panel made its way out, the court held in April that the juror's actions didn't violate any rules and that the Twitter messages did not demonstrate any evidence of Powell being partial to either side. After the judge denied the defense's effort to set aside the verdict, Powell made perhaps his most prescient observation of the trial, warning, "The courts are just going to have to catch up with the technology."

So what can be done to prevent jurors from turning the jury box into a Pandora's box? Some observers believe that one starting point is educating prospective jurors about why outside research is forbidden. Psychologist, attorney, and jury consultant Robert Gordon of Dallas' Wilmington Institute says, "Jurors go online because they can; the anonymity of the Internet makes it possible, and more alluring. You have to explain [why Internet research is harmful]; you have to actually talk to them."[11]

For a growing number of jurisdictions, the answer has been to formally revise the existing juror instructions to specifically address Internet research and electronic communications. New York's admonitions caution jurors not to research any fact, issue, or law related to the case by any means including the Internet; not to "Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case"; not to "use Internet maps or

Google Earth or any other program or device to search for and view any location discussed in the testimony"; and not to communicate with anyone about the case by any means, including by "text messages, email, Internet chat or chat rooms, blogs, or social websites, such as Facebook, MySpace, or Twitter."[12] Similarly, Connecticut admonishes jurors not to "look anything up on the Internet concerning information about the case or any of the people involved," not to use "Internet maps or Google Earth," and not to communicate to anyone about the case by any means including "Internet chat rooms, blogs, and social websites like Facebook, MySpace, YouTube or Twitter."[13] As of Sept. 1, 2009 — per new rules promulgated by the Michigan Supreme Court — Michigan judges are required to instruct jurors not to use any handheld devices, such as iPhones or BlackBerrys, while in the jury box or during deliberations. Moreover, all electronic communications by jurors during trial, whether Tweets or text messages, are banned.[14] On Jan. 15, 2010, the Supreme Court of Florida issued the report of its committee charged with revising standard jury instructions in civil and criminal cases, providing new language warning jurors against doing Internet research or using "electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all." (Previously, in 2006, the Florida Supreme Court had approved changes in the civil instructions to add the words "including the Internet" to prohibiting language concerning research). Maryland and several other states are in the process of revising their juror admonitions as well.

Other jurisdictions have followed suit. After an entire panel of 600 prospective jurors had to be excused when a number of them admitted conducting Internet research about a case, the San Francisco Superior Courts adopted a rule as of Jan. 1, 2010, instructing jurors that he or she "may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet to obtain or share information."[15] And in San Diego Superior Court, jury instructions specify not to use the Internet and jurors are asked to sign declarations saying that they will not use personal electronic and media devices to research or communicate about any aspect of the case.

While Texas has yet to revise its jury instructions to address the growing problems of jurors' online misconduct, a growing number of judges have supplemented the existing instructions with admonitions against Internet use. Judge Gena Slaughter of Dallas County's 191st Civil District Court, for example, gives specific instructions against doing online research, blogging, or otherwise communicating about the case during jury service and estimates that roughly half of her colleagues in the Dallas judiciary do likewise. Judge Susan Criss of Galveston's 212th District Court instructs her civil jurors against having cell phones, BlackBerrys, or similar devices while in the courtroom and has such wireless devices removed from the jury room. She also directs jurors not to "post or read about the case or subject matter of the case or persons in the case on blogs, internet news sites or social media including but not limited to Wikipedia, MySpace, Twitter or Facebook. … You cannot post anything about whether a verdict has or will be reached or when a verdict has or will be reached or announced in court."[16]

As mistrials and overturned verdicts continue to dot the legal landscape, it has become painfully evident that the easy access and global reach of wireless technology — combined with a generational shift in which digital intimacy has become the social norm — demand that courts do a better job of instructing jurors about the "off limits" nature of online conduct. Such instructions may be better received by jurors accustomed to getting information from the Internet and sharing their lives on Facebook if greater efforts are also made to educate them about the constitutional protections that mandate the court's control over access to information.

NOTES

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3. *Wardlaw v. Maryland*, ___ Md. App. ___ at pp. 10–11 (May 8, 2009).
4. *David N. Wilgus and Garrett Thorbjornson and the Estate of Gary Thorbjornson v. F/V Sirus, Inc.*, Civil Action No. 08-225-P-H (D. Maine, Oct. 27, 2009), "Order Denying Plaintiffs' Motion for a New Trial on the Grounds of Juror Misconduct."
5. Andrea Siegel, "Judges Confounded by Jury's Access to Cyberspace," *Baltimore Sun*, Dec. 19, 2009.
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8. *Brown v. State*, 275 Ga. App. 281 (2005).
9. *Russo v. Takata Corp.*, 2009 S.D. 83 (S.D. 2009).
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11. John Browning, "Dangers of the Online Juror," *DMagazine Legal Directory 2010*, p. 10.
12. *Jury Admonitions in Preliminary Instructions*, http://www.nycourts/gov (last visited Jan. 15, 2010).
13. Connecticut Criminal Preliminary Jury Instructions 1.2–10 (revised 6/12/09).
14. "Texts and 'tweets' by jurors, lawyers pose courtroom conundrums," http:///www.justice.org/cps/rde/xchg/justice/hs.xsl/10049.htm.
15. "Jurors: Keep your E-Fingers to Yourselves," http://blogs.findlaw.com/technologist/2009/09/jurors-keep-your-e-fingers-to-yourselves.html.
16. "Instructions to Civil Jury," courtesy Judge Susan Criss, 212th Judicial District Court, Galveston.

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