

CONFORMITY IN CONFUSION: APPLYING A COMMON  
ANALYSIS TO WIKIPEDIA-BASED JURY MISCONDUCT

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ABSTRACT

*In 2012, the United States Court of Appeals for the Fourth Circuit decided United States v. Lawson, a case of first impression about a juror's use of Wikipedia during deliberations. Had this case been decided in the 1950s, the juror's contact with the extra-record material during deliberations would have given rise to a presumption of prejudice in favor of the party claiming he was denied a fair trial. However, in the 1980s and 1990s, the United States Supreme Court seemed to eliminate that presumption and place the burden of proving prejudice on the party seeking a new trial. As a result, federal circuit courts today disagree as to when, if at all, the moving party should enjoy a presumption of prejudice in such cases. But every federal circuit court's substantive analysis focuses on the nature and impact of the extra-record contact, regardless of whether the presumption applies. This common substantive analysis has been used in Internet-based misconduct cases and should be expected in Wikipedia-based misconduct cases.*

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## INTRODUCTION

Practitioners who allege that the jury in their client’s trial has been prejudiced by coming into contact with electronic extra-record material should know that the circuit split over the presumption of prejudice is no split at all and that a common analysis applies. Technology has made it easier for jurors to access electronic extra-record material during deliberations and thereby engage in misconduct worthy of a new trial. But these advances in technology are coming at a time when federal circuit courts remain split over how to approach jury misconduct. Since the 1980s and 1990s, the federal courts have not applied a uniform approach to assessing unauthorized, potentially influential contact between the jury and extra-record material during deliberations. Some circuits approach this type of misconduct by presuming prejudice to the defendant, others utilize no such presumption, and still others will

presume prejudice only in certain cases.<sup>1</sup>

In light of new and changing technologies, these various approaches to jury misconduct may need to adapt. The Fourth Circuit's novel finding in *United States v. Lawson* suggests that a juror's contact with Wikipedia is more prejudicial than contact with other types of offline material.<sup>2</sup> However, despite the circuit split, three factors indicate the utility of a core analysis in cases of Wikipedia-based jury misconduct. This particular type of misconduct should not be subject to divergent analyses because of the overwhelming consistency among federal circuit courts in analyzing accusations of jury misconduct, the fact that these courts are employing the same analysis in the emerging Internet-based misconduct cases, and the fact that the only circuit court to address Wikipedia-based misconduct was ultimately unsure of how to approach the issue. Regardless of the labels different courts put on their approach to jury misconduct analysis and the uniqueness of the Internet and Wikipedia as sources of juror misconduct, the analysis is and will be the same in every circuit.

### I. THE CAUSE OF THE CIRCUIT SPLIT

Over the course of almost six decades, beginning in 1954, the Supreme Court created and subsequently rejected a presumption of prejudice when a juror comes into contact with potentially influential, extra-record materials or persons during deliberations. Jurors can only consider the material and witnesses presented to them during the trial.<sup>3</sup> A key component to jury trials is the ability of the court to insulate jurors from material beyond that purposefully presented to them at trial.<sup>4</sup> If a juror does come into contact with anything beyond that offered at trial, unfair prejudice might arise.<sup>5</sup>

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<sup>1</sup> See *infra* Part II.

<sup>2</sup> *United States v. Lawson*, 677 F.3d 629, 650–51 (4th Cir. 2012) (noting that the court is “troubled by Wikipedia’s lack of reliability”).

<sup>3</sup> 25 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 624.72[1], at 624–96 (3d ed. 2002).

<sup>4</sup> 1 DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 1.2 (2012).

<sup>5</sup> *Id.*

In 1954, the Supreme Court decided *Remmer v. United States*, which established a rebuttable presumption of prejudice when jurors come into contact with potentially influential, extra-record material or persons.<sup>6</sup> In *Remmer*, an unnamed person attempted to bribe a juror for a favorable verdict.<sup>7</sup> After the juror reported this bribe and while the jury deliberated, the Federal Bureau of Investigation (FBI) investigated the bribe.<sup>8</sup>

The Court, observing that any contact “with a juror during a trial about the matter pending” is presumptively prejudicial, held that the unduly impressive and potentially chilling effect of the FBI investigation might have prejudiced the jurors.<sup>9</sup> To be certain, the Court instructed the trial court to determine the circumstances of the contact, its impact, and any resulting prejudice via a hearing.<sup>10</sup> At this hearing, the government may attempt to show that the contact was harmless; however, the Court noted that the government’s burden when rebutting the presumption is “heavy.”<sup>11</sup>

Decades later, the Supreme Court decisions in *Smith v. Phillips* and *United States v. Olano* suggested a withdrawal from the strict presumption previously articulated in *Remmer*.<sup>12</sup> In *Phillips*, a juror applied for a position with the District Attorney’s office prosecuting the case.<sup>13</sup> The Supreme Court held that this contact, which tended to improperly impress upon the juror’s decisions regarding the case, required a *Remmer* hearing.<sup>14</sup> More specifically, the *Remmer* approach to allegations of juror impartiality applied because the Court accepted that “the average man in [the juror’s] position would believe that the verdict of the

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<sup>6</sup> *Remmer v. United States*, 347 U.S. 227 (1954).

<sup>7</sup> *Id.* at 228.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 229.

<sup>10</sup> *Id.* at 230.

<sup>11</sup> *Id.* at 229. Typically, the government’s burden of showing harmless error is by a preponderance of the evidence, but *Remmer* and its progeny do not clarify. See *United States v. Glover*, 413 F.3d 1206, 1210 (10th Cir. 2005); *United States v. Jackson*, 60 F.3d 128, 137 (2d Cir. 1995); *United States v. Eli*, 718 F.2d 291, 294 (9th Cir. 1983).

<sup>12</sup> *United States v. Olano*, 507 U.S. 725 (1993); *Smith v. Phillips*, 455 U.S. 209 (1982).

<sup>13</sup> *Phillips*, 455 U.S. at 212 (quoting *Phillips v. Smith*, 485 F. Supp. 1365, 1371–72 (S.D.N.Y. 1980)).

<sup>14</sup> *Id.* at 230.

jury would directly affect the evaluation of his job application.”<sup>15</sup>

The Court maintained, however, that at this hearing “the defendant ha[d] the opportunity to prove actual bias” and that it was “the defendant’s right to demonstrate” the alleged prejudice.<sup>16</sup> These articulations suggest a theoretical tailoring of that undefined, “heavy” burden in *Remmer*. Now, suggested the *Phillips* Court, the defendant must prove or demonstrate the bias that was supposed to be presumed in his favor. That is, the defendant has the burden of persuasion.

In *Olano*, the Supreme Court also appeared to move away from the strict presumption by emphasizing that the trial court’s inquiry into this type of jury misconduct can either be framed as a rebuttable presumption or as a specific analysis.<sup>17</sup> In *Olano*, the improper contact was the presence of alternate jurors in the jury room during deliberations.<sup>18</sup> Since defense counsel did not object to their presence, the undue influential capacity of the alternates was analyzed using plain error review.<sup>19</sup> Under plain error review the burden of persuasion automatically attaches to the defendant, but the Court discussed *arguendo* how to analyze this intrusion under *Remmer*.<sup>20</sup> The Court noted that “a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury’s deliberations and thereby its verdict?”<sup>21</sup> Some federal circuit courts agree that this newfound emphasis on the subject of the inquiry over framing dilutes the strength of the strict *Remmer* presumption.<sup>22</sup> Still, because neither *Phillips* nor *Olano* expressly overturned *Remmer*, other circuits keep the burden on the government.

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<sup>15</sup> *Id.* at 214.

<sup>16</sup> *Id.* at 215, 217 (quoting in part *Chandler v. Florida*, 449 U.S. 560, 575 (1981)).

<sup>17</sup> *Lawson*, 677 F.3d at 642.

<sup>18</sup> *Olano*, 507 U.S. at 727.

<sup>19</sup> *Id.* at 725.

<sup>20</sup> *Id.* at 734, 737–38.

<sup>21</sup> *Id.* at 739.

<sup>22</sup> See *Lawson*, 677 F.3d at 643 (citing the cases that hold *Olano* constituted negative treatment of *Remmer*).

## II. THE THREE APPROACHES

In response to the creation of and possible withdrawal from the presumption of prejudice, the federal circuit courts have developed three approaches to improper extra-record contact: (1) applying the *Remmer* presumption, (2) abandoning the *Remmer* presumption, and (3) determining whether or not to apply the *Remmer* presumption based on the severity of the contact. There is some debate over which category the Eighth and Ninth circuits fit into, but the remaining circuits' approaches are clear. Each approach is carried out pursuant to an abuse of discretion review, as it is well-settled law that upon investigating "whether and to what extent the conduct was prejudicial, the trial court has wide discretion."<sup>23</sup>

### A. Applying the *Remmer* Presumption: Second, Fourth, Seventh, Tenth, and Eleventh Circuits

The Second, Fourth, Seventh, Tenth, and Eleventh circuits apply the *Remmer* presumption when analyzing jury misconduct.<sup>24</sup> The clearest statement of this continued adherence to *Remmer* can be found in the Eleventh Circuit. In *United States v. Ronda*, a case later distinguished on unrelated grounds and never overturned, the court held that the defendant only has "to show that the jury has been exposed to extrinsic evidence or extrinsic contacts[.]" and that "[o]nce the defendant establishes that such exposure in fact occurred, prejudice is presumed . . . ."<sup>25</sup> Upon a mere showing of inappropriate extra-record contact, courts in the Eleventh Circuit will shift the burden to the government to prove that the contact was not prejudicial.<sup>26</sup> The Second, Fourth, Seventh, and Tenth

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<sup>23</sup> STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 12.06 (4th ed. 2010).

<sup>24</sup> See *Lawson*, 677 F.3d at 644 (noting that *Remmer* has "continued vitality"); *United States v. Moore*, 641 F.3d 812, 828 (7th Cir. 2011) (noting that the *Remmer* presumption is still good law); *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006); *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002) ("It is well-settled that any extra-record information of which the juror becomes aware is presumed prejudicial."); *United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997).

<sup>25</sup> *Ronda*, 455 F.3d at 1299.

<sup>26</sup> *Id.*

circuits have endorsed the same approach and presume prejudice in favor of the potentially disadvantaged moving party.<sup>27</sup>

*B. Abandoning the Remmer Presumption: Fifth, Sixth, and D.C. Circuits*

The circuits maintaining the second approach—no presumption at all—are the Fifth, Sixth, and D.C. circuits.<sup>28</sup> The Sixth Circuit in particular started to move away from the *Remmer* presumption the year after *Phillips* was decided, which was almost a decade before *Olano* reinforced the *Phillips* holding. In *United States v. Pennell*, the Sixth Circuit held that “[i]n light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed.”<sup>29</sup> The Fifth and D.C. circuits have issued similar opinions.<sup>30</sup>

*C. Letting Severity Dictate Application of the Remmer Presumption: First, Third, Eighth, and Ninth Circuits*

The First, Third, Eighth, and Ninth circuits apply the presumption only if the juror’s misconduct is severe enough. In these circuits, courts may approach the misconduct with a presumption of prejudice only after assessing the extra-record material’s degree of relevance and type.<sup>31</sup> The First Circuit’s

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<sup>27</sup> See cases cited *supra* note 24.

<sup>28</sup> *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (holding that “the *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*”); *United States v. Williams-Davis*, 90 F.3d 490, 496 (D.C. Cir. 1996) (holding there is no presumption, rather there is a weighing of the likelihood of prejudice); *United States v. Gillespie*, 61 F.3d 457, 460 (6th Cir. 1995) (holding that “the defendant must prove that [the juror] was prejudiced thereby; prejudice is not presumed”).

<sup>29</sup> *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984).

<sup>30</sup> See cases cited *supra* note 28.

<sup>31</sup> *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) (holding that the Third Circuit applies the *Remmer* “presumption of prejudice only when the extraneous information is of a considerably serious nature”); *United States v. Dutkel*, 192 F.3d 893, 894-95 (9th Cir. 1999) (holding that only when the jury is actively influenced, or tampered with, by an extrinsic contact does the presumption of prejudice arise; “prosaic” contacts do not warrant a

opinion in *United States v. Bradshaw* illustrates this approach.<sup>32</sup> In that case, the court maintained that, while the First Circuit still employs a *Remmer* presumption in some jury misconduct cases, that presumption did not apply when the jury came into contact with a magazine describing one of the attorneys in the case as that “of choice for ‘[e]very troubled mobster’ in Boston.”<sup>33</sup> Despite the fact that this quote both suggested that the defendant was a mobster and undermined defense counsel’s credibility, the court did not grant the defendant the benefit of the *Remmer* presumption. In the court’s view, the extra-record material was just not nefarious or egregious enough to warrant such a presumption.<sup>34</sup> Responding similarly, the Third, Eighth, and Ninth circuits apply the *Remmer* presumption only when the intruding material is of a certain, especially heinous type.<sup>35</sup>

### III. A COMMON ANALYSIS

Despite their differences, courts in each circuit engage in the same analysis when faced with jury misconduct. This analysis always addresses two basic questions: (1) what was the contact, and (2) what could its impact have been? To answer these questions, the circuit courts have created multi-factor rubrics that focus the court’s attention on the nature of the contact and the extent to which the jury appears to have relied upon it. Whether a particular circuit’s analysis is strictly limited to those two questions, calls for a looser list of factors that can ultimately be reduced to these questions, or implements a more formal list that can similarly be reduced, these are always the two basic questions.

An example of the first, strictly-limited type of analysis comes from the Sixth Circuit. The Sixth Circuit has held that a court

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presumption); *United States v. Blumeyer*, 62 F.3d 1013, 1016 (8th Cir. 1995) (holding that the *Remmer* presumption of prejudice only applies if the contacted material is extra-record factual evidence); *United States v. Boylan*, 898 F.2d 230, 261 (1st Cir. 1990) (holding that the *Remmer* “presumption is applicable only where there is an egregious tampering” in “the jury process”).

<sup>32</sup> *United States v. Bradshaw*, 281 F.3d 278, 287-88 (1st Cir. 2002).

<sup>33</sup> *Id.* (alteration in original) (quoting in part *United States v. Boylan*, 898 F.2d 230, 258 n.17 (1st Cir. 1990)).

<sup>34</sup> *Id.* at 288.

<sup>35</sup> See cases cited *supra* note 31.

should determine what the extra-record material was and what the jury did with that material.<sup>36</sup> The central focus of the analysis is the “what” and the “how.” The First, Second, Fifth, and Eighth circuits engage in a similar analysis, requiring only a bifurcated assessment of the contact, its nature, and how its impression may have affected the jury; and the extent, magnitude, or gravity of the intrusion into the jury’s deliberation.<sup>37</sup>

An illustration of the second type of analysis can be found in the Third Circuit. The Third Circuit has held that, although there is no explicit controlling list of factors, several factors found together suggest prejudice.<sup>38</sup> The factors that the Third Circuit has considered include the relatedness of the contact to an element of the crime charged, whether the material referenced was within the generalized knowledge of the juror or jurors affected, the extent to which the juror shared his or her improper impression with other jurors, when the contact occurred during deliberations, and the efficacy of curative jury instructions.<sup>39</sup>

A consideration of these several factors can be reduced to a single analysis of the material’s impact on the jury. The extent to which the jury may have been prejudiced by the improper contact will be greater if the contact was relevant to the crime charged, outside the scope of the juror’s generalized knowledge, impressed upon all of the jurors instead of just one, invaded deliberations right before the jury rendered its verdict, and was not addressed by the jury instructions. The number and strength of these factors in a given case influence whether the court believes that the contact was of such magnitude or gravity to justify setting aside a

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<sup>36</sup> *United States v. Griffith*, 756 F.2d 1244, 1252 (6th Cir. 1985).

<sup>37</sup> *See Bradshaw*, 281 F.3d at 289 (explaining that the court must “assess the magnitude of the event and the extent of the resultant prejudice”); *Blumeyer*, 62 F.3d at 1017 (holding that the contact was not prejudicial because of what it was and because of how it was used by the jury); *United States v. Weiss*, 752 F.2d 777, 783 (2d Cir. 1985) (quoting *United States ex. rel. Owen v. McMann*, 435 F.2d 813, 818 (2d Cir. 1970)) (noting that the touchstone in the court’s assessment of the misconduct is “the nature of what has been infiltrated and the probability of prejudice”); *United States v. Chiantese*, 582 F.2d 974, 980 (5th Cir. 1978) (holding that the court, during the hearing, must assess the “likely extent and gravity of the prejudice generated by” the misconduct).

<sup>38</sup> *Lloyd*, 269 F.3d at 239.

<sup>39</sup> *Id.* at 239–41.

conviction. Essentially, this analysis is merely a re-articulation or a “breaking up” of the second central question: what was the likely impact of the contacted extra-record material on the jury? The Seventh, Eleventh, and D.C. circuits also employ this type of analysis.<sup>40</sup>

The Tenth Circuit provides the best example of the third type of analysis. In the oft-cited case *Mayhue v. St. Francis Hospital of Wichita, Inc.*, the Tenth Circuit Court of Appeals provided a list of five factors that determine prejudice in cases where the jury has come into unauthorized contact with a hard copy dictionary.<sup>41</sup> These five factors are (1) the centrality of the word to the case, (2) how the definition differs from the legal definition, (3) how the jury emphasized the definition, (4) the strength of the properly presented material and when the definition was introduced to the jury, and (5) any other factors.<sup>42</sup>

Like with the Third Circuit’s rough list of factors, these five can be reduced to the second question noted *supra*—what was the impact of the contact on the jury? Once again, if the word or the contact is central to the resolution of the case, the material differs substantially from the material legally in front of the jury, the jury relied on the material for its decision, the authorized material in front of the jury is weak, and the jury came to its decision immediately after the contact, then the extent of prejudice created by the contact is greater than if one of these factors was not present. The list of factors is just an attempt to provide dimension to the extent analysis in which courts in all other circuits already engage. The Fourth and Ninth Circuits use a similarly formal list of

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<sup>40</sup> See *Ronda*, 455 F.3d at 1300 (the factors a court can “consider include: (1) the nature of the extrinsic evidence; (2) the manner in which the information reached the jury; (3) the factual findings in the district court and the manner of the court’s inquiry into the juror issues, and (4) the strength of the government’s case”); *Williams-Davis*, 90 F.3d at 497 (maintaining that the court should consider “a range of factors,” including the nature, length, and impact of the contact); *United States v. Sanders*, 962 F.2d 660, 668-69 (7th Cir. 1992) (maintaining that the factors “a court should look to in making this determination include the extent and nature of the unauthorized contact, the power of curative instructions, and the responses of the jury”).

<sup>41</sup> *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 924 (10th Cir. 1992).

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

factors.<sup>43</sup>

#### IV. ADDING THE ELEMENT OF TECHNOLOGY

Today, advances in technology have made it possible for an endless sea of electronically stored material to infiltrate jury deliberations. The Internet is a ready source of extra-record material and misconduct because unauthorized, potentially influential contact is just a few “clicks” away. The proliferation of Internet use during jury deliberations poses a challenging question to trial attorneys. Will unauthorized contact with the Internet change the core analysis discussed above? The Internet, a unique source of extra-record material, has the potential to affect the analysis because it is transient and much of its content is not subject to the integrity constraints of other media.

The few cases in this area suggest that federal courts will not analyze Internet-based contacts differently than other contacts. Courts have applied the core analysis discussed above to cases involving general Internet research and Internet searches to define terms. This approach does not refer to the unique dangers posed by the Internet. Moreover, the Fourth Circuit’s primary focus in *United States v. Lawson*, a key case involving Wikipedia, was on other factors not specific to Wikipedia. Therefore, while the *Lawson* court suggested that Wikipedia as a specific source of material contributes to prejudice, practitioners should not expect any change to the core analysis.

##### A. General Internet Research

When a juror comes into contact with unauthorized Internet research, circuit courts have appeared to pay little attention to the fact that the potentially prejudicial material was found on the Internet. In *United States v. Lopez-Martinez*, a juror compiled Internet research in an effort to be “as prepared as possible” for deliberations concerning a conspiracy to bring illegal aliens into

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<sup>43</sup> See *Lawson*, 677 F.3d at 646 (applying the *Mayhue* factors); *Marino v. Vasquez*, 812 F.3d 499, 506 (9th Cir. 1987) (listing five factors when assessing jury misconduct including the length of time the material was available to the jurors and the extent to which it was discussed).

the country.<sup>44</sup> Upon discovering that this research infiltrated the jury room on the first day of deliberations, the defendant moved for a new trial.<sup>45</sup> The district court denied the motion without venturing into the content of the research or the fact that it was from the Internet. Rather, the district court's denial relied on the fact that the vexatious juror had been dismissed following a mid-deliberation hearing and the research had not reached the other jurors.<sup>46</sup> The appellate court affirmed the denial.<sup>47</sup> The trial court's analysis of the extent to which jurors relied upon the extra-record material was sufficient even though it did not reach the actual content of the research or the fact that it was from the Internet. This analysis is well within the previously discussed traditional core analysis, as it focuses simply on the impact of the unauthorized contact.

Likewise, in *Moore v. American Family Mutual Insurance Company*, a district court denied a defendant's motion for a mistrial despite the fact that the jurors came into unauthorized contact with the defendant's financial information.<sup>48</sup> The jurors came into contact with this material via the Internet. Even though one juror said that the defendant "makes huge profits and can afford to pay[,]" the defendant's motion was denied.<sup>49</sup> In so holding, the trial court said that there was no prejudice because the defendant's ability to pay "was 'not likely to be a major revelation' to members of the jury."<sup>50</sup> The fact that the extra-record material came from the Internet was again irrelevant. The mere fact that the material was not outside the generalized knowledge of the jury was relevant. This concept is well within the traditional core analysis.

In *United States v. Farhane*, a case where the court "considered the 'nature' of the extrinsic evidence[.]" or what the evidence was, the fact that the evidence was from the Internet was, yet again, irrelevant.<sup>51</sup> In that case, a juror used Google to discover that a co-

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<sup>44</sup> *United States v. Lopez-Martinez*, 543 F.3d 509, 513, 517 (9th Cir. 2008).

<sup>45</sup> *Id.* at 517.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 787 (8th Cir. 2009).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *United States v. Farhane*, 634 F.3d 127, 169 (2d Cir. 2011).

defendant had pled guilty to “unspecified charges,” and the juror then told that fact to the other jurors.<sup>52</sup> After analyzing the “nature” of the evidence, the trial court concluded, and the appellate court affirmed, that a mistrial was unnecessary.<sup>53</sup> They held that the guilty plea was consistent with evidence presented at trial.<sup>54</sup> The extent of the contact’s prejudicial impact was negligible or of such a magnitude not to warrant a new trial. The form of the material and vehicle by which the juror accesses the material are part of its “nature,” but the mere fact that its form was electronic and the vehicle was the Internet did not enter the court’s analysis. The Internet does not, in and of itself, establish grounds for a finding of prejudice.

### B. Defining Terms

When a juror conducts an Internet search specifically to define a term, courts follow the same core analysis. In *United States v. Showa*, an unpublished opinion, a juror looked up the term “telemarketing” online during deliberations.<sup>55</sup> After questioning the juror who had done the research as well as the other jurors, all of whom said the definition was “general” or “insignificant,” the district court concluded that there was no prejudice warranting a new trial.<sup>56</sup> The district court judge took the jurors’ testimony as reliable and stopped the inquiry. Since the jurors said the definition had little or no impact on their knowledge, the trial court found no prejudice. The court did not investigate the nature of the definition at all, and the appellate court affirmed without hesitation.

Another case in which the outcome was not affected by Internet use was *United States v. Bristol-Martir*. In that case, a juror used the Internet to define legal terms, and the district court found no prejudice, but the appellate court did not affirm. The district court questioned the errant juror extensively and finally dismissed her after becoming aware that her position in the case

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<sup>52</sup> *Id.* at 168.

<sup>53</sup> *Id.* at 169.

<sup>54</sup> *Id.*

<sup>55</sup> *United States v. Showa*, Nos. 96-50698, 97-50017, 1997 WL 801452, at \*1 (9th Cir. Dec. 19, 1997).

<sup>56</sup> *Id.*

was based on her own research.<sup>57</sup> However, the district court did not grant the defendant's motion for a mistrial, stating that the "juror's research and subsequent statements to the other jurors did not taint the jury."<sup>58</sup>

The appellate court disagreed with this conclusion because the court neither questioned each juror *independently* as to whether he or she was influenced, nor attempted to cure any undue influence beyond making slight adjustments to the general jury instructions.<sup>59</sup> Therefore, the judgment was vacated and the case was remanded for a new trial.<sup>60</sup> Neither court's analysis focused on the fact that the extra-record material came from the Internet or that the juror had used an Internet-sourced definition. The focus was on the extent to which each juror relied on the research and whether the court properly mitigated against this improper reliance. The district court and appellate court disagreed on the potential extent of the jury's contact with the extrinsic evidence, but they did not disagree as to whether the Internet-based nature of the evidence was especially problematic.

### C. Wikipedia-Based Jury Misconduct

The only circuit court case that has tackled the issue of Wikipedia-based jury misconduct is *United States v. Lawson*.<sup>61</sup> In this case, the district court and the circuit court applied the *Mayhue* factors in their attempt to decide whether or not a juror's Wikipedia research on the definition of "sponsor"—a definition crucial to an element of the animal fighting offense charged<sup>62</sup>—warranted a new trial.<sup>63</sup> The trial court concluded that "there was no reasonable possibility that the external influence caused actual

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<sup>57</sup> *Id.* at 36.

<sup>58</sup> *Id.* at 38.

<sup>59</sup> *Id.* at 43.

<sup>60</sup> *Id.* at 34.

<sup>61</sup> *Lawson*, 677 F.3d at 644–46 (stating that "such a situation is an issue of first impression in this Court" and that the court cannot point to other circuit court cases, despite its lengthy cross-circuit analysis, related to jury misconduct involving Wikipedia definitions).

<sup>62</sup> *Id.* at 636.

<sup>63</sup> *Id.* at 636, 646.

prejudice,” and denied the defendant’s motion.<sup>64</sup>

On appeal the circuit court found that there were grounds for granting a new trial.<sup>65</sup> The court’s decision hinged on how integral the term defined was to the crime charged, i.e., the first *Mayhue* factor; and the difference between the Wikipedia definition and the legal definition the court would have given if asked, i.e., the second *Mayhue* factor.<sup>66</sup> Since the word “sponsor” was part of an element of a crime the defendant was charged with and the definition was at odds with its legal counterpart, the court vacated the judgment and remanded for a new trial.<sup>67</sup>

The fact that the definition came from Wikipedia, a crowd-moderated website featuring content that changes frequently, weighed in favor of remand as well.<sup>68</sup> But that fact was not conclusive in and of itself.<sup>69</sup> The Wikipedia factor was not one of the court’s central focuses. If anything, the court was unsure of how to weigh that fact.<sup>70</sup> Moreover, the court’s use of the oft-cited *Mayhue* factors, born of misconduct involving a hard copy dictionary,<sup>71</sup> further suggests that the court was not prepared to abandon the traditional, pre-Internet analysis.

Therefore, the court’s consideration of the Wikipedia element is not a harbinger of change to the core misconduct analysis. To conclude that the *Lawson* court’s mere acknowledgement of Wikipedia’s uniqueness will make Wikipedia-based jury misconduct presumptively more prejudicial would be at odds with the forces behind the core analysis, which transcended the superficial circuit split. Such a view incorrectly characterizes *Lawson* as exceptional among other cases involving Internet research and defining terms, and misplaces the Fourth Circuit’s

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<sup>64</sup> *Id.* at 641 (internal quotation marks omitted).

<sup>65</sup> *Id.* at 655.

<sup>66</sup> *Id.* at 646, 648, 655.

<sup>67</sup> *Id.* at 654–55.

<sup>68</sup> *Id.* at 650–51 (noting that the court is “troubled by Wikipedia’s lack of reliability”).

<sup>69</sup> *Id.* (explaining that the first *Mayhue* factor weighed “strongly in favor of [the defendant]” while the other factors were less significant).

<sup>70</sup> *Id.* (noting that “there remain many unresolved questions in this case due to the unreliability and ever-changing nature of Wikipedia”).

<sup>71</sup> *See Mayhue*, 969 F.2d at 924.

emphasis.

#### CONCLUSION

The Internet, with its seductive speed, expansive accessibility, and countless sources of information, is an emerging source of problems for trial lawyers whose juries may succumb to its allure during trial. Yet this potential source of prejudice will meet the same misconduct analysis as every other juror contact with extra-record material. Despite the circuit split over the proper application of the presumption of prejudice and the burden of showing the effect of extrinsic material, federal appellate courts tend to use a traditional undue influence rubric. The substantive nature and ultimate impact of the contact will be the court's primary focus, rather than the medium by which the juror came into contact with the material. A prudent practitioner should base his or her argument on that core analysis as cases of Internet-based, and Wikipedia-based, jury misconduct start to bombard courtrooms.

#### PRACTICE POINTERS

- When preparing a motion for mistrial or a new trial, or a response to said motion, focus on the substantive nature of the extra-record contact and its ultimate prejudicial impact on the jury.
- When assessing juror misconduct, do not waste too much time dealing with the presumption of prejudice, or lack thereof. Just research the language and framing of the analysis used in the circuit so as to best phrase the core argument.
- Be diligent about jurors' use of electronic devices during or outside of trial.