

Research Highlights

Jurors and New Media: Filling Knowledge Gaps for Judges and Lawyers

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Overview

Survey Participant Characteristics		Total	Percent
JUDGES	Number of Judges	451	
	Number of States Represented	32	
	<u>Years of Experience on Bench</u>		
	10 Years or Less	234	52%
	11 to 20 Years	135	30%
	More than 20 Years	64	16%
	<u>Court Type</u>		
	State General Jurisdiction Court	388	86%
	State Limited Jurisdiction Court	53	12%
	Other Court	4	1%
<u>Court Level</u>			
Trial	426	95%	
Appellate Court	3	1%	
Court of Last Resort	1	0%	
No Response	19	4%	
ATTORNEYS	Number of Attorneys	376	
	Number of States Represented	43	
	<u>Years in Legal Practice</u>		
	10 Years or Less	90	24%
	11 to 20 Years	57	15%
	21 to 30 Years	80	21%
	More Than 30 Years	132	35%
	<u>Legal Practice Area</u>		
	Civil Defense	80	21%
	Civil Mixed Practice	25	7%
Civil Plaintiff	67	18%	
Criminal Defense	116	31%	
Criminal Prosecution	76	20%	
Other	8	3%	

New media has radically transformed how people acquire and share information. It is now an integral part of prospective jurors' daily lives that poses a challenge to juror impartiality, which requires that jurors only be exposed to information that is admitted as evidence at trial. Jury service is a serious commitment requiring careful consideration of relevant facts and law. Jurors might reasonably question why they should not use new media to inform their decisions just as they do for other consequential decisions, such as those related to healthcare, education, and finances.

In response to growing concerns, trial judges have adopted practices to discourage juror misconduct involving new media. Without information about the frequency of juror misconduct to use for baseline purposes, or even an effective method of collecting that information, it is not possible to gauge the effectiveness of these interventions or the wisdom of judges' and lawyers' confidence in these approaches. In 2020, the NCSC undertook a new study to examine these issues.

The study involved two components. The first was a detailed analysis of 260 written case opinions in which juror misconduct involving new media was alleged. For each case opinion, NCSC collected information about the court issuing the opinion, the form of new media used, the information the juror sought or communicated, how the incident was discovered, the stage of the trial at which the

judge was made aware of the incident, who brought the incident to the judge's attention, and the trial judge's response to the incident. Because the search terms used to identify the opinions were intentionally broad, we believe that the case opinion dataset includes all written opinions issued on this subject through May 2020.

The second component was a survey of judges and attorneys regarding their opinions and personal experiences with juror misconduct involving new media. A total of 867 individuals responded to the survey. As shown in the table (left), the judges and attorneys reflect the geographic and professional diversity of the contemporary bench and bar, providing an informed perspective on these questions. Two hundred survey respondents reported that they had experienced at least one incident of juror misconduct in cases in which they had personally participated; 91 had experienced multiple incidents. The survey documented many of the same details collected from the case opinions, allowing for comparisons between the two components.

These Research Highlights describe key findings from the study about judge and attorney perspectives on jurors and new media; the characteristics of cases in which incidents involving jurors and new media are likely to arise; the impact that incidents have on case outcomes; and how case law on juror misconduct has evolved over time.

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Frequency and Severity of Juror Use of New Media

One-quarter of survey respondents reported firsthand experience with juror misconduct involving new media. The majority of those with personal experience reported only one incident over the course of their professional careers.

Personal Experience with Incidents of Juror Use of New Media

	Judges		Attorneys		Other Respondents	
No Experience	317	72%	288	80%	15	71%
1 Incident	75	17%	34	9%	0	0%
2 Incidents	27	6%	20	6%	0	0%
3 or more Incidents	21	5%	17	5%	6	29%

Despite the low frequency of personal experience, 41% of respondents believe that in any given case jurors will use new media inappropriately. More respondents with personal experience expressed that belief than did those who had not experienced an incident. Attorneys were also more likely to express that belief than judges.

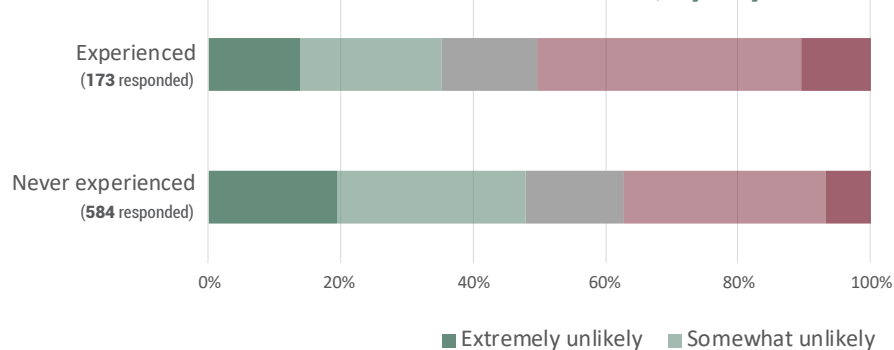
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of survey respondents reported firsthand experience with juror misconduct involving new media

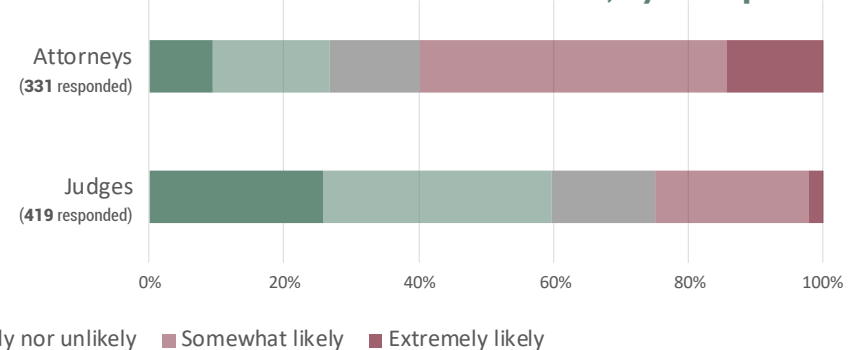
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of respondents expressed their belief that in any given trial jurors will use new media inappropriately

Likelihood of Juror Use of New Media, by Experience



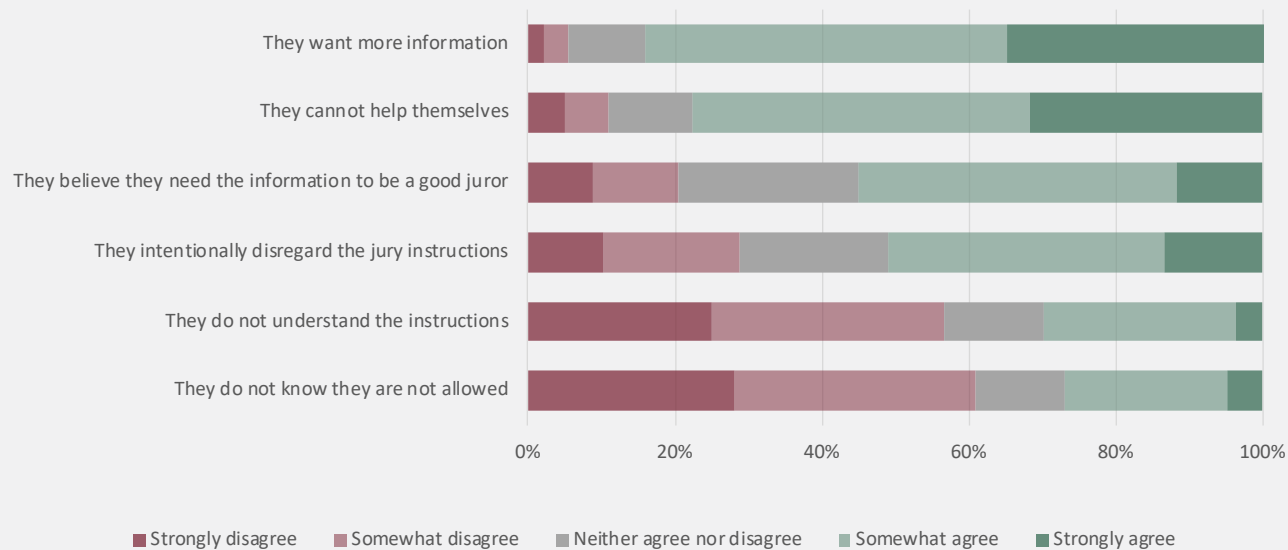
Likelihood of Juror Use of New Media, by Occupation



Reasons Jurors Engage in Misconduct

Respondents indicated their agreement with potential reasons that jurors use new media inappropriately. Most respondents said that jurors know and understand the rules but choose not to follow them. Because they are so familiar with those rules, judges and attorneys may overestimate how well jurors understand the rules and the purpose behind them.

Reasons for Juror Misconduct



Respondents also offered other reasons why jurors might use new media inappropriately:

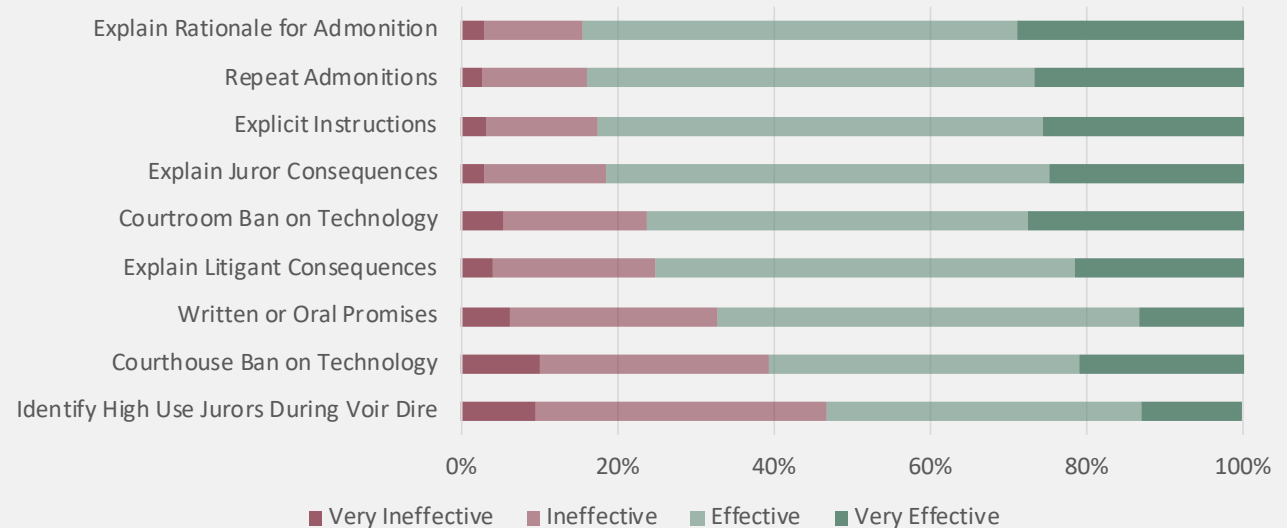
- habit
- curiosity
- boredom
- to magnify their importance as a juror
- mistrust of the court system
- the likelihood of being discovered is so small that jurors believe they will not get caught by the court
- to get out of jury duty

Effectiveness of Preventative Measures

Respondents rated the effectiveness of preventative measures commonly employed to reduce the likelihood of juror misconduct using new media. More than half the respondents rated each measure as either effective or very effective. However, some respondents indicated skepticism for some measures, particularly for courthouse bans on technology, written or oral juror promises, and use of voir dire to identify jurors unlikely to follow admonitions.

Overall, the consensus appears to be that almost any action taken will be at least somewhat effective.

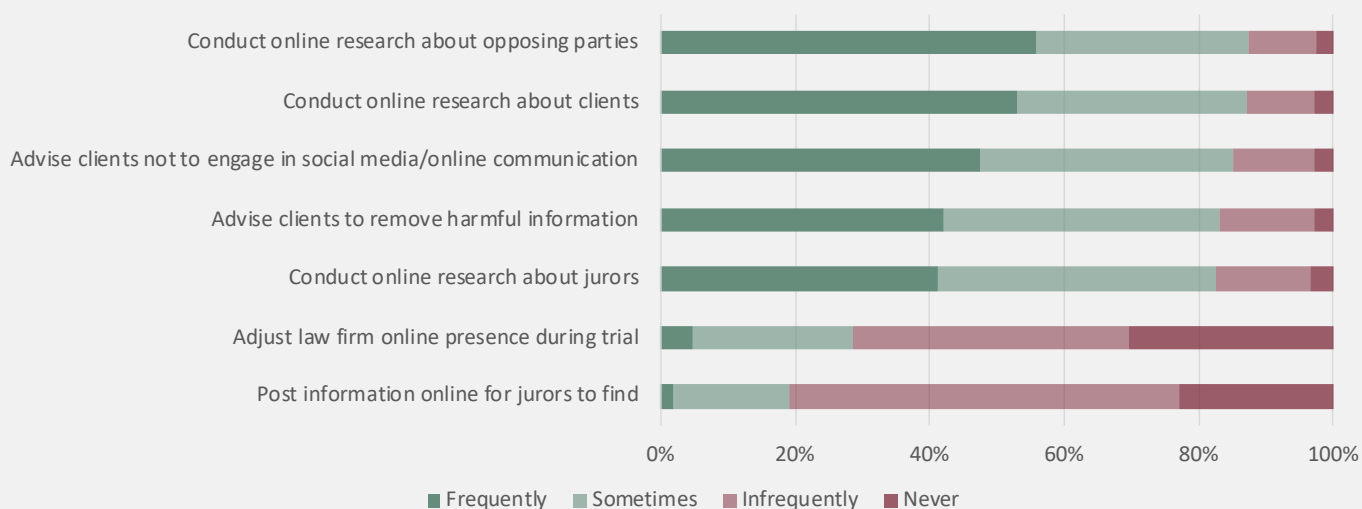
Effectiveness of Preventative Measures



Extrajudicial Strategies by Attorneys

In addition to preventive measures, respondents rated how often they think attorneys engage in various extrajudicial strategies to reduce the impact of information that jurors might encounter online or to use that information for strategic advantage. More than half reported that attorneys frequently use new media to research their own clients and opposing parties. Depending on what they find, they may advise clients to remove harmful information if possible and to avoid posting new information online. Most respondents were skeptical about the prevalence of attorneys deliberately posting information online with the intent to influence juror decision-making.

Online Attorney Behavior



More than

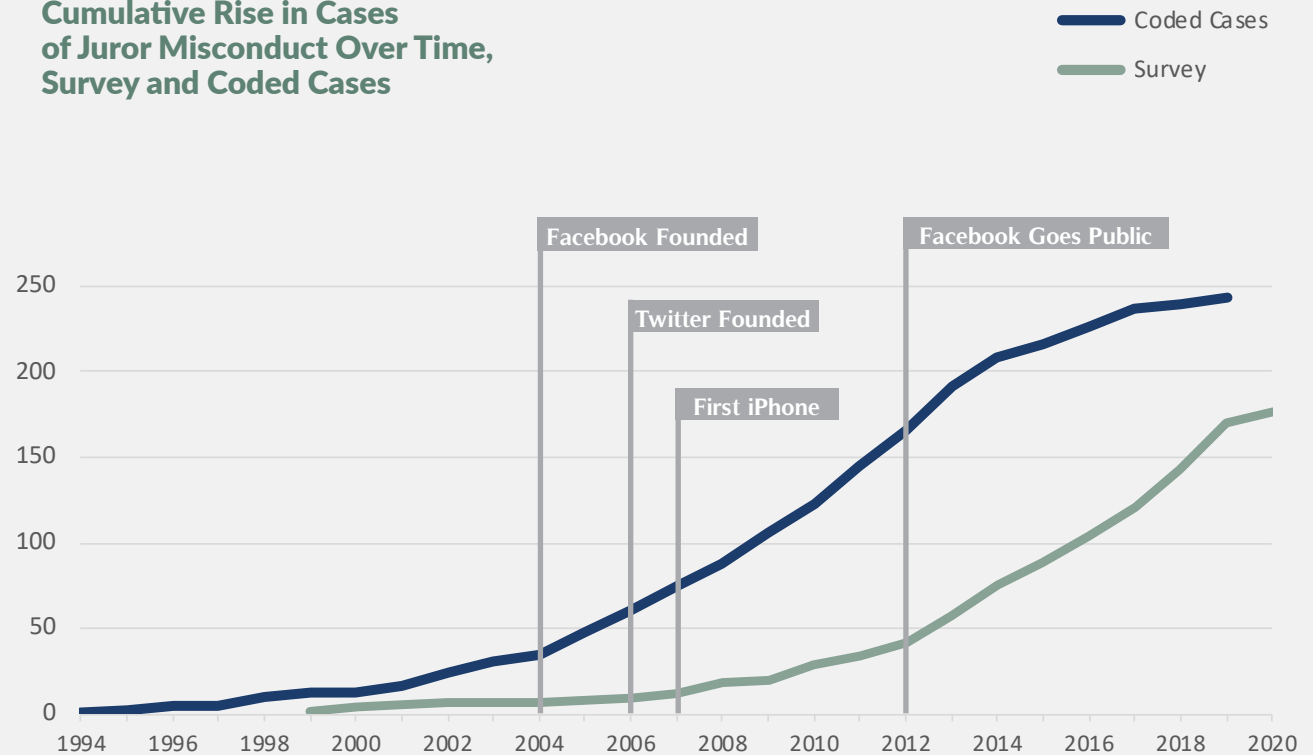
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reported that attorneys frequently use new media to research their own clients and opposing parties.

Frequency and Timing of Incidents

The figure (right) shows the running total of incidents reported in the case opinion and survey datasets. The survey data indicate the year of the first incident reported, regardless of the number of incident reported. Increases in both samples are likely due to the proliferation of new media used by Americans. The average rate of change has also increased following significant developments in new media, including the founding of Facebook in 2004.

Cumulative Rise in Cases of Juror Misconduct Over Time, Survey and Coded Cases



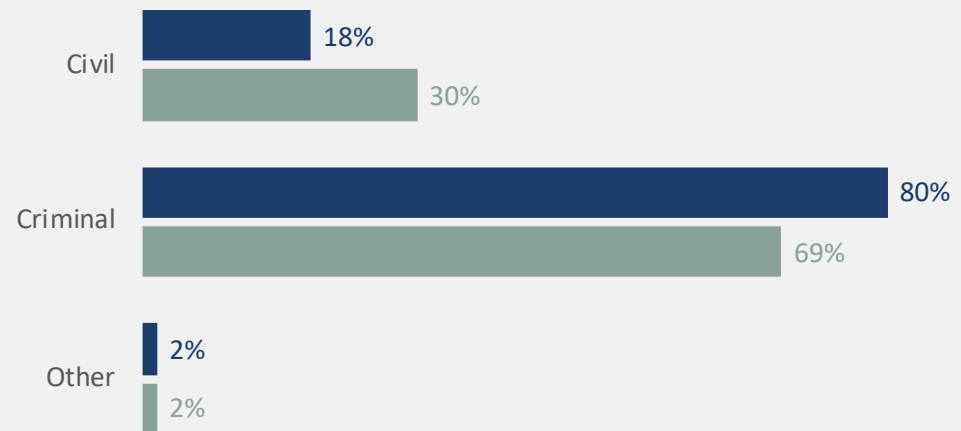
Case Types

In both the coded cases and the survey, incidents of juror misconduct involving new media were more likely to be reported for criminal cases than civil cases.



Juror Misconduct by Case Category

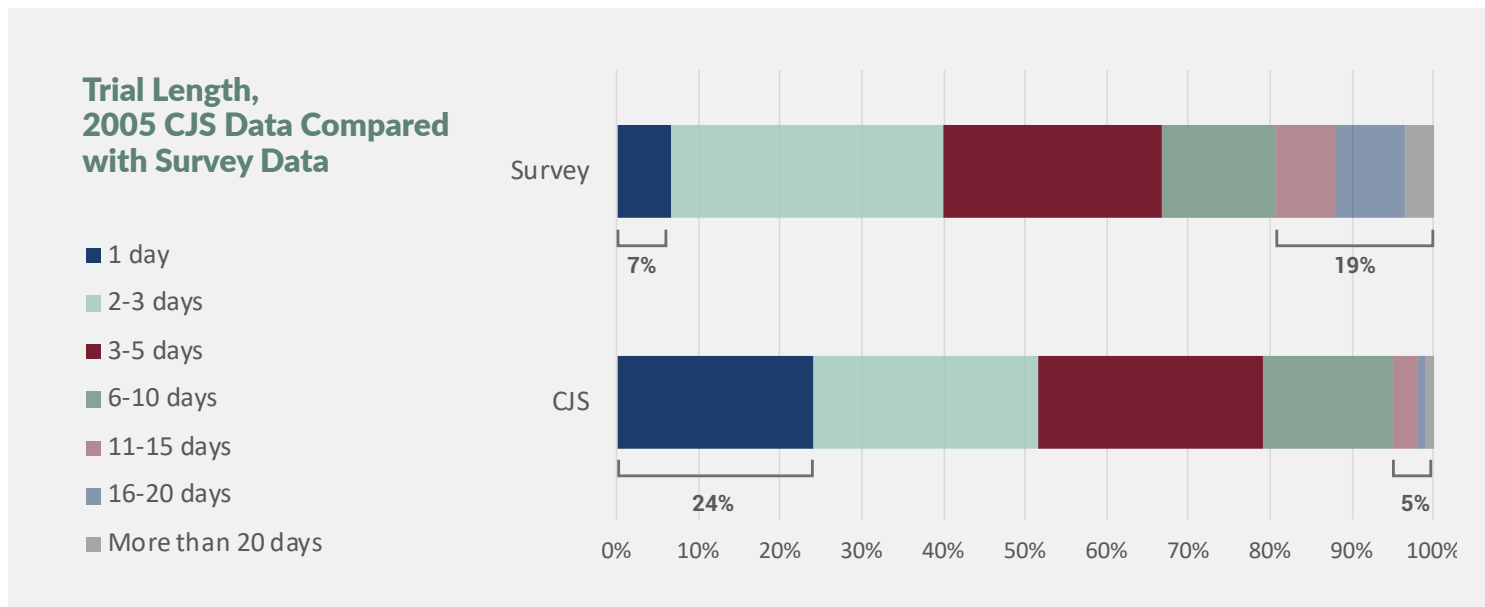
■ Opinion
■ Survey



Within the broader categories of criminal and civil cases, juror misconduct involving new media was more common in certain types of cases. Within criminal cases, most incidents occurred within homicide, assault/battery, or sex offense cases. Within civil cases, medical malpractice ranked as the most common case type both in the surveys and in the case opinions. The survey respondents listed the next highest case types as product liability and automobile tort. Meanwhile, the coded case opinions showed the next highest proportion of civil case types were other contract, employment discrimination, and other malpractice.

Trial Length

More complex trials tend to be longer, involve more topics about which jurors might want information, and offer more opportunities for jurors to conduct independent research or discussions. The figure below compares trial length from the *Civil Justice Survey of State Courts* (a representative sample of civil jury trials held in 2005) to that of trials in which incidents were reported by survey respondents. Although only 5% of trials last more than 10 days, 19% of the incidents reported by survey respondents took place in trials lasting that long. In contrast, 24% of trials last only one day, but only 7% of incidents occurred in one-day trials. Comparable statistics about trial length were not available for criminal jury trials, and trial length was not reliably reported in the case opinions.



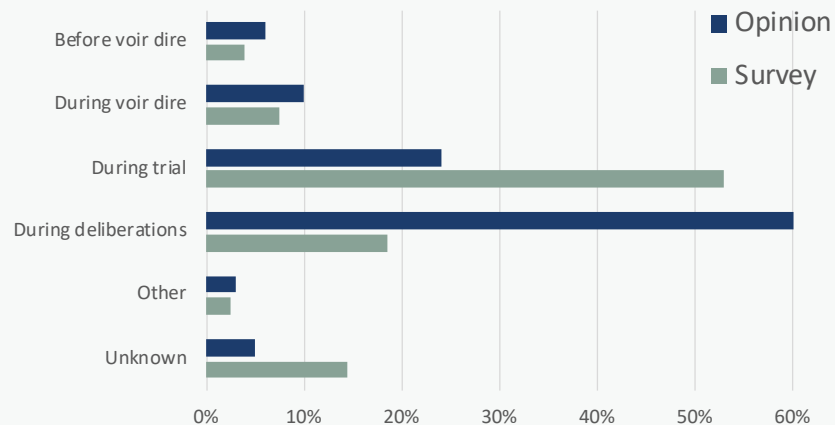
19%

of the incidents reported by survey respondents took place in trials lasting more than 10 days.

Incident Timing and Discovery

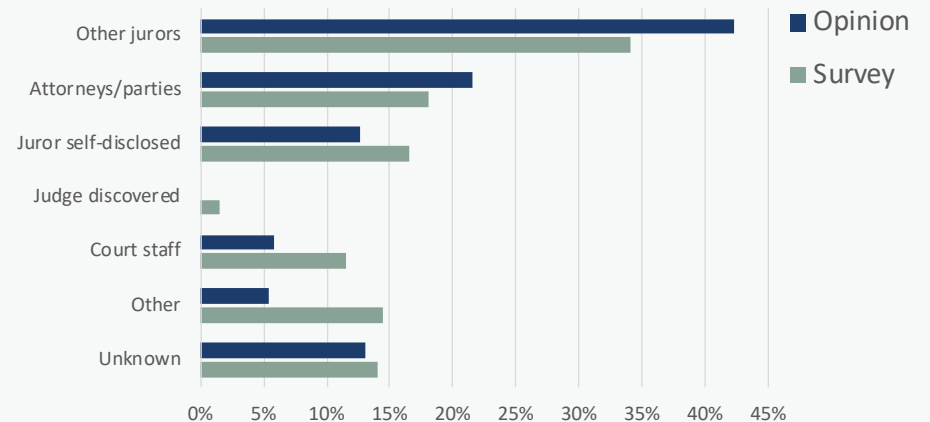
A key consideration for judges and attorneys is whether they learn about incidents of alleged juror misconduct in time to respond appropriately. Survey respondents reported that incidents occurred most often during trial but before deliberations, while within the case opinions incidents occurred most frequently during deliberations.

Timing of Incident During Trial *When did the incident occur?*



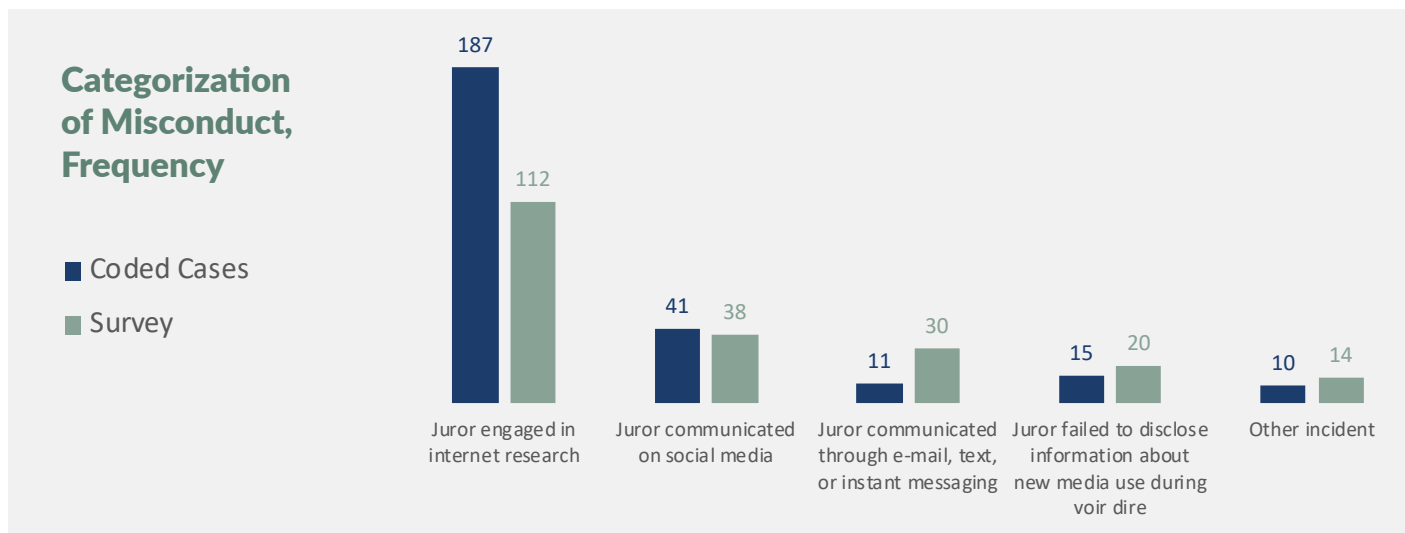
Most incidents involved jurors conducting independent research about case-relevant topics. They were discovered only because the juror shared information with other jurors, who subsequently informed the judge or attorneys. Juror communication using social media may be more easily detected by monitoring jurors' social media accounts, but the jurors themselves were less likely to disclose that they violated the judge's instructions to other jurors.

Incident Discovery *How was the incident discovered?*



Types of Juror Misconduct

Both the survey and coded cases reflect that Internet research is the most prevalent form of misconduct, but communication as a form of misconduct has been increasing in more recent years. Jurors engaged in Internet research focused most frequently on trial-relevant facts, parties, legal terms and concepts, and non-legal terms and concepts. They were less interested in researching lawyers, witnesses, the judge, or other jurors, suggesting that jurors may seek information to make better decisions rather than because they are simply curious. Case opinions involving juror communication through new media most often occurred on social media platforms, especially Facebook. In contrast, nearly half of the juror communication incidents reported by survey respondents were directed to one person or a small group of persons through email, text, or an instant messaging app.



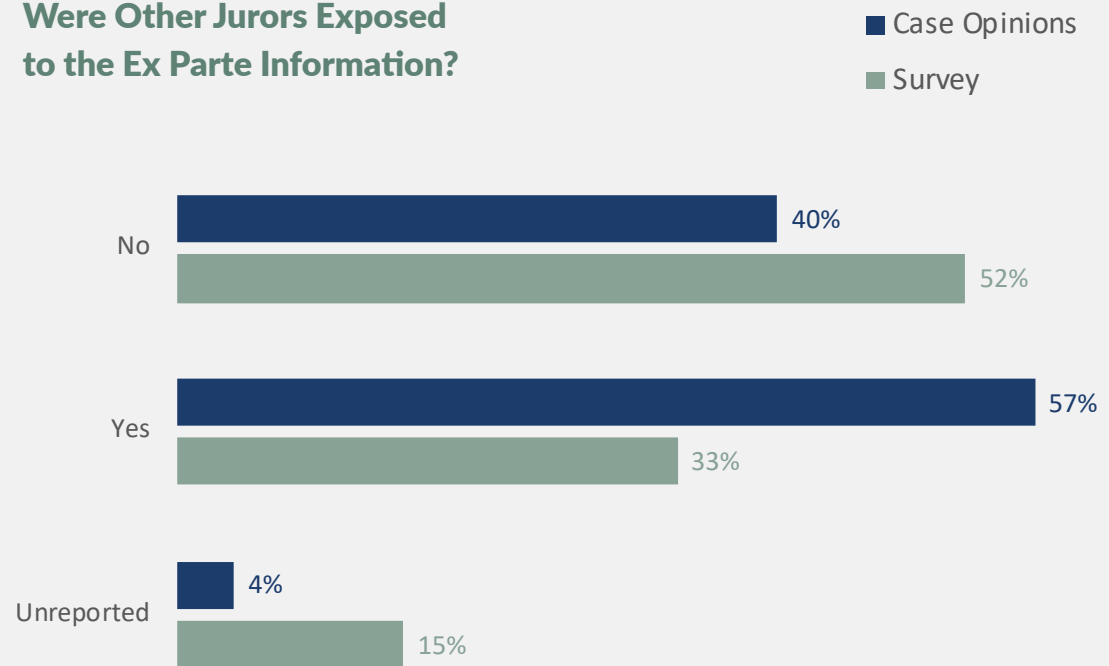
“
... jurors may seek information to make better decisions rather than because they are simply curious.
”

Number of Jurors Engaged in Misconduct or Exposed to Information

Both components of the study found that in most cases only one juror was alleged to have engaged in misconduct, but other jurors were made aware of the information in a large percentage of these cases.



Were Other Jurors Exposed to the Ex Parte Information?

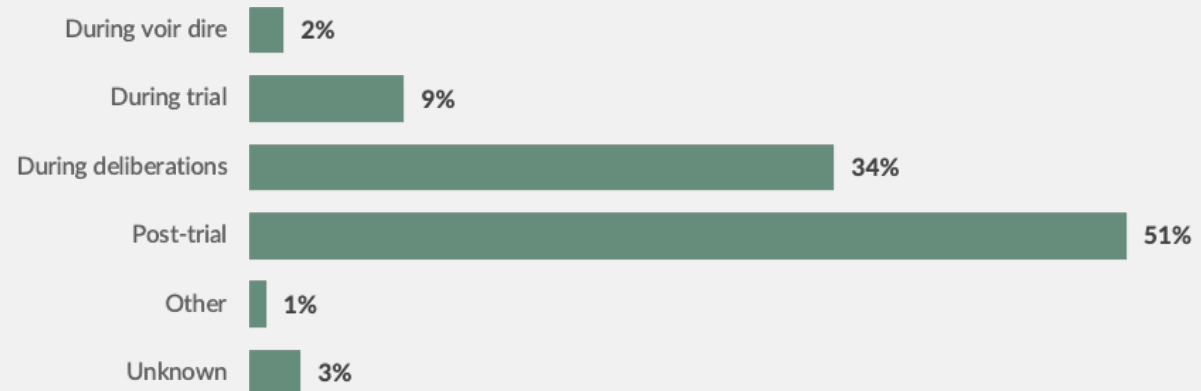


Timing of Incident Discovery

In just over half of the case opinions, trial judges learned of incidents only after the trial was completed. In fact, in some cases it was not clear that the trial judge ever learned about the incident because the incident was only reported in a subsequent appeal or habeas corpus petition. The increased incidence of juror misconduct involving new media undermines the finality of verdicts by calling into question the impartiality of jurors who rendered the verdict. Sometimes these incidents are discovered during trial, giving the judge and attorneys a range of options to mitigate the risk of prejudice to the parties. Incidents that are discovered posttrial leave only the remedy of a new trial if the juror misconduct introduced extraneous information into jury deliberations or indicated bias on the part of one or more jurors.

When Did the Trial Judge Learn of the Incident?

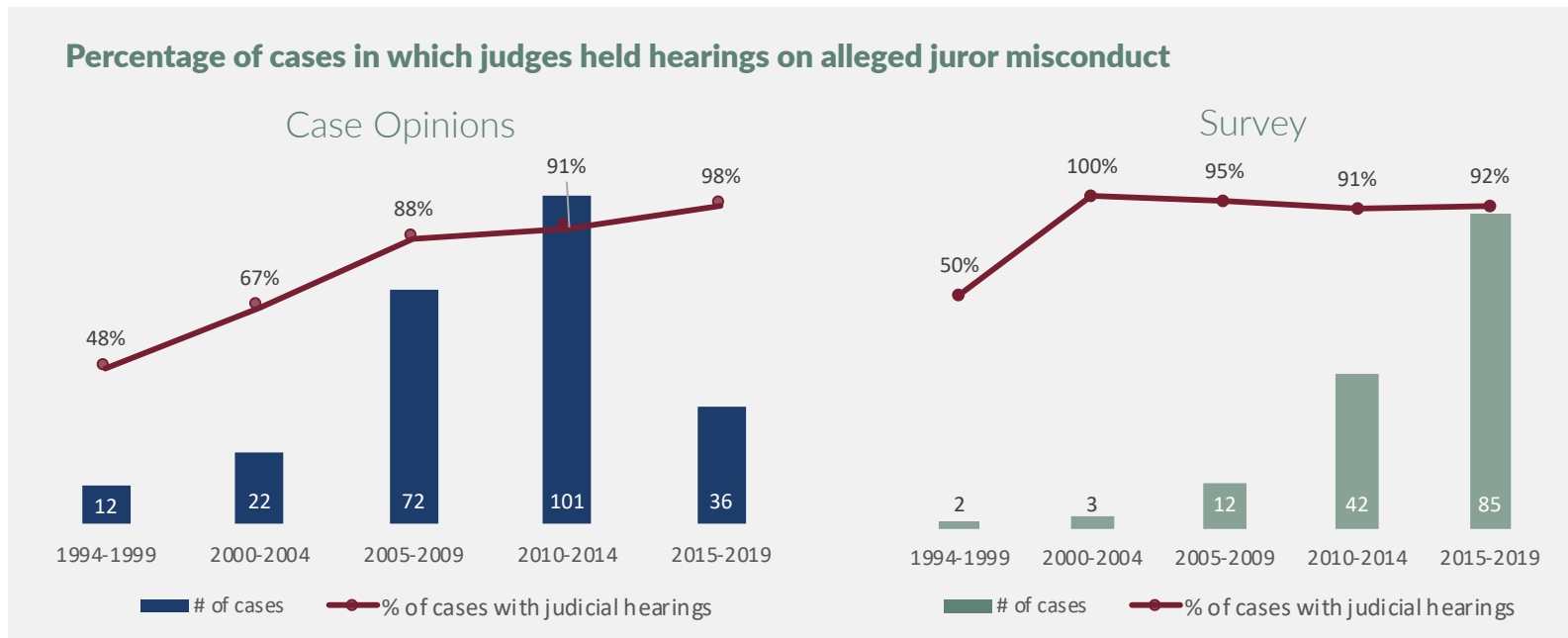
(Coded Case Opinions Only)



Incidents reported in survey responses did not include information about when the incident was brought to the judge's attention, but responses to other survey questions suggest that a much larger proportion of those incidents were discovered during trial or deliberations. For example, more than half of the incidents reported in the survey were brought to the judge's attention by jurors or court staff. Only one-quarter of the survey incidents were brought to the judge's attention by the attorneys or parties involved.

The Importance of Investigatory Hearings

Regardless of when the judge learns of the incident, the first step is an investigatory hearing about the alleged juror misconduct. In the incidents described both in the coded case opinions and the survey responses, trial judges held investigatory hearings in most cases, but there was a notable difference in hearing rates over time between the two datasets. Many of the earliest case opinions involved appeals arguing that the trial judge erred by not holding an adequate investigation into the alleged juror misconduct. As those opinions became publicized, especially in judicial education programs, the rate of these investigatory hearings increased dramatically. Most of the cases in the survey dataset were not appealed, ostensibly because the trial judges held investigatory hearings and responded with an appropriate remedy.



Holding investigatory hearings more often may have led to a decrease of appeals in cases involving juror misconduct.

Key Questions for Investigatory Hearings

Regardless of when the alleged juror misconduct is discovered, the trial judge should focus on a few key questions in the investigatory hearing:

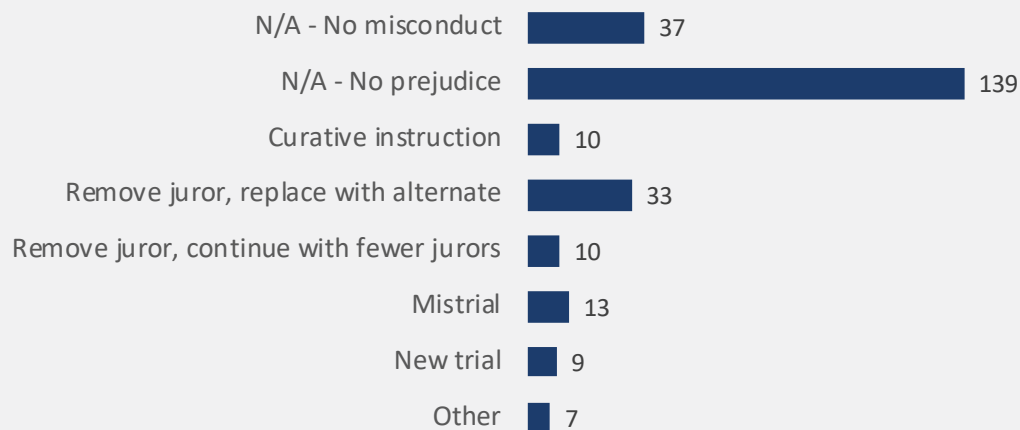
- What is the nature of the alleged juror misconduct?
- Did it involve conducting independent research about case-relevant topics? If so, what information did the juror find, if any?
- Did it involve communication about case-relevant topics with others? If so, what information did the juror communicate and to whom? Does the communication reveal bias or prejudgment by the juror?
- Was the information or communication restricted to a single juror? Or was it shared with other jurors?
- What impact has the information or communication had on the juror(s)? What impact would the information or communication have on “a reasonable juror”?
- What remedy, if any, is sufficient to mitigate the risk of prejudice to a party?

Remedies

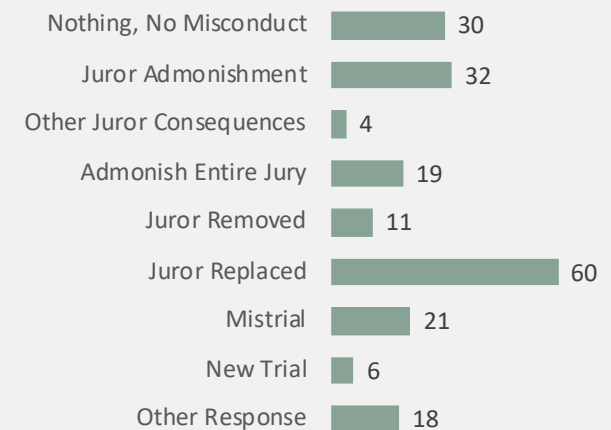
If the trial judge concludes that one or more jurors have engaged in misconduct involving new media, the judge must select a remedy to eliminate prejudice to the parties. A range of options is available if the misconduct is discovered during trial, but a new trial is the only available remedy if the misconduct is discovered posttrial. The selected remedies to address incidents as reported in the survey responses reflect, in part, how frequently judges discovered the misconduct during the trial. Two-thirds of the remedies identified in the surveys were employed during trial, but only one-quarter of the case opinion remedies could have been.

Judge Response to Incident

Case Opinions



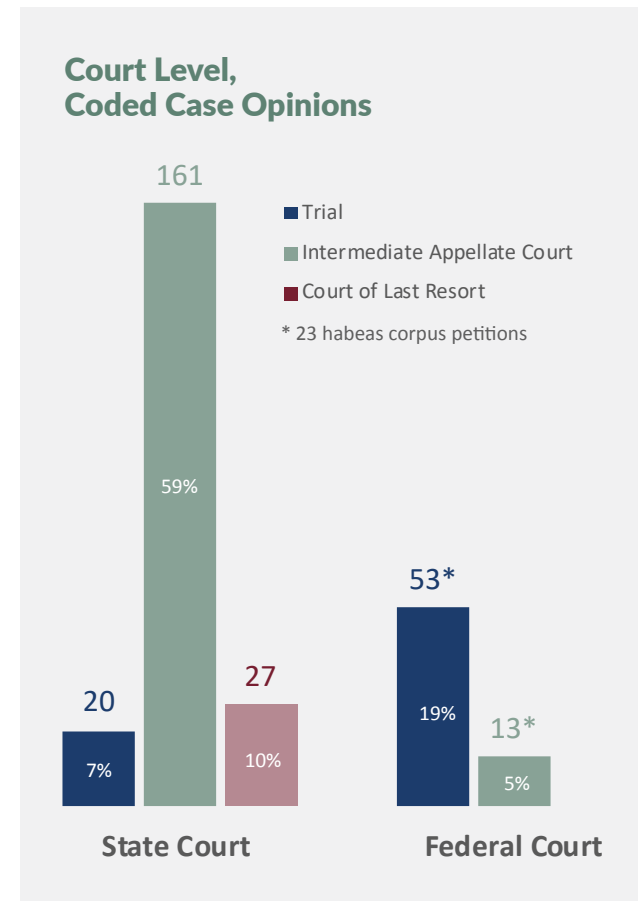
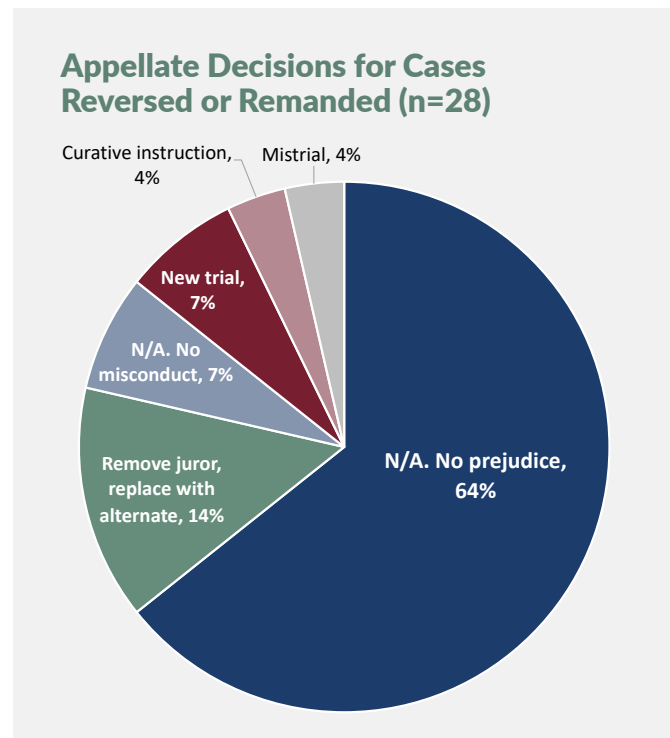
Survey



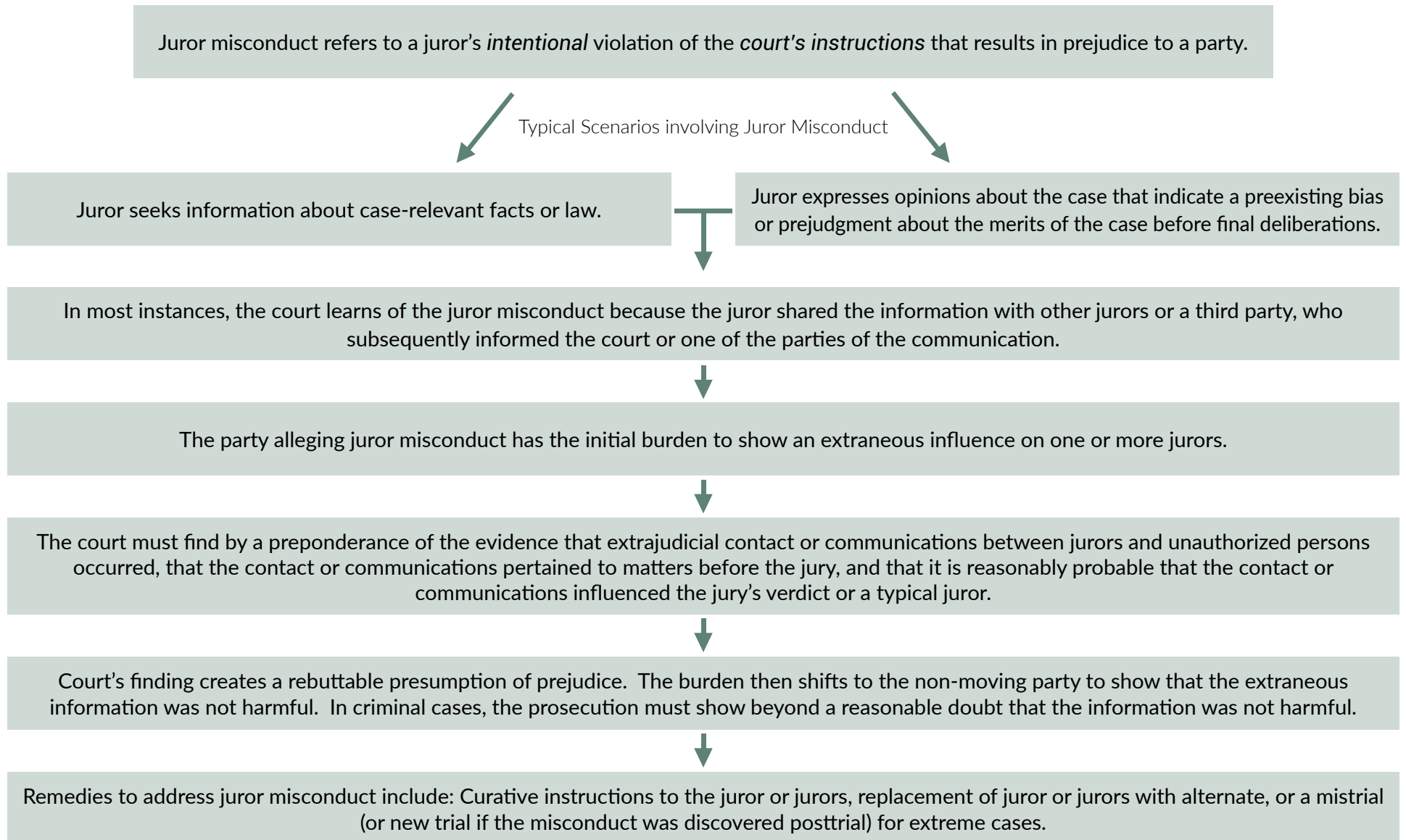
Appellate Review

Nearly two-thirds of the case opinions were issued by state intermediate courts of appeals. Additionally, 23 of the 66 federal court opinions originated in state court and were brought to federal court as habeas corpus petitions.

These opinions reflect the traditionally strong deference accorded to the trial judges, 85% of which affirmed the trial court response to the alleged juror misconduct or were never challenged. In the 28 cases in which the appellate court reversed or remanded the case back to the trial court, the most common finding by the trial court was that juror misconduct did not prejudice the parties. In three cases, the appellate court found that the trial judge had overreacted by declaring a mistrial or ordering a new trial.



Although the rapid evolution of new media over the past two decades has raised novel legal issues, an extensive body of common law concerning juror misconduct already existed. The basic analytical framework is shown below. Judges have adjusted the existing framework to fit the new media environment.







Technology Developments

Jurors are “tweeting, conducting factual research online, looking up legal definitions, investigating likely prison sentences for a criminal defendant, visiting scenes of crimes via satellite images, blogging about their own experiences and sometimes even reaching out to parties and witnesses through ‘Facebook friend’ requests.” *Social media* websites and applications have “made it quicker and easier to engage more privately in *juror misconduct*, compromise the secrecy of [jury] deliberations, and abase the sanctity of the decision-making process.” - *United States v. Fumo*, 655 F.3d 288 at 332 (Nygaard, J., concurring and dissenting)(emphasis added).



Judges have had to adapt to rapidly changing technology over the past 30 years—from improper handwritten notes to at-home Internet research to cell phone calls to social media—that has had an impact on juror misconduct.

 <p>Handwritten Notes</p>	<p>Juror transcribed handwritten notes into typed form and printed the notes for deliberations. Court found that typing notes at home was closely related to notetaking in the court room. With no evidence of extrinsic influence, there was no remedy for the appellant. <i>Stephenson v. State</i>, 742 N.E.2d 463 (Ind. 2001)</p>
 <p>Cell Phone Use</p>	<p>During a separation of jurors, the appellant alleged at least two jurors made cell phone calls to their homes. Although the court agreed that these calls improperly took place, there was no evidence of actual prejudice to overturn the conviction. <i>Pagan v. State</i>, 809 N.E.2d 915 (Ind. Ct. App. 2004).</p>
 <p>At-home Internet Research</p>	<p>After the trial, a juror revealed that he had researched the employer’s annual earnings on the internet and disclosed the information to fellow jurors while they were deliberating on damages. The trial court ordered a new trial on the issue of damages. <i>Sheffield v. Goodyear Tire & Rubber Co.</i>, No. 61238-7-I, 2009 Wash. App. LEXIS 2114 (Ct. App. Aug. 24, 2009).</p>
 <p>Social Media</p>	<p>Defendant’s motion for a mistrial was properly denied because there was no juror misconduct based on a failure to disclose that a relative of a witness was among the juror’s expansive list of Facebook friends. <i>Slaybaugh v. State</i>, 44 N.E.3d 111 (Ind. Ct. App. 2015).</p>

Differing Definitions of Extraneous Information

Black's Law Dictionary defines extraneous evidence as "any evidence that comes from outside the court." Some courts use the term "outside influence," but common terminology obscures the extent to which courts disagree about what is or is not extraneous.

The Texas Appeals Court upheld a ruling in *Soliz*, which concluded that for information to be considered an outside influence, it must come from someone who is outside the jury. Therefore, "information gathered by a juror and introduced to the other jurors by that juror" does not constitute an outside influence. *Soliz v. Saenz*, 779 S.W.2d 929 (1989).

Florida Court of Appeals: "It has been a long-standing rule of law that jurors should not consider external information outside of the presence of the defendant, the state, and the trial court. Based upon the facts of this case, and the key concern of the appellant's conduct, we cannot say that the intrusion of the definition of 'prudent' into the jury deliberations did not affect the jury verdict, and as such we are compelled to reverse and remand." *Tapanes v. State*, 43 So.2d 159 (2010).

While courts can take jurors' phones during deliberations, it is much harder to control the information that external sources post online about the trial. As an example, in 2016 the Court of Appeals of Indiana held that the media could tweet live updates of a trial from the courtroom, despite concerns that jurors might see the media reports. *Compton v. State*, 58 N.E.3d 1006 (2016).

Prejudice to the Parties

Juror misconduct using new media alone is not usually enough for a court to grant a new trial. The court must also find that a juror or jurors were exposed to information that influenced their verdict.

In *State v. Smith*, the defendant was charged with twenty counts of exploitation of a minor under fifteen for his possession of child pornography and was convicted of five of those counts. Three separate jurors reported that the foreman researched the weather on a particular day to determine whether the defendant, a pool cleaner, could have possibly been home to use the Internet. However, the trial court denied the motion for a new trial because all three jurors also reported that the information from the search had no impact on their verdict. *State v. Smith*, 413 S.W.3d 38 (Tenn. 2013).

In *Jenco v. Crowe*, a juror tweeted his disdain for jury duty during trial. The trial court found that this behavior was distasteful but did not prejudice either party. *Jenco v. Crowe*, 2015 Minn. App. Unpub. LEXIS 79.

Habeas corpus petitions face an already heightened burden to show prejudice.

“Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” *Hittson v. GDCP Warden*, 759 F.3d 1210 (2014).

Some states place restrictions on attorneys’ posttrial investigations of juror misconduct.

Although a juror initially concealed the fact that he had conducted Internet research, the federal district court found that this was not evidence of bias. *Hill v. Gipson*, 2012 U.S. Dist. LEXIS 119174.

Following a guilty verdict for first degree murder, defendant’s counsel found that one of the jurors had a “mutual friend” on Facebook with a co-defendant who pleaded guilty. The court found that the defense attorney had improperly discovered this information. *State v. Bailey*, 2020 Del. Super. LEXIS 142.

Conclusions and Recommendations

Despite widespread perceptions that juror misconduct involving new media is likely in any given trial, only one-quarter of respondents experienced any incidents over the course of their professional careers, suggesting that the actual risk of juror misconduct may be much smaller than they fear. Respondents also expressed confidence in the overall effectiveness of existing strategies to prevent juror misconduct, especially in clear jury instructions that explain the underlying rationale for prohibitions on the use of new media.

Respondents offered multiple and sometimes conflicting opinions on why jurors might violate rules concerning the use of new media. Many respondents indicated that jurors believe they need more information on which to base verdicts but also claimed that jurors understand but intentionally disobey the rules. Respondents also offered a wide variety of additional explanations for juror misconduct, including suggestions that different jurors engage in misconduct for different reasons and that some jurors may have multiple reasons for misusing new media. With so many potential motivations behind juror behavior, solutions will need to be multifaceted as well.

The present study confirms a great deal of intuition about case characteristics that indicate increased risk of juror misconduct, including:

- Criminal trials involving serious charges, such as homicide, assault/battery and sex offenses;
- Multi-day trials, especially trials lasting longer than 5 days;
- More complex trials, especially those involving unfamiliar terms or concepts;
- Trials in which jurors believe they may find information to assist their decision making on reputable websites or local news media; and
- Trials in which the attorneys know or suspect that prejudicial information exists online that jurors would likely encounter if they disregarded admonitions concerning use of new media.

Cases with these characteristics comprise only a small proportion of jury trials, but these are the ones in which judges and attorneys should be most vigilant.

Analysis of the case opinions shows that most judges handle juror misconduct appropriately, beginning with an investigatory hearing. Hearings on juror misconduct have increased over time, a trend that should continue as social media becomes more prevalent and more accessible.

Recent case law addressing juror use of new media shows a growing pragmatism about the likelihood of preventing all incidents of juror misconduct. Some of the earliest case opinions held strong presumptions that juror exposure to any extraneous information was prejudicial to the parties and tended to impute bias to jurors who failed to abide by admonitions on the use of new media. More recent cases have been more careful to uncouple the concepts of juror impartiality from juror misconduct. While there may be consequences for jurors who fail to follow the judge's instructions, the impact on the case will depend on the extent to which the extraneous information is prejudicial to the parties. Mistrials or new trials increasingly are reserved only for cases in which the extraneous information is clearly prejudicial.

One message that has been consistent in case law is the responsibility of trial judges to conduct an adequate investigation of the incident. Appellate courts have tended to defer to the discretion and reasoning of the trial court for whatever remedy it deemed appropriate to address the incident, provided that the judge made a good faith effort to investigate the incident and assess its impact on the jury's verdict. They are considerably less tolerant of judges who fail to conduct a hearing on the matter. Complicating factors for trial judges are the lack of clear consensus about how to assess prejudice and whether judges should employ an objective "reasonable person" standard or the juror's subjective self-assessment about the impact of the information on the juror's decision making.



The NCSC Center for Jury Studies is dedicated to facilitating the ability of jurors to fulfill their role in the justice system and enhancing their confidence and satisfaction with jury service by helping judges and court staff improve jury management. The authors of this Research Highlight are grateful to members of the project advisory committee, to the organizations that distributed the research survey, and to the judges and lawyers who answered the survey. We are also grateful to the State Justice Institute for financial support for the Jurors & New Media study (SJI-20-N-030). The views and opinions expressed in this research highlight are those of the authors and do not necessarily reflect the views of the National Center for State Courts or the State Justice Institute.

