

FINAL REPORT

Jurors and New Media:

Filling Knowledge Gaps for Judicial and Legal Policymakers

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INTRODUCTION

The strength of the jury in an adversarial system of justice is the impartiality of the jurors. Impartial jurors are those who are willing and able to consider the evidence presented at trial without preconceived opinions, to apply the governing law as instructed by the trial judge, and to deliberate in good faith to render a legally and factually justifiable verdict. Traditionally, the task of identifying impartial jurors takes place during voir dire, the stage of the trial in which judges and lawyers question jurors about their knowledge of the facts of the case, their opinions about issues that might arise during trial, or their life experiences that might affect how they perceive the evidence they hear. The trial begins only after biased jurors have been removed and the remaining impartial jurors are sworn.

For much of the twentieth century, it was relatively easy to protect jurors from extraneous information that might jeopardize their impartiality during trial and deliberations. Most trials were quite short—typically one to two days—and many courts routinely sequestered jurors during trial and deliberations. Consequently, there were few opportunities for jurors to be exposed to extraneous information. When not actively engaged in trial, jurors were also routinely admonished by the trial judge to avoid activities that might expose them to extraneous information, such as reading the newspaper or watching television, visiting the crime scene, or talking with friends or family about the case.

A strong presumption in formal case law is that jurors understand and comply with those admonitions, but changes in trial procedures over the past two decades pose serious challenges to this concept of juror impartiality. Trial rates have plummeted, in part because trials are extremely expensive. Straight forward cases involving relatively minor offenses or claims are more likely to be disposed by plea agreement, settlement, or other non-trial methods, leaving a greater proportion of more serious, more complex, and lengthier cases to be tried. Due to the expense of sequestration (hotels, meals, transportation), very few courts now sequester jurors except in the most high-profile cases. Consequently, jurors have far more time and opportunity to be exposed to extraneous information. Of greatest import, however, is the rapid evolution of

new media, which encompass an array of Internet-based technologies and social media platforms (e.g., Facebook, Twitter, Instagram, Tumbler). These new media make it possible for jurors to access virtually any piece of published information about pending cases in minutes. A large proportion of the American public now uses new media to communicate with friends and family and to complete routine daily tasks (e.g., shopping, getting directions to unfamiliar locations).

Even as recent revisions to jury instructions include more explicit information about permissible and impermissible use of new media, these admonitions are becoming more and more counterintuitive for many jurors. Many people rely on new media to aid in their most consequential decisions, such as healthcare, education, and finances. Given that jury service is similarly a serious commitment requiring understanding of relevant facts and law, many jurors might reasonably question why they should not use new media to inform their decisions. Indeed, reliance on new media has become so ingrained that it would require conscious effort for many jurors to refrain from doing so for the duration of a trial. As a result of these developments, judges and lawyers can no longer be confident that impaneled jurors will remain impartial for the entire trial.

What We Know About Jurors and New Media

Most of the available information on juror use of new media is anecdotal. In one of the first heavily publicized cases a Florida judge was forced to declare a mistrial in a protracted, expensive federal drug case after discovering that one juror had independently researched the case online. When the judge questioned the remaining 11 jurors to determine if others needed to be replaced, eight admitted to conducting their own illicit research.¹ Other examples of misconduct stem from the use of social-networking sites. For example, the Supreme Court of Arkansas overturned a conviction and sentence in a death penalty case in which a juror repeatedly posted updates about the case on his Twitter account.²

¹ John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, (Mar. 17, 2009) (available at <http://www.nytimes.com/2009/03/18/us/18juries.html>).

² Dimas-Martinez v. Arkansas, 2011 ARK. 515 (Dec. 8, 2011).

Most estimates of the incidence of Internet misconduct by jurors are no more than a step above anecdote. A Reuters Law analysis of Westlaw data between 1999 and 2010 found that at least 90 verdicts in U.S. courts were challenged based on claims of juror misconduct involving new media, half of which occurred within the most recent two years of the study.³ In 28 of the 90 trials, new trials were granted or verdicts overturned. In half the cases, judges found that Internet-related misconduct had occurred, but declined to declare a mistrial because the misconduct was not prejudicial to the parties. Another study examined the extent and nature of jurors' social media misconduct by monitoring Twitter activity in the United Kingdom. A general search of Twitter account for the terms "jury service" and "jury duty" returned, respectively, 160 and 26 tweets over a 24-hour period.⁴ An anonymous survey of 583 federal and state court jurors in Illinois found that 8% of respondents were tempted to use the Internet during trial or deliberations, but none admitted to violating the judge's admonitions.⁵ Based on these studies, the frequency of juror misconduct involving new media ranges from extraordinarily rare (45 confirmed cases of juror misconduct out of an estimated 450,000 jury trials that took place between 2008 and 2010⁶) to ubiquitous (186 tweets in an estimated 130 juror trials commenced daily in the United Kingdom⁷).

In 2012 the National Center for State Courts (NCSC) undertook a pilot test to assess the feasibility of survey methods to investigate juror misconduct involving new media. The NCSC surveyed judges, lawyers, and impaneled jurors in 15 trials and prospective jurors in an additional 22 trials.⁸ Although none of the jurors reported engaging in Internet-related misconduct, other responses to survey questions revealed potentially troubling trends. Sizeable proportions of jurors reported that they would have liked to use the

Internet to conduct research on case-related topics (28%) and to communicate with friends and family about the case (29%). These proportions increased for lengthier cases and cases involving more complex evidence. Younger jurors were also more likely to say that they wanted to use the Internet to conduct case-related research or to communicate about the trial. Nearly one-third of jurors misunderstood or were not sure about restrictions on Internet use. One in seven jurors said that they would not be able to refrain from using the Internet for the duration of a trial even if instructed to do so by the judge.

At the time that these early studies took place, social media platforms such as Facebook and Twitter were relatively new. Accounts on Facebook and Twitter more than doubled from 2012 to 2020.⁹ The ubiquity of new media has continued to increase over the past decade, including the launch of Instagram in 2010, Snapchat in 2012, and TikTok in 2016. Although many of the earliest cases of juror misconduct involved jurors conducting independent research online, it is quite possible, even likely, that juror misconduct involving communication over social media has become more common. Indeed, 20% of American adults report that they get their news through social media rather than from traditional news media, blurring the line between information seeking and information sharing.¹⁰

In response to growing concern, trial judges have adopted practices to discourage juror misconduct involving new media. The most common approach has been to revise jury instructions on Internet use. Some judges have experimented with administering supplemental oral or written oaths for jurors.¹¹ Most courts confiscate electronic devices from jurors during deliberations, and many do so when the trial is in session, but few state courts have banned such devices from the courthouse entirely,

³ Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, THOMPSON REUTERS NEWS & INSIGHT (Dec. 8, 2010) (available at <http://www.reuters.com/article/2010/12/08/us-Internet-jurors-idUSTRE6B74Z820101208>).

⁴ Michael C. Bromby, *The Temptation to Tweet—Jurors' Activities Outside the Trial*, (Inst. for Advanced Studies, Glasgow, Jury Research Symposium Working Paper), 2010 (available at http://papers.ssrn.com/sol3/papers.dfm?abstract_id=1590047).

⁵ Amy St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social media*, 11 DUKE L. & TECH. REV. 1 (2013).

⁶ GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS (NCSC 2007).

⁷ James Sturcke, *The Main Findings of the Juries Report*, GUARDIAN (Feb. 17, 2010) (available at <https://www.theguardian.com/uk/2010/feb/17/juries-report-main-findings>).

⁸ Paula Hannaford-Agor, David Rottman & Nicole L. Waters, *Jurors and New Media: A Baseline Exploration*, in PERSPECTIVES ON STATE COURT LEADERSHIP (NCSC 2012).

⁹ Facebook had had 1.1 billion users in 2012 but now has 2.7 billion users. Twitter had 167 million users in 2012 but now has more than 330 million users.

¹⁰ Elisa Sherer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RESEARCH CENTER (Dec. 10, 2018) (available at <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>).

¹¹ St. Eve & Zuckerman, *supra* note 5.

ostensibly recognizing the irony of making courts more accessible through their online presence while prohibiting Internet use within the courthouse itself. No court has reintroduced routine sequestration of jurors to prevent juror misconduct involving new media. Many trial lawyers report that they now routinely expect jurors to violate the admonitions and take steps to minimize the risk that jurors will find potentially prejudicial information online (e.g., counseling clients about their online presence) or, if the risk is too great, raise it explicitly during trial to blunt its impact. 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.

Appellate courts are also adjusting to the reach and potential impact of new media on trial court operations. Traditional case law on juror misconduct varies greatly from state to state with respect to the definition of misconduct and presumptions about its prejudicial impact. The introduction of juror misconduct involving new media has forced appellate courts to consider whether Internet-related misconduct is qualitatively more prejudicial to the rights of litigants than old-fashioned misconduct,¹² whether prejudice to the parties is due to the behavior of the juror or to the nature of the information,¹³ the quantum of evidence necessary to support or rebut presumptions of prejudice arising from juror misconduct,¹⁴ what

evidence must be offered to justify a posttrial hearing on alleged juror misconduct,¹⁵ and what remedies are appropriate to address juror misconduct.¹⁶

In 2020, the NCSC undertook a new study to examine many of these issues. As described in greater detail below, the study involved two components. The first involved surveys of trial judges and lawyers about their firsthand experience with juror use of new media, their opinions about the severity of the problem, and their confidence in existing preventative strategies. The second was a review and analysis of written court opinions involving allegations of juror misconduct related to new media. The case opinion review sought to learn both about case factors in which allegations were most likely to arise and about how trial and appellate judges have responded over time. This report summarizes key findings from the surveys and case opinions. Where possible, we have compared findings using both methods to verify their respective reliability while recognizing that divergent findings may be due more to the study method than the subject of juror Internet use. The report also includes a description of how case law concerning juror misconduct involving new media has evolved over the past decade. It concludes with a discussion of implications for jury trials, including recommendations for effective risk reduction strategies by trial judges and attorneys in the future. □

¹² *Dimas-Martinez*, *supra* note 2.

¹³ Dennis M. Sweeney, *Worlds Collide: The Digital Native Enters the Jury Box*, 1 REYNOLDS CT. & MEDIA L. J. 121 (2011); Fickes v. Petrolane-Alaska Gas Service, 628 P.2d 908 (1981).

¹⁴ State v. Aguilar, 224 Ariz. 299 (2010); Ramirez v. State, 7 N.E.3d 933 (Ind. 2014); Kilgore v. Fuji Heavy Industries Ltd., 240 P.3d 648 (NM 2010).

¹⁵ Schwartz v. Minneapolis Suburban Bus Co., 258 MINN. 325 (1960).

¹⁶ Ohio v. Gunnell, 132 OHIO ST.3d 442 (2012).



DATA AND METHODS

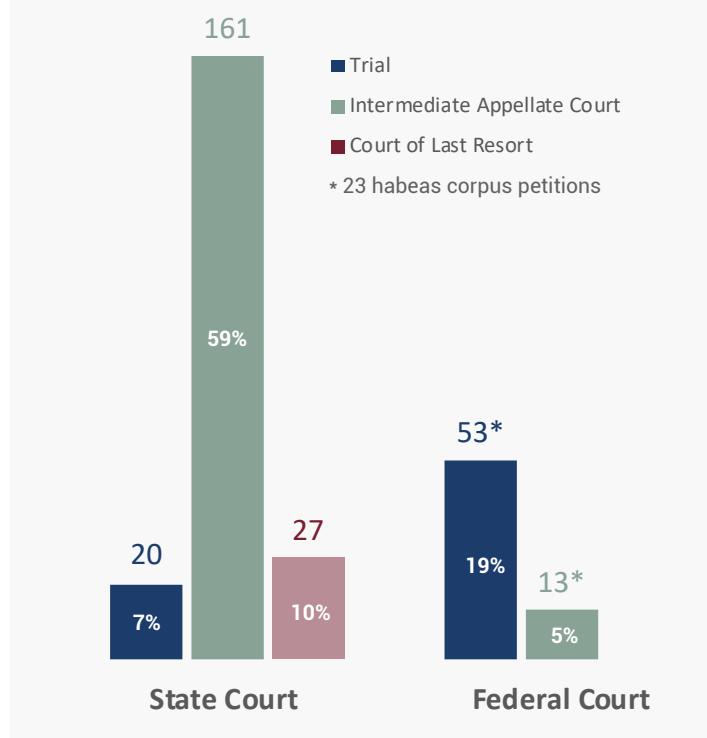
To fill gaps in the literature regarding whether juror use of new media is pervasive in modern jury trials, NCSC employed a multiple component research strategy.¹⁷ The study included a detailed legal analysis of cases involving allegations of juror misconduct involving new media and a survey of legal professionals regarding their personal experiences with juror misconduct, as well as their opinions on the prevalence of this type of juror misconduct and the effectiveness of preventive measures.

Case Opinions

To identify cases involving juror use of new media, NCSC collected both published and unpublished opinions generated by LexisNexis. To ensure identification of all relevant cases, the search terms ("juror w/p misconduct AND (Internet OR social media)")¹⁸ were deliberately over-inclusive. LEXIS generated a list of 810 cases reported between June 9, 1998, and May 19, 2020.¹⁹ NCSC research staff found that nearly half of the opinions (382) did not involve juror use of new media. Some cases, for example, involved general media coverage of the trial, challenges to jury instructions, or other types of juror misconduct. In addition, one in five opinions (168) involved either one or more appeals of the same case or did not describe the facts of juror misconduct in sufficient detail to be useful for analysis. The remaining 260 opinions concerned alleged juror misconduct involving new media.

Figure 1 shows the jurisdiction of the court that issued each coded opinion. Opinions originated from courts in 44 states, including Puerto Rico; these were heavily concentrated in five states.²⁰ Nearly two-thirds of the opinions were issued by state intermediate appellate courts for cases that were appealed from jury trials in a state trial court. Additionally, 23 of the 66 federal court opinions originated in a state court and were brought to federal court through habeas corpus petitions.

Figure 1. Court Level, Coded Case Opinions



For each 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. Information gleaned from the case opinions was intended to mirror to the greatest extent possible the questions posed to respondents in the judge and attorney surveys. Judges draft case opinions to highlight case facts they deem most relevant to their decisions. Consequently, not all of the case opinions included the same level of detail about incidents of juror misconduct involving new media as was elicited from respondents in the judge and attorney surveys. The case opinion coding form is shown in Appendix A.

¹⁷ The NCSC project team relied heavily on input from the project Advisory Committee and a focus group of experienced trials attorneys in designing the project methods and data collection instruments.

¹⁸ The LEXIS syntax was designed to identify all case opinions in which the term "juror" appeared within the same paragraph with the term "misconduct" and the terms "Internet" or "social media" appeared in the case opinion.

¹⁹ Cases were coded chronologically from oldest to newest.

²⁰ Half of all opinions were issued from courts in California (79), New York (17), Texas (16), Ohio (12), and Washington (10). Judicial staffing practices vary greatly from state to state, especially in appellate courts; some states have considerably more legal staff available to assist in drafting written opinions. See generally STATE COURT ORGANIZATION Table 20 (Provision of Law Clerks to Appellate Court Judges).

Judge and Attorney Survey

The Judge and Attorney Survey was designed in Qualtrics²¹ and distributed to members of the American Judges Association, the National Conference of State Trial Judges, the ABA Commission on the American Jury, the American Board of Trial Advocates, the National Association of Criminal Defense Attorneys, and the Association of Prosecuting Attorneys. The survey launched on March 10, 2020, and NCSC accepted responses through July 31, 2020. A total of 867 individuals completed the survey, of which 451 respondents identified themselves as judges, 376 as attorneys, and 40 as other.²² Table 1 indicates characteristics of the survey respondents.

Of the judges who responded, the vast majority (95%) were state trial court judges, mostly in the state general jurisdiction court.²³ Judges responded from 32 different states, with the highest number hailing from Illinois (81), Pennsylvania (72), Massachusetts (56), and Florida (52). Judges also provided the number of years they have served on the bench. More than half had served less than 10 years as a judge. Attorneys were asked to indicate their primary area of practice. Overall, attorney respondents reflect a well-balanced mix of civil and criminal practice, both on the plaintiff/prosecution and defense sides of the bar. Attorneys responded from 43 states, including the District of Columbia. The greatest number of attorneys were from Virginia (87), Texas (49), and California (48). Attorneys also indicated their length of time in legal practice, which ranged up to 50 years.²⁴

Table 1. 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%
	21 to 30 Years	64	14%
	31 to 40 Years	9	2%
	<u>Court Type</u>		
	State General Jurisdiction Court	388	86%
	State Limited Jurisdiction Court	53	12%
ATTORNEYS	Municipal Court	4	1%
	Federal Court	2	0%
	Other Court	4	1%
	<u>Court Level</u>		
	Trial	426	95%
	Intermediate Appellate	3	1%
	Court of Last Resort	1	0%
	Other	2	0%
	No Response	19	4%
	Number of Attorneys	376	
ATTORNEYS	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%
	Family	2	1%
	Other	8	2%

²¹ The data for this paper were generated using Qualtrics software, Version XM of Qualtrics. Copyright © 2020 Qualtrics. Qualtrics and all other Qualtrics product or service names are registered trademarks or trademarks of Qualtrics, Provo, Utah, USA. <https://www.qualtrics.com>.

²² Those who classified as *other* were asked to supply a description of their profession and reported such occupations as *court administrator*, *trial consultant*, and *retired judge* or *retired attorney*. An additional 119 participants accessed the survey but did not complete it. These participants were excluded from the analyses, and many did not answer any questions. However, all participants who responded to at least one series of questions, apart from demographic questions, were included.

²³ These data reflect two different questions about the type and level of court in which judges primarily worked. A few judges (10; 2.2%) who reported working in *federal*, *municipal*, or *other* courts also reported working at the *trial* court level. Additionally, some judges (19; 4.2%) reported the type of court (*federal*, *municipal*, *state general jurisdiction*, *state limited jurisdiction*, or *other*) in which they worked but did not specify court level (*trial*, *court of last resort*, *intermediate appellate court*, or *other*).

²⁴ Participation by ABOTA members, who must demonstrate substantial jury trial experience to be eligible for membership, may have contributed to the length of attorney practice.

Methodological Strengths and Weaknesses

Both components of this study have strengths and weaknesses. The case opinion dataset is a comprehensive collection of every known written opinion concerning juror misconduct involving new media. The cases offer detailed descriptions of the facts that were relevant to the legal issues raised in the case as well as analysis of the legal principles on which the decision was based. In the American justice system, however, relatively few trial court decisions are ultimately documented in written case opinions. Unless objected to, most decisions are communicated in sparsely worded court orders or even minute orders recorded by court clerks during in-court hearings. Only a fraction of trial court cases are ever appealed,²⁵ and an even smaller fraction are ultimately decided on the merits.²⁶ The case opinion dataset likely includes more serious allegations of prejudice prompting objections to the trial court's management of these incidents; instances involving either less serious exposure to ex parte information or timely and effective intervention by the trial court judge are less likely to result in written opinions. Consequently, only a tiny proportion of instances in which jurors were alleged to have used new media inappropriately may be included in the case opinion dataset. In addition, most of the case opinions were written by appellate court judges, who focused on the facts most relevant to their decisions. Details of particular interest in this study (e.g., the length of the trial, the types of new media used by jurors, the nature of the information sought or communicated by jurors, etc.) were missing from many of the case opinions simply because they were not germane to the court's decision.

In contrast to the case opinions, the incidents described in the survey responses were firsthand reports by trial court judges and attorneys about cases in which they personally participated. The survey

was administered to members of national judicial and bar organizations instead of a randomized sample of judges and attorneys. Although respondents may not precisely mirror the geographic and professional characteristics of the bench and bar overall, their diversity suggests that their collective experience provides a reasonably accurate picture of the frequency and nature of juror misconduct involving new media. Unlike the coded cases, the survey may have captured instances of alleged juror misconduct that were not involved in a formal appeal but were instead addressed in an in-court hearing. This methodology therefore illuminates instances that might otherwise remain obscure. The survey also allowed the respondents to elaborate on their experience, provide details of preventative measures, and rate their effectiveness. A shortcoming of survey responses, however, is the reliance on the respondents' recollection. In the survey, respondents were asked to provide details about cases in which they were involved years ago.

Comparing results from the case opinion findings with those of the survey raises considerations related to sample size for the two research components. The first is the potential scale of incidents reported in case opinions versus the judge and lawyer survey responses. The over-inclusive search terms used to obtain case opinions suggests that all or nearly all relevant case opinions ever written on the topic of jurors and new media were included and measured in the analyses. That is, the search results include more or less every occurrence of an incident that resulted in a written case opinion. Descriptive statistics (such as means, frequencies, and percentages) for the case opinions therefore describe exactly what is known about all cases about which there are opinions. However, the survey responses represent a convenience sample of judicial officers and licensed attorneys in the United States.²⁷ Consequently, readers should be aware that, based on the size of the sample relative to the population of attorneys and

²⁵ In 2018, for example, an estimated 83.8 million cases were filed in state trial courts compared to 234,000 cases filed in state courts of appeals (163,000 in intermediate appellate courts, 71,000 in courts of last resort). NICOLE L. WATERS ET AL., STATE COURT CASELOAD DIGEST, 2018 DATA, 7, 19 (NCSC 2020).

²⁶ NICOLE L. WATERS ET AL., CRIMINAL APPEALS IN STATE COURTS (U.S. DEP'T. JUST., OFF. JUST. PROGRAMS, Sept. 2015); DONALD J. FAROLE & THOMAS H. COHEN, SPECIAL REPORT: APPEALS OF CIVIL TRIALS CONCLUDED IN 2005, (U.S. Dep't. Just., Off. Just. Programs (Oct. 2011).

²⁷ An exact count of the number of judicial officers in the United States is unavailable, but most organizations estimate approximately 30,000 judges. See, e.g., [IAALS report]; The American Bar Association reported in 2018 an estimated 1.3 million licensed attorneys in the United States (https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/#:~:text=May%202018%20NewABA%20data%20reveals%20rise%20in%20number%20of%20U.S.%20lawyers,attorneys%20in%20the%20United%20States.) Not all judges are assigned to preside over dockets in which a jury trial is available (e.g., family court, probate court, many limited jurisdiction courts). Similarly, not all licensed attorneys engage in legal practice in which jury trials are a common method of dispute resolution.

judges with jury trial experience, the total number of incidents that have occurred is likely to be many times greater than the numbers reported in the survey. In addition, more complex inferential statistics are required to draw conclusions about the wider population of judges and attorneys, and results are limited by the representativeness of the sample and the role of chance and error in obtaining the results. Throughout the following analyses, figures and tables comparing the two methodologies should be viewed with these differences in mind.

Triangulation across multiple research methods is a time-honored technique for drawing conclusions from facts when a single method alone cannot fully explore the issues. However, the term "triangulation" implies at least three sources of information, not just two. An obvious question is whether a third component focused explicitly on jurors' reports about their use of Internet technologies would provide a more accurate picture about many of these issues. In addition to a broader base of information on which to draw conclusions about the frequency of juror Internet use during trial, it could also explore jurors' motivations for violating the admonitions and the impact of Internet use on their individual and collective decision-making processes. Although the survey and opinion review components of the NCSC study address these topics, judge and attorney perspectives on juror decision making are, by definition, hearsay and thus may not accurately reflect jurors' own perspectives.

NCSC has attempted on several occasions to examine juror use of new media directly but has not successfully secured either funding or court cooperation for such a study, ostensibly due to competing challenges of this approach. Some challenges involve the difficulty in

ensuring accurate and candid reports from jurors about their use of new media during trial. Jurors are routinely instructed that they should not use the Internet for research or communication purposes during trial and thus may be fearful of the consequences of disclosing that information. Depending on the length of time between the trial and when data are collected, some jurors may not accurately recall whether they or other jurors used the Internet and, if so, how it affected their decision-making.

Other challenges involve the reluctance of courts to permit researchers to conduct studies that might jeopardize the finality of jury verdicts. If, for example, a juror responded to a survey that they had obtained case-related information through independent research or communications with friends or family during the trial and that information influenced the jury verdict, a judge might feel legally and morally compelled to hold a hearing and potentially overturn the verdict based on that information. For that matter, a criminal defendant might have a legal right to subpoena information about the juror's identity to support a posttrial motion for a new trial or an appeal, making it difficult for researchers to promise confidentiality of juror responses. Those considerations have dampened court enthusiasm for collaborating on this type of research project. In the meantime, the present study sheds light on several questions about how judges and lawyers perceive and respond to concerns about juror use of new media. ☐

FINDINGS



The present study focused on several discrete questions about jurors and new media: (1) How great is the risk of juror misconduct involving new media? (2) Which case characteristics indicate increased risk that jurors will impermissibly use new media during trial? (3) How confident are judges and lawyers in existing preventive measures? (4) How has the law governing juror misconduct evolved to address risks from new media? This section first describes opinions of judges and attorneys about juror misconduct involving new media. It then relies on findings from both the survey and case opinion components of the study to examine how incidents involving jurors and new media are most likely to occur, when and how they are discovered, and how they affect the outcome of the case. The final section describes legal issues that arise in these cases and how previous case law governing juror misconduct has evolved to address them.

Judge and Attorney Opinions

Of key concern to the present study is the proportion of survey respondents who reported personal experience with incidents of juror misconduct involving new media. Plausibly, these experiences would inform their opinions about the severity of the problem and the effectiveness of preventive measures. Only one-quarter (24%) of respondents who answered the question reported firsthand experience; of the 200 responded who reported such experiences, 62% were judges, 36% were attorneys, and 3% were other respondents. Table 2 indicates the number of experiences by occupation.

Table 2.
Respondents' Experience with Incidents of Juror Use of New Media

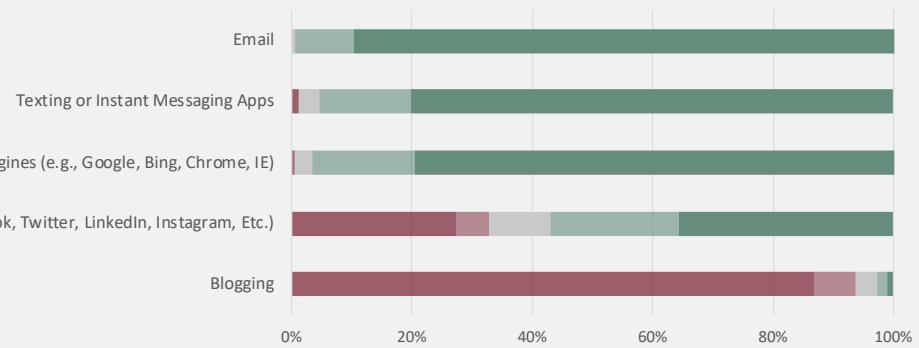
	Judges		Attorneys		Other Respondents	
No Experience	317	72%	288	80%	15	71%
1 Incident	75	17%	34	9%	0	0%
2 Incidents	27	6%	20	6%	0	0%
3 or more Incidents	21	5%	17	5%	6	29%

In addition to personal experience, the study asked respondents about their own familiarity with new media, including whether and how often they routinely use new media. We hypothesized that the two factors might be related insofar that respondents who were more familiar and confident in their use of new media might be more alert for instances of juror misconduct involving new media and, therefore, more likely to discover it when it occurs. In the present study, respondents rated their levels of tech savviness from *not at all tech savvy* to *extremely tech savvy*. Most (67%) rated themselves as only *somewhat tech savvy*, but more than one-quarter rated themselves as *very tech savvy* (20%) or *extremely tech savvy* (7%). Only 6% rated themselves as *not at all tech savvy*.

Respondents were also asked how frequently they personally used various forms of new media. Figure 2 indicates their responses. Overwhelmingly, respondents reported using e-mail, texting or instant-messaging applications, and search engines multiple times per day. Responses varied for social media use, with most respondents reporting either using social media multiple times per day or never using social media. Most respondents reported never blogging. Judges did not differ substantially from attorneys in their responses to these questions.

Figure 2. Frequency of New Media Use, Survey Respondents

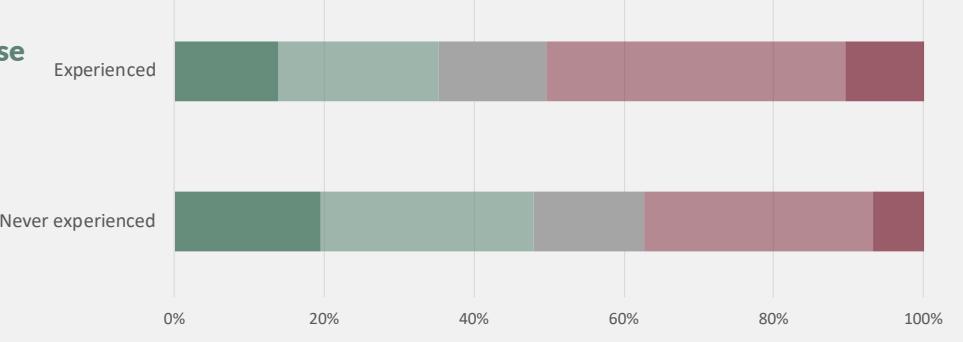
- Never
- Monthly
- Weekly
- Daily
- Multiple Times a Day



Likelihood of Juror Misconduct Using New Media. Participants were asked to report their opinion of the likelihood that one or more jurors will use new media inappropriately in any given trial. Respondents were heavily divided, with 45% reporting that such behavior was *extremely unlikely* (18%) or *somewhat unlikely* (27%) and 41% reporting that it was *somewhat likely* (33%) or *extremely likely* (8%).²⁸ Survey respondents who had personally experienced an incident in which jurors used new media inappropriately reported a slightly, but significantly, higher perceived likelihood that jurors would use new media inappropriately, compared to those who had not experienced an incident.²⁹ Figure 3 shows the differences in responses between those who had experienced an incident and those who had not. Compared to judges, attorneys were significantly more likely to report higher perceived levels of the likelihood of jurors using new media inappropriately in any given trial.³⁰ Figure 4 demonstrates differences in response frequencies for judges compared to attorneys. Among attorneys, criminal attorneys were more likely to rate the likelihood of juror misconduct higher than civil attorneys, although the effect size was small.³¹

Figure 3: Likelihood of Juror Use of New Media, by Experience

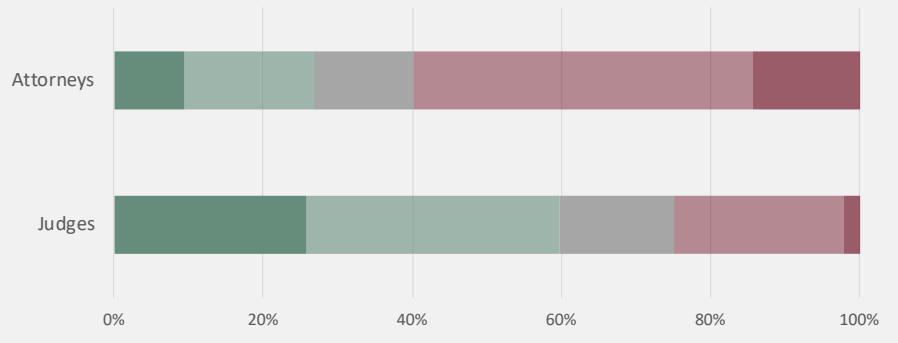
- Extremely unlikely
- Somewhat unlikely
- Neither likely nor unlikely
- Somewhat likely
- Extremely likely



Note: 173 participants who had experienced an incident and 584 participants who had not experienced an incident responded to the question. There was a higher non-response rate for those who had experienced an incident than for those who had not (14% compared with 6%).

Figure 4: Likelihood of Juror Use of New Media, by Occupation

- Extremely unlikely
- Somewhat unlikely
- Neither likely nor unlikely
- Somewhat likely
- Extremely likely



Note: For this question, 419 judges responded, while 331 attorneys answered the question.

²⁸ The mean response was 2.85 ($SD = 1.27$), which falls somewhere between “*somewhat unlikely*” and “*neither likely nor unlikely*.” Note that approximately 11% of participants did not provide a response for this question. These responses were not included in the percentages reported here.

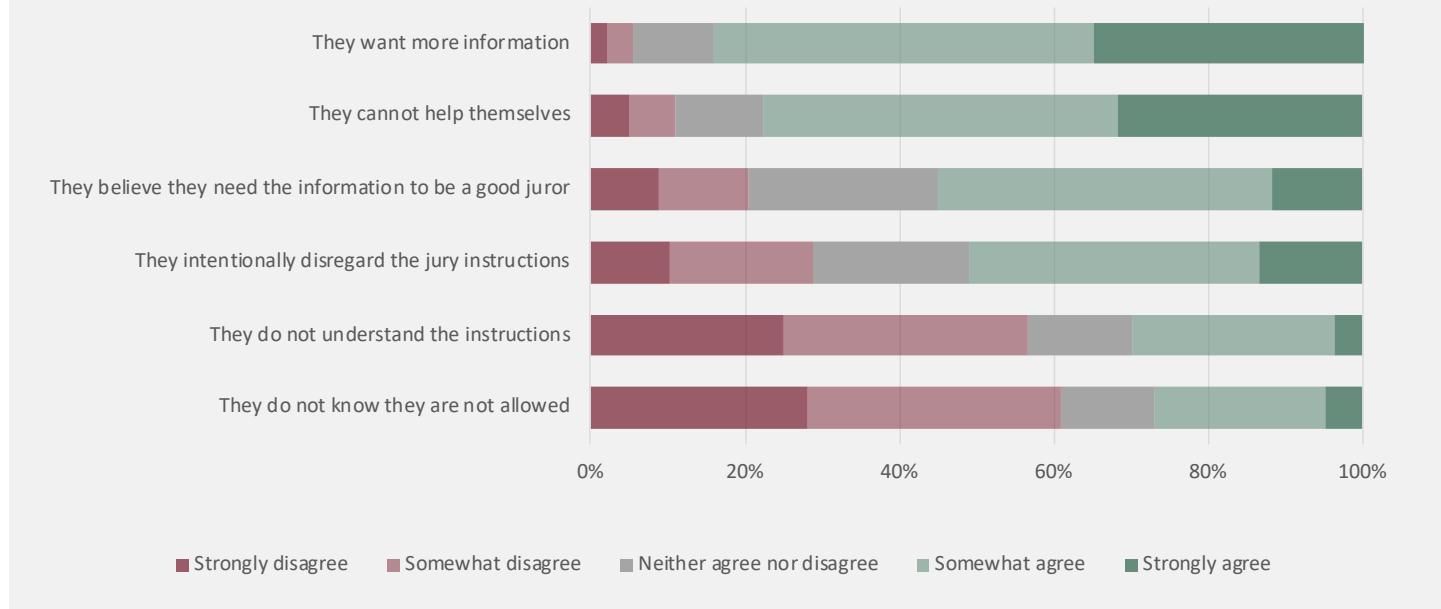
²⁹ A one-way ANOVA indicates significant differences between those who had experienced juror misconduct using new media ($n = 173$, $M = 3.12$, $SD = 1.26$) and those who had not experienced juror misconduct ($n = 584$, $M = 2.77$, $SD = 1.26$) in perceived levels of likelihood of juror misconduct, $F(1,755) = 10.33$, $p = .001$, $\eta^2 = .01$. Levene’s test indicated no difference in group variances ($F(1, 755) = 0.29$, $p = .591$).

³⁰ A one-way ANOVA indicates significant differences between judges ($n = 419$, $M = 2.42$, $SD = 1.16$) and attorneys ($n = 331$, $M = 3.38$, $SD = 1.20$) in perceived levels of likelihood of juror misconduct, $F(1,748) = 123.71$, $p < .001$, $\eta^2 = .14$.

³¹ A point-biserial correlation indicated that criminal attorneys tend to rate likelihood of juror misconduct using new media slightly higher than civil attorneys, $r(318) = .19$, $p = .001$.

Reasons for Juror Misconduct Using New Media. Respondents were asked to evaluate potential reasons why jurors use new media in inappropriate ways, including, for example, "They do not know they are not allowed." Responses were measured on a 1 (*strongly disagree*) to 5 (*strongly agree*) Likert scale. Figure 5 depicts the average responses across all participants.

Figure 5. Reasons for Juror Misconduct



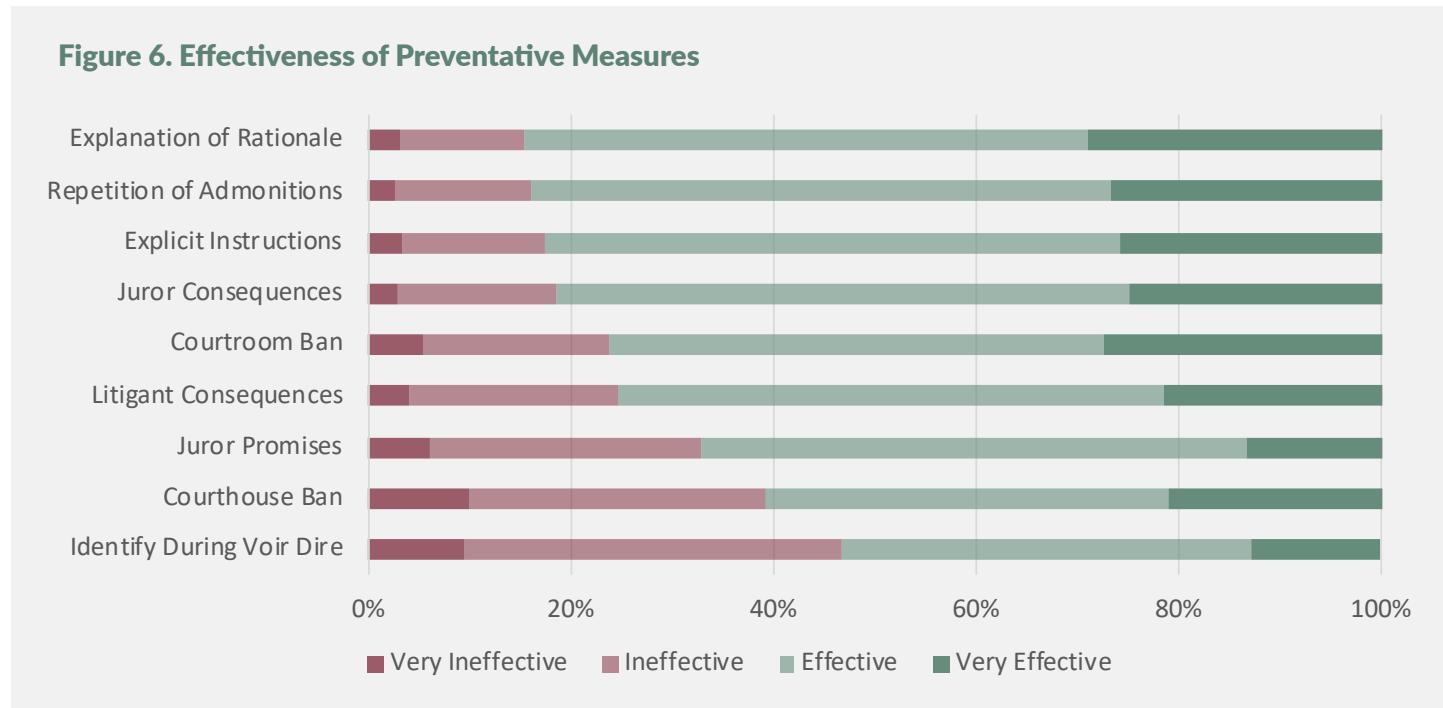
Several of the proposed reasons for juror behavior could be categorized as positive (*they want more information; they believe they need the information to be a good juror*), negative (*they intentionally disregard the jury instructions*), or neutral (*they cannot help themselves*) in valence, but no clear patterns indicated that judges and attorneys strongly believed in one of these reasons or categories over the others. In general, respondents tended to disagree that jurors *do not understand the instructions* and *do not know they are not allowed*. That is, most judges and attorneys believe jurors do know and understand the rules but choose not to follow them. However, 27% of respondents agreed or strongly agreed with those statements. Because judges and attorneys are so familiar with the rules of the courtroom, they may overestimate how well jurors understand those rules and the purpose behind them.

When asked to supply other reasons why jurors might use new media inappropriately, some of the most common responses were "*habit*," "*curiosity*," and "*boredom*." Others suggested that jurors may want to "*magnify their importance as a juror*." Some indicated that reasons may be related to a "*mistrust of the court system*." A few individuals proposed in response to this question that the "*likelihood of being discovered is so small*" that jurors "*believe they will not get caught by the court*." A few respondents indicated that jurors might engage in such behavior to "*get out of jury duty*." The wide variety in free response answers indicate that no single reason can fully explain juror behavior. Different jurors may engage in misconduct for different reasons, some of which are for perhaps laudable but misguided reasons, such as wanting to be better jurors, while others are more malicious in their intent, such as believing they can do it without being caught. Indeed, any individual juror may conceivably have multiple reasons for misusing new media during a trial, and it is important to recognize that with so many potential motivations behind juror behavior, solutions to the problem will likely need to be multifaceted as well.

Effectiveness of Preventative Measures. Awareness of problems related to juror misconduct involving new media grew substantially in the 2000s, resulting in increased judicial education programs about techniques to prevent their occurrence. In particular, new jury instructions on permissible and impermissible use of new media were drafted and widely promulgated. These instructions often included specific examples of new media tools and platforms to avoid (e.g., Google, Facebook, Twitter), explicit consequences for violations of the admonitions, and an expanded explanation of the underlying rationale for prohibitions on new media use. Other commonly recommended strategies included frequent repetition of the instructions before trial recesses, administering additional oaths or written promises from jurors, and implementing bans on Internet-enabled devices in the courtroom or the courthouse.

To consider possible solutions, survey respondents were asked to rate the effectiveness of nine preventative measures commonly employed to reduce the likelihood of juror misconduct using new media. Ratings were conducted using a 4-point Likert scale from 1 (*very ineffective*) to 4 (*very effective*). Preventative measures and their overall ratings by the group are indicated in Figure 6. 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. These measures are notable insofar that they involve a greater expenditure of time and effort to implement, and the comparatively lower ratings may reflect this reality. Overall, the consensus appears to be that almost any action taken will be at least somewhat effective.

Figure 6. Effectiveness of Preventative Measures



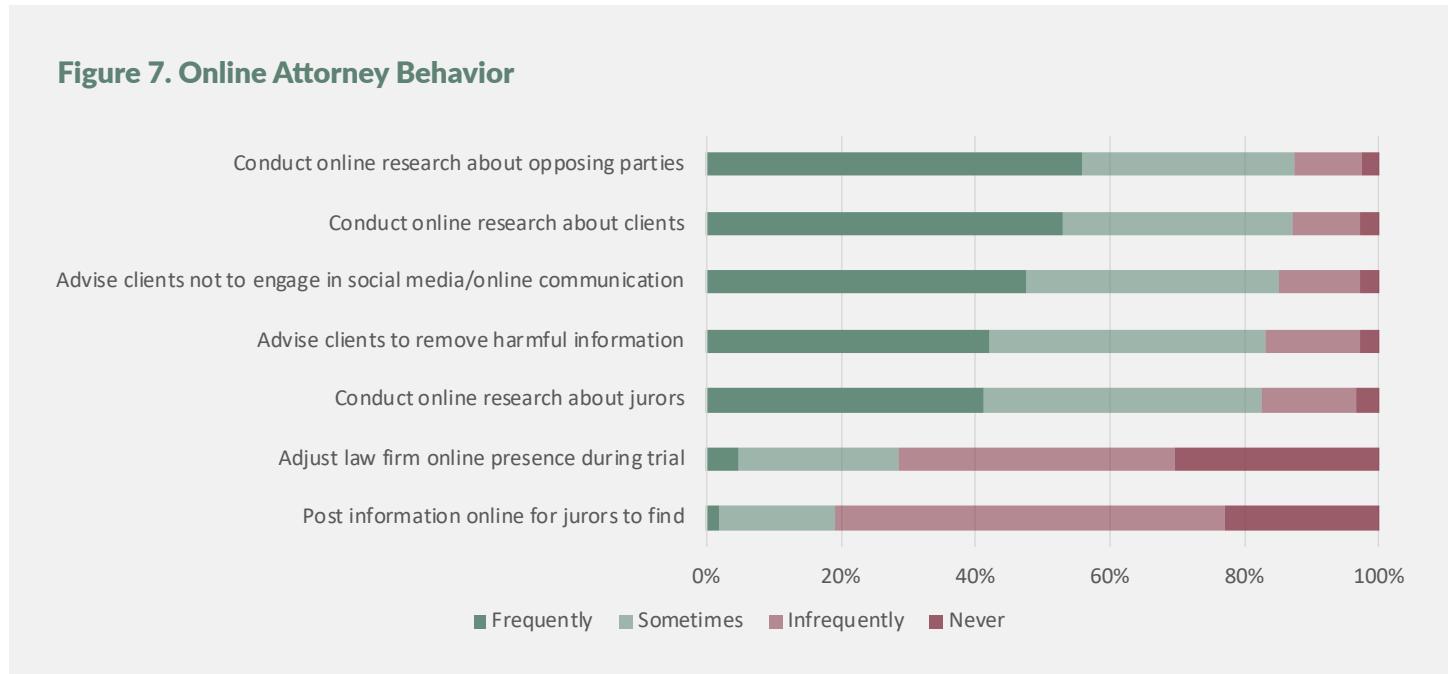
In general, mean responses to individual preventative measures appear to be largely unaffected by whether the respondent had previously experienced an incident involving juror misconduct using new media. Those who had experienced an incident of juror misconduct reported slightly lower belief in the effectiveness of most of the measures, although the size of the difference is minimal. In general, judges were slightly more optimistic than attorneys, rating each technique slightly higher than did the attorneys. Importantly, none of these measures need be taken in isolation, and the mean responses suggest that, on average, even those who have previously experienced juror misconduct of this type believe that most of these measures are at least somewhat effective.

Extrajudicial Strategies by Attorneys. In addition to measures employed in the courtroom to prevent juror misconduct using new media, this study asked judges and lawyers to assess the frequency with which lawyers employ extrajudicial strategies either to reduce the impact of information that prospective jurors might encounter online or to use that information strategically for an advantage during trial. Respondents were asked to rate how often they think attorneys engage in the following behaviors online:

- Conduct online research about jurors;
- Adjust law firm's online presence during a jury trial;
- Conduct online research about clients to identify potential prejudicial information;
- Conduct online research about opposing parties to identify potential prejudicial information;
- Advise clients not to engage in social media/online communication;
- Advise clients to remove harmful information online before trial; and
- Post information online in hopes that jurors will find it.

Figure 7 shows the average responses of survey respondents for each strategy. Overall, attorneys and judges believed that attorneys sometimes or frequently engaged in attorney behaviors regarding new media, but not a single respondent indicated that they did so *all the time* for any of the attorney behaviors. Judges and attorneys responded to these questions similarly, with mean responses for attorneys slightly higher in most cases. Ratings were similar across criminal and civil attorney respondents. For both civil and criminal attorneys, respondents reported that attorneys were less likely to adjust the law firm's online presence during a jury trial or to post information online for jurors to find, compared with the other attorney behaviors.

Figure 7. Online Attorney Behavior



Incidents of Juror Misconduct Involving New Media

As a general frame of reference, it may be helpful to consider a "typical" incident of juror misconduct involving new media before delving more deeply into case-related factors that indicate the greatest risk. The typical incident of juror misconduct involving new media occurs in a criminal case in which the defendant is charged with a violent crime. From the late 1990s until the mid-2010s, the incident would have involved a juror conducting independent research about trial-relevant facts or legal terms and concepts. The juror would then present their findings to other jurors during deliberations. The judge and lawyers usually became aware of the incident in a note from other jurors concerned about the introduction of outside research into deliberations. Since the mid-2010s, the incident could have involved either independent research or communication with others through email, texts, blogging, or, most recently, social media. When the juror communicated with others, they were less likely to bring information to the attention of other jurors. Instead, the attorneys or parties typically learned of it through social media or Internet research on jurors and brought it to the judge's attention in a posttrial motion. After conducting an investigatory hearing, the judge usually found that the information discovered or communicated by the juror was not prejudicial to the parties. If the misconduct was discovered during trial or deliberations, the judge would admonish the jurors and possibly replace the offending juror with an alternate. If the misconduct was discovered posttrial, the judge typically denied the motion for new trial.

These were the most common details of juror misconduct revealed in the survey responses and case opinions. But the contours of how each incident took place and the impact of the incident on the outcome of the case varied considerably. The following section describes these variations in greater detail, highlighting specific case characteristics that may indicate increased risk of juror misconduct.

Frequency and Timing of Incidents. Survey respondents were asked to report the number of incidents of alleged juror misconduct involving new media they had personally experienced, either as attorneys or as judges.³² As noted previously, less than one-quarter of survey respondents reported personal experience with incidents of juror misconduct involving new media.³³ Survey participants who experienced at least one incident of alleged juror misconduct involving new media were asked to estimate the year of the first incident. The trial year for the first incident ranged from 1999 to 2020. More than three-quarters of these incidents have taken place in the past eight years; the single largest number of incidents occurred in 2019 (15% of 177 incidents in which the trial year was reported). The case opinion dataset included the year that the opinion was issued and the year of the trial in which the incident occurred. The earliest incident in the case opinion dataset occurred in 1994. Half of the incidents have occurred since 2010.³⁴

Figure 8 indicates the cumulative sum of incidents reported over time, comparing survey data and case opinions and noting the year of important developments in new media. Not only has the total number of incidents increased over time, the average rate of change has also increased, both for incidents described in the coded cases and for those reported in the survey.³⁵ The increase in the average rate of change occurs after significant developments in new media, including the founding of Facebook in 2004. The apparent rise in the number of incidents over time is likely due to the rapid proliferation of new media use by Americans generally. In addition,

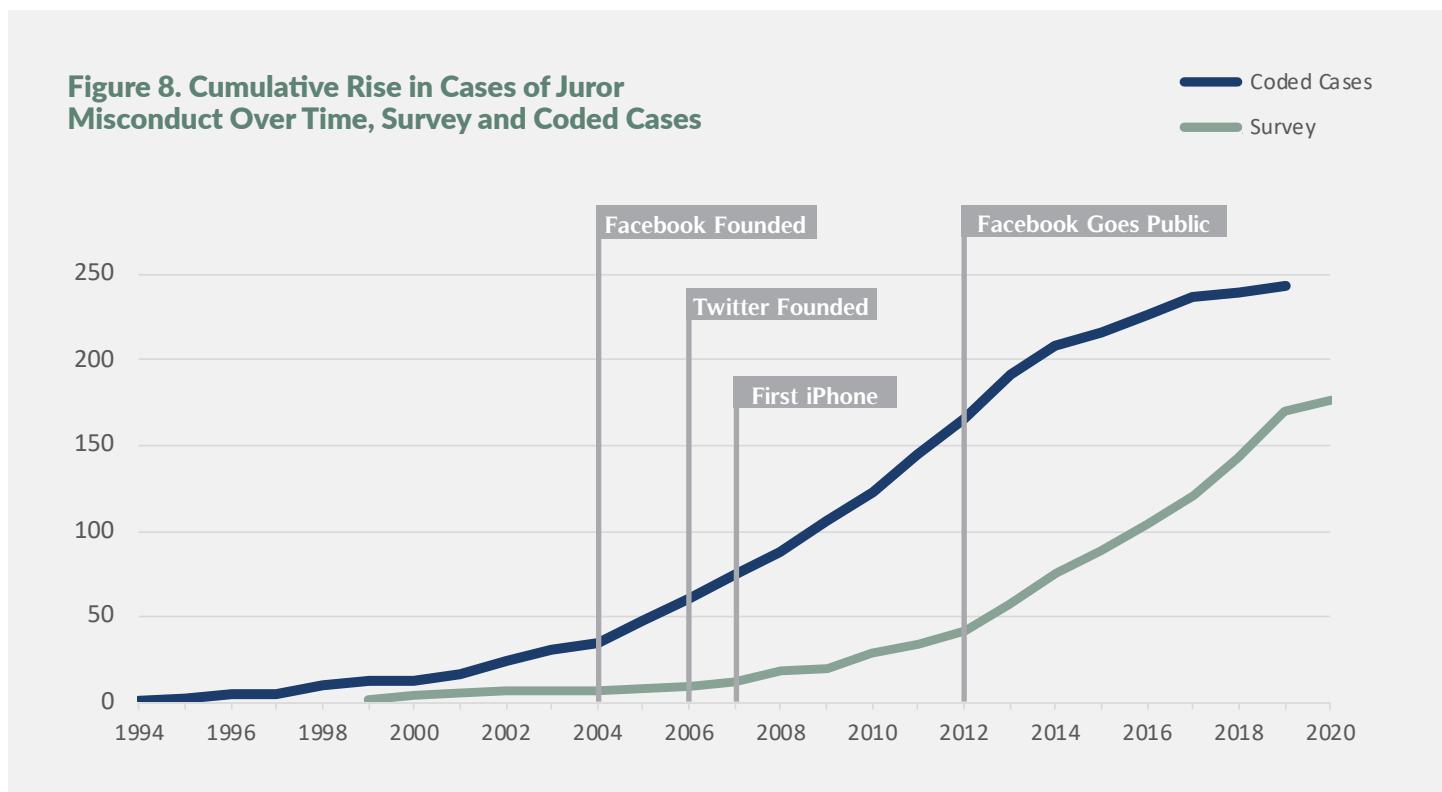
³² Note that due to the phrasing of this question, which asked respondents to consider only those cases in which they were judges or attorneys, most respondents who categorized their occupation as "other" did not report any incidents.

³³ See *supra* Table 2.

³⁴ A large proportion of opinions (75%) were issued by courts of appeal, which are written long after the incidents occurred and legal issues were raised on appeal. Appeals from state trial courts to courts of appeal can take over a year to resolve; habeas corpus claims, which often are challenged years after the original trial, add to the delay in published case opinions. Therefore, the current number of incidents for a given year, particularly for more recent years, likely underestimates the actual number of incidents about which there will eventually be case opinions. See generally NICOLE L. WATERS et al., CRIMINAL APPEALS IN STATE COURTS (Sept. 2015) (available at <https://www.bjs.gov/content/pub/pdf/casc.pdf>); NICOLE L. WATERS & TRACY SOHNI, CASELOAD HIGHLIGHTS: CIVIL TRIALS ON APPEAL – PART 2 (July 2007) (available at <https://cdm16501.contentdm.oclc.org/digital/collection/appellate/id/94>).

³⁵ The number of incidents in coded cases quadrupled in the eight years between 2005 (47 incidents) and 2013 (192 incidents), indicating an average rate of change of 18.13 incidents per year, while the average rate of change for the same number of years between 1997 (5 incidents) and 2005 is only 5.38 incidents per year. The average rate of change for the coded cases for the entire period represented by the data (25 years) is an increase in 9.72 incidents per year. The survey data indicate similar changes, although the dramatic increase in the rate of change occurs at a later period. For the survey data, the average rate of change in the eight years from 2004 (7 incidents) to 2012 (42 incidents) is 4.38 incidents per year, while there is an average yearly increase of 18.29 incidents per year for the seven-year period between 2012 and 2019 (170 incidents).

as judges, attorneys, and other court staff become more familiar with the technology themselves, they may take more notice of the use of such technology. Of course, these factors are not mutually exclusive, nor do they exclude the possibility of other influencing factors.³⁶



Note: Curves reflect cumulative sum of cases for all previous years (running total). Survey data indicate the year of the first incident reported, regardless of the number of incidents reported. There is currently no data for cases coded after 2019, and survey data for 2020 reflect approximately the first six months of 2020. Note also that the number of incidents reported in the survey is limited by the sample size whereas the case opinions reflect the known population of cases.

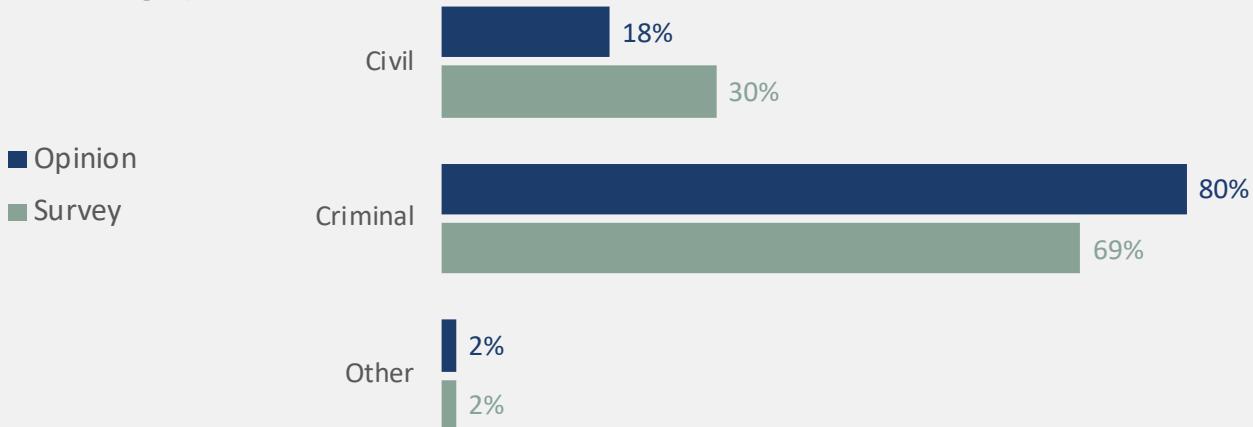
Case Types. In addition to inquiring about the timing of the first incident of juror misconduct, the judge and attorney survey asked respondents to provide detailed information about the most significant incident of juror misconduct that they experienced. For respondents who experienced more than one incident, the most significant might not necessarily be the first. In both the coded cases and the survey, incidents of juror misconduct involving new media were more likely to be reported for criminal versus civil cases. Survey respondents indicated that 69% of incidents they described occurred during criminal cases, while 30% of incidents occurred during civil cases (see Figure 9). Possibly, judges and attorneys consider incidents of misconduct occurring during criminal cases to be more significant than incidents occurring during civil cases. However, those survey respondents who experienced only one incident reported an even greater difference between incidents occurring during criminal versus civil trials, with 73% reporting incidents occurring during criminal cases and 27% reporting incidents occurring during civil cases, indicating that the risk for juror misconduct of this type may truly be greater for criminal cases than civil cases.

The coded case opinions support the conclusion that criminal cases pose a greater risk of juror misconduct involving new media than civil cases; 80% of coded cases involved criminal cases, while only 18% of coded

³⁶ Although beyond the scope of this research, it is worth noting that the COVID-19 crisis may also have affected the number of incidents reported in 2020, as many courts were not holding jury trials at the time of the judge and attorney survey. How the pandemic will influence technological advances within the courtroom and future juror misconduct using new media is as of yet undetermined and may present opportunities for future research.

cases involved civil cases (see Figure 9). Nevertheless, incidents of juror misconduct using new media may occur more often in civil cases than might be expected based on the number reported in the case opinions due simply to the likelihood of an appeal. Many states provide an appeal of right or mandatory appellate review from a criminal conviction, so the likelihood of an appellate decision on the merits is more likely for a criminal case than for a civil case over which the parties may have less incentive to appeal.

Figure 9. Juror Misconduct by Case Category



Within the broader category of criminal and civil cases, juror misconduct involving new media was more common in certain types of cases. Within criminal cases, for example, most incidents occurred within homicide, assault/battery, or sex offense cases, both in the case coding and in the survey responses. Homicides accounted for 22% of criminal cases in the survey and 46% of criminal cases in the case opinions. Assault/battery cases accounted for 20% of criminal cases in the survey and 11% of criminal cases in the case opinions. Sex offenses accounted for 16% of criminal cases in the survey and 13% of criminal cases in the case opinions. While other types of cases did not rank as highly as these three types, cases involving drug offenses were also notably high in the case opinions, accounting for 10% of the criminal cases.

Within civil cases, medical malpractice ranked as the most common case type both in the surveys (30% of civil cases) and in the case opinions (21% of civil cases). Apart from that commonality, ranking differed between the two data collection methods. The survey respondents listed the next highest case types as product liability (18% of civil cases) and automobile tort (15% of civil cases). Meanwhile, the coded case opinions showed the next highest proportion of civil case types were other contract (19% of civil cases), employment discrimination (11% of civil cases), and other malpractice (11% of civil cases). However, it is important to consider the small number of cases sampled in the coded case opinions and the wide variety of case types included; for example, 11% of civil cases represents only five cases.

When assessing the risk of juror misconduct involving new media, it is useful to consider the extent to which reports of incidents occur disproportionately to the frequency of jury trials for these case types. For example, as shown in Table 3,³⁷ product liability cases represent less than 1% of all civil jury trials, but the proportion of incidents reported in survey responses for product liability cases was 18%. Similarly, in the coded cases, 4% of civil cases with juror misconduct involving new media were product liability cases. As shown in Table 4, homicide cases make up only 6% of criminal jury trials according to the Bureau of Justice Statistics. Of those who reported juror misconduct in the current survey, 22% occurred in homicide cases. In the coded cases, homicides comprised 46% of the total cases.

³⁷ Table 6 contrasts the distribution of civil case types from the 2005 Civil Justice Survey of State Courts with the percentage of civil case types in which there was juror misconduct using new media, both for the surveys and for the case opinions. U.S. DEP'T. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS & BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 2005, Inter-university Consortium for Political and Social Research [distributor], 2011-11-02. <https://doi.org/10.3886/ICPSR23862.v2>

Table 3.
Civil Case Types

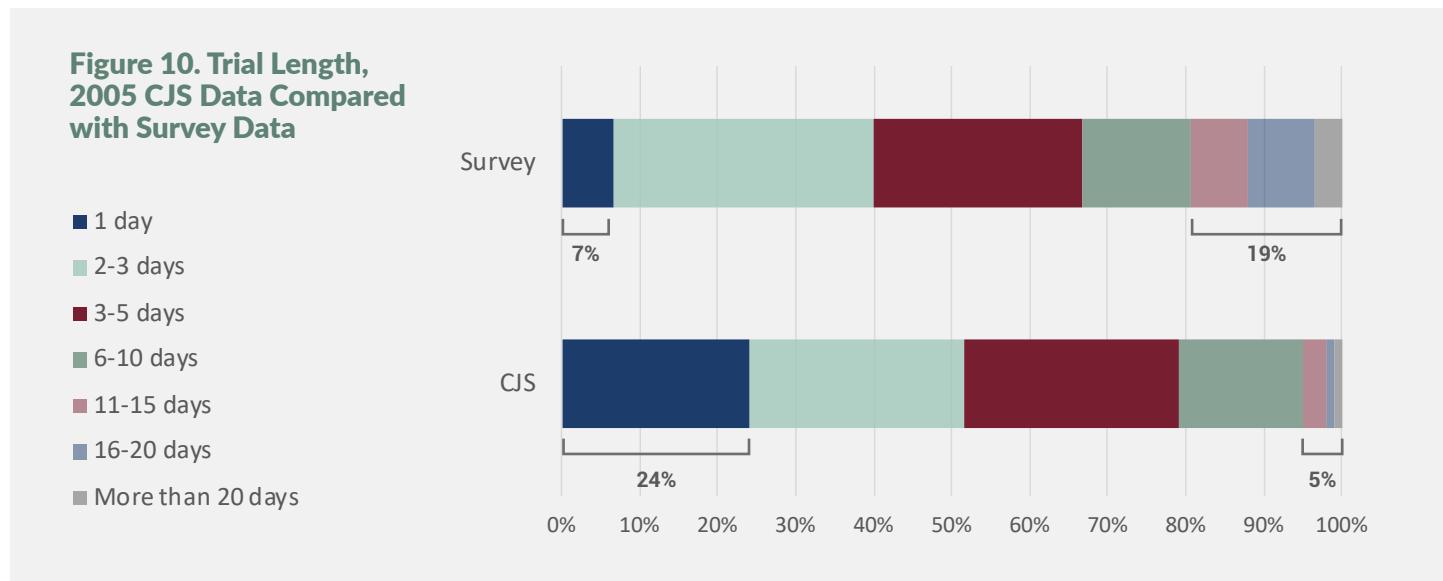
CIVIL CASE TYPES			
Case Type	2005 Civil Justice Survey of State Courts (%)	Surveys (%)	Opinions (%)
Automobile Tort	42	15	7
Medical Malpractice	15	30	22
Premises Liability	13	8	n/a
Seller Plaintiff (debt collection)	5	n/a	2
Fraud	4	2	2
Intentional Tort	3	3	2
Other Tort	3	12	15
Employment--Discrimination	2	n/a	11
Product Liability	1	18	4
Malpractice--Other	1	2	11
Rental/Lease Agreement	1	n/a	2
Eminent Domain	1	2	n/a
Other Contract	1	5	20
Unknown	n/a	3	n/a

Table 4.
Criminal Case Types

CRIMINAL CASE TYPES			
Case Type	Bureau of Justice Statistics (%)	Survey (%)	Opinions (%)
Assault/Battery/Other violent Crimes	36	20	11
Property Crimes	24	3	7
Public Order Offenses	17	2	4
Drug Offenses	14	8	10
Homicide	6	22	46
Sex Offenses	4	16	13
Child Abuse/Neglect	n/a	1	2
Domestic Violence	n/a	2	1
DUI/DWI	n/a	5	2
Weapons Offenses	n/a	1	3
Unknown	n/a	19	n/a

Possible explanations for disproportionately high rates of reported incidents for these case types include jurors' awareness of the availability and potential salience of information online. As noted previously, survey respondents attributed jurors' motivation to use new media to their desire to obtain more information on which to decide the case. Many jurors are aware of existing online resources that may provide useful information. In medical malpractice cases, for example, jurors may seek information from WebMD, the American Cancer Society, the Mayo Clinic, and other well-regarded sources of health information to assess the validity of claims and defenses raised at trial. Similarly, jurors may be aware that local media organizations reported on more serious crimes and be tempted to discover background information posted to the organizations' online archives. The temptation to do so may be much greater in cases that involve relatively complex or ambiguous evidence in which jurors have difficulty understanding or drawing firm conclusions of guilt or liability.

Length of Trial. Regardless of the repetition of instructions on impermissible use of new media, the longer the trial continues, the more time jurors have to succumb to those temptations. More complex trials tend to be longer, involve more topics about which jurors might want information, and offer more opportunity to conduct independent research or discussions. Figure 10 compares trial lengths reported in the judge and attorney surveys with data from the 2005 *Civil Justice Survey of State Courts*,³⁸ a representative sample of the length of jury trials from 125 counties in the United States. The 2005 data indicate that most jury trials are short, with 24% lasting one day and only 5% lasting longer than 10 days. In contrast, attorneys and judges reported more instances of juror misconduct using new media when cases were longer, with only 7% (11 cases) occurring when cases lasted one day and 19% occurring when cases lasted longer than 10 days.³⁹ According to the survey data, the greatest percentage of cases in which jurors reportedly engaged in misconduct involving new media were in the 2-to-3- and 3-to-5-day ranges. The reported difference in percentage of cases involving juror misconduct between single-day cases (7%) and 2-to-3-day cases (33%) is particularly striking.⁴⁰



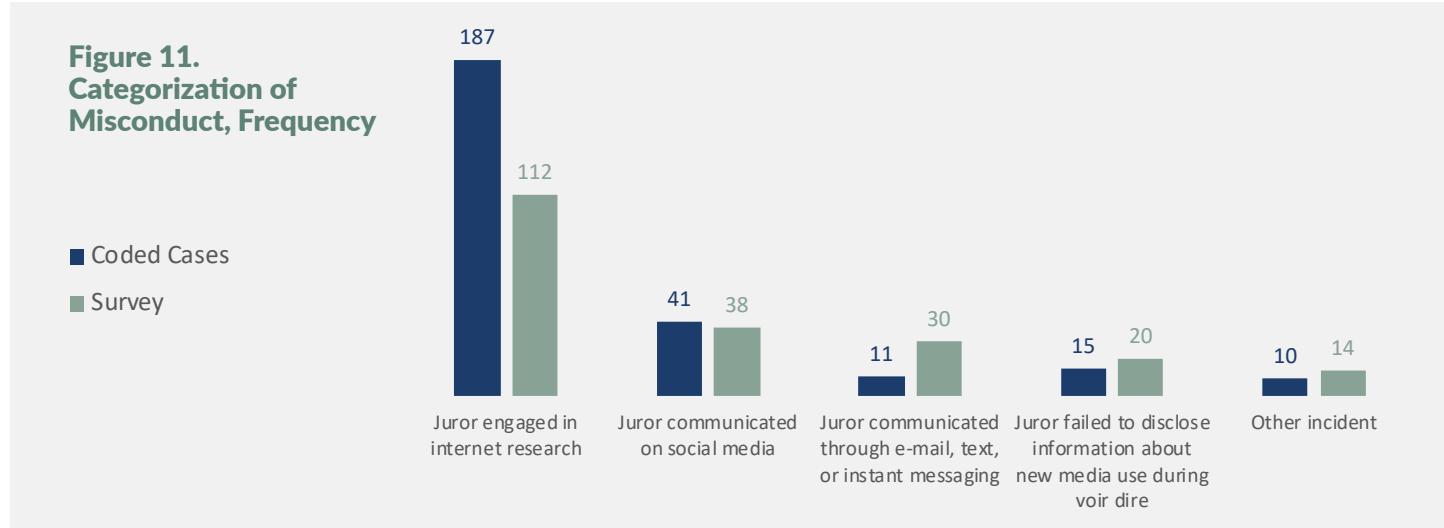
Note: CJS data show proportion of cases for each time category for all cases from a representative sample of U.S. counties. Survey data show proportion of cases for each time category only for reported cases of juror misconduct using new media.

³⁸ *Id.*

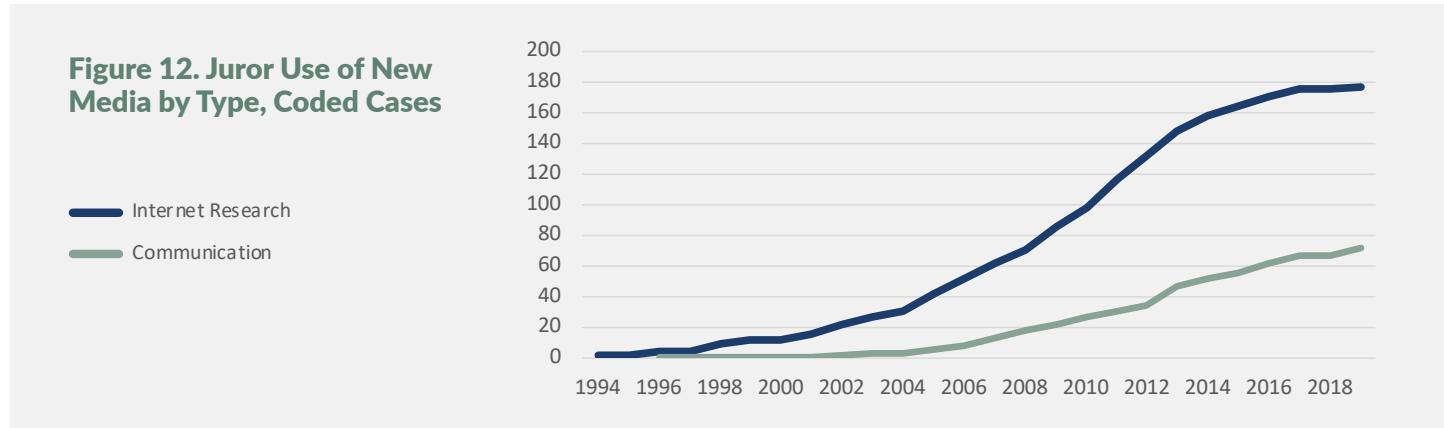
³⁹ Respondents who reported incidents but did not report the trial length (35 cases; 17.5% of incidents) were excluded from this part of the analysis.

⁴⁰ Unfortunately, the case opinions do not provide enough data regarding trial length to be able to compare them with the survey data, so it is unknown whether detailed case information would support the recollections of the survey respondents.

Types of Juror Misconduct. Survey respondents who had experienced at least one incident of alleged juror misconduct using new media were asked to categorize and briefly describe the “most significant” incident in greater detail.⁴¹ Similarly, the case opinions were categorized based on the types of juror misconduct involved. In both cases, it was possible for incidents to involve multiple categories of misconduct. For instance, an incident may have involved jurors engaging in research and also in communicating on social media.⁴² Figure 11 presents the total number of each subcategory of juror misconduct involving new media identified in the surveys and in the case opinions.



Overwhelmingly, the incidents reported by survey respondents were incidents in which jurors engaged in Internet research. Other, less frequently selected categories of misconduct included communicating on social media, communicating through e-mail, text, or instant messaging, failing to disclose information about new media use during voir dire, and other incidents.⁴³ While both the survey and coded cases reflect that Internet research is the most prevalent form of misconduct, communication has been increasing in more recent years (see Figure 12). For the coded cases, 68% of recorded instances of juror misconduct through communication occurred in 2010 or later. Conversely, only 51% of instances of juror misconduct through Internet research occurred in 2010 or later.

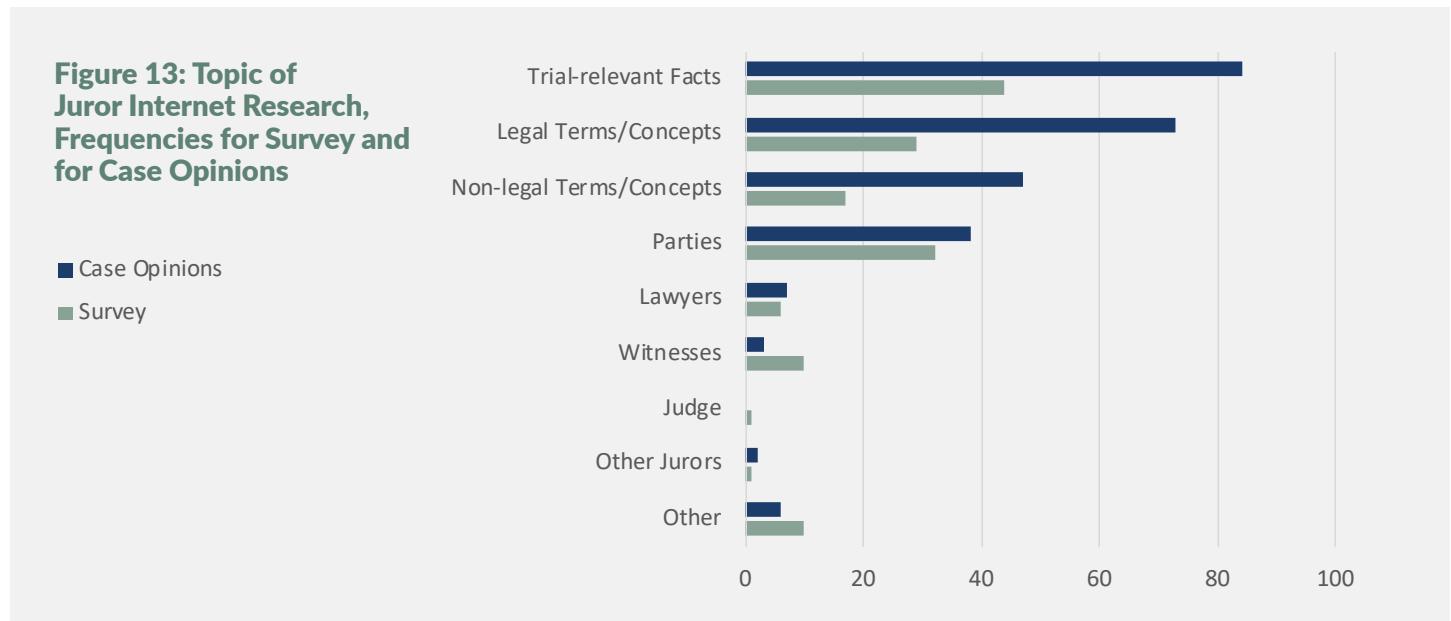


⁴¹ As indicated above, the most significant incident was also for many respondents the only incident they had experienced. Survey respondents who had experienced multiple incidents determined, based on their own judgment which experience they considered to be the most significant.

⁴² Of the 260 coded cases, four cases involved two separate incidents that involved both Internet research and communication or social media. In other cases, jurors also blurred the line between using social media for communication and research, but for the purpose of this study, the juror behavior was placed into a specific category. If a juror used a social media platform to collect case information like Internet research, the researchers classified the behavior as communication on social media. For example, in one case a juror used the professional networking site LinkedIn during trial and found information on one of the attorneys.

⁴³ Most of those who selected the *other* option described incidents NCSC researchers would categorize as either *research* or *failure to disclose*, although one respondent mentioned a situation in which the media approached a juror, which they categorized as *no misconduct*.

Juror engaged in Internet research. As demonstrated in Figure 13, when jurors engaged in Internet research, they focused most frequently on trial-relevant facts, parties, legal terms and concepts, and non-legal terms and concepts. Survey respondents indicated that jurors researched lawyers, witnesses, judges, and other jurors far less frequently than these four main topics. Although the relative order differs slightly, the results from the coded case opinions support this finding, implying that these are indeed the topics jurors are most likely to research using new media.⁴⁴ Compared to the other possible research topics, those topics that were researched more often were those that are most relevant for understanding the proceedings within the case, suggesting that jurors may be more likely to conduct research because they feel they need more information to be good jurors rather than because they are simply curious. However, as previously mentioned, judges and attorneys expressed widely differing opinions regarding reasons for juror misconduct.



Internet research was also the primary form of misconduct for the coded cases. In a large majority of the coded cases, this meant a juror went home and used his personal computer or Internet-enabled device to research the case. Sometimes other jurors were aware that the juror intended to conduct the research and awaited the results. This type of misconduct included situations in which other jurors brought the incident to the attention of the judge after the researching juror presented the results of his research. Like the survey results, in the coded cases jurors were primarily searching for trial-relevant facts, legal terms and concepts, and nonlegal terms and concepts, indicating that jurors tended to search for extraneous information clarifying the case. Jurors rarely used their smartphone to conduct this research. As previously noted, the coded cases only include instances in which the court learned of the misconduct at some point; therefore, it is likely that the cases do not include instances in which a juror conducted research for their own personal edification and did not share the information with any other jurors.

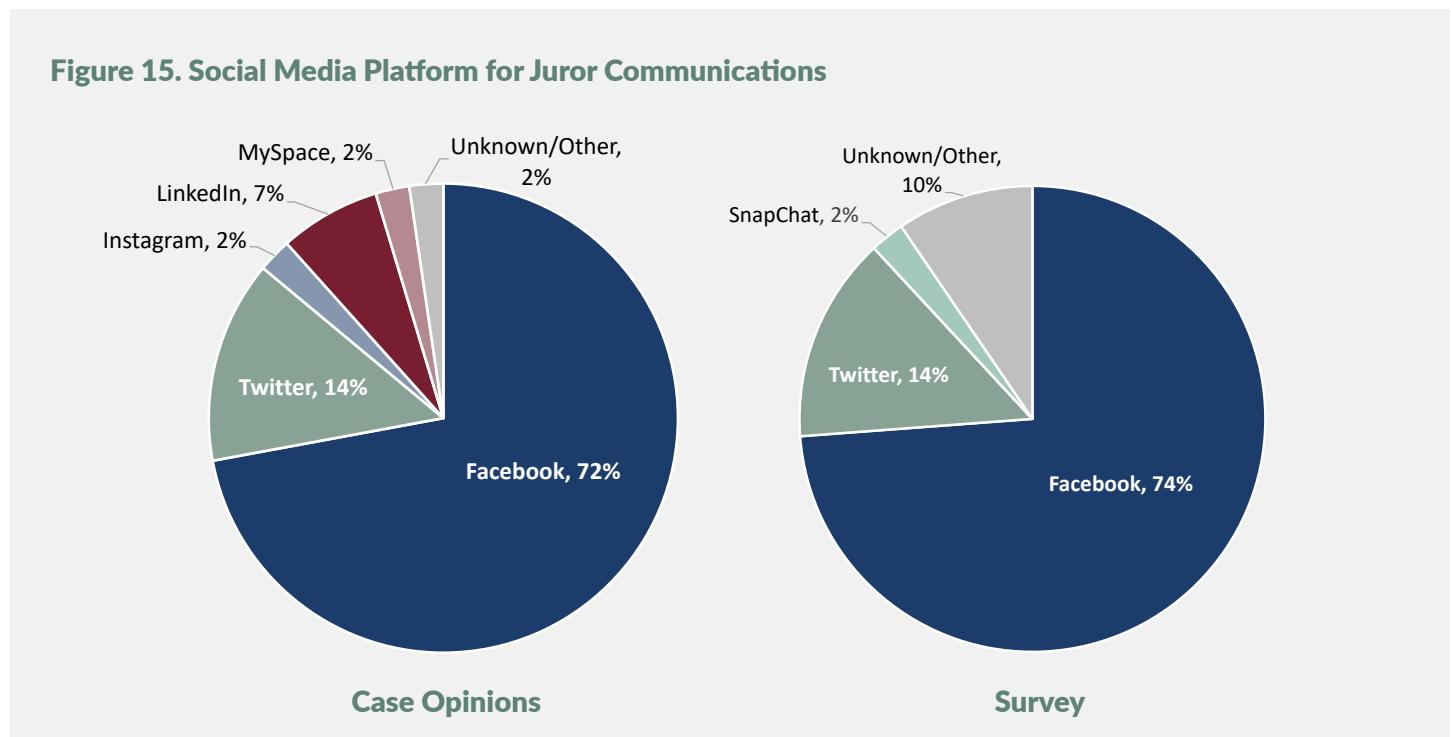
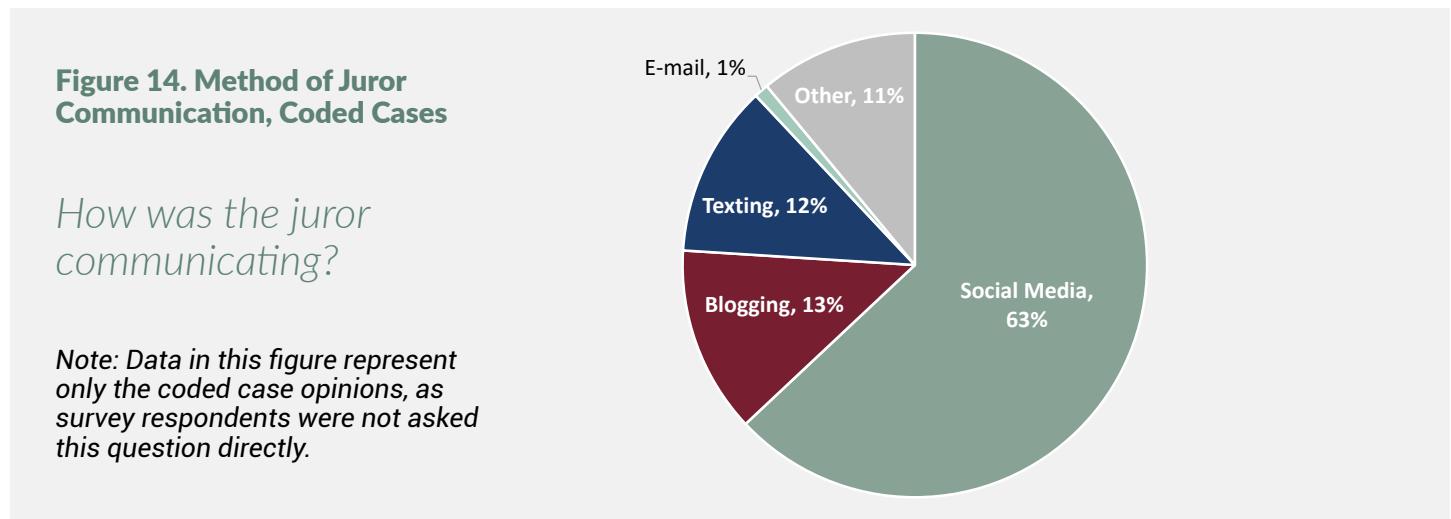
Juror Communicated Through New Media. Many of the recent incidents described in both the survey and coded case opinions involved jurors communicating with others through email, texting, blogging, or social media platforms, not all of which amounted to misconduct on the part of the juror. Judges routinely explain to jurors that they are permitted to inform others that they have been summoned for jury service. The prohibition on communication during trial and deliberations applies only to discussions about case-specific facts. It is intended both to prevent jurors from learning extraneous information from others and to reduce the risk of jurors expressing opinions about the merits of the case before final deliberations. Some courts have struggled with the question of whether juror communication through new media is qualitatively more prejudicial than old-fashioned communication, even when those communications do not indicate bias or provide case-specific information.⁴⁵

⁴⁴ For both the case opinions and the survey, selection of more than one topic of research was possible.

⁴⁵ See, e.g., *Dimas-Martinez*, *supra* note 2.

For the coded cases, communication on new media included jurors blogging about jury duty during or after trial, tweeting or Facebooking about jury duty, and in one case recording a podcast about the trial while seated as a juror. Blogging was the primary form of communication in early cases, and social media sites like Facebook serve a similar purpose today. When the misconduct was due to a juror communicating during trial, 63% of the time it was on social media (Figure 14). When it came to using social media, jurors overwhelmingly preferred Facebook, which accounted for 72% of the communications over social media, as shown in Figure 15, which compares jurors' use of different social media platforms as reported in the case opinions and in the survey. Twitter followed as a distant second, accounting for 14% of social media communication.

Survey respondents who indicated that the alleged juror misconduct involved communication on social media were asked to report which social media platform the juror had used. For the 42 incidents involving communication on social media reported in the survey, survey respondents specified that in 74% of incidents the communication occurred on Facebook. However, as social media use changes over time, this is an area where future research may result in markedly different findings and where courts should continue to be aware of trends to monitor social media use by jurors.

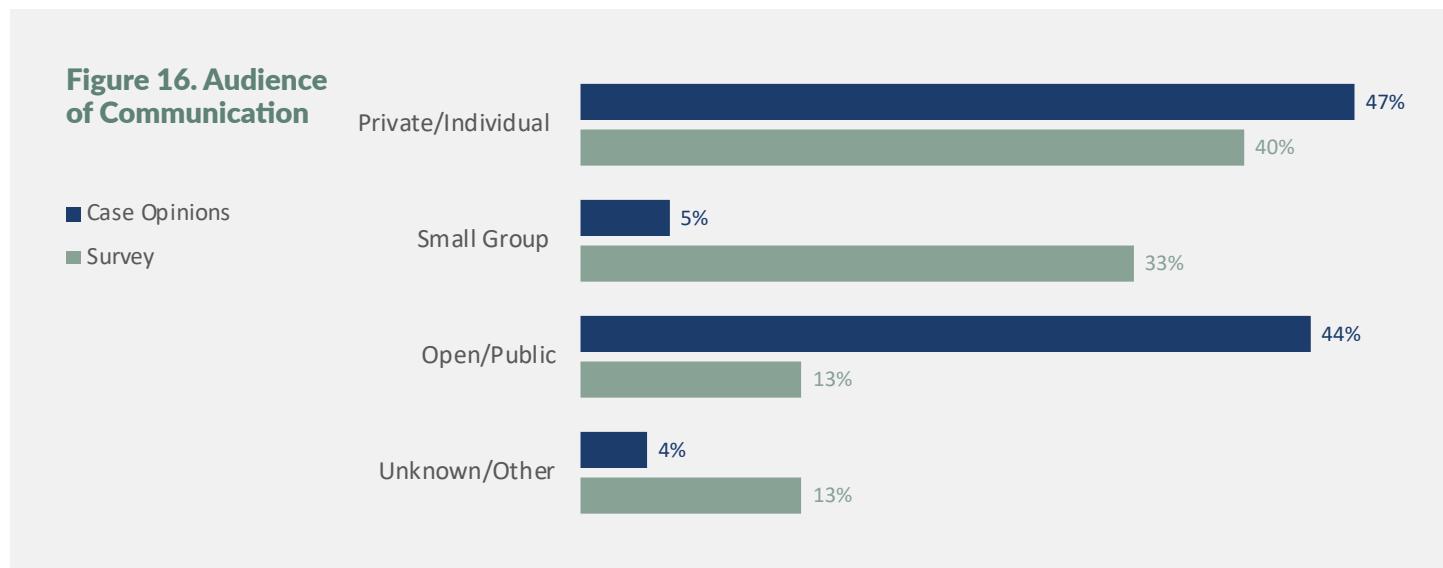


Juror Communicated Through E-mail, Texting, or Instant Messaging. As shown in Figure 15 (above), survey respondents reported in 30 incidents that the juror had communicated with other individuals through email, text, or instant messaging. Respondents further indicated that most of this type of communication was either with a private individual or with a small group. In the coded cases, the juror misconduct only involved email, texting, or instant messaging in 11 cases. This was usually because the juror was discussing the case, for which the court concluded that the juror had reached a conclusion before deliberations.

Juror Failed to Disclose. A few of the cases in the case opinion dataset involved jurors failing to disclose the use of new media during voir dire. These incidents typically were brought to the judge's attention during a posttrial investigation by an attorney who discovered a distant social media connection between a juror and a witness or party. It could also mean that an attorney discovered potential juror bias based on prior social media comments. Here, juror communication is slightly different than a juror posting on a social media site. The legal issue is not that the juror used social media, but rather that the juror did not disclose appropriate pretrial use of social media that might have been relevant to the voir dire. Survey respondents also reported a few instances of jurors failing to disclose information about new media use during voir dire. Of a total of 20 of these types of incidents, 16 included multiple forms of juror misconduct involving new media.

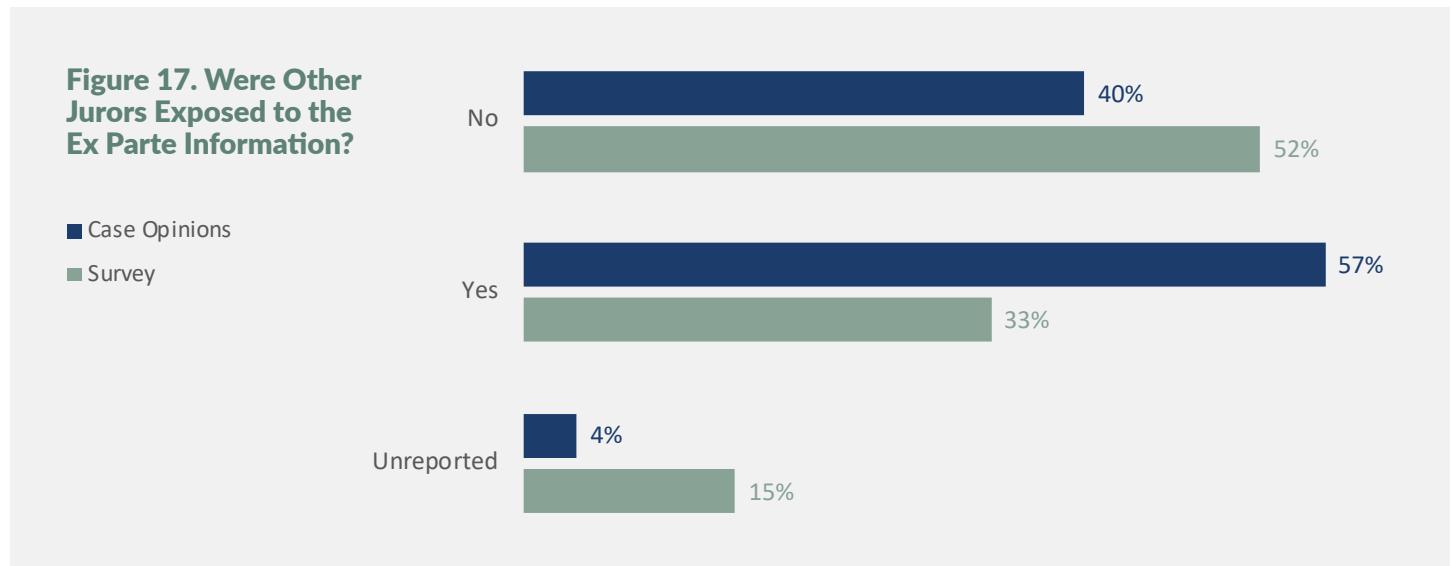
Audience of Communication. For the coded cases, social media use and email, texting, or instant messaging were all classified as communication generally, distinguishing the behavior from Internet research. When a juror communicated in the cases, it was primarily either to an individual or completely open to the public, as displayed in Figure 16. Email, texting, or instant messaging were always to an individual, while social media use varied. Some social media posts were "direct messages" through the site to another user, while others were "posts" or "tweets" that were available to anyone who accessed the site. These public social media sites were easily discoverable by an attorney or party who conducted a posttrial social media search.⁴⁶

Figure 16. Audience of Communication



⁴⁶ One limitation of this study was that survey respondents who reported that the juror communicated on social media only saw a follow-up question regarding which social media site the juror used and did not have an opportunity to respond to the question about the audience of their communication, unless they also indicated that the juror communicated through email, texting, or instant messaging. Therefore, for the survey results, responses to this question only reflect jurors who used email, texting, or instant messaging for communication, and it is thus unsurprising that respondents reported that the communication was more likely only with a private individual or a small group, rather than being public. As a result, the coded cases may more accurately reflect the distribution of the overall audience of juror communications.

Number of Jurors Engaged in Misconduct or Exposed to Information. To assess the extent to which juror misconduct affected the collective jury, the survey and coded case opinions documented the extent to which multiple jurors were involved or exposed to ex parte information through new media. Both components of the study found that in most cases only one juror was alleged to have engaged in misconduct (76% of survey responses, 88% of coded case opinions),⁴⁷ but other jurors were made aware of the information in a large percentage of these cases (33% of survey responses, 57% of coded case opinions). As Figure 17 demonstrates, 15% of the survey respondents did not answer the question, which may indicate that respondents were unsure about the extent of exposure to other jurors. On the other hand, the coded case opinions may overrepresent the risk of exposure to other jurors insofar that cases involving widespread exposure to ex parte information are more likely to be appealed, resulting in a written opinion.



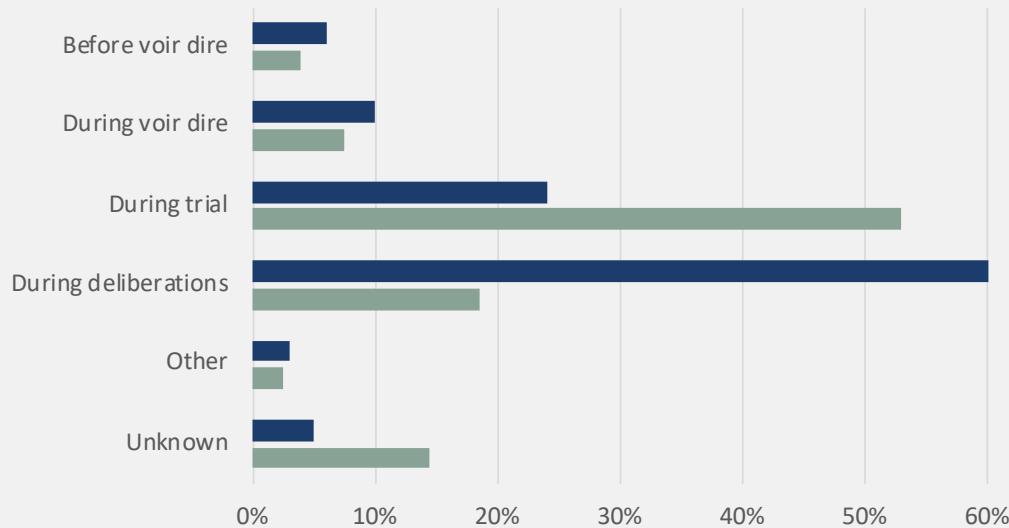
Incident Timing and Discovery. A key consideration for judges and attorneys is whether they learn about incidents of alleged juror misconduct in time to respond appropriately. A range of remedies is available to address incidents that are discovered during trial or deliberations (e.g., curative instructions, removal and replacement of jurors with alternates, mistrial), but a new trial is the only remedy available when prejudice arises from an incident discovered posttrial. Survey respondents who had experienced an incident of juror misconduct involving new media were asked to identify the point during which the incident occurred. Figure 18 shows their responses, along with the same information from the coded cases. Notably, survey respondents reported that incidents occurred most often during trial but before deliberations, while within the case opinions incidents occurred most frequently during deliberations.

⁴⁷ A greater proportion of jurors used new media for research than for communication in the coded case opinions. In both the coded case opinions and the surveys, more jurors shared information with other jurors when conducting Internet research, compared with jurors using new media for communication. In the coded cases, jurors were usually not using social media to intentionally look up trial-relevant facts. Instead, the jurors were using social media for personal reasons. This gave the juror less of an incentive to share the information with other jurors as compared to a juror committing misconduct through deliberate Internet research.

Figure 18. Timing of Incident During Trial

When did the incident occur?

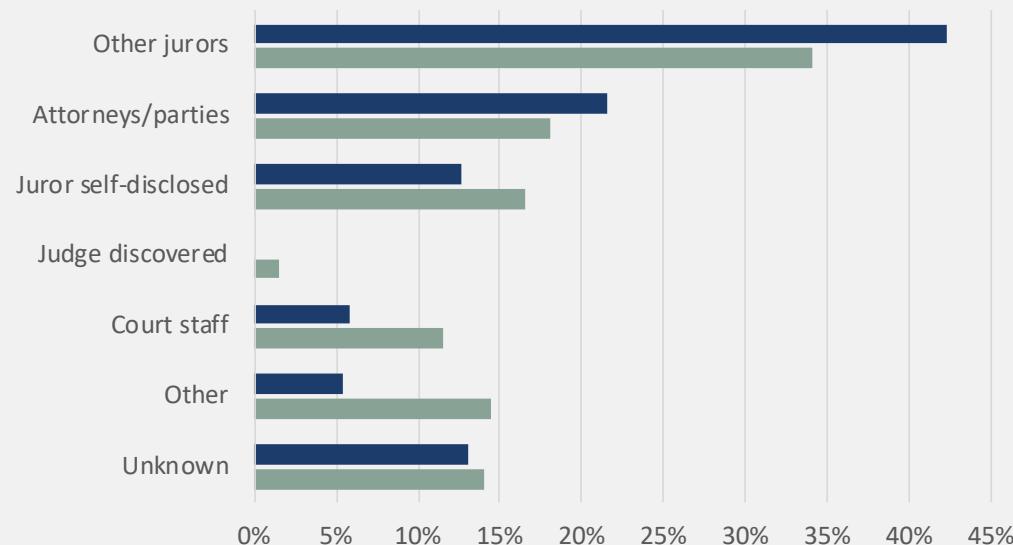
Case Opinions
Survey



In both the case opinions and survey responses, NCSC researchers distinguished between who discovered the incident versus who brought the incident to the judge's attention. For instance, if a juror told a bailiff that one of the other jurors accessed the Internet and the bailiff told the judge, then the incident was discovered by other jurors and court staff brought the incident to the judge's attention. Figure 19 indicates who discovered the incident for both case opinions and survey responses, while Figure 20 indicates who brought the incident to the judge's attention. Regarding incident discovery, the survey responses revealed that the alleged misconduct was most frequently (34%) discovered by other jurors and was most often brought to the attention of the judge either by the other jurors (28%) or by the attorneys (25%). Respondents reported that attorneys or the parties to the case discovered the alleged misconduct in approximately 18% of incidents, followed closely by juror self-disclosure in 17% of incidents. The judge was listed as the one who discovered the alleged misconduct in only 2% of survey responses. In the coded cases, the trial judge was made aware of the incident posttrial in 51% of the cases. For habeas corpus petitions, the original trial judge was often not aware at all. Interestingly, attorneys brought the incident to the judge's attention in exactly 50% (130) of the cases. Of the cases in which the attorney brought the incident to the judge's attention, they did so posttrial 82% of the time. This might be because the attorney only discovered the incident after the trial but only used it as grounds for a new trial after receiving a losing verdict.

Figure 19. Incident Discovery

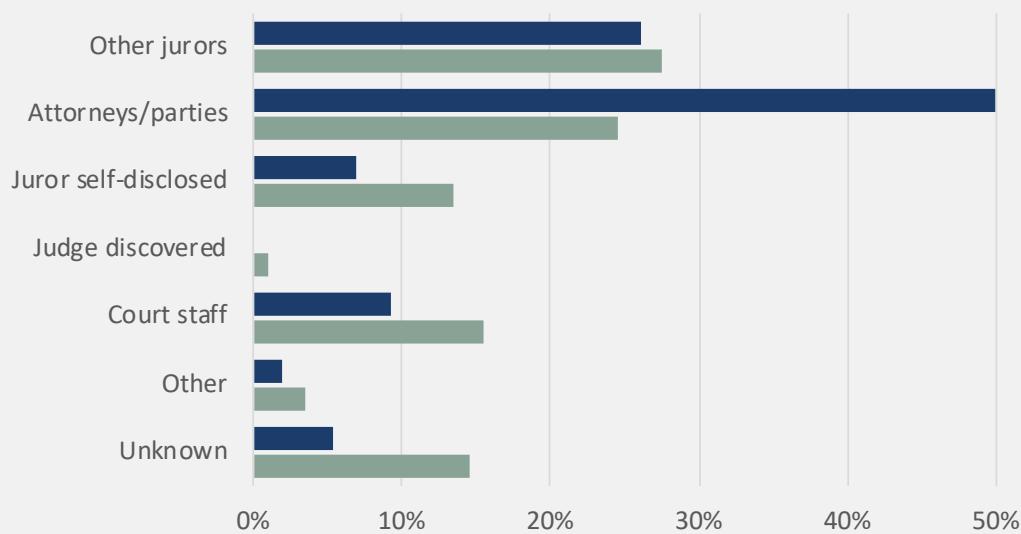
How was the incident discovered?



Similar to the results from the survey, almost 45% of the time, other jurors discovered the incident in the coded cases. However, other jurors only brought the incident to the judge's attention 25% of the time. Often, this meant that the jury sent the judge a note during deliberations. A large reason for the disparity between the level of other jurors discovering the incident and other jurors bringing it to the judge's attention is because the jurors could have brought the incident to attorneys or court staff. This also contributes to the posttrial figures, as jurors sometimes felt guilty after the verdict and then brought the incident to the attention of the losing party's attorney. Finally, in the coded cases the judge was never the one to discover an incident of misconduct. Both the survey results and the coded case opinions indicated that judges rarely discovered incidents of alleged juror misconduct involving new media on their own. Instead, as shown in Figure 20, other individuals, most often other jurors or attorneys/parties of the case, notified the judge of the juror's behavior.

Figure 20. Individuals Informing Judge of Juror Misconduct

Who brought the incident to the judge's attention?

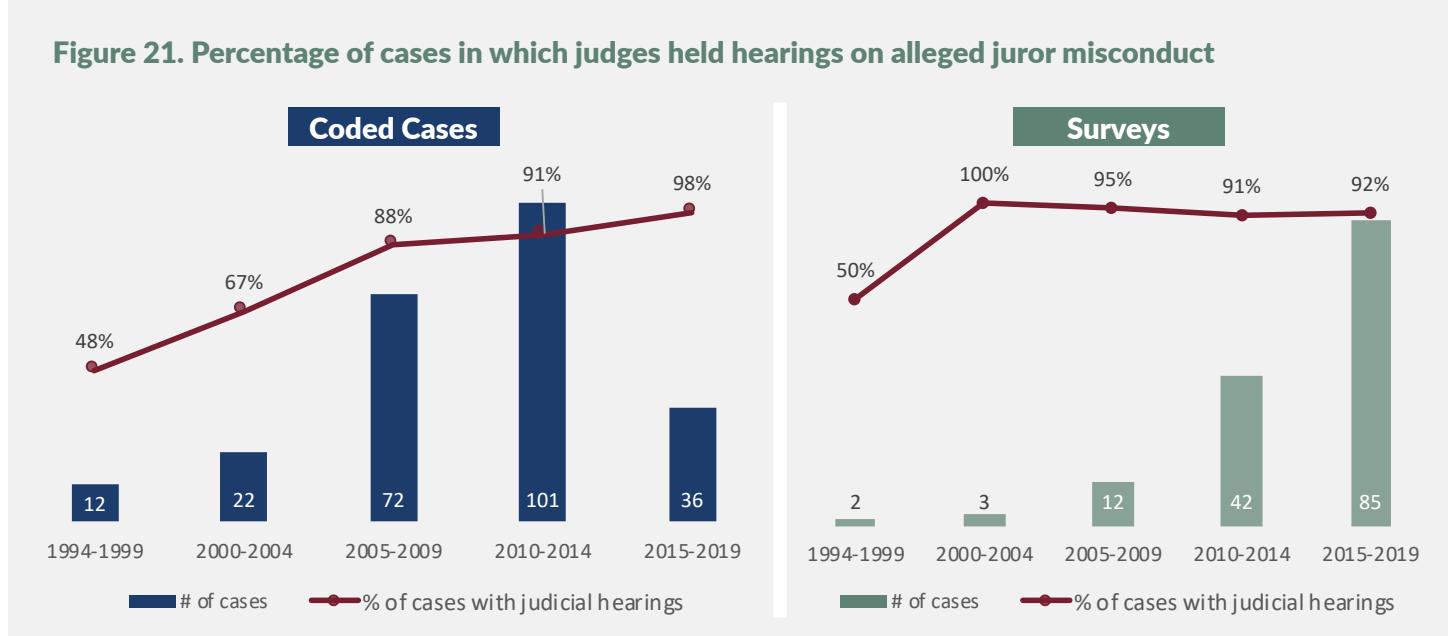


Judge Response to Incident. In the case opinions dataset, trial judges learned of incidents only after the trial was completed in slightly over half (51%) of the cases. The late notice greatly restricts the types of remedies available to address the incident. Essentially, the only option is to hold a hearing to investigate the incident and its impact on juror decisionmaking and then decide whether a new trial is warranted or if the offending juror should be punished for violating the court's instructions regarding use of new media. If the incident is brought to the judge's attention during trial or deliberations, the judge must still hold an investigatory hearing but has a range of options from issuing curative instructions to the juror or the entire jury, removing the offending juror and either replacing the juror with an alternate or continuing the trial with fewer jurors,⁴⁸ or declaring a mistrial. In the coded case opinions, the incident was brought to the judge's attention during voir dire in 2% of the cases, during trial in 10% of the cases, and during deliberations in 34% of the cases.⁴⁹

Incidents reported in survey responses did not include information about when the incident was brought to the judge's attention; however, responses to questions about how the incident was discovered and who brought it to the judge's attention suggest that a much larger proportion of incidents were discovered during trial or deliberations. For example, more than half (58%) of the incidents reported in the surveys were brought to the judge's attention by jurors, including disclosure by the juror who used the Internet, or by court staff or by the judge. Only one-quarter of incidents were brought to the judge's attention by the attorneys or parties.

Regardless of when the judge learns of the incident, the first step is an investigatory hearing to learn whether the juror has violated the instructions concerning use of new media, what information the juror learned or communicated to others, whether the information was shared with other jurors, and the extent to which the information affected the jurors' decision-making. Figure 21 shows the proportion of cases in which judges held hearings to investigate the nature of the alleged misconduct, comparing survey respondents and coded cases. Overwhelmingly (in 87% of coded cases), judges held hearings for the incidents that occurred. Survey respondents reported that judges held hearings regardless of the type of alleged misconduct, the response to the alleged misconduct (juror removed, juror replaced, etc.), or the timing of the incident during the trial (before voir dire, during jury deliberations, etc.). There was also a notable increase in the rate of hearings over time, likely prompted by appellate opinions and judicial education programs emphasizing that trial judges have an obligation to investigate allegations of juror misconduct to determine the extent of prejudice to the parties. Before 2000, less than half of the coded case opinions indicated that the judge held a hearing. The hearing rate climbed to 67% for trials that took place over the next five years, and to 88% for the following five-year period. Since 2010, judges held hearings in more than 90% of cases involving allegations of juror misconduct.⁵⁰

Figure 21. Percentage of cases in which judges held hearings on alleged juror misconduct

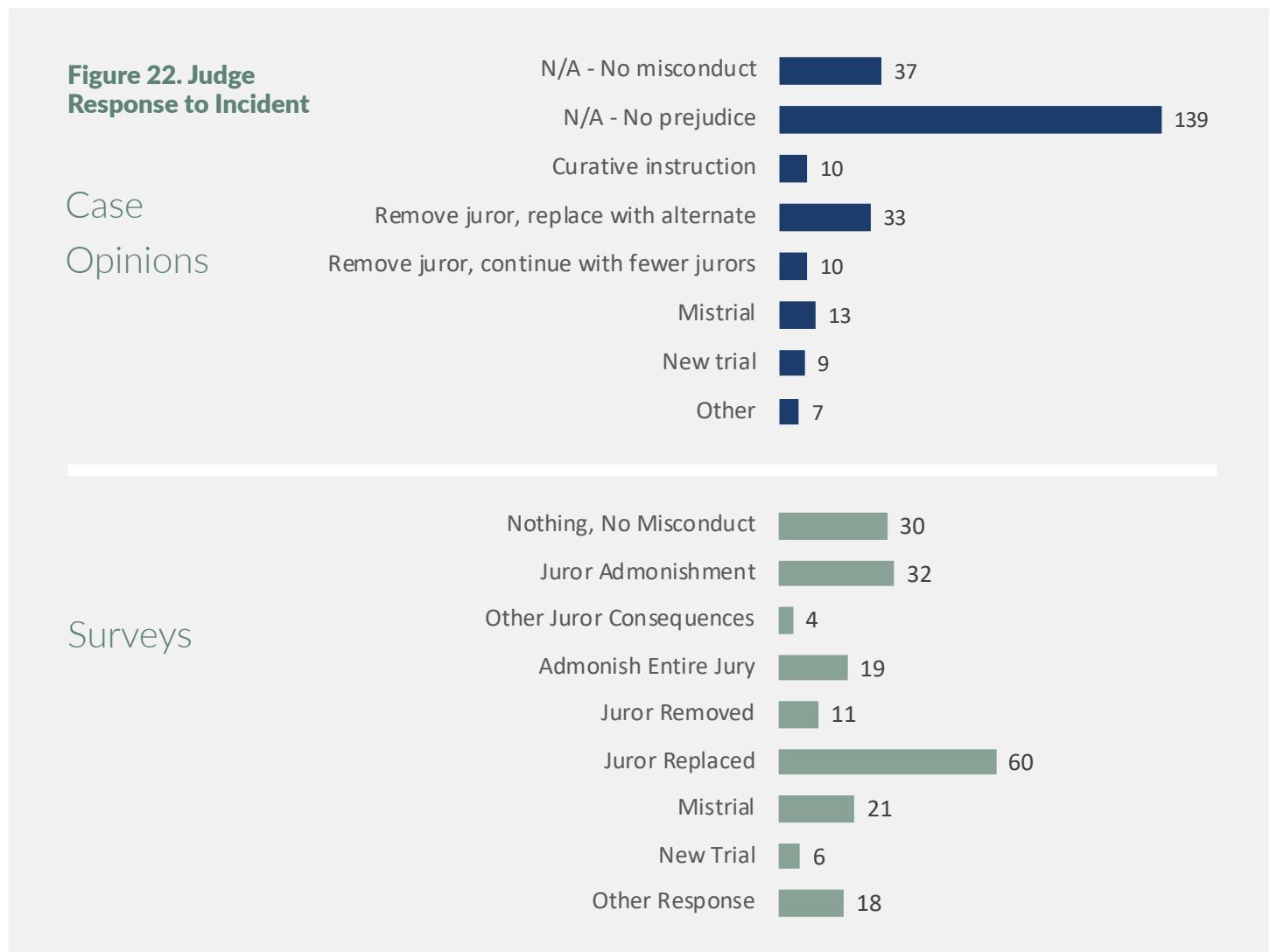


⁴⁸ Replacing a juror with an alternate after deliberations have begun may be difficult or impossible in some jurisdictions, especially if alternates were released from service and have left the courthouse. Most jurisdictions require consent of the parties to continue with fewer jurors.

⁴⁹ In 3% of the cases, it was unknown when the trial judge was informed or, in the case of habeas corpus petitions, if the trial judge was ever made aware of the incident.

⁵⁰ See *infra* at p. 37.

Figure 22 compares the types of judge responses undertaken in cases reported in the surveys with those of the case opinions, but this is not an apples-to-apples comparison due to differences in the coding methods across the two study components. Coders of the case opinions dataset could select only a single judicial response, but survey respondents could indicate multiple judicial responses to the incident. In addition, survey respondents were not given a "no prejudice" option. The differences in judicial responses are more likely due to when the judge was made aware of the incident than differences in the coding. Recall, for example, that half of the incidents reported in case opinions were brought to the judge's attention after the trial had concluded and the jurors were released from service. Judicial decisions to replace the juror with an alternate or to declare a mistrial occurred at half the rate that they did in the survey responses. Additional admonitions to the juror or the entire jury are nearly five times greater (23%) in the survey responses compared to the coded case opinions. In contrast, judges in more than half the coded case opinions undertook no official response to the incidents after concluding that the parties had experienced no prejudice from the juror's use of new media.



The 260 coded cases also reflect the traditionally strong deference accorded to the trial judge concerning decisions to uphold the integrity of the trial process, including that a decision is only set aside when it is clearly erroneous or the judge has abused his or her discretion. The vast majority (85%) of trial court decisions in the coded case opinions dataset were ultimately affirmed on appeal or never challenged, including on posttrial motions. Additionally, three cases were also affirmed and remanded, while another 11 cases were remanded. Only 18 cases were reversed and remanded, while only 6 cases were reversed.

The Evolution of Case Law

The rapid evolution of new media over the past two decades has raised novel legal issues, but it is important to recognize that before the recent disruptions, an extensive body of common law concerning juror misconduct already existed. The legal issues presented by juror use of new media did not require the development of an entirely new body of caselaw but instead challenged courts to apply existing case law to these new challenges. Some legal principles have provided a useful framework for addressing these challenges while others have been stretched to the breaking point.

Traditionally, juror misconduct refers to a juror's *intentional violation of the court's instructions* that results in prejudice to a party.⁵¹ It usually involves one of two possible scenarios: either a juror seeks information about case-relevant facts or law or the juror expresses opinions about the case that indicate a preexisting bias or prejudgment about the merits of the case before final deliberations. In most instances, the court learns of the juror misconduct because the juror shared the information with other jurors or a third party, who subsequently informed the court or one of the parties of the communication.

In most jurisdictions, the party alleging juror misconduct has the initial burden to show an extraneous influence on one or more jurors. The court must find by a preponderance of the evidence that extra-judicial contact or communications between jurors and unauthorized persons occurred, that the contact or communications pertained to matters before the jury, and that it is reasonably probable that the contact or communications influenced the jury's verdict or a typical juror.⁵² That finding creates a rebuttable presumption of prejudice. The burden then shifts to

the non-moving party to show that the extraneous information was not harmful.⁵³ This can be shown when the extraneous information is merely tangential to the jury's verdict⁵⁴ or duplicates information that was introduced as evidence at trial.⁵⁵ In criminal cases, the prosecution must show beyond a reasonable doubt that the information was not harmful.⁵⁶

Variations to the basic framework have developed in some states. The Supreme Court of Indiana provides an alternative test for cases in which a party alleging juror misconduct fails to show extrajudicial contact or communications related to the trial. Instead of creating a rebuttable presumption of prejudice, the trial court must apply a probable harm standard to determine if the misconduct is "gross and probably harmed" the defendant.⁵⁷ The Supreme Court of New Mexico explicitly disavowed a burden-shifting presumption-of-prejudice framework and instead opined that the burden always remains with the moving party to show a reasonable probability that extraneous material affected the verdict or a typical juror.⁵⁸ Other states, however, have expanded the presumption of prejudice beyond the impact of extraneous information to include the own juror's failure to comply with the court's instructions. For example, the California Court of Appeals found that a juror who repeatedly discussed the case with a friend despite frequent admonitions cast doubt on the juror's ability to perform his duties, including his willingness to follow the court's other instructions on the law.⁵⁹

Remedies to address juror misconduct vary based not only on the degree of prejudice but also on when the misconduct is discovered and whether it has spread beyond a single juror to the entire jury. Curative instructions to the juror or jurors may be sufficient for cases in which a juror fails to comply with instructions but is not exposed to prejudicial

⁵¹ Jurors may also be exposed to extraneous information unintentionally or intentionally by third parties (e.g., attempts to intimidate or bribe jurors). These are not technically instances of juror misconduct; however, the potential for prejudice to parties is similar as are procedural requirements for a judicial hearing to investigate the incident and implement appropriate remedies.

⁵² Ramirez v. State, 7 N.E.3d 933 (Ind. 2014).

⁵³ *Id.*

⁵⁴ State v. Taylor, 917 S.W.2d 222 (Ct. of App Miss. Western Dist. 1996)(evidence that jurors researched the punishments that accompanied each charge and discussed their findings with other jurors was not prejudicial because their research did not deal with guilt, merely punishment).

⁵⁵ Stebner v. Associated Materials, Inc., 2010 MT 138 (2010)(the definition of "preponderance" that a juror looked up matched the jury instruction).

⁵⁶ State v. Abdi, 45 A.2d 29 (Vt. 2012).

⁵⁷ Ramirez, v. State, 7 N.E.3d 933 (Ind. 2014).

⁵⁸ Kilgore v. Fuji Heavy Industries Ltd., 240 P.3d 648 (NM 2010).

⁵⁹ People v. Cissna, 182 Cal. App. 4th 1105 (2010).

information.⁶⁰ If the misconduct is discovered during trial or deliberations, the juror may be removed and replaced with an alternate juror.⁶¹ But in cases in which the extraneous information is highly prejudicial and has been shared with multiple jurors, a mistrial may be appropriate. This is an extreme measure, however, and courts have cautioned that it should weigh the interests of litigants, witnesses, jurors, and the public and only order a mistrial if there is "such a defect in the proceeding that it would be a manifest injustice to continue."⁶² When the misconduct only comes to the court's attention as posttrial motion, the only available remedy is to vacate the jury's verdict and hold a new trial after an evidentiary hearing and a finding of prejudice due to the juror's misconduct.

Caselaw on Juror Misconduct Involving New Media

The transition from old-fashioned juror misconduct to misconduct involving new media has alarmed judges and lawyers across the country. Judge Richard Nygaard observed that 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."⁶³

One part of the challenge in applying the existing case law is keeping up with the rapid changes in the technologies themselves. Early cases involved jurors using personal computers to transcribe handwritten notes or making phone calls during deliberations.⁶⁴

Jurors then began using personal computer tools to build models of the evidence or cell phones to conduct Internet research.⁶⁵ More recently courts have had to deal with juror Facebook friends during voir dire or jurors posting on Facebook and Twitter during trial.⁶⁶

Courts have employed a variety of approaches as new technology devices and platforms have been developed. For example, Maryland courts do not allow electronic devices in jury deliberation rooms.⁶⁷ In *Cole v. State*, the trial court did not take away jurors' cell phones during the second day of deliberations as required by former Md. Rule 16-110(d). To summarize, the jurors' electronic devices were taken during the first day of deliberations, but when they returned the next day to resume, the court did not collect the devices. The defendant filed a motion for mistrial, but the trial court concluded that its oversight did not warrant a new trial. On appeal, the appellant claimed that the jurors could have potentially been exposed to extraneous information, and he should therefore be granted a new trial. The Appeals Court reversed and remanded, concluding that the trial court should have investigated the jury for the potential of being exposed to extraneous information.⁶⁸ Clearly, Maryland courts believe that separating jurors from their personal devices during deliberations is essential to limiting juror misconduct.

Not all courts reach the same conclusions on juror use of new media, and not all decisions are based on an established court rule. In *State v. Webster*, the Supreme Court of Iowa heard an appeal claiming juror bias as revealed through Facebook use during trial. In this case, the trial court concluded that the juror's Facebook use was misconduct but did not constitute juror bias and therefore denied the motion for a new trial. The Supreme Court agreed and gave deference to the trial court decision. However, Justice Hecht of the Iowa Supreme Court dissented, noting that in

⁶⁰ *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986)(a curative instruction was sufficient to overcome prejudice from juror misconduct in which a juror read an article about the case that discussed settlement agreements with another party, but the amount of the settlement was not disclosed); *Minsnew v. State*, 594 So. 2d 703 (Ala. 1991)(after a juror looked up legal definitions in a dictionary, the judge gave a curative instruction that jurors must ignore definitions unless provided by the court).

⁶¹ *Eaton v. State*, 192 P.3d 36 (Wyom. 2008)(excusing a juror who went to the crime scene and seating an alternate adequately addressed the misconduct).

⁶² *Gould v. Charlton Co.*, 929 S.W.2d 734 (Ken. 1996).

⁶³ *United States v. Fumo*, 655 F.3d 288 at 332 (Nygaard, J., concurring and dissenting)(emphasis added).

⁶⁴ See *Stephenson v. State*, 742 N.E.2d 463 (Ind. 2001); *Pagan v. State*, 809 N.E.2d 915 (Ind. Ct. App. 2004).

⁶⁵ See *United States v. Wheaton*, 426 F. Supp. 2d 666 (N.D. Ohio 2006); *State v. Pope*, No. W2014-01057-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 470 (Crim. App. June 16, 2015).

⁶⁶ See *Slaybaugh v. State*, 44 N.E.3d 111 (Ind. Ct. App. 2015); *State v. Thomas*, 376 P.3d 184 (N.M. 2016).

⁶⁷ Policy Regarding Cell Phones and Other Electronic Devices (2020), <https://www.mdcourts.gov/clerks/calvert/cellphones>

⁶⁸ *Cole v. State*, No. 2768, 2017 Md. App. LEXIS 1146 (App. Nov. 14, 2017).

his opinion the juror's Facebook activity rendered the juror biased.⁶⁹ The Supreme Court issued this decision twelve years after Facebook was founded and four years after Facebook went public, but the justices were still not unanimous on how to handle the juror's actions.

Defining Extraneous Information

The courts' decisions on juror use of new media largely are contingent on two considerations: exposure to extraneous information and prejudice to the parties. The first of these considerations, extraneous information, concerns the type of information to which the juror was exposed. *Black's Law Dictionary* defines extraneous evidence as, "any evidence that comes from outside the court."⁷⁰ The U.S. District Court for the Middle District of Alabama defines extraneous information as "exposure of jurors to prejudicial information not admitted into evidence, such as media reports or the fruits of independent juror investigations of facts relating to the case . . . or other prejudicial contacts between jurors and third parties."⁷¹

Other courts use different terms, such as "outside influence." In 2011 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.⁷² Therefore, "information gathered by a juror and introduced to the other jurors by that juror" does not constitute an outside influence.⁷³ Conversely, in 2010 the Florida Court of Appeals reversed and remanded a trial court's denial of a motion for a new trial based on the fact that a juror used his smartphone to look up the definition of the word "prudent" during deliberations. The court concluded:

Although here we confront new frontiers in technology, that being the instant access to a dictionary by a smartphone, the conduct complained of by the appellant is not at all novel or unusual. 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.⁷⁴

Although courts are aware of the potential that jurors use new media, such as cell phones and social media, to access information, there still needs to be proof of access to extraneous information for courts to grant a new trial. In *Brandsma*, the Court of Appeals of Wisconsin denied a motion for a new trial on the basis that the jury could separate. The appellant's main claim was that during the separation, the jurors could have accessed extraneous information through cell phones or other devices. The appeals court noted that the appellant was claiming, "what is only the tip of a growing iceberg that no doubt potentially threatens every criminal defendant's elemental right to an impartial jury." However, because the appellant had no actual evidence of juror exposure to extraneous information, the court affirmed the trial court's judgment.⁷⁵

Despite concerns over jurors accessing extraneous information, courts are still bound by the law of the land, notably the First Amendment of the U.S. Constitution. 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.⁷⁶

⁶⁹ State v. Webster, 865 N.W.2d 223 (Iowa 2015).

⁷⁰ What is Extraneous Evidence?, *Black's Law Dictionary* Free Online Legal Dictionary 2d ed. (2020), <https://thelawdictionary.org/extraneous-evidence/#:~:text=applied%20to%20any%20evidence%20that%20comes%20from%20outside%20the%20court.&text=Any%20evidence%20that%20is%20not%20pertinent%20to%20matters%20at%20hand>.

⁷¹ United States v. Siegelman, 2007 U.S. Dist. LEXIS 45648 (M.D. Ala. June 22, 2007).

⁷² McQuarrie v. State, 380 S.W.3d 145 (Tex. Crim. App. 2012) (citing *Soliz v. Saenz*, 779 S.W.2d 929 (Tex. App.—Corpus Christi 1989, pet. denied)).

⁷³ *Id.*

⁷⁴ Tapenes v. State, 43 So. 3d 159 (Fla. Dist. Ct. App. 2010).

⁷⁵ State v. Brandsma, 795 N.W.2d 64 (Wis. Ct. App. 2010).

⁷⁶ Compton v. State, 58 N.E.3d 1006 (Ind. Ct. App. 2016).

Prejudice to the Parties

Courts also carefully examine if the extrinsic information was prejudicial 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 criminal trials. For example, 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.⁷⁷

Federal courts also strongly consider a showing of prejudice in Writ of Habeas Corpus claims, which are often brought in U.S. District Courts years after the original trial. The burden is already somewhat higher for a petitioner because “[w]here 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.”⁷⁸ The U.S. District Court for the Eastern District of California considered a habeas corpus petition in *Hill v. Gipson*. In this case, Hill claimed that the trial court improperly denied his motion for a new trial after a juror admitted to conducting Internet research by accessing an online article. However, the trial court concluded that the article was similar to and did not contradict the testimony given at trial, so it was not prejudicial. The District Court agreed and went on to address the fact that although the juror originally concealed his Internet research, this was not evidence of bias. The District Court reasoned that the juror’s failure to immediately disclose was more likely a result of fear or embarrassment.⁷⁹

The Supreme Court of Tennessee considered the issue of a juror contacting an assistant medical examiner who testified for the state through Facebook. The

Supreme Court cited precedent, which noted, “An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, that is influenced only by the competent evidence admitted during the trial, and that bases its verdict on that evidence.”⁸⁰ Further, “the State bears the burden in criminal cases either to explain the conduct of the juror or the third party or to demonstrate how the conduct was harmless. Error is harmless when ‘it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” The Supreme Court remanded the case back to the trial court because it had not conducted an adequate investigation as to the impact of the juror communication to determine if the information biased the verdict.

Increasingly, losing defendants’ lawyers are searching the Internet following trial. A Delaware trial court recently experienced such a case. 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. Coincidentally, the mutual friend was a potential juror who was excused during voir dire after admitting that he knew the co-defendant and was also the impaneled juror’s cousin. The court found first that the defense attorney had improperly discovered this information. The court then found that this distant Facebook connection did not impact the trial. Specifically, the court noted “[o]ne of the reasons why such ‘friendship’ does not represent true relationships between people is the fact that Facebook only allows one choice for individuals—either to be ‘friends’ or not to be ‘friends.’ The use of the moniker ‘friends’ is very broad and somewhat amorphous.”⁸¹

Civil cases have a similar standard for evaluating whether juror misconduct was prejudicial to warrant a new trial. 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 rise to the level of misconduct as there was no prejudice to either party. The Appeals Court agreed and determined the parties had done nothing more than speculate that the tweets caused any sort of prejudice.⁸²

⁷⁷ *State v. Welch*, 2013 Ariz. Super. LEXIS 230.

⁷⁸ *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011).

⁷⁹ *Derrick Lashan Hill v. Gipson*, 2012 U.S. Dist. LEXIS 119174.

⁸⁰ *State v. Smith*, 418 S.W.3d 38 (Tenn. 2013).

⁸¹ *State v. Bailey*, 2020 Del. Super. LEXIS 142.

⁸² *Jenco v. Crowe*, 2015 Minn. App. Unpub. LEXIS 79.

In *Russo v. Takata Corp.*, the civil appellants were successful in showing prejudice. In this case a juror conducted Internet research on the case before voir dire but did not disclose the research during voir dire. Then, the juror shared the information with all other jurors just before the end of deliberations. The appellant submitted ten sworn juror affidavits in their posttrial motion for a new trial. The court concluded that it was extrinsic information because it did not come from the trial itself and found that the information was prejudicial because of the time at which the juror shared the information. The appeals court concluded that it was a close case but affirmed the trial court's granting of a new trial.

Making Claims of Juror Misconduct

Courts are wary of the resources it takes to conduct a new trial, and the standards of extraneous and prejudicial are not always easy to meet. In criminal cases, "the introduction of prejudicial extraneous influences into the jury room constitutes misconduct which may result in the reversal of a conviction. Not every instance of juror misconduct, however, requires a new trial. Under Supreme Court precedent, the remedy for allegations of juror misconduct is a prompt hearing in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not the misconduct was prejudicial."⁸³

Most of the written case opinions were generated by state intermediate appellate courts, which traditionally place a high priority on both respecting the discretion of the trial judge and on preserving the finality of jury verdicts. In a large proportion of those cases, the incident was not brought to the attention of the trial judge during the trial when some remedial action could have been taken. So, it is not particularly surprising that most opinions ultimately affirm the action of the trial judge. Even when appellate judges disapproved of the trial judge's actions, they often found harmless error due to a lack of prejudice to the parties. In contrast, most of the survey respondents' descriptions suggested that the judges learned about incidents at some point during the trial and were able to take remedial action in the few instances in which there was a question of prejudice.

Therefore, it is imperative that the trial court investigate or hold a hearing when juror misconduct is brought to its attention, even in civil cases. For example, following an eight-day medical malpractice suit, a juror repeatedly contacted counsel and the trial judge to inform them that another juror conducted Internet research during deliberations. Using this information, losing counsel submitted a motion for a new trial and the trial judge decided to summarily deny the motion after oral argument and no investigation into the misconduct. The Supreme Court of Delaware eventually reversed and remanded the decision stating that further investigation was mandatory.⁸⁴

Similarly, a party wishing to claim juror misconduct for a new trial must follow proper procedure. This is especially true in habeas petitions, as a petitioner is required to first exhaust all state court remedies. In a joint trial, a juror admitted to conducting extraneous Internet research. One defendant unsuccessfully raised the issue in his state court appeal, while the other did not. The defendant who did not raise the claim, now petitioner, asked the U.S. District Court to review the issue of juror misconduct. The U.S. District Court ruled that it could, only because the co-defendant raised the same claim, so if the petitioner would have raised the identical claim in the state court of appeals, his effort would have been futile. However, had there not been a co-defendant, the petitioner would not have been able to bring his petition.⁸⁵

Finally, it is imperative that parties bring juror misconduct to the attention of the trial judge as soon as they are aware. The United States District Court for the Southern District of New York decided a case in which an alternate juror contacted a defendant over the professional networking site LinkedIn before voir dire. However, the issue was not raised until after a guilty verdict, and the defendant provided no indication as to when he was made aware of the contact. The District Court noted that granting a "new trial based on information regarding a juror that may have been available to him prior to the verdict would 'transform a tactical decision to withhold the information from the court's attention into a trump card to be played only if . . . expedient.'"⁸⁶

⁸³ Sanders v. Folk, 2019 U.S. Dist. LEXIS 22889 (citing Parker v. Gladden, 385 U.S. 363, 364-65 (1966); United States v. Klee, 494 F.2d 394, 396 (9th Cir. 1974); Bell v. Uribe, 748 F.3d 857, 867 (9th Cir. 2014)).

⁸⁴ Baird v. Owczarek, 93 A.3d 1222 (Del. 2014).

⁸⁵ Steffes v. Thrumer, 2008 U.S. Dist. LEXIS 121220 (E.D. Wis. May 5, 2008).

⁸⁶ United States v. Teman, 465 F. Supp. 3d 277 (S.D.N.Y. 2020); See United States v. Diaz-Albertini, 772 F.2d 654, 657 (10th Cir. 1985).

Protecting Jurors

While much of the discussion is centered on what happens if a juror does something wrong, courts have also made efforts to protect jurors' rights following the expansion of new media. In 2016 the Supreme Court of Iowa upheld a trial court's decision denying a defendant's motion for a mistrial and jury polling on a false news article relating to the trial. Both the trial court and the Supreme Court agreed that there was no factual showing of prejudice to the parties or that any jurors had seen the news article. The Supreme Court of Iowa concluded that courts must poll the jury about exposure to midtrial publicity only if the material raises serious questions of possible prejudice. There seems to be a level of trust in the jurors, as well as a belief that the court admonitions work. In this case, "the court's admonition directed jurors to avoid media reports—not just to disregard them—and the court gave a renewed warning, including a specific mention of media, immediately before recessing the jury on the afternoon the article appeared."⁸⁷

The United States District Court for the Northern District of California was also presented with an interesting question between tech giants Oracle and

Google.⁸⁸ Both sides requested that the court require the venire to complete a two-page jury questionnaire. One side then wanted a full extra day to digest the answers, and the other side wanted two full extra days, all before beginning voir dire. The court realized that this delay was so that the attorneys could investigate the social media accounts of perspective jurors, which counsel admitted. That shifted the question to whether Internet investigation by counsel about the venire should be allowed at all. In its order on this question, the U.S. District Court listed multiple reasons why courts should restrict, if not forbid, such searches by counsel, their jury consultants, investigators, and clients. First, the court held that jurors learning of these searches might be more inclined to visit the Internet and social media themselves. Second, the court believed that searches by counsel would facilitate improper personal appeals to jurors via jury arguments and witness examinations patterned after preferences of jurors found online. Third, the court noted juror privacy concerns, given that juror information was not traditionally as accessible before the advent of new media. □

⁸⁷ State v. Gathercole, 877 N.W.2d 421 (Iowa 2016).

⁸⁸ Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100 (N.D. Cal. 2016).

A photograph showing a diverse group of approximately ten people of various ages and ethnicities seated in rows, likely in an auditorium or conference room. They are all looking towards the right side of the frame with serious expressions. The background features vertical window blinds.

CONCLUSIONS AND RECOMMENDATIONS

As the name implies, new media is a relatively recent phenomenon that has radically transformed how people acquire and share information. The pool of prospective jurors, by definition, comprises individuals for whom new media is now an integral part of their daily lives. It should not be a surprise that its presence poses a challenge to traditional notions of juror impartiality. In part because it is so new, the NCSC undertook the present study to explore the frequency of incidents of juror misconduct involving new media; to solicit judge and attorney opinions about the effectiveness of existing preventive measures; to identify case factors indicating heightened risk that one or more jurors will use new media inappropriately; and to describe how case law concerning juror misconduct has evolved over time.

One component of the study was a survey of state trial judges and trial attorneys soliciting their opinions about the severity of the challenge, their confidence in existing preventive measures, and details about incidents in which they had firsthand experience. The 867 respondents collectively reflect the geographic and professional diversity of the contemporary bench and bar and, thus, likely provide an informed perspective on these questions. A second component was a review of 260 written case opinions addressing instances of juror misconduct involving new media through May 2020. It is possible that some opinions have been omitted from the resulting dataset; however, the search terms employed to identify the cases were intentionally broad to ensure the greatest probability of including all relevant opinions.

A sizable proportion of judges and attorneys reported that juror misconduct involving new media is somewhat or very likely in any given trial, but their reports of personal experience and the relative paucity of case opinions suggest that these incidents are not a particularly common occurrence. Only one-quarter of survey respondents reported any personal experience over the course of their professional careers and only 11% had experienced more than one incident. NCSC identified only 260 written opinions issued since 1994 out of an estimated 2 million jury trials that took place during the same period. Either the risk of juror misconduct in any given case is quite small, or judges and attorneys are remarkably incapable of identifying incidents when they occur.

The low rate of incidents does not mean that judges and attorneys should become complacent about the risk of juror misconduct, however. This is a relatively recent problem, which has increased in frequency as the number of new media platforms has grown and their functionality has improved. In the meantime, public reliance on new media has accelerated during the COVID-19 pandemic, in which substantial segments of the population migrated to online networks to maintain communication with friends, family, and coworkers. In spite of widespread professed longing to "return to normal," it is unlikely that heavy reliance on new media will wane in tandem with an end to social-distancing requirements when the pandemic abates.

Discoverability of juror misconduct involving new media will also continue to be a challenge. Most of the incidents described by survey respondents and case opinions involved jurors conducting independent research about case-relevant topics that were discovered only because the juror shared the information with other jurors, who subsequently informed the judge or attorneys. But the methods employed in the present study cannot shed light on how frequently jurors conduct independent research and either fail to find information or at least decline to share it with other jurors. Juror communication using social media may be somewhat easier for judges and lawyers to detect by monitoring jurors' social media accounts during and after trial, but the jurors themselves are less likely to disclose that they are violating the judge's instructions with other jurors. Recent case law has also taken note of juror privacy interests, which may establish restrictions on the ability of attorneys to monitor jurors' online presence for evidence of impermissible activity during trial and deliberations.

The present study confirms a great deal of intuition about case characteristics that indicate increased risk of juror misconduct. For example, serious criminal trials appear to pose more risk than civil trials. Juror misconduct also occurs more frequently in longer and more complex trials, both of which offer more opportunity to access new media over time and more topics that jurors might feel the need to research or communicate using new media. In addition, jurors may be more tempted to conduct research online when they believe that they are likely to find information to assist their decision making (e.g., popular websites, local news 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.

Survey respondents also indicated that attorneys often research their own clients' and opposing parties' online profiles for potentially prejudicial information. Attorneys with substantial concerns about jurors finding information through illicit use of new media should alert the trial judge during the final pretrial conference and perhaps request more forceful or more frequent jury instructions. Given that most of the reported misconduct involved jurors doing independent research on case-related topics, it also highlights the importance for judges and lawyers to be especially alert for unfamiliar terms or topics introduced in witness testimony that might need extra explanation. In jurisdictions where it is permitted, judges and attorneys should invite jurors to submit written questions about trial evidence or testimony, rather than seeking information independently, if they believe the answers are necessary to inform their verdict.⁸⁹

Most of the survey respondents generally expressed confidence in the effectiveness of existing preventive measures, many of which have been recommended in judicial education programs for several years. Clear and explicit jury instructions that explain the underlying rationale for restrictions on new media use were viewed as most effective. There was somewhat less enthusiasm for preventive measures that involved additional effort to implement (e.g., written promises, courthouse bans on devices, additional screening during voir dire), but this may reflect their respective implementation costs rather than confidence in the effectiveness of these measures.

In general, judges were somewhat more optimistic than attorneys about the effectiveness of preventive measures, especially on the efficacy of clear instructions. This optimism may in part reflect judges' regard for jurors generally, both in terms of their competence as decision makers and the integrity with which they undertake their responsibilities. A longstanding measure of jury performance, for example, is the proportion of cases in which judges report that they would have reached the same verdict

as the jury (judge-judge agreement rate), which consistently ranges from 75% to 85%.⁹⁰ Part of the optimism, however, may also be a self-defensive belief in their own role in directing the trial. A longstanding presumption in case law is that jurors understand and follow the law as instructed by the trial judge, which forms the basis for the legitimacy of the verdict itself. It follows, therefore, that jurors would also understand and abide by instructions governing their conduct during trial. Personal experience with one or more incidents of juror misconduct involving new media slightly dampened survey respondents' confidence in some preventive measures, but not others.

While attorneys may have limited ability to monitor or control juror behavior during trial, survey respondents reported that attorneys often compensate by using new media themselves to identify the risk that jurors would find prejudicial information online if they went looking for it and, when possible, to minimize the damage that the information might cause. More than half of the survey respondents 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. Interestingly, these approaches were cited at least as often as using new media to investigate prospective jurors. The actual existence of potentially prejudicial information that jurors might discover if they violated the judge's instructions should certainly be considered a significant risk factor insofar that it might bias the decision making of any jurors who were exposed to the information. Most respondents were doubtful about the prevalence of attorneys deliberately posting information online with the intent to affect juror decision making.

The review of case law on this topic shows a growing pragmatism about the likelihood of preventing all incidents of juror misconduct and a new focus on introducing remedies only in cases in which ex parte information, which could be very narrowly defined, clearly shows prejudice to the parties. Some of the earliest opinions held strong presumptions that any ex parte information was prejudicial to the parties and tended to impute bias to jurors who failed to abide by admonitions on the use

⁸⁹ G. THOMAS MUNSTERMAN ET AL., JURY TRIAL INNOVATIONS §5.7 (2006).

⁹⁰ The first use of this measure was reported in *The American Jury*, a study that examined jury verdicts in 3,576 criminal jury trials that took place between 1955 and 1957; judges reported agreement with the verdict in 77% of the trials. HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966).

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 (additional admonitions, curative instructions, removal from the jury, or contempt proceedings), the impact of the juror's misconduct will depend on a more careful review of the information learned or communicated through new media to determine the extent to which it prejudices the parties.

A necessary prerequisite for any such determination is, of course, an adequate investigation into the incident to determine not only the juror's actions, but also the nature of the information exchanged or communicated with non-jurors, the extent to which it was shared with other jurors, and the impact, if any, on the jurors' decision making. Appellate courts appear likely 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, however, of judges who fail to conduct a hearing on the matter. Trial judges should ensure that the remedy implemented to address the incident is proportionate to the risk of prejudice to the parties.⁹¹

A complicating factor for trial judges, however, is the lack of clear consensus about how to assess prejudice in these cases. Compare, for example, the court's assessment in *Hill v. Gipson* that a juror's exposure to information that was similar to, and more pointedly did not contradict, witness testimony at trial was not prejudicial to a different court's decision in *Clark v. Maryland*. In *Clark*, a juror looked up the definitions of *livor mortis* and *algor mortis* (technical terms used to describe how blood settling in a body can establish the time and place of death), which were used by a coroner testifying as an expert witness. There was no consideration in the *Clark* opinion about whether the definitions were generally accurate or whether there was any evidence that the information affected the juror's decision making. The simple fact that

the information was not adduced at trial made it "an adverse influence . . . [that] compromises the impartiality of the entire jury."⁹² Similarly, there is no clear direction in case law about whether judges should employ an objective "reasonable person" standard or a subjective self-assessment by the juror about the impact of ex parte information on the juror's decision making. Provided that a trial judge conducted a hearing and can offer a plausible justification for its proposed remedy (or lack thereof), the decision will likely survive an appeal.

The present study delved deeply into judges' and attorneys' opinions and their experiences, both firsthand and as reported in case law, concerning juror misconduct using new media. The juxtaposition of findings from the two components of the study confirm much that was suspected about the nature of these incidents and the frequency with which they are discovered. Nevertheless, some questions remain unanswered. We do not know, for example, how often juror use of new media goes undetected by judges and lawyers, which may be considerably more than currently assumed. We also do not fully understand jurors' motivations for violating the admonitions on juror use of new media. In truth, jurors may have mixed motives, including some about which they have little cognitive awareness. For example, jurors may be trying to find information that will make them better jurors or seeking out information because they do not trust the system. While judges and attorneys suggested potential reasons for juror behavior and indicated an understanding that juror behavior may have a variety of causes, the present study allows only an indirect understanding of the most prevalent reasons for juror misbehavior and the most effective means of countering it. Future research should endeavor to anonymously survey jurors directly to better understand the causes of their actions. Finally, as new media continues to evolve, courts should continue to develop strategies to monitor and prevent juror misconduct involving new media. ☐

⁹¹ Gunnell v. Ohio, 132 OHIO St.3d 442 (2012).

⁹² Andrew Radding et al., *Juror Misconduct and the Internet*, Md. LITIGATOR 4, 11 (Sept. 2011) (available at <https://adelberg.com/wp-content/uploads/2016/06/jurormisconduct.pdf>).

APPENDIX A

CODING FORM

1) OPINION INFORMATION

- a. Case Citation:
- b. Opinion Date:
- c. Court Type:
 - State trial court
 - State IAC
 - State COLR
 - Federal trial court
 - Federal IAC
 - Federal COLR
- d. Did this case involve allegations of juror use of new media? **Y/N**

2) If YES, TRIAL INFORMATION

- a. State:
- b. Trial year:
- c. Case Type:
 - Criminal
 - Homicide (Capital)
 - Homicide (Non-capital)
 - Assault/Battery/Other crimes involving violence against a person
 - Sex Offenses (rape, sexual assault, sexual battery)
 - Property Crimes
 - Domestic violence
 - Child abuse/neglect
 - Drug offenses
 - Weapons offenses
 - DUI/DWI
 - Public order offenses
 - Civil
 - Traffic
 - Other
- d. How long was the trial (days?)
- e. How was the juror(s) alleged to have used new media?
 - For research
 - i. If for research, what was the juror seeking information about (check all that apply)?
 - Legal terms/concepts
 - Parties
 - Witnesses
 - Trial-relevant facts
 - Lawyers
 - Other (specify)
 - ii. If for communication, how was the juror communicating?
 - For communication

- Social media platform (specify)
 - Texting
 - Email
 - Blogging
 - Other (specify)
- f. When did the incident occur?
- Before voir dire
 - During voir dire (before jury sworn)
 - During trial (after jury sworn, but before jury deliberations)
 - During jury deliberations
 - Other time
- g. When was the judge made aware of the incident?
- Before voir dire
 - During voir dire (before jury sworn)
 - During trial (after jury sworn, but before jury deliberations)
 - During jury deliberations
 - Post-trial
- h. How did the judge learn about the incident?
- Juror self-disclosed
 - Other jurors
 - Attorneys/parties
 - Court staff
 - Judge discovered
 - Other
- i. How many jurors were involved in the incident?
- j. Did the judge hold a hearing to investigate the incident? Y/N
- k. How did the judge respond to the incident?
- No response necessary (incident did not involve juror misconduct)
 - Curative instruction to juror(s)
 - Remove juror, continue fewer jurors
 - Remove juror, replace with alternate
 - Mistrial
 - New trial

APPENDIX B

JUDGE AND ATTORNEY SURVEY QUESTIONS

The National Center for State Courts is conducting research on judge and attorney experiences and opinions about Internet and social media use by trial jurors. The research is funded by a grant from the State Justice Institute and is being conducted in partnership with the American Judges Association, the National Conference of State Trial Judges, the ABA Commission on the American Jury, and the American Board of Trial Advocates. This survey is intended identify case characteristics that pose the greatest risk of inappropriate juror use of new media and to gauge judge and attorney assessments of existing techniques for addressing these risks.

We anticipate that the survey will take approximately 15 minutes to complete. Your participation in the survey is purely voluntary, and individual responses will be kept strictly confidential and survey findings reported in the aggregate. To encourage the broadest participation possible, we also encourage you to forward the survey to other judges and lawyers. If you have questions about the survey or encounter any difficulty completing the survey, please contact the project director, Paula Hannaford-Agor at phannaford@ncsc.org.

Q1.I am.....

- a Judge (1)
- an Attorney (2)
- Other (4) _____

Follow-up questions to judges:

Q1.1 In what kind of court do you preside?

- Federal (2)
- State General Jurisdiction (3)
- State Limited Jurisdiction (4)
- Municipal (5)
- Tribal (6)
- Other (7) _____

Q1.2 In what level of court do you preside?

- Trial (1)
- Intermediate Appellate Court (2)
- Court of Last Resort (3)
- Other (4) _____

Q1.3 In which state do you preside?

▼ Alabama (1) ... I do not preside in a court in the United States (53)

Q1.4 How long have you been on the bench? (total years)

▼ 0 (1) ... More than 50 (13)

Follow-up questions to attorneys:

Q1.5 What is your primary practice area?

- Criminal Prosecution (1)
- Criminal Defense (2)
- Civil Plaintiff (3)
- Civil Defense (4)
- Civil Mixed Practice (5)
- Family (6)
- Other (7) _____

Q1.6 In which state do you primarily practice?

▼ I do not practice in the United States (54) ... Wyoming (52)

Q1.7 How long have you been a practicing attorney?

▼ 0 (1) ... More than 50 (13)

Q2.1 How "tech savvy" are you?

- Not at all (1)
- Somewhat (2)
- Very (3)
- Extremely (4)

Q2.2 How frequently do you use:

	Never (1)	Monthly (2)	Weekly (3)	Daily (4)	Multiple Times a Day (5)
Email (1)	<input type="radio"/>				
Texting or Instant Messaging Apps (2)	<input type="radio"/>				
Search Engines (e.g., Google, Bing, Chrome, IE) (3)	<input type="radio"/>				
Social Media (e.g., Facebook, Twitter, LinkedIn, Instagram, etc.) (4)	<input type="radio"/>				
Blogging (5)	<input type="radio"/>				

Q3.1

Considering only trials in which you were a judge or an attorney, in how many trials were jurors alleged to use internet or communication technologies ("new media") inappropriately?

▼ 0 (1) ... Click to write Choice 18 (39)

Follow-up questions if more than one case was experienced:

Q3.1.1 If more than one, what was the year of the first incident you can recall?

▼ 2020 (1) ... 1999 (22)

Q3.1.2 If you have experienced more than one instance, please tell us more about the most significant: _____

Q3.2 What type of case was it?

- Criminal (1)
- Civil (2)
- Traffic (3)
- Other (4) _____

*Follow-up question if it was a **civil case**:*

Q3.2.1 For Civil Case Types, please specify primary type:

- Automobile Tort (1)
- Intentional Tort (2)
- Malpractice-Medical (3)
- Malpractice-Other (4)
- Premises Liability (5)
- Product Liability (6)
- Slander/Libel/Defamation (7)
- Tort-Other (8)
- Buyer Plaintiff (9)
- Employment Dispute-Discrimination (10)
- Employment Dispute-Other (11)
- Fraud (12)
- Landlord/Tenant Dispute-Unlawful Detainer (13)
- Landlord/Tenant-Other (14)
- Mortgage Foreclosure (15)
- Seller Plaintiff (debt collection) (16)
- Contract-Other (17)
- Eminent Domain (18)
- Real Property-Other (19)
- Other Civil (21) _____

*Follow-up question if it was a **criminal case**:*

Q3.2.2 For Criminal Case Types, please specify primary charge:

- Homicide (1)
- Assault/Battery/Other crimes involving violence against a person (3)
- Sex Offenses (rape, sexual assault, sexual battery) (4)
- Property Crimes (5)
- Domestic violence (6)
- Child abuse/neglect (7)
- Drug offenses (8)
- Weapons offenses (9)
- DUI/DWI (10)
- Public order offenses (11)
- Other Criminal (12) _____

Q3.3 In what year did the trial take place?

▼ 2020 (1) ... 1990 (31)

Q3.4 What was the trial length in days?

- 1 day (1)
- 2-3 days (2)
- 3-5 days (3)
- 6-10 days (4)
- 11-15 days (5)
- 16-20 days (6)
- more than 20 days (7)

Q3.5 Tell us about the incident involving juror use of new media. Select all that apply:

- Juror failed to disclose information about use of new media during voir dire (1)
- Juror engaged in internet research (2)
- Juror communicated with other individuals through email, text, or instant messaging (3)
- Juror communicated on social media (4)
- Other, please specify (5) _____

Q3.6 Please briefly describe the alleged juror misconduct:

Follow-up question if juror communicated on social media:

Q3.6.1 Which social media platform did the juror use?

- Facebook (1)
- Twitter (2)
- LinkedIn (3)
- Instagram (4)
- SnapChat (5)
- Other (6) _____

Follow-up question if juror communicated with other individuals through email, text, or instant messaging:

Q3.6.2 Who was the audience of the juror's communication?

- Private/Individual (1)
- Private/Small group (2)
- Open/Public (3)
- Other (4) _____

Follow-up question if juror engaged in internet research:

Q3.6.3 About what was the juror seeking information (check all that apply)?

- Legal terms/concepts (1)
- Non-legal terms/concepts (8)
- Parties (2)
- Other jurors (7)
- Witnesses (3)
- Trial-relevant facts (4)
- Lawyers (5)
- Judge (9)
- Other (6) _____

Q3.7 Was more than one juror involved in the incident?

- Yes (1)
- No (2)

Q3.8 Were other jurors exposed to the ex parte information?

- Yes (1)
- No (2)

Q3.9 When did the incident occur?

- Before voir dire (1)
- During voir dire (before jury sworn) (2)
- During trial (after jury sworn, but before jury deliberations) (3)
- During jury deliberations (4)
- Other time (5)

Q3.10 How was the incident discovered?

- Juror self-disclosed (1)
- Other jurors (2)
- Attorneys/parties (3)
- Court staff (4)
- Judge discovered (5)
- Other (6)

Q3.11 Who brought the incident to the judge's attention?

- Juror self-disclosed (1)
- Other jurors (2)
- Attorneys/parties (3)
- Court staff (4)
- Judge discovered (5)
- Other (6)

Q3.12 Did the judge hold a hearing on the record, including a sidebar or a meeting in chambers, to investigate the incident?

- Yes (1)
- No (2)

Q3.13 What happened in response to the incident involving juror use of new media?

- Nothing, no misconduct (1)
- Juror admonishment with curative instructions (2)
- Other consequences for the jurors (3)
- Admonishment of the entire jury (4)
- Juror removed, no replacement (5)
- Juror replaced with alternate (6)
- Mistrial (7)
- New Trial (8)
- Other (9) _____

Q3.14 With respect to the incident involving juror use of new media, what is the current status of the case?

- Closed (1)
- Post-trial motions are pending (2)
- Further investigatory hearings scheduled (3)
- Under advisement (4)
- New trial scheduled (5)
- On appeal (6)
- Other (7) _____

Q4.1 In your opinion, what is the likelihood that one or more jurors will use new media inappropriately in any given trial?

- Extremely unlikely (1)
- Somewhat unlikely (2)
- Neither likely nor unlikely (3)
- Somewhat likely (4)
- Extremely likely (5)

Q4.2 Rate the effectiveness of the following preventative measures with regard to juror use of new media:

	Very Ineffective (1)	Ineffective (2)	Effective (3)	Very Effective (4)
Courtroom ban on cellphones and technology (1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Courthouse ban on cellphones and technology (2)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Explicit instructions or admonitions about juror use of new media (3)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Repetition of admonitions during trial breaks or recesses (4)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Explanations of the rationale underlying the admonitions (5)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Emphasizing the consequences for litigants of violating the admonition (6)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Emphasizing the consequences for jurors of violating the admonition (7)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Promises elicited by jurors (written or oral) (8)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Use voir dire to identify jurors who are unlikely to follow admonitions (9)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Q4.3 Do you know of any other measures that are effective in preventing jurors from using new media inappropriately?

- Yes (1) _____
- No (2) _____

*Follow-up question **if other measures are known:***

Q4.3.1 Would you be willing to discuss other measures that are effective in preventing jurors from using new media inappropriately?

- Name (1) _____
- Email (2) _____
- Phone (3) _____

Q4.4 Agree/Disagree: Why do jurors use new media in inappropriate ways?

	Strongly disagree (1)	Somewhat disagree (2)	Neither agree nor disagree (3)	Somewhat agree (4)	Strongly agree (5)
They do not know they are not allowed (1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
They do not understand the instructions (2)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
They cannot help themselves (3)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
They believe they need the information to be a good juror (4)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
They intentionally disregard the jury instructions (5)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
They want more information (6)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Q4.5 Are there other reasons you think jurors use new media inappropriately?

Q4.6 How frequently do you believe trial attorneys engage in the following:

	Never (1)	Infrequently (2)	Sometimes (3)	Frequently (4)	All the time (5)
Conduct online research about jurors (1)	<input type="radio"/>				
Post information online in hopes that jurors will find it (2)	<input type="radio"/>				
Conduct online research about clients to identify potential prejudicial information. (3)	<input type="radio"/>				
Conduct online research about opposing parties for prejudicial information (4)	<input type="radio"/>				
Advise clients not to engage in social media/online communication (5)	<input type="radio"/>				
Advise clients to remove harmful information online before trial (6)	<input type="radio"/>				
Adjust law firm's online presence during a jury trial (7)	<input type="radio"/>				

Q5 Are you aware of any other attorney practices in response to juror use of new media?

Please elaborate:

Q6 We expect to have research findings publicly available in late 2020. Please provide an email address if you would like to receive a copy:

- Name (1) _____
- email address (2) _____

