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ESSAY

IMPEACHING A JURY VERDICT, JUROR MISCONDUCT, AND RELATED ISSUES: A VIEW FROM THE BENCH

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I. INTRODUCTION

After a lengthy jury trial, a judge is frequently presented with a motion for a new trial alleging that the misconduct of the jurors corrupted the verdict or that some extraneous, prejudicial influence has reached the jurors during trial or deliberation. This Article explores the most commonly encountered situations involving juror misconduct or extraneous influences. It further provides an examination of relevant Illinois case law as well as law from other jurisdictions, primarily federal, which addresses these issues. Finally, this Article identifies certain problem areas in applying the law from a judge's perspective.

II. WHAT CONSTITUTES JUROR MISCONDUCT OR PREJUDICIAL INFLUENCE?

A review of the case law shows that jurors' conduct, which potentially deprives the parties of a fair trial, generally falls into two broad categories. The first category consists of those situations in which jurors indulge in what is called "irregular conduct." Such "irregular conduct" frequently includes unauthorized juror visits to the scene involved in the trial, personal investigation by jurors or testing of evidence that may or may not have been presented at trial. "Irregular conduct" may also consist of juror consultation of reference materials, such as books, almanacs, and dictionaries,[1] or coercion or pressure on an

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1. *See generally* People v. Holmes, 372 N.E.2d 656, 658-59 (Ill. 1978) (describing a jury that went to Florsheim Shoe Store to inspect heels of shoes after shoe-print was discussed at trial); Templeton v. Chicago & North-

individual juror beyond the normal tensions generated when twelve diverse people attempt to reach a consensus.[2] The last type of "irregular conduct" includes cases that reflect simple confusion in the application of complex jury instructions or verdict forms, resulting in a verdict that does not accurately reflect the jury's intended decision.[3]

The second category of juror misconduct cases discussed in this Article comprises situations where extraneous and potentially prejudicial information reaches the jury and affects the verdict. The parties often claim that the source of such contamination is a remark of the trial judge or bailiff during the trial proceedings.[4] A smaller number of cases deal with outside influences in the form of threats, advice, or information pertinent to a significant issue in the trial that reaches the jury from an outside source.[5]

In whatever way the jury verdict is alleged to be tainted, motions for a new trial based upon such issues are virtually always supported by the affidavits and/or testimony of the jurors who reached the verdict in question, or others who had conversations with them. In Illinois, the admissibility of this evidence is judged by the application of the 1978 Illinois Supreme

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western Transp. Co., 628 N.E.2d 442, 449 (Ill. App. Ct. 1993) (explaining how a jury brought a book on financial management into jury room); Birch v. Township of Drummer, 487 N.E.2d 798, 806 (Ill. App. Ct. 1985) (discussing evidence that jury went to scene to inspect allegedly dangerous curve).

2. *See generally* People v. Reid, 583 N.E.2d 1, 1-2 (Ill. App. Ct. 1991), *app. den.*, 591 N.E.2d 29, 29 (Ill. 1992) (relating how a juror received a threatening phone call while sequestered); United States v. Kohne, 358 F. Supp. 1046, 1049 (W.D. Pa. 1973) (detailing how a holdout juror was told that if the jury had to be sequestered one more night, the speaker would be in court charged with murder); People v. Keenan, 758 P.2d 1081, 1120-21 (Cal. 1988) (describing a male juror who threatened to kill an elderly female juror); People v. Jacobson, 440 N.Y.S.2d 458, 464 (N.Y. Trial Term 1981) (discussing a juror who threw a chair).

3. *See generally* Chalmers v. City of Chicago, 431 N.E.2d 361, 364-65 (Ill. 1982) (dealing with a jury confused over use of a verdict form); Taylor v. R.D. Morgan & Assocs., 563 N.E.2d 1186, 1193-94 (Ill. App. Ct. 1990) (involving jury's misunderstanding of jury instructions).

4. *See generally* People v. Green, 415 N.E.2d 595, 595 (Ill. App. Ct. 1980) (analyzing the behavior of a judge who improperly asked for the numerical decision of jury, gave a non-standard jury instruction, and refused to grant a mistrial after 11 hours of deliberation and a statement by the jury that they were deadlocked); Hunter v. Smallwood, 328 N.E.2d 344, 344 (Ill. App. Ct. 1975) (discussing a trial judge who refused to answer a jury question); Sanders v. City of Chicago, 91-L-7200 (Cir. Ct. of Cook County, 1991) (Order 1-96-0780 *denying leave to appeal*) (involving a bailiff who told the deliberating jury that they would reach a verdict).

5. *See generally Reid*, 583 N.E.2d at 1 (discussing a holdout juror who received a threatening anonymous phone call while sequestered); *Keenan*, 758 P.2d at 1081 (analyzing the impropriety of a male juror who threatened to kill an elderly female holdout juror).

Court case *People v. Holmes*.[6]

III. THE GUIDELINES IN ILLINOIS: *PEOPLE V. HOLMES*

Since 1978, virtually every Illinois decision concerned with juror misconduct, civil or criminal, has cited *People v. Holmes*.[7] In *Holmes*, the jury convicted the defendant of attempted armed robbery and the court sentenced him to the penitentiary.[8] The appellate court affirmed the conviction[9] and the supreme court granted the defendant's petition for leave to appeal.[10] The defendant contended that the circuit and appellate courts had erred in failing to consider an affidavit that supported his motion for a new trial.[11] The affidavit alleged that jury members had conducted their own investigation of critical evidence.[12]

Testimony at trial showed that there was snow on the ground at the time of the attempted robbery, and the victim identified shoe prints that she claimed were made by her assailant.[13] The arresting officer then required that the defendant make shoe prints in the snow for comparison.[14] At trial, the arresting officer testified that: defendant's left shoe print matched the one in the snow; a crack extended from the brand name "logo" towards the corner of the heel; and the insignia "Florsheim" appeared in the heel of each shoe print.[15]

The defendant's attorney submitted an affidavit supporting the defendant's motion for a new trial.[16] The affidavit stated that after the trial, in a conversation with members of the jury and in the presence of an Assistant State's Attorney, a juror told the defendant's attorney that during the trial, several jurors had gone to a Florsheim Shoe Store and looked at the bottoms of various shoes to examine the Florsheim insignia.[17] The juror further stated that they observed two kinds of designs, one containing a crack or line, and another containing the "Florsheim" logo.[18] The jurors discussed this inspection during deliberations.[19]

In deciding the defendant's motion for a new trial, the trial court concluded that it was precluded from considering the

6. 372 N.E.2d 656, 656 (Ill. 1978).
7. *Id.* at 656.
8. *Id.* at 657.
9. People v. Holmes, 354 N.E.2d 611, 614 (Ill. App. Ct. 1976).
10. *Holmes*, 372 N.E.2d at 657.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Holmes*, 372 N.E.2d at 657.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

allegations contained in the supporting affidavit on the grounds that to do so would permit the defendant to improperly impeach the jury's verdict.[20] The appellate court affirmed, both courts apparently relying on *People v. Stacey*, cited in *Holmes*,[21] which stated that in Illinois, it has long been the rule that the jury cannot impeach its verdict by either affidavit or testimony.[22]

The *Holmes* court noted that Professor Wigmore traced the origin of this rule to the decision of Lord Mansfield in *Vaise v. Delaval*.[23] In looking at juror affidavits in general, the *Holmes* court stated that its review of authority showed that there are two categories in which parties offer the testimony or affidavit of a juror to impeach a jury verdict.[24] In the first category, a party offers a juror's testimony or affidavit to demonstrate the "motive, method or process by which the jury reache[s] its verdict."[25] Courts have, almost without exception, held such testimony or affidavit inadmissible. In the second category, a party offers the testimony or affidavit of a juror to show conditions or events brought to the attention of the jury without any attempt to ascertain its effects on the jury's deliberations or mental processes.[26] In most jurisdictions, courts hold such proof to be admissible.

Examining the reasoning for distinguishing the two types of affidavits, the *Holmes* court relied on the rationale articulated by Justice William J. Brennan, then sitting on the New Jersey Supreme Court:

> [t]he better reasoned decisions support the exclusion of jurors'

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20. *Holmes*, 372 N.E.2d at 657.

21. *Id.* at 658 (quoting the appellate court's opinion in *Holmes*, 354 N.E.2d 611, 621 (Ill. App. Ct. 1976) and citing People v. Stacey, 184 N.E.2d 866 (Ill. 1962) (ascertaining whether the additional investigation had improperly influenced the jury's verdict)).

22. *Holmes*, 372 N.E.2d at 658.

23. *Id.* at 658-59 (citing 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2352 (John T. McNaughton rev. ed. 1961) (citing Vaise v. Delaval (K.B. 1785) 1 Term. R. 11)). The rule, however, had been somewhat inconsistently applied in Illinois. As early as the July term of 1820, the Illinois Supreme Court affirmed a trial judge who granted a new trial on the basis of an affidavit of one of the jurors. Sawyer v. Stephenson, 1 Ill. 24 (1820). That affidavit stated that, during deliberations, another juror offered new testimony that had not been offered at trial. *Id.* Because of the testimony, the affiant was induced to render a verdict for the plaintiff although he would not have been inclined to do so otherwise. *Id.* While the 1820 Illinois Supreme Court clearly accepted the affidavit which went directly to the mental processes of the jury as competent evidence, later cases held exactly the opposite, making no mention of the *Sawyer* case. Martin v. Ehrenfels, 24 Ill. 187, 189 (1860); Reins v. People, 30 Ill. 256, 274 (1863); Wykoff v. Chicago City R.R. Co., 85 N.E. 237 (Ill. 1908). These later decisions, the *Holmes* court critically commented, were supported by "neither reasoning [n]or authority." *Holmes*, 372 N.E.2d at 657.

24. *Holmes*, 372 N.E.2d at 658.

25. *Id.*

26. *Id.*

> testimony as to their mental processes, not upon the discredited basis of the policies against self-stultification and avoidance of jury tampering, perjury or other fraudulent practices, but upon the sounder ground that, being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore that such testimony should not be received to overthrow the verdict to which all assented.[27]

Justice Brennan noted alternatively that

> [w]here, however, jurors' testimony goes, not to the motives or methods or processes by which they reach the verdict, but merely to the existence of conditions or the occurrence of events bearing upon the verdict, the basis of policy does not exist, and this whether the condition happens or the event occurs in or outside of the jury room. Evidence of the actual effect of the extraneous matter upon jurors' minds can and should be excluded, as such evidence implicates their mental processes, but receiving their evidence as to the existence of the condition or happening of the event, particularly when the consequences are governed according to whether capacity for adverse prejudice inheres in the condition or event itself supplies evidence which can be put to the test of other testimony (and thus sound policy is satisfied) and at the same time the evidence can serve to avert, as here, a grave miscarriage of justice, which is certainly the first duty of a court of conscience to prevent if at all possible.[28]

American courts thus moved from a rule that completely excluded consideration

> of any juror affidavits or testimony to impeach a jury verdict,[29] to a more modified rule that admitted affidavits showing the existence of extraneous material or outside influence in the jury room. However, courts still held affidavits that went to the "mental processes" of the jurors to be inadmissible.[30]

In concluding its analysis, the *Holmes* court focused on Rule 606(b) of the Federal Rules of Evidence that makes an identical distinction. The Rule provides:

> (b) Inquiry into the validity of verdict or indictment. Upon an inquiry into the validity of a verdict or an indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon his or any other jurors' mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was

27. *Id.* at 658-59.

28. *Id.* (quoting State v. Kociolek, 118 A.2d 812, 816 (Ill. 1978)); 58 A.L.R. 2d 545, 552 (1955).

29. People v. Stacey, 184 N.E.2d 866, 872 (Ill. 1962).

30. *Holmes*, 372 N.E.2d at 659.

> improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for those purposes.[31]

The notes to the *Committee on the Judiciary*, House Report No. 93-650, succinctly stated the above distinction. The Committee candidly said, "[t]he jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reaction involves no particular hazard to the value sought to be protected."[32] The foregoing reasoning persuaded the Illinois Supreme Court that a juror should be permitted to testify whether extraneous information improperly brought before the jury prejudiced jurors, or whether outside influences persuaded jurors.[33] Applying this reasoning to the facts in *Holmes*, the court concluded that the issue of identification of the shoe was critical and that the private investigation conducted by the jurors introduced unfair prejudice.[34] The trial judge's failure to consider the affidavit regarding the extraneous investigation was held to be reversible error; consequently, the reviewing court remanded the case.[35]

IV. THE LAW IN ILLINOIS AFTER *HOLMES*

Since *Holmes*,[36] Illinois courts have heard a variety of cases concerning juror misconduct and extraneous influences. The first, *Heaver v. Ward*,[37] decided by the Second District only one year after *Holmes*, resulted in a remand for a new trial based on two common types of improper jury activity: unauthorized visits to the scene and use of reference materials.[38]

In *Heaver*, the plaintiff sued the defendant for injuries received in an automobile accident.[39] After a verdict in favor of the defendant, the trial court learned that jury members had gone to the scene and brought a copy of *Rules of the Road* into the jury room during deliberations.[40] An evidentiary hearing confirmed that this conduct had occurred.[41] The trial court refused to certify the transcript of the proceedings of the evidentiary hearing and

31. FED. R. EVID. 606(b).
32. *Holmes*, 372 N.E.2d at 660 (quoting COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 93-650 (1973)).
33. *Id.*
34. *Id.* at 662.
35. *Id.*
36. *Id.* at 656.
37. 386 N.E.2d 134, 134 (Ill. App. Ct. 1979).
38. *Id.* at 139.
39. *Id.* at 136.
40. *Id.* at 138-39.
41. *Id.* at 136.

denied a motion for a new trial.[42] The appellate court found error on both grounds, quoting with approval from *Daniels v. Barker*,[43] a 1938 New Hampshire case: "[w]hen incompetent evidence which may be prejudicial is received, the verdict is set aside, without proof that the jury gave it any weight in reaching the verdict. To require the losing party to prove the actual prejudice would place a difficult and unjust burden on him."[44]

This position was not in conflict with the frequently cited rule of *People v. Mills*,[45] that "a jury verdict will not be set aside where it is apparent that no injury or prejudice resulted from a communication to the jury either by the court or by third persons outside the presence of the defendant."[46] The court reasoned that with the conflicting testimony of jurors in *Heaver*, and the lack of clarity as to exactly which section of the *Rules of the Road* the jurors had discussed, the defendant was unable to show that no prejudice occurred.[47]

Subsequently, the Third and Fourth District Appellate Courts considered two cases involving unauthorized visits to the scenes of accidents. Both courts applied *Holmes* with different results. In the first, *Brown v. Johnson*,[48] a plaintiff-motorcyclist sued an automobile driver and his employer to recover for injuries sustained in a collision.[49] For reasons not set forth in the opinion, the day after the trial, with the permission of the court and in the presence of a court reporter, the plaintiff's attorney interviewed one of the jurors.[50] The attorney asked the juror his opinion on the credibility of a key defense witness.[51] That witness had testified that, while he stood in an electronics store, he looked out the window and saw the plaintiff's motorcycle go by at high speed.[52] The juror replied that he believed the witness to be credible since another juror visited the scene and looked out the same window, telling his fellow jurors that, since the block was short, that position provided a view.[53] In another conversation, the same juror revealed that perhaps two or three other jury members had also visited the scene.[54]

The trial court later held an evidentiary hearing in which all

42. *Heaver*, 386 N.E.2d at 136.
43. 200 A. 410, 410 (N.H. 1938).
44. *Id.* at 415.
45. 237 N.E.2d 697, 703 (Ill. 1968).
46. *Heaver*, 386 N.E.2d at 139.
47. *Id.*
48. 416 N.E.2d 799, 800 (Ill. App. Ct. 1981).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Brown*, 416 N.E.2d at 801.
54. *Id.*

the jurors questioned at the hearing denied making an unauthorized visit to the scene and/or looking out the window.[55] In contrast to his earlier statement, the juror who provided the initial information stated tentatively at the hearing that he "may have heard somebody had visited the scene."[56] The juror excused his lack of memory by saying that this occurred approximately two years ago and he had no specific knowledge as to which juror visited the scene.[57] The trial court denied the plaintiff's motion without considering either the substance of the affidavit or the statement.[58]

The appellate court reversed stating, "[n]either the trial court nor this court need attempt to delve into the exact effect of unauthorized evidence on a particular juror. It is enough that the unauthorized evidence directly related to the issues in the case and may have improperly influenced the verdict."[59] The opinion is not clear as to how the appellate court decided that the first conversation with the juror was credible while the second was not, or the reasons for the two-year time lapse between the trial and the evidentiary hearing.

In *Birch v. Township of Drummer*, the Illinois Appellate Court reached a different conclusion while still applying *Holmes*.[60] In *Birch*, the estate of a driver killed in a two-car collision brought an action against the Township of Drummer and its Highway Commissioner, alleging that they had been negligent in failing to warn of a dangerous roadway condition.[61] During the course of deliberations, two jurors went to the scene to inspect this allegedly dangerous curve.[62]

After a verdict for the defendants, the plaintiff brought a motion for a new trial supported by the statements of jurors attesting to the unauthorized visits to the scene.[63] Citing *Holmes*, the court concluded that it could properly consider these statements, since they simply showed that the jurors had conducted an independent investigation without making any effort to relate this action to the jurors' mental processes.[64]

Nonetheless, the trial court denied plaintiff's motion, and the judgment was affirmed.[65] The appellate court distinguished *Brown* by stating:

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55. *Id.*
56. *Id.*
57. *Id.*
58. *Brown*, 416 N.E.2d at 802.
59. *Id.* at 803 (quoting Heaver v. Ward, 386 N.E.2d 134, 139 (1979)).
60. 487 N.E.2d 798, 808 (Ill. App. Ct. 1985).
61. *Id.* at 801.
62. *Id.* at 806.
63. *Id.*
64. *Id.* at 807.
65. *Birch*, 487 N.E.2d at 808.

> [u]nlike *Brown*, the plaintiff here does not allege the intersection had changed since the accident. Both parties presented their own plan and profile of the intersection and a number of photographs of the accident scene. A verdict in a civil case ordinarily need not be set aside because the jurors made an unauthorized visit to the scene of the accident where the visit disclosed nothing about the location not accurately depicted by photographs, maps, diagrams, or the like lawfully admitted into evidence (Annot. 11 A.L.R. 3d 918, 945 (1967)). When maps and photographs lawfully admitted into evidence correctly depict the area, the prevailing party has met its burden of proving the lack of prejudice.[66]

The *Birch* court noted that while the physical characteristics of the scene were crucial to the outcome of the case, they were not in dispute.[67]

Illinois cases also address juror misconduct in connection with jury consultation of outside reference materials. The holdings of these cases differ, depending upon the circumstances and the reasoning of the appellate court involved. In *Frede v. Downs*, the appellate court set aside the jury verdict after the circuit court chose not to do so.[68] The plaintiff, injured in a boating accident, maintained a right to a new trial because the jury consulted a book entitled *Piloting, Seamanship and Small Boat Handling* during deliberations.[69]

After the trial court reconvened the jury, it followed the precedent set forth in *Holmes* and only questioned the jurors on their use of the book—not as to the book's effect on their decision-making.[70] One juror stated he looked at the entire book, while most of the others only glanced at it, or looked at pictures.[71] The sections most frequently looked at were those involving "right-of-way," responsibilities of the skipper, and *Rules of the Road* for boats.[72] All of these issues proved vital to the case. In reversing, the appellate court cited *Heaver v. Ward*[73] and stated:

> [w]e believe that the circumstances of the case at bar require a reversal of the judgment and a remandment because there was a

66. *Id.* at 807 (citing Newton v. Minneapolis St. Ry. Co., 243 N.W. 684 (Minn. 1932)).

67. The fact that the plaintiff had apparently not properly preserved the issue for appeal created an additional problem, and the only support of the motion consisted of a statement from the trial judge as to what the jurors told him. *Birch*, 487 N.E.2d at 808. The reviewing court held this failure to be insufficient. *Id.* "The rights of litigants in a court of record cannot be left to the mercy of private remarks in the Judge's ear." *Id.* (quoting Loucks v. Pierce, 93 N.E.2d 372, 374 (Ill. App. Ct. 1950)).

68. 428 N.E.2d 1035, 1036-38 (Ill. App. Ct. 1981).

69. *Id.* at 1037.

70. *Id.*

71. *Id.*

72. *Id.*

73. 386 N.E.2d 134 (Ill. App. Ct. 1974).

> requisite showing of the probability of prejudice. As in *Holmes* the extraneous information that was improperly brought to the jury's attention was in the nature of evidence appearing on a crucial question, that is the alleged negligence of Downs in failing to keep a proper lookout. Frede had not been confronted with nor given any opportunity to refute what the jurors may have looked at in the book. In determining whether Downs was keeping a proper lookout the jury was instructed that Downs had the duty to exercise ordinary care to avoid a collision and also that in making that determination they should consider the statutes on the right-of-way. The extent to which the jury read the book is not certain. They did, however, read the rules of the road for boats and the duties of a skipper which relate to this issue of a proper lookout. This may have improperly influenced the verdict.[74]

The probability of prejudice mandated a reversal in *Haite v. Aldridge Electric*, a car-truck collision case, where affidavits supporting a motion for a new trial showed that a juror consulted an almanac to ascertain the time of sunset on the day in question.[75] Visibility was a key issue in the case.[76] Applying *Holmes*, the court refused to consider the effect of the almanac evidence on the jurors' decision, but did examine the "nature" of the evidence.[77] Further refining the holding in *Holmes*, the court stated:

> [h]ere it is obvious that the almanac evidence as to the time of sunset on the day of the accident related directly to a crucial issue in the case—visibility. The burden then shifted to defendants to demonstrate that no injury or prejudice resulted. We do not believe that this burden has clearly been met.[78]

The court rejected the defendant's argument that evidence regarding visibility had been introduced at trial, stating the trial evidence was conflicting.[79]

In *People v. Szymanski*, the jury convicted the defendant of forgery.[80] Prior to sentencing, the defense submitted a motion for a new trial supported by four signed handwritten statements of jurors, one of which was notarized.[81] The statements, in effect, said that one of the women on the jury simply appointed herself foreperson.[82] The foreperson told the jury that she lived in the

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74. *Frede*, 428 N.E.2d at 1037.
75. 575 N.E.2d 243, 253 (Ill. App. Ct. 1991).
76. *Id.* at 255.
77. *Id.*
78. *Id.*
79. *Id.* Impliedly, the court felt that the jury impermissibly used the time of sunset from the almanac to resolve conflicts in the evidence and reversed the case. *Id.*
80. 589 N.E.2d 148, 149 (Ill. App. Ct. 1992).
81. *Id.* at 150.
82. *Id.*

Naperville area, and drew a map to demonstrate the route that the defendant had taken from various points in the village.[83] One juror's statement claimed the map showed that the building in question was located in a small area, and all of the jurors' statements said that the map was inaccurate.[84] The affidavits also stated that, at least at one point during deliberations, a tie existed among the jurors regarding the defendant's guilt or innocence.[85]

After argument on the motion, and without an evidentiary hearing, the court denied the defendant's motion for a new trial, holding that the "map referred to in the statements was merely an extension of the jury foreperson's mental processes and was not 'extraneous' to the actual deliberation."[86] The appellate court affirmed, concluding that it is well established that a jury has a right to consider evidence in the light of its own knowledge and observations.[87] The map merely involved the juror's own knowledge and observations regarding the scene.[88] The appellate court pointed out that the juror had not made a trip to the scene for the purpose of ascertaining the particulars of the map, but rather drew it based on her own familiarity with the area.[89] The appellate court further held that the trial court properly classified the proffered affidavits regarding the use of the map as inadmissible because they concerned the mental processes the jury used to reach its verdict.[90]

An interesting case involving both reference materials and completely conflicting affidavits is *Templeton v. Chicago & North Western Transportation Co.*[91] In *Templeton*, a railroad employee was severely injured when he fell from a railway bridge.[92] The employee subsequently sued the railroad under the Federal Employee's Liability Act (FELA).[93] The jury entered a verdict in favor of the plaintiff, and the defendant filed a post-trial motion arguing entitlement to a new trial because one of the jurors brought a book entitled *Instruction to Financial Management* into the jury room during deliberations.[94] An unsworn, handwritten affidavit by juror Jackson, stating that it was he who provided the

83. *Id.* at 151.
84. *Id.*
85. *Szymanski*, 589 N.E.2d at 150-51.
86. *Id.* at 151.
87. *Id.* at 152.
88. *Id.*
89. *Id.*
90. *Szymanski*, 589 N.E.2d at 152. This case seems to represent an expansion of what may be considered "mental processes."
91. 628 N.E.2d 442, 442 (Ill. App. Ct. 1993).
92. *Id.* at 444.
93. *Id.*
94. *Id.* at 449.

book, supported the motion.[95] The defendant further alleged that the jurors referred to the book for assistance in deliberations.[96]

In response to the defendant's motion, the plaintiff presented a verified affidavit by the same juror containing a directly contradictory statement, as well as the affidavit of a second juror, Ross, that corroborated Jackson's second affidavit.[97] In Jackson's new affidavit, he stated that while he brought the book into the jury room, jurors did not look at it.[98] Juror Ross further stated in her affidavit that she neither referred to any books, nor did she observe any other juror doing so.[99] The court held that while the presence of the textbook in the jury room was improper, the plaintiff had not established injury or prejudice because the sworn affidavit stated that no one had looked at the book.[100]

Three recent Illinois cases in which jurors' use of dictionaries did not result in reversals were *Danhof v. Richland Township*,[101] *Macias v. Cincinnati Forte*,[102] and *Pietrzak v. Rush-Presbyterian-St. Luke's Medical Center*.[103] In *Danhof*, the jury consulted a dictionary for the definition of the word "proximate."[104] The court held that no reversible error existed since the jurors stated at the evidentiary hearing that they followed the trial court's instructions, and the definition did not affect their verdict.[105] Moreover, the dictionary definition of "proximate" did not contradict, nullify, or negate the definition contained in the instructions.[106]

In *Macias*, the trial court held that no error had occurred where the jury foreperson researched and shared with the jury the definitions of "reasonable" and "reasonable care," as well as "defective condition," all taken from *Black's Law Dictionary*.[107] The appellate court decided that the definitions of "reasonable" and "reasonable care" were essentially the same as those given in the

95. *Id.*
96. *Templeton*, 628 N.E.2d at 449.
97. *Id.*
98. *Id.* at 449.
99. *Id.*
100. *Id.* at 453-54. The holding does not address the conflict in the affidavit, and we might assume that the court relied on the second affidavit because the juror verified it.
101. 559 N.E.2d 1155, 1155 (Ill. App. Ct. 1990).
102. 661 N.E.2d 472, 472 (Ill App. Ct. 1996).
103. 670 N.E.2d 1254, 1254 (Ill. App. Ct. 1996).
104. *Danhof*, 559 N.E.2d at 1157.
105. *Id.*
106. *Id.* Although *Holmes* precludes courts from considering anything that goes to the mental processes of the jurors, and the court in *Danhof* clearly considered the jurors' testimony that the dictionary definitions did not "affect" their verdict, there is no explanation in the opinion for this apparent inconsistency.
107. *Macias*, 661 N.E.2d at 473.

instructions and did not conflict with, or substantially differ from, the instructions.[108] Since the dictionary definitions were merely cumulative of the definitions in the instructions, they caused the plaintiff no prejudice.[109] The court never instructed the jury on the meaning of "defective condition."[110]

Finally, in *Pietrzak*, the plaintiffs brought a medical malpractice action against the hospital and various medical providers on behalf of a brain-damaged patient.[111] After a verdict for the defendant, the plaintiffs filed a post-trial motion claiming that jurors' consultation of the dictionary for the definition of "timely" prejudiced them.[112] The plaintiff moved to introduce testimony of a linguistics expert, discussing the possible prejudice caused by the definition.[113]

The trial court denied the motion, holding that "the dictionary definitions at issue were ordinary, neutral and non-argumentative definitions that did not improperly influence the jury."[114] The appellate court ruled that the lower court was correct in its decision to disallow the testimony of the linguistics expert, because "language interpretation is a question of law for the court so that expert linguistic testimony may be disallowed."[115]

A. Coercion

The second category of cases that involve actual misconduct on the part of jurors is those cases where jurors coerce or pressure one another beyond the ordinary pressure that occurs when twelve diverse people attempt to reach a verdict. In *People v. Wilson*, a juror contacted defense counsel after the trial because she feared that the jury verdict was improper.[116] She informed counsel that another juror had advised her that if she persisted in her vote of "not guilty," defendant would be set free, would never stand trial for the charges, and it would be her responsibility if he committed a similar offense.[117] Her affidavit also stated that this "misinformation" persuaded her to vote "guilty."[118] The trial court

108. *Id.* at 475.
109. *Id.*
110. *Id.* Nonetheless, the appellate court agreed with the trial court that the introduction of this definition had no impact upon the jury's verdict where the foreperson testified that after he read the definition of "defective condition" to the jurors, no one discussed the definition, and, in fact, the jury seemed "bored." *Id.*
111. 670 N.E.2d 1254, 1254 (Ill. App. Ct. 1996).
112. *Id.* at 1256.
113. *Id.*
114. *Id.*
115. *Id.* at 1259.
116. 615 N.E.2d 1283, 1289 (Ill. App. Ct. 1993).
117. *Id.* at 1289-90.
118. *Id.* at 1290.

denied defendant's motion, refusing to conduct a hearing, and the appellate court affirmed the denial.[119] The court held the affidavit to be incompetent evidence because it went to the mental processes of the juror.[120]

The court reached a similar result in *Sale v. Allstate Insurance Co.*[121] The plaintiff offered an affidavit which stated in part that the jurors misunderstood the instructions, and the holding denying the motion seemed to address only this issue.[122] However, the plaintiff also claimed that one of the jurors offered himself as foreperson, and told the other jurors after his election that he would give them one hour to reach a verdict.[123] He insisted that only one issue required a decision, and wanted to eliminate all the "legalese" as well as "medicalese" and get down to basics.[124] He instructed the jury that the standard of proof was "beyond a reasonable doubt" despite the fact that this was a civil case and the court had instructed the jury otherwise.[125] During deliberations, he allegedly paced about the room in a frustrated manner and hit the door—conduct which at least one juror found to be intimidating.[126] While the court did not specifically address the issue of intimidation in its holding, the court concluded that this conduct went to the emotional state of the jury at the time they reached a verdict, and thus the evidence was inadmissible.[127]

Similarly, in *People v. Boclair*, after a verdict of guilty, the defense received an undated and unsolicited letter from juror Vercler.[128] In the letter, the juror wrote that he thought the defendant was innocent, that he had resisted a guilty verdict for as long as he could, but when two other jurors capitulated, he too gave in and voted guilty.[129] At that point, the jury was into its second day of deliberations and faced a second night of sequestration.[130]

At a subsequent evidentiary hearing Vercler testified, as did Barbara Harston, another member of the jury.[131] Vercler stated that everyone knew who was voting guilty and who was not, and the jury had thoroughly discussed the evidence.[132] He

119. *Id.*
120. *Id.*
121. 467 N.E.2d 1023, 1023 (Ill. App. Ct. 1984).
122. *Id.* at 1035.
123. *Id.* at 1036.
124. *Id.*
125. *Id.*
126. *Sale*, 467 N.E.2d at 1036.
127. *Id.*
128. 544 N.E.2d 715, 727 (Ill. 1989).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

unsuccessfully presented his theory to the other jurors.[133] When two other jurors capitulated and voted guilty, he felt the pressure of eleven other people and changed his own vote to guilty, even though he maintained a reasonable doubt regarding the defendant's guilt.[134]

However, juror Harston testified that when Vercler told the jury members that he would go along with the rest of them and vote guilty, the others encouraged him to re-examine the evidence to make sure that he was comfortable with his vote.[135] The court held that the testimony of these jurors went to the mental processes of the jury and was therefore inadmissible.[136] As a result, the court affirmed the defendant's conviction.[137]

In contrast to the Illinois cases described, a number of federal cases exemplify more extreme coercive conduct. Discussion of these cases follows in the Section of this Article examining similar matters from other jurisdictions.

Other cases illustrate confusion of the jury regarding issues of jury instruction and use of jury verdict forms. In these cases, courts did not find jury misconduct.

In *Chalmers v. City of Chicago*, the appellate court affirmed the trial court's denial of plaintiff's motion for a new trial, but the Illinois Supreme Court granted the plaintiff's petition for leave to appeal.[138] Affidavits submitted by the plaintiff in support of the post-trial motions stated that the jury intended to award damages to the plaintiff for the nature, extent, and duration of her injury, temporary disability, and pain and suffering.[139] However, the jury erroneously placed the dollar figure in the punitive damages blank because they believed that the blank was reserved for that purpose.[140] The court stated that these affidavits, if recognized, would impeach and change the legal effect of the jury's verdict in direct contravention of the rule established in *Holmes*.[141]

Taylor v. R. D. Morgan and Associates, Ltd., a medical malpractice case, presented a number of problems involving both jury misconduct and confusion on the part of the jury.[142] The affidavits supporting plaintiff's post-trial motion claimed that the jury misunderstood the instructions.[143] Citing *Chalmers*, the court declined to consider these allegations since "the authorities are in

133. *Boclair*, 544 N.E.2d at 727.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 728.
138. 431 N.E.2d 361, 361 (Ill. 1982).
139. *Id.* at 362-63.
140. *Id.* at 363.
141. *Id.* at 365.
142. 563 N.E.2d 1186, 1186 (Ill. App. Ct. 1990).
143. *Id.* at 1192.

accord that a party cannot use the testimony or affidavits of jurors to show that the jury misunderstood the instructions or the law."[144]

Other portions of the affidavits in *Taylor* presented more complicated issues centering on the alleged misconduct of one of the jurors, Ronald Mann.[145] The plaintiff's attorney challenged juror Mann for cause during voir dire because the juror worked for the Carbondale Medical Clinic and the plaintiff felt it biased the juror in favor of the doctor.[146] It turned out that juror Mann also knew one of the defendants that worked at the Carbondale Clinic.[147] In reaching its decision, the court noted that the plaintiff did not prove that juror Mann failed to answer any questions that the plaintiff's attorney asked him on voir dire or that he answered any questions falsely.[148] Most judges generally read a list of witnesses to potential jurors during voir dire, and ask whether any of the jurors know any of the people who have been named. The opinion said nothing concerning whether this was done here, but apparently the judge chose not to, since juror Mann knew the individual employed at the Carbondale Clinic.[149]

Conflicting affidavits of different jurors stated that either a conversation took place between juror Mann and the nurse at the clinic, or that juror Mann "overheard" a conversation at the clinic, depending on the affidavit the judge believed.[150] The conversation consisted of discussion of how the plaintiff's life could not be saved.[151] The jurors learned of this conversation either during or after deliberations, depending on which affidavit the court accepted.[152]

The appellate court held that while the circuit court did not abuse its discretion in failing to grant a new trial, sufficient evidence existed to warrant an evidentiary hearing on the issue.[153] The court stated:

> [t]he condition of the plaintiff's heel was hotly contested and was the pivotal issue in the case; the alleged out-of-court statement directly concerned this crucial matter. While we are aware of the difficulties the jurors may face in attempting to recall events which occurred years ago, and while we are reluctant to again interrupt the jurors' lives and involve them in additional court proceedings, those considerations do not outweigh the need to insure that the parties

144. *Id.* at 1192-93.
145. *Id.* at 1193.
146. *Id.*
147. *Taylor*, 563 N.E.2d at 1193.
148. *Id.* at 1193-94.
149. *Id.* at 1194.
150. *Id.*
151. *Id.* at 1193.
152. *Taylor*, 563 N.E.2d at 1193-94.
153. *Id.* at 1194.

received a trial untainted by bias or extraneous information.[154]

Accordingly, the appellate court vacated the judgment in favor of the defendant and remanded the case to the trial court for an evidentiary hearing.[155]

Two similar cases are *People v. Whitecotton*[156] and *Hall v. National Freight, Inc.*[157] The court refused to reverse the defendant's conviction in *Whitecotton*, holding that three juror affidavits claiming a verdict reached due to fatigue could not be considered, because the affidavits went to the mental processes of the jurors.[158] In *Hall*, the court found juror affidavits relating improper jury use of an "averaging technique" invalid to overturn the verdict.[159]

B. Extraneous Influences: Illinois Cases

The next category of cases involves situations where some extraneous and potentially prejudicial information reaches the jury and affects its verdict. Often, remarks of the trial judge or bailiff are the source of the prejudice. Still other cases deal with information alleging improper influence on jury deliberations.

Generally, courts have not considered cases involving remarks of the trial judge to be so prejudicial as to warrant a new trial. An exception is a 1950 case, *Loucks v. Pierce*,[160] which does not involve a remark, but rather conduct of a trial judge. In *Loucks*, the administrator of plaintiff's estate sued the defendant for injuries sustained in a motorcycle accident.[161] The jury returned a verdict for the defendant, and the judge sealed it, by agreement of the parties, before he left the country.[162] Thereafter, the plaintiff brought a motion for a new trial supported by affidavits from counsel and one of the jurors claiming misconduct during deliberations.[163] No hearing occurred on the motion, and it was "not clear whether the court ever saw or considered the affidavit."[164] However, the judge apparently made a personal investigation off the record, and "thereupon ordered a new trial based upon alleged irregularities and a possible error in instructions."[165] The appellate court reversed, with directions that

154. *Id.* at 1194.
155. *Id.*
156. 514 N.E.2d 1160, 1160 (Ill. App. Ct. 1987).
157. 636 N.E.2d 791, 791 (Ill. App. Ct. 1994).
158. *Whitecotton*, 514 N.E.2d at 1168-69.
159. *Hall*, 636 N.E.2d at 801.
160. 93 N.E.2d 372 (Ill. App. Ct. 1950).
161. *Id.* at 374.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Loucks*, 93 N.E.2d at 374.

a hearing be accorded the parties on the motion for a new trial.[166]

Another line of cases, dating from the 1960s, involves remarks made to the jury by the trial judge. In *People v. Duszkewycz*, the jury found the defendant guilty of forcible rape and incest.[167] The defendant contended in his motion for a new trial that certain statements made to the jury by the trial judge resulted in a coerced verdict.[168] The jury had begun deliberations on the morning of Thanksgiving Eve.[169]

> [Then,] about five o'clock in the afternoon, the Judge brought the jury into open court and asked the foreman how the vote stood. [The foreman] replied, '8-4, sir.' The Judge then asked, 'If I give you another hour, do you think you will be able to reach a verdict? Do you think so, in your judgment?' The answer was 'No, sir.' [The Judge then] asked, 'Do you think it will take longer than one hour?' . . . The Judge then said, 'Well, I will send you back for one hour, six o'clock. You see if you can't reach a verdict.'[170]

Shortly before 6:00 p.m., the judge again called the jury into the courtroom and told them that dinner was ready and that cigarettes were available.[171] They ate dinner and continued their deliberations.[172] Later that night after additional deliberations, the duration of which is not reflected in the record, the jury reached its verdict.[173] The defendant brought a motion for a new trial, contending that the judge's remark coerced a verdict by setting a time limit for jury deliberations.[174] The trial court denied the motion for a new trial and the appellate court affirmed, stating:

> [t]he remarks should not have been made, yet it cannot be said that they interfered with the deliberations of the jurors to the prejudice of plaintiff in error or that they hastened the verdict. Nor can it be said that the trial court set a time limit on the deliberations of the jury. When the court stated, 'Well, I will send you back for one hour, six o'clock. You see if you can't reach a verdict,' the jury did not in fact reach a verdict by six o'clock. At six o'clock they retired for and then resumed deliberations.[175]

In *Hunter v. Smallwood*, the court discussed the question of whether Illinois' *Rules of Civil Practice* require that the judge notify counsel and discuss with them any questions the jury may

166. *Id.* at 377.
167. 189 N.E.2d 299, 300 (Ill. 1963).
168. *Id.*
169. *Id.* at 301.
170. *Id.*
171. *Id.*
172. *Duszkewycz*, 189 N.E.2d at 301-02.
173. *Id.* at 302.
174. *Id.*
175. *Id.*

have.[176] In *Hunter*, the trial judge's affidavit indicated that the bailiff advised him twice during jury deliberations that the jury wished clarification of the verdict forms, although the judge had already given the jury instructions as to their use.[177] The attorneys representing the parties, however, had departed from the courthouse and the court "deemed it inappropriate or improper to accede to such a request out of the presence of the attorney," and accordingly refused to answer the jury's question.[178] In his motion for a new trial, the defendant contended that the court's conduct violated the Civil Practice Act that stated, "[the court] shall in no case, after instructions are given, clarify, modify, or in any manner explain them to the jury, otherwise than in writing, unless the parties agree otherwise."[179]

The defendant maintained that the statute meant the judge could not communicate with the jury without first advising the parties.[180] The appellate court agreed, stating that the proper interpretation of the statute permits oral communication with the jury if the parties agree.[181] However, to avoid reversible error, an attempt to notify counsel must be made of any jury instruction in order to eliminate the appearance of secrecy or prejudice.[182]

Nonetheless, Illinois courts most commonly hold that there should be no communication between the trial court and the deliberating jury other than in the presence, or with the knowledge, of counsel, citing cases dating from 1860 to 1971.[183] Such communication outside of open court may become grounds for reversal depending on the facts of each particular case. Courts generally conclude that the trial court should, at the very least, attempt to notify counsel of a jury request for clarification before making any response. With regard to a trial court's obligation to answer a jury question, it is within the sound discretion of the trial court.[184]

Courts also suggest that judges have the duty to further instruct when the jury requests clarification, at least when the

176. 328 N.E.2d 344, 346 (Ill. App. Ct. 1975).
177. *Id.*
178. *Id.*
179. *Id.* (quoting 735 ILL. COMP. STAT. 5/2-1107(9) (West 1999)).
180. *Id.*
181. *Hunter*, 328 N.E.2d at 347.
182. *Id.*
183. People v. Brothers, 180 N.E. 442, 447-50 (Ill. 1932); City of Mound v. Mason, 104 N.E. 685, 688 (Ill. 1914); Crabtree v. Hagenbaugh, 23 Ill. 289, 289 (1860); Mathes v. Basso, 244 N.E.2d 362, 363-64 (Ill. App. Ct. 1968).
184. *See* People v. Pierce, 308 N.E.2d 577, 578-79 (Ill. 1974) (holding the trial judge properly used his discretion in refusing the jury's request to review particular trial testimony); *but see* People v. Queen, 310 N.E.2d 166, 169 (Ill. 1974) (holding that refusing to exercise discretion is error when court believes it does not have discretion).

judge gives incomplete original instructions or when the jurors indicate confusion.[185] This suggestion reflects a view that tends to be somewhat different than the general practice in the trial courts, that being "[w]here the jury [members] make their difficulties explicit, the judge should clear them away with concrete accuracy; and where the question asked is not clear, it is the duty of the court to seek clarification."[186]

In *Hunter*, the affidavit of one of the jurors indicated confusion.[187] Following the rule in place in the years preceding *Holmes*, the court categorically refused to consider any jury affidavit.[188] Nonetheless, the court decided that there were enough indications of confusion on the part of the jury to warrant a new trial.[189] The appellate court reversed the order of the trial court denying a new trial and, therefore, remanded the cause.[190]

Other Illinois cases address issues raised by the judge's polling of the jury and/or the *Prim* instruction.[191] In *People v. Preston*, the defendant's murder, armed robbery, and robbery trial took "slightly less than two days."[192] Although the state called six witnesses, the defendant neither testified nor called any witnesses.[193] The jury began deliberating in the late afternoon of the second day.[194] At 11:00 p.m., the judge invited the attorneys to his chambers and familiarized them with a supplemental instruction he was going to give the jury regarding deadlock.[195] Since the jury gave no indication of their deadlock, the defendant objected to the issuance of the instruction as "premature" and also to specific portions of the instruction.[196] Individual members of the jury were then called in and the following conversation occurred.

> The Court: . . . Ladies and Gentlemen, have you been able to reach a verdict?
>
> The Foreman: Not completely, your Honor.

185. People v. Kucala, 288 N.E.2d 622, 626-27 (Ill. App. Ct. 1972); People v. Harmon, 244 N.E.2d 358, 361 (Ill. App. Ct. 1968).

186. *Hunter*, 328 N.E.2d at 348-49 (quoting 23A C.J.S. CRIMINAL LAW § 1376 (1989)).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 349.

191. *See* People v. Prim, 289 N.E.2d 601, 610 (Ill. 1972) (instructing the jury that "it is your duty to decide the case if you can conscientiously do so). The court in *Prim* held that these instructions were not coercive and did not interfere with the deliberations of the jurors to the prejudice of the defendant. *Id.*

192. 391 N.E.2d 359, 361 (Ill. 1979).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

The Court: Do you think you can arrive at a verdict?

The Foreman: I couldn't tell you at this moment, sir . . . .[197]

The Illinois Supreme Court then gave its own modified *Prim* instruction advising the jury:

> Okay. I'm going to send you back. I just want to let you know that in a large proportion of the cases absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror and not a mere acquiescence of the conclusion of others; yet you should examine the questions submitted with proper regard and deference to the opinions of each other and you should listen to each other's opinions with a disposition to be convinced. It is your duty to decide the case if you can conscientiously do so. If you fail to agree on a verdict, the case must be retried and a future jury must be selected in the same manner and from the same source as you have been chosen and there is no reason to believe that the case would not be submitted to twelve men and women more competent to decide, nor can a case be tried any better or more exhaustively than it has been here, or that any more clear evidence could be produced on behalf of either side. Now you can retire and reconsider the verdict in this case.[198]

The judge subsequently retired to chambers and informed counsel that he intended to call the jury out each hour and ask if they could reach a decision.[199] At this point the defendant moved for a mistrial, which was denied.[200] At 12:50 a.m., the defendant again moved for a mistrial and a directed finding, stating that the length of time the jury had been out indicated a reasonable doubt as to his guilt.[201] The judge denied both of these motions and the jury was recalled.[202] After the jury reached its verdict, the foreman told the judge; but on examination of the verdict forms, the court apparently realized that the jury reached a verdict on only one of three charges.[203] The court did not specify on which charge the verdict was reached, but merely sent the jury back for further deliberations.[204] At 1:50 a.m., the jury reached guilty verdicts on all three charges.[205]

When the judge polled the jury, one juror gave a curious answer to the traditional question, "[w]as this and is this now your verdict?"[206] The juror responded, "[c]ompromise."[207] After the rest

197. *Preston*, 391 N.E.2d at 361.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Preston*, 391 N.E.2d at 361.
203. *Id.*
204. *Id.* at 362.
205. *Id.*
206. *Id.*

of the jury was polled, the court questioned that juror further, and the following colloquy took place.

> The Court: Juror Gross, you were asked by the clerk if the verdict when you signed this was your verdict and is it still your verdict. What is your answer to that?
>
> Juror Gross: Compromise . . . .
>
> Mr. Mikula (counsel for defendant): Judge . . . .
>
> Court: Wait a minute. Is this your verdict?
>
> Gross: Yes.
>
> Court: Is it still your verdict as of right now?
>
> Juror Gross: Yes.[208]

On appeal, the defendant contended that the lower court had prematurely given the *Prim* instruction, since the jury never indicated they faced a deadlock.[209] The supreme court rejected that contention, stating that "no fixed time can be prescribed" for the instruction and "great latitude must be accorded to the trial court in the exercise of its informed discretion."[210]

The court also rejected the defendant's second argument that the trial court's *Prim* instruction was improper, as it stated that "if no verdict were reached a new trial would be necessary," a statement of which *Prim* disapproves.[211] While the court acknowledged that the trial court's version was erroneous, it was harmless "where the jury had been deliberating for approximately six hours prior to hearing the instruction, and continued to deliberate for three hours thereafter," and as such, no reversible error occurred.[212]

The defendant finally argued that the trial court's questioning intimidated the juror.[213] With regard to juror Gross' unresponsive answer of "compromise," the Illinois Supreme Court stated that the trial court gave the juror ample opportunity to repudiate her recorded verdict if she so desired.[214] The supreme court also found that no basis existed in the record to conclude that the trial court intimidated the juror by its question.[215] The court affirmed the

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207. *Preston*, 391 N.E.2d at 362.
208. *Id.*
209. *Id.* at 363.
210. *Id.*
211. *Id.* at 364.
212. *Preston*, 391 N.E.2d at 364.
213. *Id.* at 364-65.
214. *Id.* at 364.
215. *Id.* at 366.

judgment of the circuit court denying the defendant's motion for a new trial.[216]

People v. Green involved numerous allegations of misconduct on the part of the trial judge.[217] After a jury trial, the jury found the defendant, John Green, guilty of burglary.[218] The defendant's motion for a new trial alleged that the judge: 1) improperly asked the jury foreman to reveal the numerical division of the jury during deliberations; 2) gave a prejudicially inaccurate version of *Prim* because he left out the words "without violence to individual judgment;" and 3) refused to declare a mistrial although after eleven hours of deliberation, ten jurors revealed that additional deliberation would not result in a verdict.[219] While acknowledging that some of the judge's remarks were erroneous, the reviewing court held that none were serious enough to require reversal.[220]

Several other Illinois cases have claimed extraneous influences and information as sources of prejudice. In *People v. Tucker*, the defendant argued in his post-trial motion that the jury had learned improper information.[221] The defense lawyer's secretary heard one of the jurors state "that it was a shame that the jury had to convict the defendant, but in light of his prior [convictions] they had to."[222] Written statements from other jurors showed that several members of the jury speculated about the defendant's possible previous convictions.[223] The defendant maintained that the jury's speculation, along with juror Stadel's certain knowledge of the defendant's prior arrest and conviction, showed that Stadel shared his knowledge of the convictions with the jury.[224] However, at an evidentiary hearing, five other subpoenaed jurors confirmed that Stadel did not share her knowledge of the defendant's convictions with the rest of the jury.[225] The five other jurors also testified that they had no knowledge of the defendant's prior arrests or convictions for DUI when they convicted him.[226] The appellate court affirmed the trial court's denial of defendant's motion, stating that the record did not support the argument that juror Stadel had informed her fellow jurors of the defendant's history of DUI.[227]

The court in *People v. Reid* reached a somewhat surprising

216. *Id.*
217. 415 N.E.2d 595, 595 (Ill. App. Ct. 1980).
218. *Id.* at 596-98.
219. *Id.*
220. *Id.* at 599.
221. 550 N.E.2d 581, 583 (Ill. App. Ct. 1990).
222. *Id.*
223. *Id.* at 586.
224. *Id.*
225. *Id.* at 587.
226. *Tucker*, 550 N.E.2d at 587.
227. *Id.*

result.[228] In that case, the jury found the defendant guilty of murder and armed robbery.[229] The record showed that the jury's deliberations began on a Thursday.[230] Late that evening, the court sequestered the jury for the night in a local motel.[231] The next day, Friday, after deliberating until 7:00 p.m., the jury returned a verdict of guilty on both counts.[232]

According to the reported case,

> six days after the sentencing hearing, the defendant filed a motion for a new trial alleging that one of the jurors, Kent Bullock, received an anonymous telephone threat during the jury's sequestered night at the motel [on Thursday evening]. At a hearing on defendant's motion, Bullock testified that when the jury [left for the motel] Thursday evening, it was deadlocked 11-1 in favor of conviction on the armed robbery count. Bullock further testified that during the bus ride to the motel, the jurors attempted to figure out who the hold-out juror was and [Bullock] admitted to another juror that [it was he who] had voted against conviction.[233]

At the motel, Bullock had a room to himself.[234] After he had been in the room for some time, he received a "hang-up" phone call.[235] Two hours later, Bullock answered the telephone, and a male voice he did not recognize responded, exclaiming, "[y]ou son of a bitch, we'll get you for that."[236] Bullock did not report the telephone call to anyone.[237]

The following morning, Bullock changed his vote from acquittal to guilty on the armed robbery count after approximately three hours of deliberation.[238] During the deliberations on the murder charge that followed, Bullock stated that nine jurors, including himself, favored acquittal on the first vote.[239] By later in the day, the number of jurors in favor of acquittal had dwindled to three.[240] At around 6:00 p.m., with the judge waiting to see them, the jurors took one last unanimous vote for conviction on the murder charge.[241] Bullock did not testify that he believed the threatening phone call was related to his earlier position as the

228. 583 N.E.2d 1, 1 (Ill. App. Ct. 1991).
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Reid*, 583 N.E.2d at 1-2.
234. *Id.* at 2.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Reid*, 583 N.E.2d at 2.
239. *Id.*
240. *Id.*
241. *Id.*

only juror who had voted guilty.[242] He also stated that he did not change his vote on the murder count because of the call.[243] However, responding to a question from the court, Bullock stated that because of the call he was fearful about his vote and that he did not want to spend the weekend at the motel.[244] His fear and desire not to return to the motel where he had received the call influenced his decision to change his vote.[245]

The state's attorney's cross examination of Bullock revealed that he belonged to the same church congregation as the defendant's mother, which had collected money to assist the defendant's family.[246] Moreover, "[o]ut of respect for the defendant's mother," Bullock even attended the sentencing.[247] Further, a motel maintenance person testified that while he had no personal knowledge regarding the evening Bullock received the call, motel policy dictated that when the motel sequestered jurors, the staff must disconnect the telephones to those rooms.[248]

The defendant's motion for a new trial could not state with certainty that Bullock's motel telephone had been disconnected.[249] The court thus held that Bullock's testimony was insufficient to impeach the jury's verdict.[250] Intriguingly, the opinion makes no comment on Bullock's tie to the defendant's family through his church connection, or why this was not discovered in voir dire.[251]

The appellate court affirmed the trial court but distinguished this case from *Remer v. United States*, the case that the defendant relied on in his motion.[252] Stating that no Illinois cases were directly on point, the appellate court relied on three cases from other jurisdictions that it found "similar."[253] In each of the three cases, a juror physically or verbally threatened another juror, but the courts found no prejudice.[254] In *United States v. Kohne*, one juror told a holdout juror that if the holdout juror did not agree, so the jurors could go home, the juror would "be in court the next morning for murder."[255] Similarly, in *People v. Keenan*, a male juror threatened to kill an elderly female holdout juror.[256] Further,

242. *Id.*
243. *Reid*, 583 N.E.2d at 2.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Reid*, 583 N.E.2d at 2.
249. *Id.*
250. *Id.*
251. *See generally id.*
252. *See id.* at 3 (distinguishing 347 U.S. 227 (1954)).
253. *Reid*, 583 N.E.2d at 3.
254. *Id.*
255. *Id.* (citing *Kohne*, 358 F. Supp. 1046, 1049 (W.D. Pa. 1973)).
256. *Id.* (citing *Keenan*, 758 P.2d 1081, 1121 (Cal. 1988)).

in *People v. Jacobson*, the court did not agree that by throwing a chair one juror had coerced the verdict.[257] The court in *Reid* noted that during the jury poll, each juror assented to his verdict in open court.[258] The courts in *Keenan*, *Kohne*, and *Jacobson* also mentioned jury polling as a factor in the failure to find prejudice.[259] Detailed discussion of these cases follows in the Section of this Article dealing with cases from other jurisdictions.

People v. Whitehead also involved allegedly prejudicial extraneous influence in which the jury convicted the defendant of murder and aggravated kidnapping.[260] In a third amended petition to the Illinois Supreme Court, the defendant claimed a violation of his Eighth Amendment right to an impartial jury for two reasons.[261] First, jurors were very angry because soon after their selection, the local newspaper published their names and addresses.[262] Second, the jurors witnessed the mother of the victim rise from the witness stand and shout at the defendant.[263] In support of his motion, the defendant presented affidavits from two jurors, as well as that of the clerk of the circuit court and a social psychologist.[264]

One juror stated in her affidavit that the jurors were apprehensive about the publication of their names.[265] Further, two jurors had complained to the clerk because "a person who might be a murderer would have their names and addresses if he was set free" two jurors complained to the clerk.[266] An affidavit from the clerk of the court confirmed that the jurors had made these complaints.[267] The psychologist stated that with the publication of the jurors' names, their privacy and anonymity, which ensures an unbiased jury verdict, was lost.[268] Finally, a second juror "stated that while he was in the courtroom, he observed the victim's mother arise, shout and cry towards the defendant," an allegation reflected in the record.[269]

The trial court denied the defendant's motion and the reviewing court affirmed the denial.[270] The reviewing court

257. *Id.* (citing *Jacobson*, 440 N.Y.S.2d 458, 462 (N.Y. Sup. Ct. 1981)).
258. *Reid*, 583 N.E.2d at 3.
259. *Id.*; *Keenan*, 758 P.2d at 1122; *Kohne*, 358 F. Supp. at 1050; *Jacobson*, 440 N.Y.S.2d at 461.
260. 662 N.E.2d 1304, 1325 (Ill. 1996).
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Whitehead*, 662 N.E.2d at 1325.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Whitehead*, 662 N.E.2d at 1326.

concluded that

> [the] vital question to be determined was whether the jurors had been influenced and prejudiced to such an extent that they would not, or could not, be fair and impartial. . . . This determination involved the court's consideration of all the facts and circumstances and conjecture relating to the effect that the incompetent information had upon the minds of the jurors, a determination incapable of absolute accuracy or a very high degree of reliability.[271]

The court noted that "jurors themselves are incapable of knowing the effect prejudicial information may have on them."[272]

With regard to the mother's emotional outburst, the court stated that it is well-settled that where a cautionary instruction is given, no prejudice results.[273] Therefore, the court needed to use its "sound judicial discretion."[274] The court stated that the mother's emotional outburst in *Whitehead* did not require a mistrial.[275] In the *Whitehead* case, the court cautioned the jury to disregard any comments that the witness made, and no prejudice resulted.[276]

V. CASES FROM OTHER JURISDICTIONS

There are a number of interesting cases from other jurisdictions that focus on various forms of juror misconduct and related matters. Three cases, from California, Pennsylvania, and New York respectively, are of particular interest to Illinois practitioners because as recently as 1991, the First District Appellate Court relied on them in deciding *People v. Reid*.[277] In *Reid*, despite the fact that a juror had allegedly been threatened while sequestered in a criminal case, the First District Appellate Court affirmed the trial court's denial of a motion for a new trial.[278]

In a California case, the defendant's motion for a new trial alleged that a particular juror coerced the verdict.[279] Supporting affidavits from a number of jurors indicated that one juror, a male, had repeatedly threatened a holdout juror, an elderly woman.[280] On at least one of these occasions, after he had shouted that he would kill the woman, she began crying, shaking, and became

271. *Id.* at 1325 (citing People v. Hryciuk, 125 N.E.2d 61, 64 (Ill. 1954)).
272. *Id.*
273. *Id.* (citing People v. Howard, 588 N.E.2d 1044, 1044 (Ill. 1991); People v. Hudson, 263 N.E.2d 473, 473 (Ill. 1970); People v. Bradley, 357 N.E.2d 696, 696 (Ill. App. Ct. 1976)).
274. *Id.* at 1326.
275. *Whitehead*, 662 N.E.2d at 1326.
276. *Id.*
277. 583 N.E.2d 1, 3 (Ill. App. 1991). For further discussion of cases analyzing juror misconduct, see *supra* Part IV.
278. *Reid*, 583 N.E.2d at 4.
279. People v. Keenan, 758 P.2d 1081, 1121 (Cal. 1988).
280. *Id.*

physically ill.[281] While the offending juror apparently admitted that he had indeed threatened the older juror, he refused to sign what he termed a "confining affidavit."[282] Nevertheless, he offered to tell the whole story in open court.[283]

The trial court declined the juror's offer, refused to hold an evidentiary hearing, and denied the defendant's motion, deciding that this action was an improper investigation into the mental processes of the jurors.[284] The Supreme Court of California affirmed, commenting that while the outburst described was particularly harsh and inappropriate, it could not have been taken literally by any reasonable juror.[285] The juror merely expressed frustration, temper and strong conviction against the contrary views of another panelist.[286] The court reasoned

> [that to inquire] as to the validity of the verdict based upon the demeanor, eccentricities or personalities of the individual jurors would deprive the jurors of the most inherent quality of free expression.... Jurors may be expected to disagree during deliberations, even at times in heated passion.[287]

Similarly, in a Pennsylvania case, *United States v. Kohne*, the defendant claimed that the trial judge erred when he denied the defendant's motion for a mistrial based upon juror misconduct.[288] The unsworn affidavit of juror Tisak supported the motion, which alleged the other jurors coerced Tisak with threats of physical harm because he held out, threats that he interpreted as genuine.[289] Tisak repeated incidents of hollering, yelling, and abusive language directed at him during deliberations.[290] Another juror had allegedly told Tisak that he "didn't get mad, he got even."[291] After the court required a number of jurors to spend the night on cots in a hotel, a juror commented that if he had to sleep on a cot another night he would be "in Federal Court for murder."[292] At times, Tisak said, one juror placed his hands on the back of Tisak's chair, flexed his muscles, and Tisak believed that the other juror would break the chair over his head.[293] However, Tisak acknowledged that no one actually picked up a chair.[294]

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281. *Id.*
282. *Id.*
283. *Id.*
284. *Keenan*, 758 P.2d at 1121.
285. *Id.*
286. *Id.*
287. *Id.*
288. 358 F. Supp. 1046, 1047 (W.D. Pa. 1973).
289. *Id.*
290. *Id.* at 1049.
291. *Id.*
292. *Id.*
293. *Kohne*, 358 F. Supp. at 1049.
294. *Id.*

Furthermore, he responded affirmatively during the poll and never reported any of these incidents to the marshal or the judge.[295] He did not even mention the other jurors' conduct until five days after the trial.[296]

Affirming the trial court ruling, the appellate court stated that even assuming that the testimony of Tisak was credible, it merely represented heated interchanges, common in the juryroom.[297] Tisak's reasons for assenting to the verdict were inadmissible pursuant to *Federal Rule of Evidence* 606(b).[298] Therefore, the district court correctly declined to vacate the defendant's conviction.

A New York court relying on the *Kohne* decision also affirmed a trial court's denial of a new trial in *People v. Jacobson*.[299] There, the defendant brought a motion based on the following allegations: intimidation of jurors through obscenities, slamming of fists, and chair-throwing; refusal of the foreman to report to the court that the jury was deadlocked; the action of a court officer who interrupted deliberations on hearing a loud noise; and alleged misuse of notes by one of the jurors.[300] The court first stated that consideration of any of the incidents violates Rule 606(b) of the *Federal Rules of Evidence*.[301] However, even if the court considered the incidents on their merits, the court stated that it would reach the same conclusion: "[s]harp differences of opinion and use of obscenities, although not to be encouraged, are a reality of life," and do not warrant vacating the verdict.[302] Likewise, the Court did not regard the jury foreman's alleged refusal to issue a deadlock note as grounds for a new trial.[303] The Court reasoned that the jury actively requested testimony on the last day of deliberations, and none of the jurors complained that further deliberations would be futile.[304]

With regard to the chair-throwing incident, the *Jacobson* court specifically relied on *Kohne*.[305] The court did not state whether it believed a chair had actually been thrown, nor did it consider the alleged incident.[306] It merely noted that the subjective reasons a jury reaches a verdict are inadmissible.[307]

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295. *Id.* at 1050.
296. *Id.*
297. *Id.*
298. *Kohne*, 358 F. Supp. at 1050.
299. 440 N.Y.S.2d 458, 464 (N.Y. Sup. Ct. 1981).
300. *Id.* at 460.
301. *Id.*
302. *Id.* at 463.
303. *Id.*
304. *Jacobson*, 440 N.Y.S.2d at 463.
305. *Id.*
306. *Id.* at 463-64.
307. *Id.*

The defendant raised an additional allegation based on the conduct of a court officer in response to the "chair throwing" incident.[308] The defendant alleged that the court officer heard a loud noise, and without the permission of the court entered the jury room and told the jury to stop deliberating.[309] The officer allowed the deliberations to begin again only after the jury foreman assured the officer that no problem existed.[310] Although the court agreed with the defendant that rarely might a jury be interrupted during deliberations without permission of the court, the judge concluded that the circumstances of this case made the "prompt inquiry" of the officer proper.[311] The court dismissed the final allegation regarding the improper use of notes by one of the jurors, without explanation.[312]

As earlier noted, the appellate court, in deciding *Reid*, found the above cases to be "similar," but distinguished *Remmer v. United States*,[313] relied on by the defendant to support his motion.[314] In *Remmer*, during the trial, an unnamed person had remarked to the jury foreman that the foreman "could profit by bringing in a verdict favorable to the defendant."[315] Following a report by the juror, the presiding judge informed the prosecuting attorney and the Federal Bureau of Investigation (FBI) of the remarks, but did not inform the defendant or his counsel.[316] At the judge's request, the FBI investigated, determining that the remark had been made "in jest."[317] The trial continued and the jury convicted the defendant.[318] On appeal, the U.S. Supreme Court concluded that the trial court should have conducted a hearing to determine if the events actually prejudiced the defendant.[319] The Supreme Court remanded the case to the district court below.[320]

The court deemed the evidence of racial slurs sufficiently prejudicial to cause reversal in *United States v. Heller*.[321] The jury convicted the defendant, Daniel Heller, of tax evasion and false statements on his income tax returns.[322] During the course of deliberations, the trial judge received a note that prompted him to

308. *Id.* at 464.
309. *Jacobson*, 440 N.Y.S.2d at 464.
310. *Id.*
311. *Id.*
312. *Id.*
313. 347 U.S. 227, 227 (1954).
314. People v. Reid, 583 N.E.2d 1, 3 (Ill. App. Ct. 1991).
315. *Remmer*, 347 U.S. 227 at 228.
316. *Id.*
317. *Id.*
318. *Id.* at 229.
319. *Id.* at 229-30.
320. *Remmer*, 347 U.S. at 230.
321. 785 F.2d 1524, 1525 (11th Cir. 1986).
322. *Id.*

stop deliberations and voir dire each juror individually.[323] Voir dire revealed facts that the court found "highly disturbing."[324]

One of the jurors told the judge that the trial had barely started when somebody, in an effort at jocularity said, "[h]ey, somebody asked me what kind of a case you were on."[325] The juror allegedly replied, "[w]ell, the fellow we are trying is a Jew, I say 'let's hang him.'"[326] The reporting juror commented that he would not want to be tried by anyone with that kind of mentality.[327] There was another allegation made that the juror had contacted a "reliable accountant" about some matters in the trial and shared that with the rest of the jurors.[328] The court of appeals reversed, stating that it found the first allegation of error, involving racial and religious slurs, compelling enough to require reversal without reaching any other issues.[329]

Similarly, in *United States v. Posner*, a reviewing court granted a new trial where jurors in a tax evasion trial learned of the previous conviction of the defendant's former co-defendant from the jury foreperson, who had read about the conviction in newspaper accounts.[330] After reviewing the testimony of all the jurors, the reviewing court concluded that the jury's prejudicial exposure to information required a new trial.[331]

Two instances of juror misconduct led to a reversal of a defendant's murder conviction in *Marino v. Vasquez*.[332] First, one juror used a dictionary to ascertain the definition of "malice."[333] Second, a juror and a non-juror conducted an experiment with a handgun to evaluate the defendant's theory of defense, and reported the theory's implausibility back to the jury.[334] The jury deliberated for a long time prior to the experiment that led a holdout juror to change his mind.[335]

In contrast, in *Tanner v. United States*, the defendant sought a new trial based on a juror's statement that several jurors consumed alcohol at lunch throughout the trial, causing them to sleep in the afternoon.[336] After the court denied that motion, the court denied a subsequent motion supported by another juror's

323. *Id.*
324. *Id.* at 1526.
325. *Id.* at 1525.
326. *Heller*, 785 F.2d at 1526.
327. *Id.*
328. *Id.*
329. *Id.* at 1258.
330. 644 F. Supp. 885, 885 (S.D. Fla. 1986).
331. *Id.* at 890.
332. 812 F.2d 499, 499 (9th Cir. 1987).
333. *Id.* at 502.
334. *Id.*
335. *Id.* at 503.
336. 483 U.S. 107, 107 (1987).

affidavit alleging widespread use of alcohol and drugs during the trial.[337] The court concluded that these affidavits violated *Federal Rule of Evidence* 606(b).[338]

The U.S. Supreme Court's affirmance in *Tanner* is notable for its comment on the public policy behind Federal Rule 606(b). The Court explained that Rule 606(b) is supported by substantial policy considerations, including the need to assure full and frank discussion in the privacy of the jury room, to prevent the harassment of jurors by losing parties, and to preserve the "community's trust in a system that relies on the decisions of lay people."[339] Petitioner's arguments that "substance abuse constitutes an improper 'outside influence' about which jurors may testify" under the rules was without merit in light of contrary judicial interpretations of the common law rules, as well as Rule 606(b)'s plain language and legislative history.[340]

A case from the Eastern District of Michigan is notable for its eloquent discussion of the rationale for excluding the testimony or affidavits of jurors and upholding Federal Rule 606(b). In *United States v. Schultz*, after the jury convicted the defendant on drug charges, he brought a motion for a new trial, alleging that one of the jurors ingested sufficient amounts of a controlled substance to render him unfit to perform his duties.[341]

The court began its analysis by noting that serious allegations such as those presented by the *Schultz* case have implications reaching far beyond any decision made in an individual case.[342] On the other hand, compelling reasons exist for excluding testimony by jurors about the process in order to preserve the secrecy and finality of jury deliberations.[343] Characterizing the latter as the "exclusionary principle," the court noted with approval that there are, however

> [v]alid and powerful reasons which support the exclusionary principle. The Supreme Court long ago singled out two reasons as being the most important. First, the exclusionary principle is necessary to prevent jurors from being harassed and beset by the defeated party in an effort to secure evidence of facts which might establish misconduct sufficient to set aside a verdict. Second, the exclusionary principle is necessary to prevent 'what was intended to be private deliberation' from being made subject to constant public scrutiny, 'to the destruction of all frankness and freedom of

337. *Id.* at 107-08.
338. *Id.* at 108.
339. *Id.* at 120.
340. *Id.* at 122.
341. 656 F. Supp. 1218, 1219 (E.D. Mich. 1987).
342. *Id.*
343. *Id.*

discussion and conference."[344]

> Third, allowing unrestricted attacks by jurors upon their verdict would so undermine the finality of their verdict as to threaten the system itself; judges 'would become Penelopes, further engaged in unraveling the webs they wove.' It is one thing to permit review on the basis of the record, by post-trial motion and appeal; it is quite another to extend review to the deliberative process of the jury. Such extension would amount to a whole new dimension of scrutiny which would of course finally reduce the measure of finality which verdicts and judgments now achieve.[345]

> Fourth, allowing unrestricted attacks by jurors upon their verdict invites tampering with the process which would be difficult to detect. A single juror who reluctantly joined in the verdict is likely to be sympathetic to the overtures of defeated parties, and to be persuaded to the view that his own consent rested upon false or impermissible considerations; the truth will be hard to ascertain. In the process, the trier itself will be tried, all at the behest of a dissatisfied party aided by the second thoughts of a vaguely uncomfortable juror.[346]

In another notable case, after the trial of *Herring v. Blankenship*, the jury foreperson submitted an affidavit to the trial court alleging that during the course of deliberations he had been contacted and offered favors.[347] When later questioned by the trial court, the juror pled the Fifth Amendment.[348] Inexplicably, the trial court then refused to conduct any further examination of any other juror.[349] On a habeas petition, the district court reversed, holding that the court should have conducted further inquiries.[350] They concluded the juror contact tainted the defendant's conviction and remanded the case for further proceedings.[351]

Other instances of classic juror misconduct resulted in new trials. In *United States v. Gaffney*, the jury admitted watching television and reading newspaper accounts of the trial.[352] In *Jennings v. Oku*, a reviewing court granted the defendant, murder

344. *Id.* (citing Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 923-24 (1978)).

345. *Id.*

346. *Schultz*, 656 F. Supp. at 1219.

347. 662 F. Supp. 557, 559-60 (W.D. Va. 1987).

348. *Id.* at 559. In "pleading the Fifth Amendment" an individual raises his or her Constitutional right prohibiting "the government from requiring a person to be a witness against himself [or herself]." BLACK'S LAW DICTIONARY 1360 (6th ed. 1990).

349. *Id.*

350. *Id.* at 565.

351. *Id.* at 566.

352. 76 F. Supp. 1544, 1549 (N.D. Fla. 1987).

suspect Gary Lee Jennings, a new trial because the entire jury left the room during their deliberations to conduct an experiment on how the defendant's fingerprint appeared on the victim's car.[353] The magistrate noted that Jennings' fingerprint on the car door was the most important evidence linking Jennings to the crime, and the experiment created evidence so prejudicial that he recommended habeas release.[354] The district court adopted the recommendation and vacated the petitioner's conviction and sentence.[355]

In *United States v. Resko*, the court learned on the seventh day of a nine-day trial that the jurors discussed the case among themselves since the first day.[356] In response, the court asked the jurors by way of a questionnaire "whether they had discussed the case with other jurors and if so, had they formed opinions on the guilt or innocence of the defendant."[357] Each juror admitted having prematurely discussed the case; however, each juror also stated they had not decided upon the defendant's guilt.[358] Based on this, the trial court denied the defendants' request for an individualized voir dire of each juror and motion for mistrial.[359] The trial resumed, and the jury convicted the defendants of conspiracy to distribute cocaine and heroin.[360]

In reversing, the reviewing court stated that the "[lower] court had erred by refusing to conduct a more searching inquiry into the potential prejudice to defendants because of the jury's misconduct." Ordinarily, the court noted,

> [a] defendant must show that the error prejudiced him or her in order to obtain a new trial.... However, because the two-part questionnaire did not provide any significant information about the nature or extent of the jurors' discussion, we fail to see how the District Court could have made a reasonable determination [that no prejudice occurred].[361]

In a case such as this, where the court only discovers the jury misconduct at mid-trial, and it is impossible for the judge to determine whether the parties have been prejudiced, the court acts properly when it vacates the convictions.[362]

The conduct of the judge and/or the bailiff has been the source of alleged prejudice in other jurisdictions as well as in Illinois.

353. 677 F. Supp. 1061, 1061 (D. Haw. 1988).
354. *Id.* at 1065.
355. *Id.* at 1066.
356. 3 F.3d 684, 686 (3d Cir. 1993).
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Resko*, 3 F.3d at 686.
362. *Id.*

Jones v. Kemp is one of those rare cases, federal or state, reversed on the conduct of the trial judge.[363] In the sentencing phase of Kemp's trial, at the start of its deliberations, the trial judge allowed a juror to take a Bible into the jury room.[364] The district court reversed, saying that "the search for the command of extra-judicial 'law' from any source other than the trial judge, no matter how well-intentioned," violates of the Eighth Amendment requirement that sentences be narrowly channeled and circumscribed by the secular law of the jurisdiction.[365]

In *United States v. Luffred*, the reviewing court reversed the defendant's conviction because the judge permitted the jury to bring into its deliberating room a chart reflecting the government's theory of the case that incorrectly reflected the evidence.[366] The chart had never been admitted into evidence, but had been used as a trial aid during the government's closing argument, and the deliberating jury requested the trial aid.[367] The court noted that the jury obviously considered the chart important in light of their request, and ruled it to be so prejudicial as to require a remand.[368]

The reviewing court remanded *Keller v. Petsock* because of an improper instruction by the bailiff.[369] A habeas petition contended that a juror asked to see the judge during deliberations, but the bailiff informed the juror that it would not be possible.[370] The court decided that this presented grounds for an evidentiary hearing and possible habeas release, and thus the case was remanded.[371]

A very recent and high profile case, *United States v. Symington*, again involved the conduct of a trial judge who was reversed when he dismissed a juror during deliberations.[372] The United States charged Symington, the former governor of Arizona, with wire fraud and with making false statements to financial institutions.[373] After several days of deliberations, the jury sent a note to the judge alleging in substance that one of the jurors was refusing to participate in their discussions.[374] Specifically, the majority of jurors claimed that the woman appeared to be unable to remain focused on the deliberations, was unable to recall topics under discussion, and refused to discuss her views with the other

363. 706 F. Supp. 1534, 1559 (N.D. Ga. 1989).
364. *Id.*
365. *Id.*
366. 911 F.2d 1011, 1012 (5th Cir. 1990).
367. *Id.* at 1014.
368. *Id.* at 1015.
369. 853 F.2d 1122, 1124 (3d Cir. 1988).
370. *Id.*
371. *Id.* at 1130.
372. 195 F.3d 1080, 1098 (9th Cir. 1999).
373. *Id.* at 1082.
374. *Id.* at 1083.

jurors.[375] In the note, the jurors also expressed their frustrations with her behavior.[376] The trial court responded by dismissing the juror and replacing her with an alternate.[377] The reconstituted jury voted to convict Symington.[378]

The Ninth Circuit reversed the trial court, implying that the judge's action could validate an impermissible tendency on the part of majority jurors to attempt to remove a holdout juror under the guise of lack of participation.[379] Specifically, the *Symington* court held that if the record disclosed any reasonable possibility that the impetus for a dismissal request stemmed from the minority juror's views on the merits of the case, the court could not dismiss the juror.[380] Faced with this dilemma, therefore, the trial court had but two choices: request that the jury continue deliberations or declare a mistrial.[381]

Sometimes, the remarks of persons who might be considered strangers to the trial are cause for a new trial. In *Stockton v. Virginia*, while several jurors were having lunch at the Owl Diner on the day they deliberated Stockton's sentence, the proprietor approached the jurors and told them "they ought to fry the son-of-a-bitch."[382] The Fourth Circuit held that such a communication denied the defendant his right to a fair and impartial jury.[383] The appellate court affirmed the district court's judgment vacating Stockton's death sentence and gave the State the choice of either reducing his sentence to life imprisonment or re-sentencing him.[384]

VI. SOME PROBLEMS IN THE APPLICATION OF THE LAW FOR JUDGES: AN ANALYSIS

The widely divergent results reflected in the case law from Illinois and other jurisdictions demonstrate the difficulty a judge faces in applying the law to specific cases. The most apparent problem is whether to caution or instruct the jurors at the outset in more than the very general manner which judges tend to do at the beginning of a trial.

Having granted a new trial on two different occasions because of juror misconduct, this Author has taken to instructing the jury more thoroughly than had been done in the past. In addition to telling the jurors that they must decide the case only on the

375. *Id.*
376. *Id.*
377. *Symington*, 195 F.3d at 1083-84.
378. *Id.* at 1084.
379. *Id.* at 1088.
380. *Id.*
381. *Id.*
382. 852 F.2d 740, 742 (4th Cir. 1988)
383. *Id.* at 741.
384. *Id.* at 749.

evidence presented in court, and they are not to discuss the case with anyone until deliberation, jurors should be cautioned about the three most flagrant and commonly encountered types of juror misconduct. In short, jurors should be warned not to visit the scene unless authorized to do so; not to conduct any private investigations of evidence presented at trial or any other evidence, specifically not with their computers; and not to consult any reference materials such as dictionaries, almanacs, or "Rules of the Road-type" booklets. They must simply decide the case on the evidence that is presented in open court where ample opportunity exists for either side to confront and/or refute the evidence.

A second area of concern arises out of an Illinois decision, *People v. Szymanski*.[385] Recall that in *Szymanski*, the jury foreperson lived in or near the town of Naperville and drew a map of the area, which was used in deliberations.[386] The trial court reached the conclusion that the map simply arose out of the "common experience" of the juror, and the appellate court affirmed.[387] The question then arises: how broad is a juror's "common experience" in the affairs of life, and how may this experience be applied to the evidence presented at trial without becoming "new" evidence? Jurors today are in general more sophisticated and better educated than in previous years. Computers, for example, are part of a child's education from grammar school forward. Is computer literacy part of a juror's "common experience," and how may that skill be applied to the evidence? Can a juror subject an item of evidence to a computer program, using a computer dictionary that the other side has no opportunity to challenge? Is this simply doing with the computer what the person would do mentally, but faster? When this type of juror investigation occurs, is reversal required?[388]

Moreover, the common experience of jurors is as broad as the walks of life from which these people come. Persons with special areas of expertise have long served as jurors, particularly in large metropolitan areas. What is the common experience of physicians, nurses, engineers, physicists, etc.? Is theirs a body of knowledge any different from the juror's familiarity with the area of

385. 589 N.E.2d 148 (Ill. App. Ct. 1992).
386. *Id.* at 151.
387. *Id.* at 152.
388. *See, e.g.*, Pavlou v. Rhanna, No. 94-L-5295, slip op. (Cir. Ct. of Cook County, Law Div., June 30, 1998) *aff'd.* No.1-98-1496 (Ill. App. Ct. 1998) (describing a medical malpractice case in which the plaintiff alleged the defendant doctor failed to diagnose breast cancer, and a juror created a computer spreadsheet at home which tracked "doubling-time" of plaintiff's tumor, an issue vital to the case). The juror concluded that defendant could not be responsible for failing to diagnose the tumor at the time he examined plaintiff. *Id.* After an evidentiary hearing, the trial court granted a new trial. *Id.* The appellate court affirmed without comment. *Id.*

Naperville in *Szymanski*?[389] A surgeon sitting on a medical malpractice case does not have to be at the "scene of the surgery" to draw on his or her special knowledge of surgical technique, operating room procedure, and basic human anatomy. The same is true for an aeronautical engineer serving on a case involving an airplane crash, and so forth.

Persons with particularized knowledge of the evidence to be presented in certain cases are often potential jurors. While lawyers frequently make a great effort to exclude such people, it is not always possible to do so. Are they candidates for a challenge for cause, even though they protest that they can be fair? Since it is not possible for the juror, counsel or the judge to know ahead of time exactly how they will apply their specialized knowledge, should they automatically be excluded? Many lawyers think so, although judges generally defer to the good will of the juror who says in voir dire that he or she can be fair.

A third area that presents major problems for a trial judge is sorting out what is meant by the term "mental processes of the jurors," evidence of which must be excluded pursuant to *Holmes*.[390] Courts seem to interpret this rule in very different ways, sometimes broadly, including any statement in the affidavits that refer to the decision-making process, or even to the emotional or physical state of the jurors. Thus, affidavits stating that a juror was "crying and upset," "fatigued," or "confused" are, in most cases, held inadmissible. These descriptions, however, appear to refer more accurately to physical or emotional conditions easily observable by other jurors, rather than to mental processes, even though they may be the physical manifestations of the latter.[391]

The ever-changing definition of the term "prejudice," which must be applied in deciding cases involving juror misconduct, presents further difficulty. Some cases establish the standard of probability of actual prejudice, stating that it would be an impossible burden to establish definite prejudice.[392] Other cases caution that "mere suspicion of bias or prejudice is not sufficient."[393] The distinction between "probable prejudice" as opposed to "mere suspicion of prejudice" is surely a fine one.

In addition, lawyers frequently present affidavits that violate *Holmes'* prohibitions against delving into the mental processes of

389. *Szymanski*, 589 N.E.2d at 148.

390. People v. Holmes, 372 N.E.2d 656, 658 (1978).

391. *Cf.* BLACK'S LAW DICTIONARY 889 (5th ed. 1979) (defining "mental" as "[r]elating to or existing in the mind; intellectual, emotional").

392. *See, e.g.*, Daniels v. Barker, 200 A. 410, 415 (N.H. 1938) (holding that when incompetent evidence is received that may be prejudicial, the verdict should be set aside).

393. *See, e.g.*, People v. Porter, 489 N.E.2d 1329, 1337 (1986) (requiring that the moving party have the burden of showing prejudice).

jurors. Consequently, the judge is often in possession of a juror affidavit stating that certain information actually influenced or prejudiced his or her judgment. Nonetheless, the trial court must disregard this information and substitute its own judgment for that of the juror actively involved in the decision.

Obviously, little clear guidance exists in the case law from any jurisdiction. In some cases, what appears to be very extreme conduct is condoned by the trial judge and affirmed on appeal.[394] In other cases, seemingly mild infractions result in reversal.[395]

Finally, tension always exists between the need for judicial economy and the preservation of the rights of fundamental fairness. Judges are naturally somewhat invested in the concept of judicial economy and have no desire to retry a case. While such tension is theoretically to be resolved in favor of the right to a fair trial, it is questionable whether that is always the case. A simple concept is that individual judges must exercise fairness in their own courtrooms and decide cases involving juror misconduct or related matters on a case-by-case basis. A balance must exist between respect for the historical concerns of protecting the finality of a jury verdict reflected in Illinois law and law from other jurisdictions, and a constitutional right to a fair trial.

CONCLUSION

No definite answers exist to most of these issues. However, the more frequently the courts see the issue of juror misconduct in motions for a new trial, the more the courts will clarify these issues. A balance must develop between the need to discover irregular conduct that may have tainted a verdict and the avoidance of harassment of jurors once the trial is over. There is an obvious danger of overzealous lawyers pursuing jurors, and an even greater danger of a chilling effect on the willingness, particularly of educated professionals, to serve as jurors in the future. Courts will need to develop guidelines for approaching jurors after a trial is over; these guidelines will emerge if the problem continues to grow. In the meantime, judges will simply have to rely on the guidance of the courts above, as well as their own common sense, in making these decisions.

394. *See, e.g.*, United States v. Kohne, 358 F. Supp. 1046, 1049 (1973) (describing a case in which the life of a holdout juror was threatened by another juror); People v. Jacobson, 440 N.Y.S.2d 458, 468 (1987) (refusing to reverse the trial court where juror threw a chair at another juror).

395. *See* U.S. v. Resko, 3 F.3d 684, 690 (3d Cir. 1993) (determining the trial court has discretion when a jury discusses the evidence prior to deliberation).