

But have we made any progress? An update on the status of jury improvement efforts in state and federal courts

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The impetus for many of the jury improvement efforts implemented in state and federal courts over the past two decades was an article by Judge B. Michael Dann of the Maricopa County Superior Court in Phoenix, Arizona published in the *Indiana Law Journal* in 1993.¹ In that article, Judge Dann critiqued the traditional model of juror decision-making described in case law and generally accepted by the legal community in light of insights from contemporary experts in social psychology. Based on this research, he concluded that many of the restrictions imposed on jurors during trial (e.g., prohibitions on jurors' ability to take notes, to ask questions of witnesses, and to discuss the evidence before final deliberations) not only failed to preserve juror impartiality, but actually interfered with jurors' ability to remember and understand evidence presented at trial and to render informed decisions in jury verdicts.

Dann's article revolutionized contemporary thinking within the legal community about juror decision-making and the court's obligation to facilitate the ability of jurors to fulfill their role in the American justice system. It inspired two decades of concerted efforts by bench and bar organizations across the country to study and implement best practices in jury trial procedure.² In 2005, the ABA House of Delegates adopted *Principles for Juries and Jury Trials* as aspirational standards for conducting jury trials in both civil and criminal cases. The commentary for the *Principles* summarized the empirical literature supporting the effectiveness of those techniques.

Also in 2005, the National Center for State Courts (NCSC) undertook a national study to gauge the extent to which these efforts had taken root in actual trial practice. The *State-of-the-States Survey of Jury Improvement Efforts* included a survey that asked judges and lawyers to describe the trial procedures employed in their most recent jury trial.³ Nearly 12,000 judges and lawyers from all 50 states and the District of Columbia responded to the survey with reports from jury trials in both state and federal courts. At the time of the study's publication in 2007, it was the most comprehensive picture of jury trial procedures ever compiled.

Since 2007, bench and bar organizations have continued efforts to provide jurors with appropriate tools to aid decision-making. They have also developed new procedures to address more recent challenges for jury trials such as juror Internet use and the continuing decline in jury trial rates. Now 10 years have passed since the ABA adopted the *Principles* and the NCSC conducted the *State-of-the-States Survey*. Leadership at both organizations were interested to learn whether judges and lawyers had continued to

¹ B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 IND. L. J. 1229 (1993).

² Many of the innovations in jury trial procedure are described in G. THOMAS MUNSTERMAN et al., JURY TRIAL INNOVATIONS (2d ed. 2006).

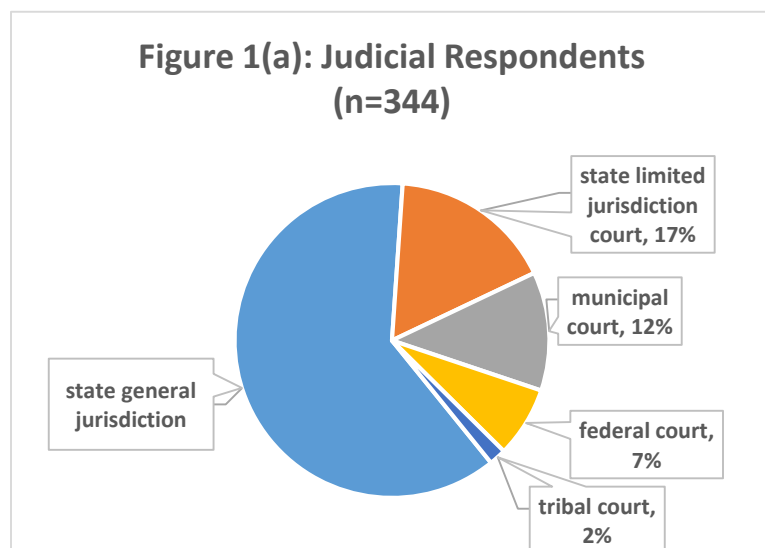
³ GREGORY E. MIZE et al., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007). The *State-of-the-States Survey of Jury Improvement Efforts* also included a local court survey that documented practices employed by state courts in jury operations and a statewide survey that documented state-level policies governing jury system management and jury trial procedure.

embrace jury trial innovations or whether the pace of their adoption had slowed. In 2014, they undertook a cooperative venture between the ABA Commission on the American Jury and the NCSC Center for Jury Studies to update the judge and lawyer component of the *State-of-the-States Survey*. This essay describes the methods and data used in the survey and summarizes the findings from that study for civil jury trials.

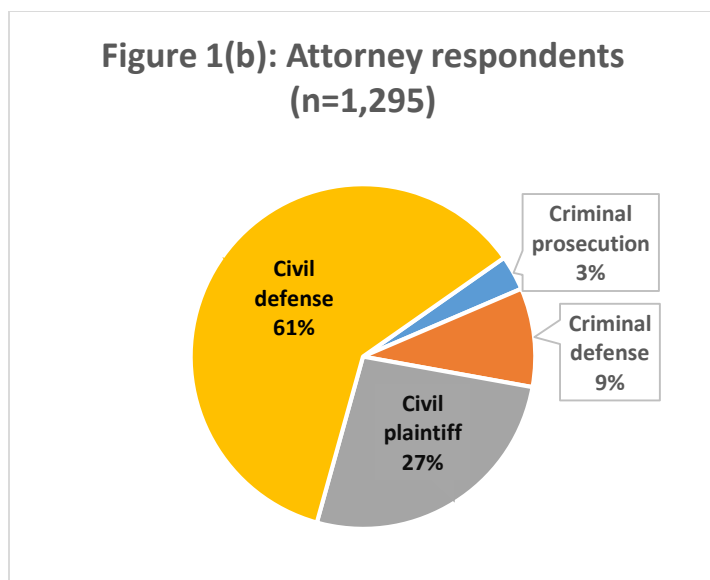
Data and methods

The quality of the data from the original *State-of-the-States Survey* was due largely to the painstaking efforts undertaken to secure a comprehensive sample of respondents. For the judge and lawyer survey component, NCSC staff personally contacted the chief justices of every state court of last resort, the presidents and executive directors of every state bar association, and national bench and bar organizations and their state chapters to request participation of their respective members. It was an extraordinarily time and labor-intensive process. Replicating that process would have been prohibitively costly. For the replication, the NCSC partnered with the ABA Commission on the American Jury to gain access to a representative sample of lawyer respondents, especially those involved in the Litigation Section, the Criminal Justice Section, the Tort and Intellectual Property Section, and the Judicial Division. The NCSC also used communication with organizations such as the Conference of Chief Justices, the Conference of State Court Administrators, the National Association for Court Management, the American Judges Association and the American Board of Trial Advocates to reach state trial judges and trial lawyers.

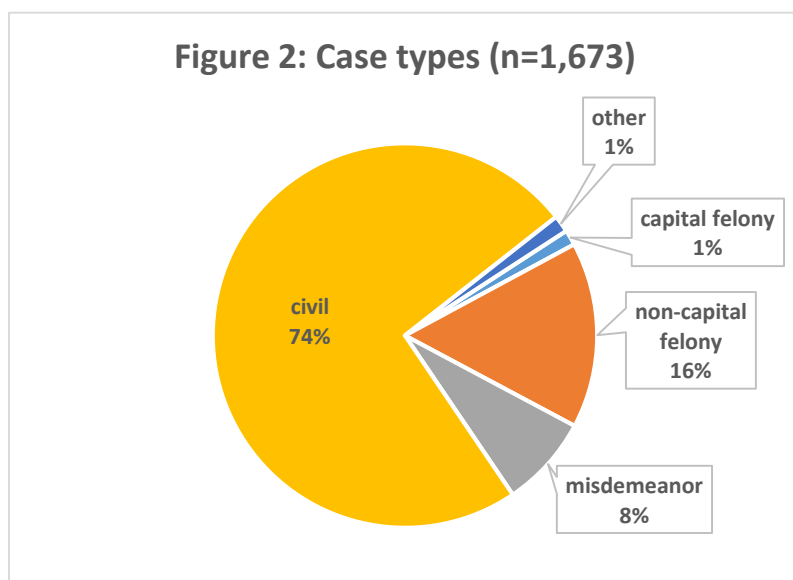
The survey itself asked judges and lawyers to describe their most recent jury trial. It began with a series of questions about the respondents, the jurisdictions in which they practice, the type of case tried in the most recent jury trial, where it took place, and the trial outcome. It then asked about the voir dire process and jury trial innovations employed during trial or deliberations. The replication survey was somewhat more detailed than the original *State-of-the-States Survey*. For example, it collected detailed information about the case type (e.g., assault, medical malpractice, homicide, automobile tort) rather than just the general case category (e.g., civil, felony, misdemeanor).



A total of 1,639 individuals responded to the survey including 344 judges and 1,295 attorneys. Figures 1(a) and (b) illustrate the breakdown of respondent types. Of the judicial respondents, almost two-thirds were general jurisdiction court judges from state courts. The overwhelming majority (88%) of attorney respondents were civil lawyers, mostly representing defendants.



The respondents described trial practices in 1,673 jury trials, three-quarters of which were civil trials. Two-thirds of the trials were tort cases involving automobile tort (264), medical malpractice (124), products liability (89), premises liability (79), other malpractice (35), intentional infliction of emotional distress (24), and other tort cases (51). Contract trials were comprised of breach of contract cases (104), employment (67), IP (36), fraud (28), and other contract (23). One-quarter of the civil trials (24%) took



place in federal court and the remainder in different types of state courts. In terms of geographic distribution, state court civil trials took place in 49 different states while the federal court civil trials took place in 40 different states.⁴ Nearly two-thirds (62%) of the juries empaneled in state court trials were 12-person juries compared to federal court trials in which two-thirds of the juries were 6-person juries. The median trial length was 5 days in state courts and 6 days in federal courts. With respect to trial outcomes, a plaintiff verdict was

rendered in 45% of the cases in which liability was contested.⁵ One-third of damages awarded to prevailing

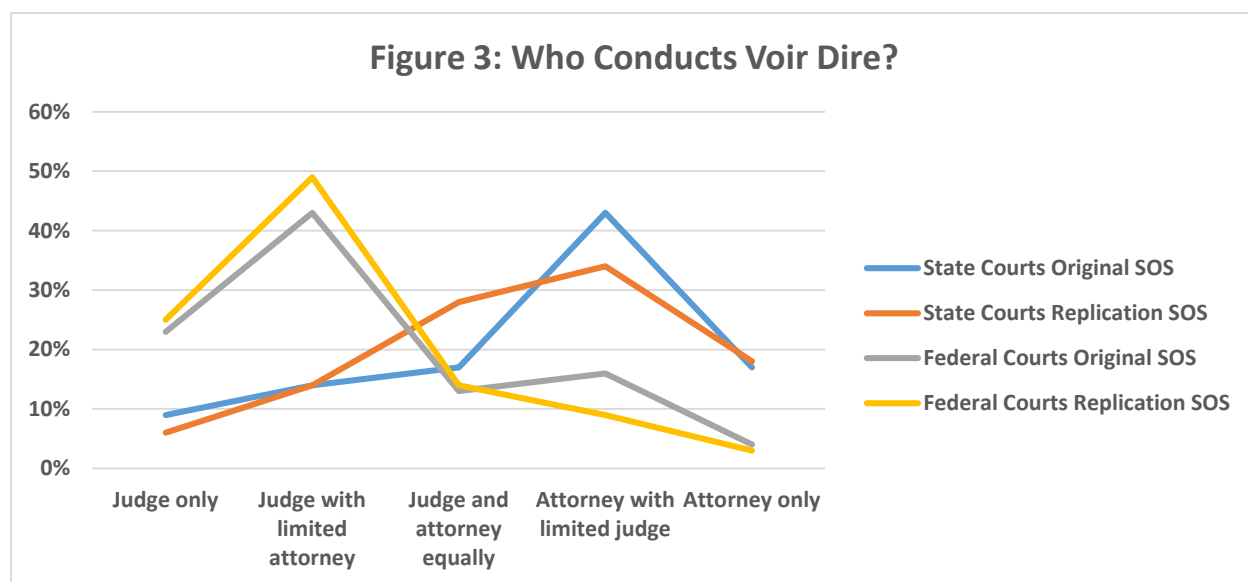
⁴ State court civil trials took place in all states except North Dakota and the District of Columbia. Federal court civil trials took place in all states except Alaska, Hawaii, Idaho, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and the District of Columbia.

⁵ Liability was uncontested in 11% of civil trials. Comparative fault was raised as an issue at trial in one-third of the civil cases.

plaintiffs were \$1 million or more, which suggests that the cases are not well representative of civil cases generally.⁶

Voir Dire Practices in Civil Jury Trials

Comparing the replication data to the original *State-of-the-States Survey* data, it appears that little has changed in jury selection procedures. In state courts, lawyer-conducted voir dire is still the predominant method of questioning prospective jurors. See Figure 3. Attorneys had exclusive responsibility for questioning prospective jurors in 18% of civil trials and had predominant responsibility in another 34% of civil trials.⁷ In contrast, judges questioned prospective jurors exclusively in 25% of civil trials and had predominant responsibility with limited attorney follow-up in an additional 49% of civil cases. In federal courts, the practices reflected in the replication study closely mirror the practices documented in the original *State-of-the-States Survey*. In states courts, it appears that there may have been a shift away from the predominantly attorney-conducted voir dire with limited judicial participation to a more egalitarian approach in some jurisdictions.

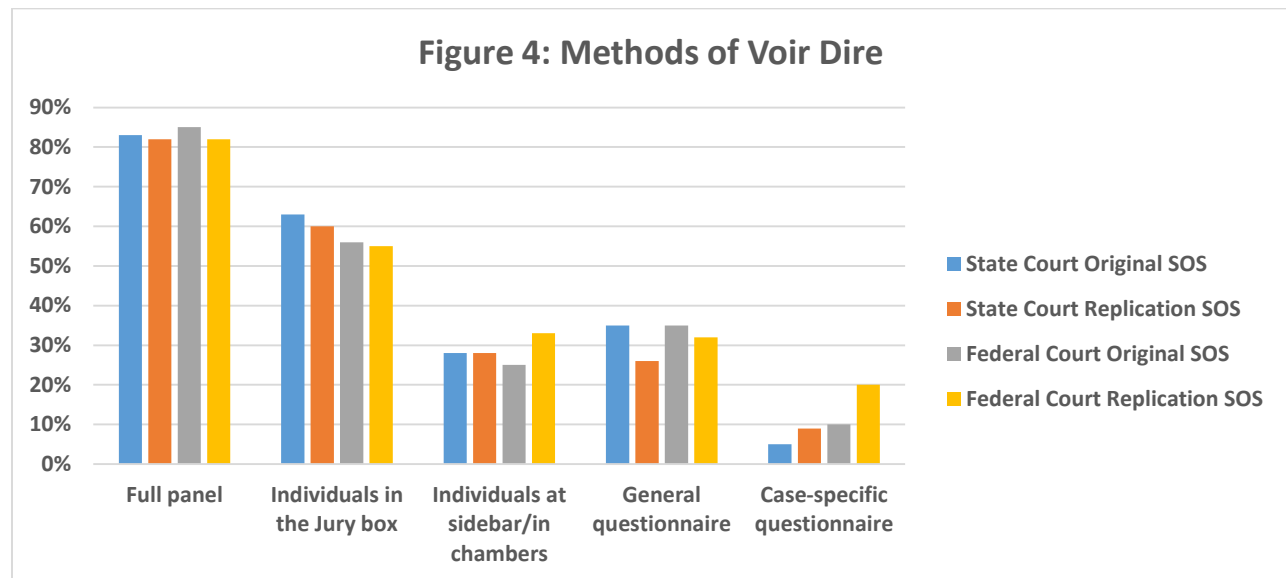


Other than who had primary responsibility for questioning jurors, there was little difference between state and federal courts with respect to voir dire methods in civil cases. See Figure 4. Judges and attorneys posed questions to prospective jurors in the full panel in approximately 82% of trials in both courts. Federal courts were slightly more likely to question jurors individually at sidebar (33%) compared to state courts (28%), and federal courts were somewhat more likely to use a general questionnaire (32% compared to 26%) or case-specific written questionnaire (19% compared to 9%) for jury selection

⁶ In 2005, only 9% of civil jury trials exceeded \$1,000,000. CIVIL JUSTICE SURVEY OF STATE COURTS, 2005 (data on file with NCSC).

⁷ Civil trials differed somewhat from criminal trials in terms of whether the trial judge or attorneys conducted voir dire in state court. The trial judge and attorneys shared responsibility for questioning prospective jurors in nearly half of criminal trials (44%) compared to civil trials (28%), but attorneys were also more likely to have exclusive responsibility for questioning prospective jurors in civil trials (18%) compared to criminal trials (9%). Pearson $\chi^2=31.952$, $df=4$, $p<.001$. There were no differences between civil and criminal trials in federal court.

compared to state courts.⁸ When a case-specific questionnaire was used during voir dire, it was more likely to be distributed before jurors reported to the courthouse (40%) or in the jury assembly room before jury selection (46%) in federal court, but in the courtroom before questioning began (41%) in state courts. The only major difference between the original *State-of-the-States Survey* and the replication study is the use of case-specific questionnaires in federal courts, which doubled in the rate of use from 10% to 20%.



The median length of voir dire in state court civil jury trials was somewhat longer (3 hours) in the replication data compared to the original *State-of-the-States Survey* data (2 hours), but there was no difference for federal courts (2 hours).⁹ The length of voir dire in state courts was strongly correlated with the degree of evidentiary and legal complexity.¹⁰ Consequently, it is possible that the higher valued cases in reported in this sample were driving the increased length of time for voir dire.¹¹

In addition to documenting voir dire procedures, the replication study added several questions to gauge perceptions about the representativeness of the resulting jury. More than half (56%) of the respondents reported that the venire in civil trials reflected a fair cross section of the community and only 7% reported a challenge to the jury venire. *Batson* challenges were raised in 4% of civil trials, in most instances by the plaintiff. Those motions were granted or partially granted 28% of the time.

Preliminary Jury Instructions

Trial courts have always given jurors preliminary instructions that are usually intended as basic education about the jury's role and responsibilities in the trial process. Since the late 2000s, many courts have added

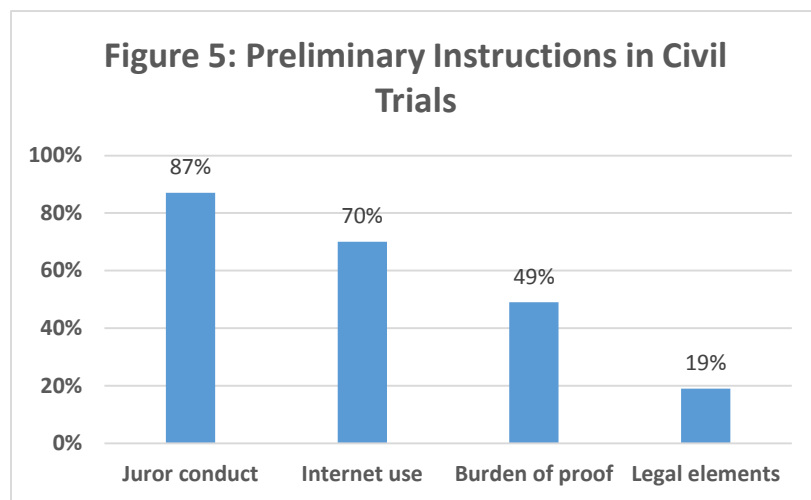
⁸ Only use of a case-specific written questionnaire was statistically different. $F=18.171, p<.001$.

⁹ Jury size may also play a role in the difference in the length of voir dire between state and federal courts. As jury size increases, the amount of time needed to select a jury also increases. Most state court juries were 12-person juries rather than 6-person juries in federal court.

¹⁰ Pearson R-squared (evidentiary complexity)=0.185, $p<.001$; Pearson R-squared (legal complexity)=0.181, $p<.001$. There was no significant correlation between length of voir dire and evidentiary or legal complexity in federal court cases, which may reflect a lack of variability in the degree of complexity for those cases.

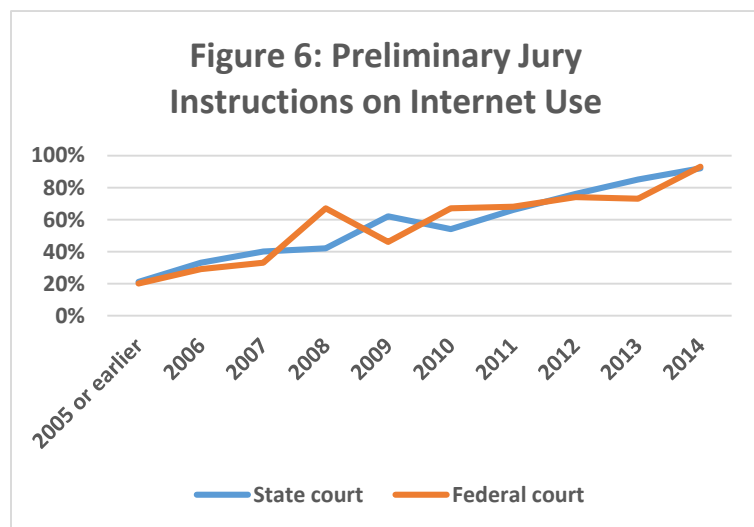
¹¹ Pearson R-squared (damages for prevailing plaintiffs)=0.186, $p<.001$.

more detailed instructions about Internet use into their preliminary instructions. In addition, one of the innovations introduced over the past 20 years was the proposal to instruct jurors about the substantive black letter law that jurors would likely be told to apply when the case was given to them for deliberations. Figure 5 shows the percentage of civil cases in which the preliminary instructions included admonitions on juror conduct, Internet use, the burden of proof, and the legal elements of the claim.



Overall, state courts were significantly more likely to instruct on Internet use (77%) compared to federal courts (65%).¹² Figure 6 shows that the rate at which courts have been giving such instructions has increased progressively since 2005. Federal courts (25%) were more likely to instruct on the legal elements of the claim than state courts (19%).¹³ Respondents only reported 13 civil trials (1%) involving Internet misconduct (12

in state courts, 1 in federal court), all of which took place in trials occurring after 2010. Both the state and the federal courts reported higher rates of providing preliminary instructions on the legal elements of the claim than in the original *State-of-the-States Survey* data (state courts=18%, federal courts=17%).

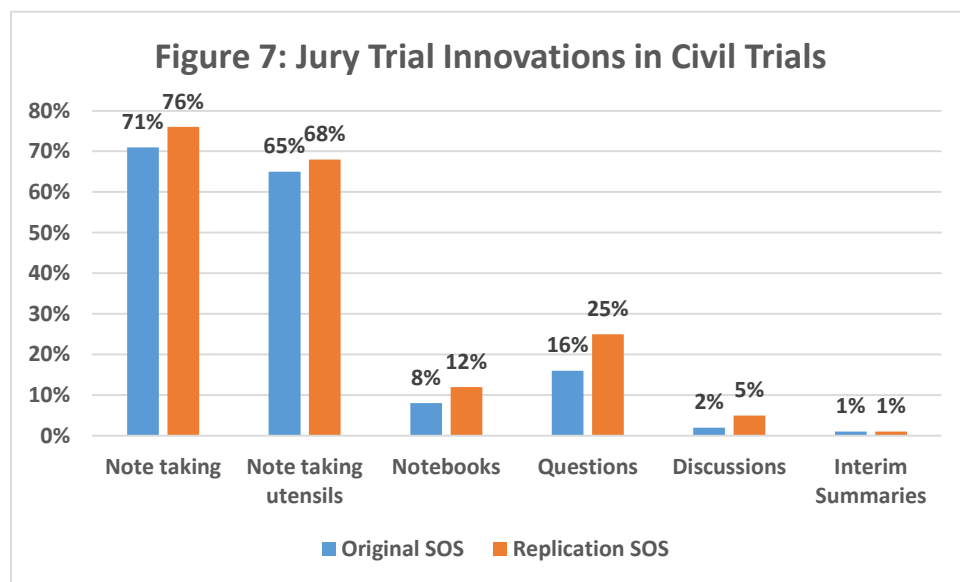


¹² $F=6.717$, $df=2$, $p<.001$.

¹³ $F=3.618$, $df=2$, $p=.027$.

Jury Trial Innovations

Based on comparisons between the replication data and the original *Sate-of-the-States* data, the strong emphasis on judicial and bar education about jury trial innovations had the greatest impact on in-court practices. Figure 7 shows that the use of the most commonly endorsed innovations all increased between 2005 and 2015. Permitting juror to take notes, and providing jurors with writing utensils and paper, were already practices by more than two-thirds of state and federal courts by 2007, so there was not as much room for improvement over the past 10 years. The use of juror notebooks and permitting jurors to submit written questions to witnesses increased by 50% or more during this period, and permitting jurors to discuss the evidence among themselves before final deliberations more than doubled. The only innovation that remained at the same level was interim summaries of evidence, which remained at only 1% of all civil cases.



There were some differences in the use of these innovations between state and federal courts. Juror notebooks were twice as likely to be used in federal court (22%) compared to state court (11%).¹⁴ Juror notebooks are generally reserved for use in more complex cases, so this

difference likely reflects the greater evidentiary and legal complexity in federal court jury trials. On the other hand, state courts were significantly more likely to permit jurors to submit written questions to witnesses (28%) than federal courts (18%) and to permit jurors to discuss the evidence among themselves before final deliberations (6% in state courts, 1% in federal courts). These increases no doubt were supported by the adoption of state court rules and statutes that expressly permitted, and even advocated, their use in civil jury trials.

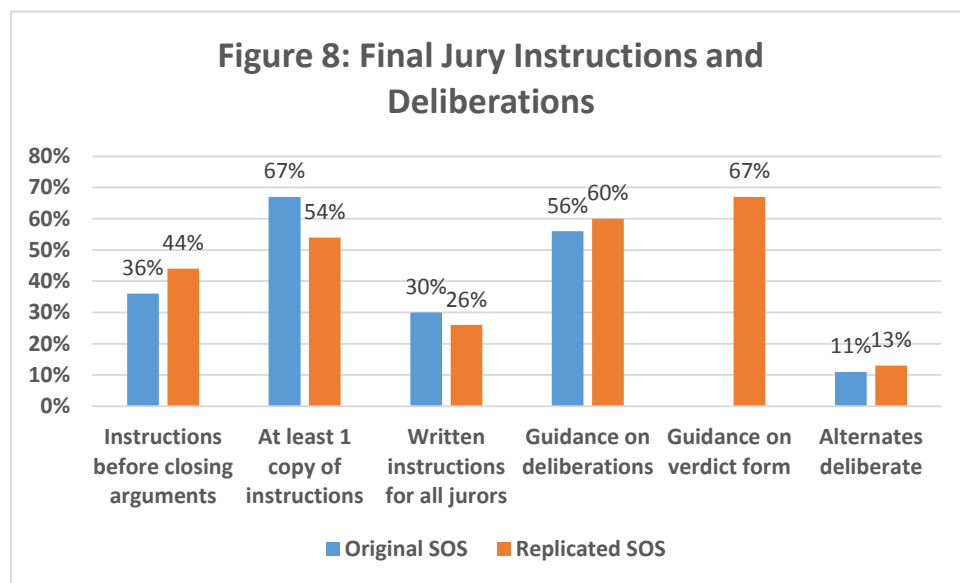
Final Instructions and Deliberations

After the evidence has been presented at trial, the judge gives final jury instructions including information about jury deliberations and the lawyers give closing arguments. Then the jurors begin their deliberations. Three practices that have been recommended involve the order in which the final jury instructions and closing arguments are given, the form of the final jury instructions, and the usefulness of guidance to jurors about conducting jury deliberations. Providing jurors with final jury instructions before the lawyers

¹⁴ $F=16.527$, $df=1$, $p<.001$.

give closing arguments allows the lawyers to incorporate the applicable law in their closing arguments so that jurors can consider the evidence in that context.¹⁵ Jury instructions are often long and quite complex in terms of grammar and syntax, which makes them difficult to understand when delivered orally. Many states now require that courts provide at least one copy of the final jury instructions to jurors for use during deliberations.¹⁶ Providing copies for each juror is strongly recommended.¹⁷ Finally, jury deliberations are an extraordinarily unique exercise in group decision-making; there is no other situation in which adults with no previous relationship are compelled to draw a unanimous conclusion about the appropriate judgment in a civil case. Many jurors have reported that organizing their deliberations is one of the greatest challenges of their task and welcome any guidance from judges about how to begin. There is still lingering unease in some jurisdictions, however, that doing so is an unwarranted judicial intrusion on the independence of the jury.¹⁸

Figure 8 shows the rate at which these innovations were reported in the replication data. Overall, there is not as much improvement in these practices as was observed in the in-court innovations. There was a 22% increase the frequency of giving final jury instructions before closing arguments, but no significant difference in the rate of providing guidance on deliberations and substantial decreases in the rate of providing written instructions to jurors. As with in-court innovations, there were differences between state and federal court practices. State courts were significantly more likely to instruct before closing arguments (49%) than federal courts (38%),¹⁹ but marginally less likely to provide a written copy of the final instructions to jurors (56% compared to 64% in federal courts).²⁰ In courts that did provide a written copy of instructions, however, state courts were significantly more likely to provide copies to all jurors (29%) than federal courts (22%).²¹ The original *State-of-the-States Survey* did not ask whether the trial



judge explained the verdict sheet to jurors as part of final deliberations, but respondents in the replication study report that this occurred in two-thirds of civil jury trials (67%). The practice of permitting alternates to deliberate with the sitting jurors is still relatively unusual in state courts (10%), but is fairly common in

¹⁵ JURY TRIAL INNOVATIONS, *supra* note 2, at 142-43.

¹⁶ [cite statutes, caselaw]

¹⁷ JURY TRIAL INNOVATIONS, *supra* note 2, at 151-52.

¹⁸ *Id.* at 149-50.

¹⁹ $F=7.151$, $df=1$, $p=.008$.

²⁰ $F=3.800$, $df=1$, $p=.052$.

²¹ $F=4.206$, $df=1$, $p=.041$.

federal courts (28%).²² The median length of deliberations was 3 hours in state court and 4 hours in federal court, which is unchanged from the original *State-of-the-States Survey* data²³ and is significantly correlated with evidentiary and legal complexity.²⁴

Conclusions

Before drawing conclusions about the amount of progress achieved in terms of cementing best practices in jury trial management, it is important to acknowledge some of the shortcomings in this attempt to replicate the original *State-of-the-States Survey*. While the overall geographic coverage was extremely good, this study yielded a much smaller sample of trial reports. Although useful for a national picture of current jury trial practices, it does not provide a reliable picture for any given state. This is unfortunately for two reasons. First, we know that jury practices do differ substantially from state to state, so the national picture is not always a good reflection of local experience. Second, the limits on assessing state individual state progress means that bench and bar organizations that wish to continue efforts to improve jury trial practices cannot use the survey to identify the “low hanging fruit” where a concerted effort would produce substantial improvements.

In terms of the representativeness of the trials reports in the study, it is clear that the study included a much greater proportion of civil trials than criminal trials, and the trials themselves appear to be slightly more complex, and involve higher value stakes, than was reflected in the original *State-of-the-States Survey*. This is fortunate for judges and lawyers who are more interested in civil trials generally, but they should be somewhat cautious about imputing too much weight to these findings given that jury trial innovations are generally employed more frequently in more complex cases. On the other hand, the original *State-of-the-States Survey* did not document the monetary value of civil cases, so we do not have a valid basis for comparison.

The good news is that we do see some increased use of innovations in civil jury trials compared to a decade ago. Nearly one-quarter of respondents reported that jurors were permitted to submit written questions to witnesses, and 5% reported that jurors in civil trials were permitted to discuss the evidence among themselves before final deliberations. While these practices are not yet the predominant practices, they are significantly more prevalent than they were in the original *State-of-the-States Survey*. We also documented a dramatic increase in the use of jury instructions concerning appropriate Internet use. The timing of the increase tracks closely with growing awareness by the trial bench about the risk of juror misconduct as post-trial motions and appeals began to arise with more frequency. Voir dire and deliberation practices do not appear to have improved as much over the same period. The only noticeable difference in voir dire practices involved greater use of case-specific questionnaires in federal jury trials.

²² $F=43.754$, $df=1$, $p<.001$.

²³ THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT, *supra* note 1, at 38.

²⁴ Pearson’s R-squared (evidentiary complexity)=.251, $p<.001$; Pearson’s R-squared (legal complexity)=.234, $p<.001$.